PEOPLE'S UNION FOR CIVIL LIBERTIES & ANR.

v.

UNION OF INDIA & ANR.

(Writ Petition (C) No. 161 of 2004)

SEPTEMBER 27, 2013

[P. SATHASIVAM, CJI, RANJANA PRAKASH DESAI AND RANJAN GOGOI, JJ.]

CONSTITUTION OF INDIA, 1950:

Art.19(1)(a) – Freedom of speech and expression -- Decision taken by a voter after verifying the credentials of the candidate, either to vote or not is a form of expression under Art.19(1)(a) -- Fundamental right under Art.19(1)(a) read with statutory right u/s.79(d) of the RP Act is violated unreasonably if right not to vote effectively is denied and secrecy is breached – Representation of the People Act, 1951 – s.79(d).

Art. 32 r/w Arts. 19(1)(a) and 14 – Writ petition challenging rr.41(2), (3) and 49-O of Conduct of Election Rules – Held: Is maintainable -- Casting of vote is a facet of right of expression of an individual under Art.19(1)(a) -- Fundamental right under Art.19(1)(a) read with statutory right u/s.79(d) of RP Act is violated unreasonably if right not to vote effectively is denied and secrecy is breached, which attracts Art. 14 -- Any violation of the said rights gives the aggrieved person the right to approach Supreme Court under Art.32 and a prima facie case exists for exercise of jurisdiction under Art. 32 – Besides, it may not be appropriate to direct the petitioners to go to each and every High Court and seek appropriate relief -- Therefore, Supreme Court is competent to hear the issues raised in the writ petition filed under Art.32 – Conduct of Election Rules, 1961 – rr. 41 (2), (3) and 49-O.

CONSTITUTIONAL LAW:

Basic structure and Art.14 of Constitution of India – Held: Democracy and free and fair election are part of the basic structure of Constitution of India and necessarily include within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion -- Protection of elector's identity and affording secrecy is, therefore, integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Art. 14 -- Thus, secrecy is required to be maintained for both categories of persons – Constitution of India – Art. 14.

CONDUCT OF ELECTION RULES, 1961:

rr. 41(2), (3) and 49-O – Held: A part of r.49-O read with Form 17-A, which treats a voter who decides not to cast his vote differently and allows the secrecy to be violated, is arbitrary, unreasonable and violative of Art. 19 and is also ultra vires ss.79(d) and 128 of the RP Act – rr.41(2), (3) and 49-O are ultra vires s.128 of the RP Act and Art.19(1)(a) of the Constitution to the extent they violate secrecy of voting -- Election Commission is directed to provide necessary provision in ballot papers/EVMs, and another button called "None of the Above" (NOTA) may be provided in EVMs so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to vote, while maintaining their right of secrecy -- Representation of the People Act, 1951-- ss. 79(d) and 128 – Constitution of India, 1950 – Art.19(1)(a).

ELECTION LAWS:

Right to vote and right, after verifying credentials of the candidate, either to vote or not – Held: Judgments in Association for Democratic Reforms and PUCL have not disturbed the position that right to vote is a statutory right -- Both the judgments have only added that the right to know the background of a candidate is a f[illegible] a

voter so that he can take a rational decision of expressing himself while exercising the statutory right to vote -- Kuldip Nayar does not overrule the other two decisions rather it only reaffirms what has already been said by the two decisions.

The instant writ petition was filed challenging the constitutional validity of rr. 41(2) and (3) and 49-O of the Conduct of Election Rules, 1961 (the Rules) to the extent these provisions violate the secrecy of voting. The petitioners prayed for declaring rr. 41(2), (3) and 49-O of the Rules ultra vires and unconstitutional and also for a direction to the Election Commission of India-respondent No.2, to provide necessary provision in the ballot papers as well as in the electronic voting machines (EVM) for the protection of the right of not to vote. An objection was raised with regard to maintainability of the writ petition on the ground that right to vote was not a fundamental right but a statutory right. The Division Bench before which the matter was initially listed, felt that even though the judgment in *Kuldip Nayar*[1] did not overrule or discard the ratio laid down in *Association for Democratic Reforms*[2] and *People's Union for Civil Liberties*[3] (PUCL), it created a doubt in this regard and, therefore, referred the matter to a larger Bench.

Disposing of the writ petition, the Court

HELD: 1.1. In succinct, the ratio of the judgment in PUCL was that though the right to vote is a statutory right but the decision taken by a voter after verifying the credentials of the candidate, either to vote or not is his right of expression under Art. 19(1)(a) of the Constitution. The judgments in Association for Democratic Reforms

1. Kuldip Nayar & Ors. vs. Union of India & Ors. 2006 (5) Suppl. SCR 1
2. Union of India vs. Association for Democratic Reforms and Anr. 2002 (3) SCR 696
3. People's Union for Civil Liberties vs. Union of India 2003 (2) SCR 1136

and PUCL have not disturbed the position that right to vote is a statutory right. Both the judgments have only added that the right to know the background of a candidate is a fundamental right of a voter so that he can take a rational decision of expressing himself while exercising the statutory right to vote. [Paras 19 and 20] [304-A-D]

People's Union for Civil Liberties vs. Union of India **2003 (2) SCR 1136 = (2003) 4 SCC 399; and** *Union of India vs. Association for Democratic Reforms and Anr.* **2002 (3) SCR 696 = (2002) 5 SCC 294 – referred to.**

1.2. After a careful perusal of the verdicts of this Court in Kuldip Nayar, Association for Democratic Reforms and PUCL, this Court is of the considered view that Kuldip Nayar does not overrule the other two decisions rather it only reaffirms what has already been said by the two decisions. The decisions recognize that right to vote is a statutory right and also that in PUCL it was held that "a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression". Therefore, it cannot be said that Kuldip Nayar has observed anything to the contrary. This Court holds that there is no doubt or confusion persisting in the Constitution Bench judgment in Kuldip Nayar and the decisions in Association for Democratic Reforms and PUCL do not stand impliedly overruled. [Para 21] [305-E-G; 306-C-D]

Kuldip Nayar & Ors. vs. Union of India & Ors. **2006 (5) Suppl. SCR 1 = (2006) 7 SCC 1 – referred to.**

2.1. As regards maintainability of the instant writ petition under Art.32, it is significant to note that the decision taken by a voter after verifying the credentials of the candidate either to vote or not is a form of expression under Art.19(1)(a) of th

fundamental right under Art.19(1)(a) read with statutory right u/s.79(d) of the RP Act is violated unreasonably if right not to vote effectively is denied and secrecy is breached, which attracts Art. 14. The casting of the vote is a facet of the right of expression of an individual and the said right is provided under Art.19(1)(a) of the Constitution. Therefore, any violation of the said rights gives the aggrieved person the right to approach this Court under Art.32 and, thus, a prima facie case exists for the exercise of jurisdiction of this Court under Art.32. [Para 24] [307-B-F]

2.2. Besides, considering the reliefs prayed for which relate to the right of a voter and applicable to all eligible voters, it may not be appropriate to direct the petitioners to go to each and every High Court and seek appropriate relief. Therefore, this Court is competent to hear the issues raised in the writ petition filed under Art.32 of the Constitution. [Para 25] [307-F-H; 308-A]

3.1. In direct elections to Lok Sabha or State Legislatures, maintenance of secrecy is a must and is insisted upon all over the world in democracies where direct elections are involved to ensure that a voter casts his vote without any fear of being victimized if his vote is disclosed. It is clear from s.128 of the RP Act, and rr. 39, 41, 49M and 49-O of the Rules that secrecy of casting vote is duly recognized and is necessary for strengthening the democracy. However, From the provisions of rr.41(2) and (3) and r. 49-0, it is clear that in case an elector decides not to record his vote, a remark to this effect shall be made in Form 17-A by the Presiding Officer and the signature or thumb impression of the elector shall be obtained against such remark. [Para 7, 26 and 27] [294-H; 308-B-C; 310-B-C]

Kuldip Nayar & Ors. vs. Union of India & Ors. **2006 (5) Suppl. SCR 1 = (2006) 7 SCC 1; and** *S. Raghbir Singh Gill*

vs. S. Gurcharan Singh Tohra and Others **1980 SCR 1302 = 1980 (Supp) SCC 53 – relied on.**

3.2. Chapter II of the Rules deals with voting by Electronic Voting Machines only. Therefore, Rule 49-O, which talks about Form 17-A, is applicable only in cases of voting by EVMs. Rule 49-O provides that if an elector, after his electoral roll number has been entered in the register of electors in Form 17-A, decides not to record his vote on the EVM, a remark to this effect shall be made against the said entry in Form 17-A by the Presiding Officer and signature/thumb impression of the elector shall be obtained against such remark. Further, In case an elector chooses not to cast his vote in favour of any of the candidates labeled on the EVM, and consequently, does not press any of the labeled button, neither will the light on the control unit change from red to green nor will the beep sound emanate; and all present in the poll booth at the relevant time will come to know that a vote has not been cast by the elector. Thus, the mechanism of casting vote through EVM and r. 49-O compromise on the secrecy of the vote as the elector is not provided any privacy when the fact of the neutral/negative voting goes into record. [Para 40-42] [315-B-F]

3.3. Voting by ballot papers is governed by Chapter I of Part IV of the Rules. Rule 39 talks about secrecy while voting by ballot and Rule 41 talks about ballot papers. However, in the case of voting by ballot paper, the candidate always had the option of not putting the cross mark against the names of any of the candidates and thereby record his disapproval for all the candidates in the fray. Even though such a ballot paper would be considered as an invalid vote, the voter still had the right not to vote for anybody without compromising on his/her right of secrecy. However, with the introduction of EVMs, the said option of not voting fo

compromising the right of secrecy is not available to the voter since the voting machines did not have 'None of the Above' (NOTA) button. [Para 42] [315-F-H; 316-A-B]

3.4. Right to vote as well as right not to vote have been statutorily recognized u/s.79 (d) of the RP Act and rr. 41(2) and (3) and 49-O of the Rules respectively. Whether a voter decides to cast his vote or decides not to cast his vote, in both cases, secrecy has to be maintained. Secrecy is an essential feature of the "free and fair elections" and r.49-O undoubtedly violates that requirement. Therefore, a part of r.49-O read with Form 17-A, which treats a voter who decides not to cast his vote differently and allows the secrecy to be violated, is arbitrary, unreasonable and violative of Art. 19 of the Constitution and is also ultra vires ss.79(d) and 128 of the RP Act. [Para 31 and 34] [311-E-H; 313-A-B]

Lily Thomas vs. Speaker, Lok Sabha, **1993 (1) Suppl. SCR791 = (1993) 4 SCC 234 – referred to**

R vs. Jones, **(1972) 128 CLR 221 and** *United Democractic Movement vs. President of the Republic of South Africa,* **(2003) 1 SA 495– referred to.**

3.5. A positive 'right not to vote' is a part of expression of a voter in a parliamentary democracy and it has to be recognized and given effect to in the same manner as 'right to vote'. A voter may refrain from voting at an election for several reasons including the reason that he does not consider any of the candidates in the field worthy of his vote. One of the ways of such expression may be to abstain from voting, which is not an ideal option for a conscientious and responsible citizen. Thus, the only way by which it can be made effectual is by providing a button in the EVMs to express that right. This is the basic requirement if the lasting values in a healthy democracy have to be sustained,

which the Election Commission has not only recognized but has also asserted. [Para 37] [313-E-H; 314-A]

"Practice and Procedure of Parliament for voting"; and "Law Commission of India, **170th Report relating to Reform of the Electoral Laws" – referred to**

4.1. Democracy and free and fair election are part of the basic structure of the Constitution and necessarily include within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Art. 14. Thus, secrecy is required to be maintained for both categories of persons. Giving right to a voter not to vote for any candidate while protecting his right of secrecy, is extremely important in a democracy. [Para 45, 54 and 55] [316-F; 319-F-H; 320-A]

Indira Nehru Gandhi vs. Raj Narain, **1975 Supp 1 SCC 198;** *Mohinder Singh Gill and Another vs. Chief Election Commissioner, New Delhi and Others,* **1978 (2) SCR 272 = (1978) 1 SCC 405 and** *Kihoto Hollohon vs. Zachillhu and Others,* **1992 (1) SCR 686 = 1992 (Supp) 2 SCC 651 – relied on.**

4.2. In order to protect the right in terms of s.79(d) and r. 49-O, viz., "right not to vote", this Court is competent/ well within its power to issue directions that secrecy of a voter who decides not to cast his vote has to be protected in the same manner as the Statute has protected the right of a voter who decides to cast his vote in favour of a candidate. This Court is also justified in giving such directions in order to give effect to the right of expression under Art.19(1)(a) and to avoid any discrimination by directing the Elec o

provide "None of the Above" button in the EVMs. [Para 46] [317-B-D]

4.3. Not allowing a person to cast vote negatively defeats the very freedom of expression and the right ensured in Art. 21 i.e., the right to liberty. Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. This situation palpably tells the dire need of negative voting. The mechanism of negative voting, thus, serves a very fundamental and essential part of a vibrant democracy. No doubt, the right to vote is a statutory right but this statutory right is the essence of democracy. [Para 49, 51, 52 and 58] [318-C; 319-A-B, C; 320-G]

5.1. This Court, therefore, holds that rr. 41(2), (3) and 49-O of the Rules are ultra vires s.128 of the RP Act and Art.19(1)(a) of the Constitution to the extent they violate secrecy of voting. The Election Commission is directed to provide necessary provision in the ballot papers/EVMs and another button called "None of the Above" (NOTA) may be provided in EVMs so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to vote while maintaining their right of secrecy. Inasmuch as the Election Commission itself is in favour of the provision for NOTA in EVMs, it is directed to implement the same either in a phased manner or at a time. The Government of India is also directed to provide necessary help for implementation of the direction. The Election Commission is also to undertake awareness programmes to educate the masses. [Para 61] [322-G-H; 323-A-C]

N.P. Ponnuswami vs. Returning officer, 1952 SCR 218, Jamuna Prasad Mukhariya vs. Lachhi Ram, **1955 (1) SCR**

608, *University of Delhi vs. Anand Vardhan Chandal,* **(2000) 10 SCC 648,** *Kuldip Nayar (supra) and K. Krishna Murthy (Dr.) vs. Union of India,* **(2010) 7 SCC 202;** *Kochunni vs. State of Madras,* **1959 (2) Supp. SCR 316;** *Daryo vs. State of U.P.* **1962 (1) SCR 574- cited.**

Case Law Reference:

2002 (3) SCR 696	**relied on**	**para 4**
2003 (2) SCR 1136	**relied on**	**para 4**
2006 (5) Suppl. SCR 1	**relied on**	**para 4**
1980 SCR 1302	**relied on**	**para 4**
1952 SCR 218	**cited**	**para 22**
1955 (1) SCR 608	**cited**	**para 22**
(2000) 10 SCC 648	**cited**	**para 22**
(2010) 7 SCC 202	**cited**	**para 22**
1959 (2) Supp. SCR 316	**cited**	**para 23**
1962 (1) SCR 574	**cited**	**para 23**
(1972) 128 CLR 221	**referred to**	**Para 33**
(2003) 1 SA 495	**referred to**	**Para 33**
1993 (1) Suppl. SCR 791	**referred to**	**Para 35**
1975 Supp 1 SCC 198	**relied on**	**Para 45**
1978 (2) SCR 272	**relied on**	**Para 45**
1992 (1) SCR 686	**relied on**	**Para 45**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 161 of 2004.

Under Article 32 of the Constitution of India

P.P. Malhotra, ASG, Rajinder Sachhar, Bushra Parveen, Mamta Saxena, A.N. Singh, Sanjay Parikh, S. Wasim A. Qadri, Yasir Rauf, Sushma Suri, B.V. Balram Das, D.S. Mahra, Meenakshi Arora, S.K. Mendiratta, Vasav Anantharamey, Kamini Jaiswal, Raghenth Basant, Arjun Singh Bhati, Hardeep Singh, Liz Mathew for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. The present writ petition, under Article 32 of the Constitution of India, has been filed by the petitioners herein challenging the constitutional validity of Rules 41(2) & (3) and 49-O of the Conduct of Election Rules, 1961 (in short 'the Rules') to the extent that these provisions violate the secrecy of voting which is fundamental to the free and fair elections and is required to be maintained as per Section 128 of the Representation of the People Act, 1951 (in short 'the RP Act') and Rules 39 and 49-M of the Rules.

2. The petitioners herein have preferred this petition for the issuance of a writ or direction(s) of like nature on the ground that though the above said Rules, viz., Rules 41(2) & (3) and 49-O, recognize the right of a voter not to vote but still the secrecy of his having not voted is not maintained in its implementation and thus the impugned rules, to the extent of such violation of the right to secrecy, are not only ultra vires to the said Rules but also violative of Articles 19(1)(a) and 21 of the Constitution of India besides International Covenants.

3. In the above backdrop, the petitioners herein prayed for declaring Rules 41(2) & (3) and 49-O of the Rules ultra vires and unconstitutional and also prayed for a direction to the Election Commission of India-Respondent No. 2 herein, to provide necessary provision in the ballot papers as well as in the electronic voting machines for the protection of the right of not to vote in order to keep the exercise of such right a secret under the existing RP Act/the Rules or under Article 324 of the Constitution.

4. On 23.02.2009, a Division Bench of this Court, on an objection with regard to maintainability of the writ petition on the ground that right to vote is not a fundamental right but is a statutory right, after considering *Union of India vs. Association for Democratic Reforms and Anr.* (2002) 5 SCC 294 and *People's Union for Civil Liberties vs. Union of India* (2003) 4 SCC 399 held that even though the judgment in *Kuldip Nayar & Ors. vs. Union of India & Ors.* (2006) 7 SCC 1 did not overrule or discard the ratio laid down in the judgments mentioned above, however, it creates a doubt in this regard, referred the matter to a larger Bench to arrive at a decision.

5. One Centre for Consumer Education and Association for Democratic Reforms have filed applications for impleadment in this Writ Petition. Impleadment applications are allowed.

6. Heard Mr. Rajinder Sachhar, learned senior counsel for the petitioners, Mr. P.P. Malhotra, learned Additional Solicitor General for the Union of India-Respondent No. 1 herein, Ms. Meenakshi Arora, learned counsel for the Election Commission of India-Respondent No. 2 herein, Ms Kamini Jaiswal and Mr. Raghenth Basant, learned counsel for the impleading parties.

Contentions:

7. Mr. Rajinder Sachhar, learned senior counsel for the petitioners, by taking us through various provisions, particularly, Section 128 of the RP Act as well as Rules 39, 41, 49-M and 49-O of the Rules submitted that in terms of Rule 41(2) of the Rules, an elector has a right not to vote but still the secrecy of his having not voted is not maintained under Rules 41(2) and (3) thereof. He further pointed out that similarly according to Rule 49-O of the Rules, the right of a voter who decides not to vote has been accepted but the secrecy is not maintained. According to him, in case an elector decides not to record his vote, a remark to this effect shall be made against the said entry

in Form 17-A by the Presiding Officer and the signature or thumb impression of the elector shall be obtained against such remark. Hence, if a voter decides not to vote, his record will be maintained by the Presiding Officer which will thereby disclose that he has decided not to vote. The main substance of the arguments of learned senior counsel for the petitioners is that though right not to vote is recognized by Rules 41 and 49-O of the Rules and is also a part of the freedom of expression of a voter, if a voter chooses to exercise the said right, it has to be kept secret. Learned senior counsel further submitted that both the above provisions, to the extent of such violation of the secrecy clause are not only ultra vires but also contrary to Section 128 of the RP Act, Rules 39 and 49-M of the Rules as well as Articles 19(1)(a) and 21 of the Constitution.

8. On the other hand, Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the Union of India submitted that the right to vote is neither a fundamental right nor a constitutional right nor a common law right but is a pure and simple statutory right. He asserted that neither the RP Act nor the Constitution of India declares the right to vote as anything more than a statutory right and hence the present writ petition is not maintainable. He further pointed out that in view of the decision of the Constitution Bench in *Kuldip Nayar* (supra), the reference for deciding the same by a larger Bench was unnecessary. He further pointed out that in view of the above decision, the earlier two decisions of this Court, viz., *Association for Democratic Reforms and Another* (supra) and *People's Union for Civil Liberties* (supra), stood impliedly overruled, hence, on this ground also reference to a larger Bench was not required. He further pointed out that though the power of Election Commission under Article 324 of the Constitution is wide enough, but still the same can, in no manner, be construed as to cover those areas, which are already covered by the statutory provisions. He further pointed out that even from the existing provisions, it is clear that secrecy

of ballot is a principle which has been formulated to ensure that in no case it shall be known to the candidates or their representatives that in whose favour a particular voter has voted so that he can exercise his right to vote freely and fearlessly. He also pointed out that the right of secrecy has been extended to only those voters who have exercised their right to vote and the same, in no manner, can be extended to those who have not voted at all. Finally, he submitted that since Section 2(d) of the RP Act specifically defines "election" to mean an election to fill a seat, it cannot be construed as an election not to fill a seat.

9. Ms. Meenakshi Arora, learned counsel appearing for the Election Commission of India - Respondent No. 2 herein, by pointing out various provisions both from the RP Act and the Rules submitted that inasmuch as secrecy is an essential feature of "free and fair elections", Rules 41(2) & (3) and 49-O of the Rules violate the requirement of secrecy.

10. Ms. Kamini Jaiswal and Mr. Raghenth Basant, learned counsel appearing for the impleading parties, while agreeing with the stand of the petitioners as well as the Election Commission of India, prayed that necessary directions may be issued for providing another button viz., "None of the Above" (NOTA) in the Electronic Voting Machines (EVMs) so that the voters who come to the polling booth and decide not to vote for any of the candidates, are able to exercise their right not to vote while maintaining their right of secrecy.

11. We have carefully considered the rival submissions and perused the relevant provisions of the RP Act and the Rules.

Discussion:

12. In order to answer the above contentions, it is vital to refer to the relevant provisions of the RP Act and the Rules. Sections 79(d) and 128 of the RP Act

"79(d)--"electoral right" means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election.

128 - Maintenance of secrecy of voting--(1) Every officer, clerk, agent or other person who performs any duty in connection with the recording or counting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (except for some purpose authorized by or under any law) communicate to any person any information calculated to violate such secrecy:

Provided that the provisions of this sub-section shall not apply to such officer, clerk, agent or other person who performs any such duty at an election to fill a seat or seats in the Council of States.

(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to three months or with fine or with both."

Rules 39(1), 41, 49-M and 49-O of the Rules read as under:

"39. Maintenance of secrecy of voting by electors within polling station and voting procedure.--(1) Every elector to whom a ballot paper has been issued under rule 38 or under any other provision of these rules, shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

41. Spoilt and returned ballot papers.--(1) An elector who has inadvertently dealt with his ballot paper in such manner that it cannot be conveniently used as a ballot paper may, on returning it to the presiding officer and on satisfying him

of the inadvertence, be given another ballot paper, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked "Spoilt: cancelled" by the presiding officer.

(2) If an elector after obtaining a ballot paper decides not to use it, he shall return it to the presiding officer, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked as "Returned: cancelled" by the presiding officer.

(3) All ballot papers cancelled under sub-rule (1) or sub-rule (2) shall be kept in a separate packet.

49M. Maintenance of secrecy of voting by electors within the polling station and voting procedures.--(1) Every elector who has been permitted to vote under rule 49L shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

(2) Immediately on being permitted to vote the elector shall proceed to the presiding officer or the polling officer incharge of the control unit of the voting machine who shall, by pressing the appropriate button on the control unit, activate the balloting unit; for recording of elector's vote.

(3) The elector shall thereafter forthwith--

(a) proceed to the voting compartment;

(b) record his vote by pressing the button on the balloting unit against the name and symbol of the candidate for whom he intends to vote; and

(c) come out of the voting compartment and leave the polling station.

(4) Every elector shall vote without

(5) No elector shall be allowed to enter the voting compartment when another elector is inside it.

(6) If an elector who has been permitted to vote under rule 49L or rule 49P refuses after warning given by the presiding officer to observe the procedure laid down in sub-rule (3) of the said rules, the presiding officer or a polling officer under the direction of the presiding officer shall not allow such elector to vote.

(7) Where an elector is not allowed to vote under sub-rule (6), a remark to the effect that voting procedure has been violated shall be made against the elector's name in the register of voters in Form 17A by the presiding officer under his signature.

49-O. Elector deciding not to vote.--If an elector, after his electoral roll number has been duly entered in the register of voters in Form 17A and has put his signature or thumb impression thereon as required under sub-rule (1) of rule 49L, decide not to record his vote, a remark to this effect shall be made against the said entry in Form 17A by the presiding officer and the signature or thumb impression of the elector shall be obtained against such remark."

13. Apart from the above provisions, it is also relevant to refer Article 21(3) of the Universal Declaration of Human Rights and Article 25(b) of the International Covenant on Civil and Political Rights, which read as under:

"21(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

"25. Every citizen shall have the right and the opportunity,

without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) *** *** ***;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;"

14) Articles 19(1)(a) and 21 of the Constitution, which are also pertinent for this matter, are as under:

"19 - Protection of certain rights regarding freedom of speech, etc.-- (1) All citizens shall have the right-

(a) to freedom of speech and expression;

xxxxx

21 - Protection of life and personal liberty--No person shall be deprived of his life or personal liberty except according to procedure established by law."

15. From the above provisions, it is clear that in case an elector decides not to record his vote, a remark to this effect shall be made in Form 17-A by the Presiding Officer and the signature or thumb impression of the elector shall be obtained against such remark. Form 17-A reads as under:

"FORM 17A
[See rule 49L)
REGISTER OF VOTERS

Election to the House of the People/ Legislative Assembly of the State/ Union territory ……from……Constituency No. and Name of Polling Station……Part No. of Electoral Roll……

Sl No.	Sl. No. of elector in the electoral roll	Details of the document produced by the elector in proof of his/ her identification	Signature/ Thumb impression of elector	Remarks
(1)	(2)	(3)	(4)	(5)
1.				
2.				
3.				
4.				

etc.

Signature of the Presiding Officer"

16. Before elaborating the contentions relating to the above provisions with reference to the secrecy of voting, let us first consider the issue of maintainability of the Writ Petition as raised by the Union of India. In the present Writ Petition, which is of the year 2004, the petitioners have prayed for the following reliefs:

"(i) declaring that Rules 41(2) & (3) and 49-O of the Conduct of Election Rules, 1961 are ultra vires and unconstitutional to the extent they violate secrecy of vote;

(ii) direct the Election Commission under the existing Representation of People Act, 1951 and the Conduct of Election Rules, 1961 and/ or under Article 324 to provide necessary provision in the ballot papers and the voting machines for protection of right not to vote and to keep the exercise of such right secret;"

17. It is relevant to point out that initially the present Writ

Petition came up for hearing before a Bench of two-Judges. During the course of hearing, an objection was raised with regard to the maintainability of the Writ Petition under Article 32 on the ground that the right claimed by the petitioners is not a fundamental right as enshrined in Part III of the Constitution. It is the categorical objection of the Union of India that inasmuch as the writ petition under Article 32 would lie to this Court only for the violation of fundamental rights and since the right to vote is not a fundamental right, the present Writ Petition under Article 32 is not maintainable. It is the specific stand of the Union of India that right to vote is not a fundamental right but merely a statutory right. It is further pointed out that this Court, in Para 20 of the referral order dated 23.02.2009, reported in (2009) 3 SCC 200, observed that since in *Kuldip Nayar* (supra), the judgments of this Court in *Association for Democratic Reforms* (supra) and *People's Union for Civil Liberties* (supra) have not been specifically overruled which tend to create a doubt whether the right to vote is a fundamental right or not and referred the same to a larger Bench stating that the issue requires clarity. In view of the reference, we have to decide:

(i) Whether there is any doubt or confusion with regard to the right of a voter in Kuldip Nayar (supra);

(ii) Whether earlier two judgments viz., *Association for Democratic Reforms* (supra) and *People's Union for Civil Liberties* (supra) referred to by the Constitution Bench in *Kuldip Nayar* (supra) stand impliedly overruled.

18. Though, Mr. Malhotra relied on a large number of decisions, we are of the view that there is no need to refer to those decisions except a reference to the decision of this Court in *Kuldip Nayar* (supra), *Association for Democratic Reforms* (supra) and *People's Union for Civil Liberties* (supra).

19. A three-Judge Bench of this Court comprising M.B Shah, P. Venkatarama Reddi and D.M. Dharmadhikari, JJ. expressed separate but concurring op's

Union for Civil Liberties (supra). In para 97, Reddi, J made an observation as to the right to vote being a Constitutional right if not a fundamental right which reads as under:

> "97. In *Jyoti Basu v. Debi Ghosal* [1982] 3 SCR 318 this Court again pointed out in no uncertain terms that:
>
> 8 "a right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple a statutory right."
>
> With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely, R.P. act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple. Even with this clarification, the argument of the learned Solicitor General that the right to vote not being a fundamental right, the information which at best facilitates meaningful exercise of that right cannot be read as an integral part of any fundamental right, remains to be squarely met…."
>
> Similarly, in para 123, point No. 2 Reddi, J., held as under:-
>
> "(2) The right to vote at the elections to the House of the People or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter."

Except the above two paragraphs, this aspect has nowhere been discussed or elaborated wherein all the three Judges, in their separate but concurring judgments, have taken the pains to specifically distinguish between right to vote and freedom of voting as a species of freedom of expression. In succinct, the ratio of the judgment was that though the right to vote is a statutory right but the decision taken by a voter after verifying the credentials of the candidate either to vote or not is his right of expression under Article 19(1)(a) of the Constitution.

20. As a result, the judgments in *Association for Democratic Reforms* (supra) and *People's Union for Civil Liberties* (supra) have not disturbed the position that right to vote is a statutory right. Both the judgments have only added that the right to know the background of a candidate is a fundamental right of a voter so that he can take a rational decision of expressing himself while exercising the statutory right to vote. In *People's Union for Civil Liberties* (supra), Shah J., in para 78D, held as under:-

> "…However, voters' fundamental right to know the antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from statutory rights, he is having fundamental rights conferred by the Constitution…"

P. Venkatrama Reddi, J., in Para 97, held as under:-

> "…Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1)(a) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of ex[illegible]e

carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom…"

Dharmadhikari, J., in para 127, held as under:-

"…This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a voter which is to be regulated by statutory law on the election like the RP Act…"

In view of the above, Para 362 in *Kuldip Nayar* (supra) does not hold to the contrary, which reads as under:-

"We do not agree with the above submission. It is clear that a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression, while reiterating the view in Jyoti Basu v. Debi Ghosal that a right to elect, fundamental though it is to democracy, is neither a fundamental right nor a common law right, but pure and simple, a statutory right".

21. After a careful perusal of the verdicts of this Court in Kuldip Nayar (supra), Association for Democratic Reforms (supra) and *People's Union for Civil Liberties* (supra), we are of the considered view that *Kuldip Nayar* (supra) does not overrule the other two decisions rather it only reaffirms what has already been said by the two aforesaid decisions. The said paragraphs recognize that right to vote is a statutory right and also in *People's Union for Civil Liberties* (supra) it was held that "a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression". Therefore, it cannot be said that *Kuldip Nayar* (supra) has observed anything to the contrary. In view of the whole debate of whether these two decisions were overruled or discarded because of the opening line in Para 362 of *Kuldip Nayar* (supra) i.e., "we do not agree with the above submissions…" we are of the opinion that this line must be read as a whole

and not in isolation. The contention of the petitioners in *Kuldip Nayar* (supra) was that majority view in *People's Union for Civil Liberties* (supra) held that right to vote is a Constitutional right besides that it is also a facet of fundamental right under Article 19(1)(a) of the Constitution. It is this contention on which the Constitution Bench did not agree too in the opening line in para 362 and thereafter went on to clarify that in fact in *People's Union for Civil Liberties* (supra), a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression. Thus, there is no contradiction as to the fact that right to vote is neither a fundamental right nor a Constitutional right but a pure and simple statutory right. The same has been settled in a catena of cases and it is clearly not an issue in dispute in the present case. With the above observation, we hold that there is no doubt or confusion persisting in the Constitution Bench judgment of this Court in *Kuldip Nayar* (supra) and the decisions in *Association for Democratic Reforms* (supra) and *People's Union for Civil Liberties (PUCL)* (supra) do not stand impliedly overruled.

Whether the present writ petition under Article 32 is maintainable:

22. In the earlier part of our judgment, we have quoted the reliefs prayed for by the petitioners in the writ petition. Mr. Malhotra, learned Additional Solicitor General, by citing various decisions submitted that since right to vote is not a fundamental right but is merely a statutory right, hence, the present writ petition under Article 32 is not maintainable and is liable to be dismissed. He referred to the following decisions of this Court in *N.P. Ponnuswami vs. Returning officer,* 1952 SCR 218, *Jamuna Prasad Mukhariya vs. Lachhi Ram,* 1955 (1) SCR 608, *University of Delhi vs. Anand Vardhan Chandal,* (2000) 10 SCC 648, *Kuldip Nayar* (supra) and *K. Krishna Murthy (Dr.) vs. Union of India,* (2010) 7 SCC 202, wherein it has been held that the right to vote is not a fundamental right but is merely a statutory right.

23. In *Kochunni vs. State of Madras,* 1959 (2) Supp. SCR 316, this Court held that the right to move before this Court under Article 32, when a fundamental right has been breached, is a substantive fundamental right by itself. In a series of cases, this Court has held that it is the duty of this Court to enforce the guaranteed fundamental rights.[Vide *Daryo vs. State of U.P.* 1962 (1) SCR 574].

24. The decision taken by a voter after verifying the credentials of the candidate either to vote or not is a form of expression under Article 19(1)(a) of the Constitution. The fundamental right under Article 19(1)(a) read with statutory right under Section 79(d) of the RP Act is violated unreasonably if right not to vote effectively is denied and secrecy is breached. This is how Articles 14 and 19(1)(a) are required to be read for deciding the issue raised in this writ petition. The casting of the vote is a facet of the right of expression of an individual and the said right is provided under Article 19(1)(a) of the Constitution of India (Vide: *Association for Democratic Reforms* (supra) and *People's Union for Civil Liberties* (supra). Therefore, any violation of the said rights gives the aggrieved person the right to approach this Court under Article 32 of the Constitution of India. In view of the above said decisions as well as the observations of the Constitution Bench in *Kuldip Nayar* (supra), a prima facie case exists for the exercise of jurisdiction of this Court under Article 32.

25. Apart from the above, we would not be justified in asking the petitioners to approach the High Court to vindicate their grievance by way of a writ petition under Article 226 of the Constitution of India at this juncture. Considering the reliefs prayed for which relate to the right of a voter and applicable to all eligible voters, it may not be appropriate to direct the petitioners to go to each and every High Court and seek appropriate relief. Accordingly, apart from our conclusion on legal issue, in view of the fact that the writ petition is pending before this Court for the last more than nine years, it may not

be proper to reject the same on the ground, as pleaded by learned ASG. For the reasons mentioned above, we reject the said contention and hold that this Court is competent to hear the issues raised in this writ petition filed under Article 32 of the Constitution.

Discussion about the relief prayed for in the writ petition:

26. We have already quoted the relevant provisions, particularly, Section 128 of the RP Act, Rules 39, 41, 49M and 49-O of the Rules. It is clear from the above provisions that secrecy of casting vote is duly recognized and is necessary for strengthening democracy. We are of the opinion that paragraph Nos. 441, 442 and 452 to 454 of the decision of the Constitution Bench in Kuldip Nayar (supra), are relevant for this purpose which are extracted hereinbelow:

> "441. Voting at elections to the Council of States cannot be compared with a general election. In a general election, the electors have to vote in a secret manner without fear that their votes would be disclosed to anyone or would result in victimisation. There is no party affiliation and hence the choice is entirely with the voter. This is not the case when elections are held to the Council of States as the electors are elected Members of the Legislative Assemblies who in turn have party affiliations.
>
> 442. The electoral systems world over contemplate variations. No one yardstick can be applied to an electoral system. The question whether election is direct or indirect and for which House members are to be chosen is a relevant aspect. All over the world in democracies, members of the House of Representatives are chosen directly by popular vote. Secrecy there is a must and insisted upon; in representative democracy, particularly to the upper chamber, indirect means of election adopted on party lines is well accepted practice.

452. Parliamentary democracy and multi-party system are an inherent part of the basic structure of the Indian Constitution. It is the political parties that set up candidates at an election who are predominantly elected as Members of the State Legislatures. The context in which general elections are held, secrecy of the vote is necessary in order to maintain the purity of the electoral system. Every voter has a right to vote in a free and fair manner and not disclose to any person how he has voted. But here we are concerned with a voter who is elected on the ticket of a political party. In this view, the context entirely changes.

453. That the concept of "constituency-based representation" is different from "proportional representation" has been eloquently brought out in United Democratic Movement v. President of the Republic of South Africa where the question before the Supreme Court was: whether "floor crossing" was fundamental to the Constitution of South Africa. In this judgment the concept of proportional representation vis-à-vis constituency-based representation is highlighted…

454. The distinguishing feature between "constituency-based representation" and "proportional representation" in a representative democracy is that in the case of the list system of proportional representation, members are elected on party lines. They are subject to party discipline. They are liable to be expelled for breach of discipline. Therefore, to give effect to the concept of proportional representation, Parliament can suggest "open ballot". In such a case, it cannot be said that "free and fair elections" would stand defeated by "open ballot". As stated above, in a constituency-based election it is the people who vote whereas in proportional representation it is the elector who votes. This distinction is indicated also in the Australian judgment in R. v. Jones. In constituency-based representation, "secrecy" is the basis whereas in the case

of proportional representation in a representative democracy the basis can be "open ballot" and it would not violate the concept of "free and fair elections", which concept is one of the pillars of democracy."

27. The above discussion in the cited paragraphs makes it clear that in direct elections to Lok Sabha or State Legislatures, maintenance of secrecy is a must and is insisted upon all over the world in democracies where direct elections are involved to ensure that a voter casts his vote without any fear of being victimized if his vote is disclosed.

28. After referring to Section 128 of the RP Act and Rule 39 of the Rules, this Court in *S. Raghbir Singh Gill vs. S. Gurcharan Singh Tohra and Others* 1980 (Supp) SCC 53 held as under:

> "14…Secrecy of ballot can be appropriately styled as a postulate of constitutional democracy. It enshrines a vital principle of parliamentary institutions set up under the Constitution. It subserves a very vital public interest in that an elector or a voter should be absolutely free in exercise of his franchise untrammelled by any constraint, which includes constraint as to the disclosure. A remote or distinct possibility that at some point a voter may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise. Therefore, it can be said with confidence that this postulate of constitutional democracy rests on public policy."

29. In the earlier part of this judgment, we have referred to Article 21(3) of the Universal Declaration of Human Rights and Article 25(b) of the International Covenant on Civil and Political Rights, which also recognize the right of secrecy.

30. With regard to the first prayer ..,

extension of principle of secrecy of ballot to those voters who decide not to vote, Mr. Malhotra, learned ASG submitted that principle of secrecy of ballot is extended only to those voters who have cast their votes in favour of one or the other candidates, but the same, in no manner, can be read as extended to even those voters who have not voted in the election. He further pointed out that the principle of secrecy of ballot pre-supposes validly cast vote and the object of secrecy is to assure a voter to allow him to cast his vote without any fear and in no manner it will be disclosed that in whose favour he has voted or he will not be compelled to disclose in whose favour he voted. The pith and substance of his argument is that secrecy of ballot is a principle which has been formulated to ensure a voter (who has exercised his right to vote) that in no case it shall be known to the candidates or their representatives that in whose favour a particular voter has voted so that he can exercise his right to vote freely and fearlessly. The stand of the Union of India as projected by learned ASG is that the principle of secrecy of ballot is extended only to those voters who have cast their vote and the same in no manner can be extended to those who have not voted at all.

31. Right to vote as well as right not to vote have been statutorily recognized under Section 79(d) of the RP Act and Rules 41(2) & (3) and 49-O of the Rules respectively. Whether a voter decides to cast his vote or decides not to cast his vote, in both cases, secrecy has to be maintained. It cannot be said that if a voter decides to cast his vote, secrecy will be maintained under Section 128 of the RP Act read with Rules 39 and 49M of the Rules and if in case a voter decides not to cast his vote, secrecy will not be maintained. Therefore, a part of Rule 49-O read with Form 17-A, which treats a voter who decides not to cast his vote differently and allows the secrecy to be violated, is arbitrary, unreasonable and violative of Article 19 and is also ultra vires Sections 79(d) and 128 of the RP Act.

32. As regards the question as to whether the right of expression under Article 19 stands infringed when secrecy of the poll is not maintained, it is useful to refer S. Raghbir Singh (supra) wherein this Court deliberated on the interpretation of Section 94 of the RP Act which mandates that no elector can be compelled as a witness to disclose his vote. In that case, this Court found that the "secrecy of ballots constitutes a postulate of constitutional democracy…A remote or distinct possibility that the voter at some point of time may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise". Secrecy of ballot, thus, was held to be a privilege granted in public interest to an individual. It is pertinent to note that in the said case, the issue of the disclosure by an elector of his vote arose in the first place because there was an allegation that the postal ballot of an MLA was tampered with to secure the victory of one of the candidates to the Rajya Sabha. Therefore, seemingly there was a conflict between the "fair vote" and "secret ballot".

33. In *Kuldip Nayar* (supra), this Court held that though secrecy of ballots is a vital principle for ensuring free and fair elections, the higher principle is free and fair elections. However, in the same case, this Court made a copious distinction between "constituency based representation" and "proportional representation". It was held that while in the former, secrecy is the basis, in the latter the system of open ballot and it would not be violative of "free and fair elections". In the said case, *R vs. Jones,* (1972) 128 CLR 221 and *United Democractic Movement vs. President of the Republic of South Africa,* (2003) 1 SA 495 were also cited with approval.

34. Therefore, in view of the decisions of this Court in *S. Raghubir Singh Gill* (supra) and *Kuldip Nayar* (supra), the policy is clear that secrecy principle is integral to free and fair elections which can be removed only wh[illegible]at

there is any conflict between secrecy and the "higher principle" of free elections. The instant case concerns elections to Central and State Legislatures that are undoubtedly "constituency based". No discernible public interest shall be served by disclosing the elector's vote or his identity. Therefore, secrecy is an essential feature of the "free and fair elections" and Rule 49-O undoubtedly violates that requirement.

35. In *Lily Thomas vs. Speaker, Lok Sabha,* (1993) 4 SCC 234, this Court held that "voting is a formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question" and that "right to vote means right to exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well".

36. In view of the same, this Court also referred to the Practice and Procedure of the Parliament for voting which provides for three buttons: viz., AYES, NOES and ABSTAIN whereby a member can abstain or refuse from expressing his opinion by casting vote in favour or against the motion. The constitutional interpretation given by this Court was based on inherent philosophy of parliamentary sovereignty.

37. A perusal of Section 79(d) of the RP Act, Rules 41(2) & (3) and Rule 49-O of the Rules make it clear that a right not to vote has been recognized both under the RP Act and the Rules. A positive 'right not to vote' is a part of expression of a voter in a parliamentary democracy and it has to be recognized and given effect to in the same manner as 'right to vote'. A voter may refrain from voting at an election for several reasons including the reason that he does not consider any of the candidates in the field worthy of his vote. One of the ways of such expression may be to abstain from voting, which is not an ideal option for a conscientious and responsible citizen. Thus, the only way by which it can be made effectual is by providing a button in the EVMs to express that right. This is the basic requirement if the lasting values in a healthy democracy

have to be sustained, which the Election Commission has not only recognized but has also asserted.

38. The Law Commission of India, in its 170th Report relating to Reform of the Electoral Laws recommended for implementation of the concept of negative vote and also pointed out its advantages.

39. In India, elections traditionally have been held with ballot papers. As explained by the Election Commission, from 1998 onwards, the Electronic Voting Machines (EVMs) were introduced on a large scale. Formerly, under the ballots paper system, it was possible to secretly cast a neutral/negative vote by going to the polling booth, marking presence and dropping one's ballot in the ballot box without making any mark on the same. However, under the system of EVMs, such secret neutral voting is not possible, in view of the provision of Rule 49B of the Rules and the design of the EVM and other related voting procedures. Rule 49B of the Rules mandates that the names of the candidates shall be arranged on the balloting unit in the same order in which they appear in the list of contesting candidates and there is no provision for a neutral button.

40. It was further clarified by the Election Commission that EVM comprises of two units, i.e. control and balloting units, which are interconnected by a cable. While the balloting unit is placed in a screened enclosure where an elector may cast his vote in secrecy, the control unit remains under the charge of the Presiding Officer and so placed that all polling agents and others present have an unhindered view of all the operations. The balloting unit, placed inside the screened compartment at the polling station gets activated for recording votes only when the button marked "Ballot" on the control unit is pressed by the presiding officer/polling officer in charge. Once the ballot button is pressed, the Control unit emanates red light while the ballot unit which has been activated to receive the vote emanates green light. Once an elector casts his vote by pressing balloting button against the candidate of his cho[illegible]d

light glow against the name and symbol of that candidate and a high-pitched beep sound emanates from the machine. Upon such casting of vote, the balloting unit is blocked, green light emanates on the control unit, which is in public gaze, and the high pitched beep sound is heard by one and all. Thereafter, the EVM has to re-activate for the next elector by pressing "ballot button". However, should an elector choose not to cast his vote in favour of any of the candidates labeled on the EVM, and consequently, not press any of the labeled button neither will the light on the control unit change from red to green nor will the beep sound emanate. Hence, all present in the poll booth at the relevant time will come to know that a vote has not been cast by the elector.

41. Rule 49-O of the Rules provides that if an elector, after his electoral roll number has been entered in the register of electors in Form 17-A, decides not to record his vote on the EVM, a remark to this effect shall be made against the said entry in Form 17-A by the Presiding Officer and signature/thumb impression of the elector shall be obtained against such remark. As is apparent, mechanism of casting vote through EVM and Rule 49-O compromise on the secrecy of the vote as the elector is not provided any privacy when the fact of the neutral/negative voting goes into record.

42. Rules 49A to 49X of the Rules come under Chapter II of Part IV of the Rules. Chapter II deals with voting by Electronic Voting Machines only. Therefore, Rule 49-O, which talks about Form 17-A, is applicable only in cases of voting by EVMs. The said Chapter was introduced in the Rules by way of an amendment dated 24.03.1992. Voting by ballot papers is governed by Chapter I of Part IV of the Rules. Rule 39 talks about secrecy while voting by ballot and Rule 41 talks about ballot papers. However, as said earlier, in the case of voting by ballot paper, the candidate always had the option of not putting the cross mark against the names of any of the candidates and thereby record his disapproval for all the candidates in the fray. Even though such a ballot paper would

be considered as an invalid vote, the voter still had the right not to vote for anybody without compromising on his/her right of secrecy. However, with the introduction of EVMs, the said option of not voting for anybody without compromising the right of secrecy is not available to the voter since the voting machines did not have 'None of the Above' (NOTA) button.

43. It is also pointed out that in order to rectify this serious defect, on 10.12.2001, the Election Commission addressed a letter to the Secretary, Ministry of Law and Justice stating, *inter alia,* that the "electoral right" under Section 79(d) includes a right not to cast vote and sought to provide a panel in the EVMs so that an elector may indicate that he does not wish to vote for any of the aforementioned candidates. The letter also stated that such number of votes expressing dissatisfaction with all the candidates may be recorded in a result sheet. It is also brought to our notice that no action was taken on the said letter dated 10.12.2001.

44. The Election Commission further pointed out that in the larger interest of promoting democracy, a provision for "None of the Above" or "NOTA" button should be made in the EVMs/ ballot papers. It is also highlighted that such an action, apart from promoting free and fair elections in a democracy, will provide an opportunity to the elector to express his dissent/ disapproval against the contesting candidates and will have the benefit of reducing bogus voting.

45. Democracy and free elections are part of the basic structure of the Constitution. In *Indira Nehru Gandhi vs. Raj Narain,* 1975 Supp 1 SCC 198, Khanna, J., held that democracy postulates that there should be periodic elections where the people should be in a position to re-elect their old representatives or change the representatives or elect in their place new representatives. It was also held that democracy can function only when elections are free and fair and the people are free to vote for the candidates of their choice. In the said case, Article 19 was not in issue and th n

the context of basic structure of the Constitution. Thereafter, this Court reiterated that democracy is the basic structure of the Constitution in *Mohinder Singh Gill and Another vs. Chief Election Commissioner, New Delhi and Others,* (1978) 1 SCC 405 and *Kihoto Hollohon vs. Zachillhu and Others,* 1992 (Supp) 2 SCC 651.

46. In order to protect the right in terms of Section 79(d) and Rule 49-O, viz., "right not to vote", we are of the view that this Court is competent/well within its power to issue directions that secrecy of a voter who decides not to cast his vote has to be protected in the same manner as the Statute has protected the right of a voter who decides to cast his vote in favour of a candidate. This Court is also justified in giving such directions in order to give effect to the right of expression under Article 19(1)(a) and to avoid any discrimination by directing the Election Commission to provide NOTA button in the EVMs.

47. With regard to the above, Mr. Malhotra, learned ASG, by drawing our attention to Section 62 of the RP Act, contended that this Section enables a person to cast a vote and it has no scope for negative voting. Section 62(1) of the RP Act reads as under:

> "62. Right to vote.(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency."

48. Mr. Malhotra, learned ASG has also pointed out that elections are conducted to fill a seat by electing a person by a positive voting in his favour and there is no concept of negative voting under the RP Act. According to him, the Act does not envisage that a voter has any right to cast a negative vote if he does not like any of the candidates. Referring to Section 2(d) of the RP Act, he asserted that election is only a means of choice or election between various candidates to fill a seat.

Finally, he concluded that negative voting (NOTA) has no legal consequence and there shall be no motivation for the voters to travel to the polling booth and reject all the candidates, which would have the same effect of not going to the polling station at all.

49. However, correspondingly, we should also appreciate that the election is a mechanism, which ultimately represents the will of the people. The essence of the electoral system should be to ensure freedom of voters to exercise their free choice. Article 19 guarantees all individuals the right to speak, criticize, and disagree on a particular issue. It stands on the spirit of tolerance and allows people to have diverse views, ideas and ideologies. Not allowing a person to cast vote negatively defeats the very freedom of expression and the right ensured in Article 21 i.e., the right to liberty.

50. Eventually, voters' participation explains the strength of the democracy. Lesser voter participation is the rejection of commitment to democracy slowly but definitely whereas larger participation is better for the democracy. But, there is no yardstick to determine what the correct and right voter participation is. If introducing a NOTA button can increase the participation of democracy then, in our cogent view, nothing should stop the same. The voters' participation in the election is indeed the participation in the democracy itself. Non-participation causes frustration and disinterest, which is not a healthy sign of a growing democracy like India.

Conclusion:

51. Democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country. The 'Fair' denotes equal opportunity to all people. Universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for these millions of individual

voters to go to the polls and thus participate in the governance of our country. For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values, who win the elections on a positive vote. Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. This situation palpably tells us the dire need of negative voting.

52. No doubt, the right to vote is a statutory right but it is equally vital to recollect that this statutory right is the essence of democracy. Without this, democracy will fail to thrive. Therefore, even if the right to vote is statutory, the significance attached with the right is massive. Thus, it is necessary to keep in mind these facets while deciding the issue at hand.

53. Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. We are of the considered view that in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfill one of its objective, namely, wide participation of people.

54. Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. Thus,

secrecy is required to be maintained for both categories of persons.

55. Giving right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity.

56. The direction can also be supported by the fact that in the existing system a dissatisfied voter ordinarily does not turn up for voting which in turn provides a chance to unscrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one. Furthermore, a provision of negative voting would be in the interest of promoting democracy as it would send clear signals to political parties and their candidates as to what the electorate think about them.

57. As mentioned above, the voting machines in the Parliament have three buttons, namely, AYES, NOES, and ABSTAIN. Therefore, it can be seen that an option has been given to the members to press the ABSTAIN button. Similarly, the NOTA button being sought for by the petitioners is exactly similar to the ABSTAIN button since by pressing the NOTA button the voter is in effect saying that he is abstaining from voting since he does not find any of the candidates to be worthy of his vote.

58. The mechanism of negative voting, thus, serves a very fundamental and essential part of a vibrant democracy. The following countries have provided for neutral/protest/negative voting in their electoral systems:

S.No	Name of the Country	Method of Voting	Form of Negative Vote
1.	France	Electronic	NOTA
2.	Belgium	Electronic	NOTA
3.	Brazil	Ballot Paper	NOTA
4.	Greece	Ballot Paper	NOTA
5.	Ukraine	Ballot Paper	NOTA
6.	Chile	Ballot Paper	NOTA
7.	Bangladesh	Ballot Paper	NOTA
8.	State of Nevada, USA	Ballot Paper	NOTA
9.	Finland	Ballot Paper	Blank Vote and/or 'write in*'
10.	Sweden	Ballot Paper	Blank Vote and/or 'write in*'
11.	United States of America	Electronic/Ballot (Depending	Blank Vote on and/or 'write in*'
12.	Colombia	Ballot Paper	Blank Vote
13.	Spain	Ballot Paper	Blank Vote

* Write-in' - The 'write-in' form of negative voting allows a voter to cast a vote in favour of any fictional name/candidate.

59. The Election Commission also brought to the notice of this Court that the present electronic voting machines can

be used in a constituency where the number of contesting candidates is up to 64. However, in the event of there being more than 64 candidates in the poll fray, the conventional system of ballot paper is resorted to. Learned counsel appearing for the Election Commission also asserted through supplementary written submission that the Election Commission of India is presently exploring the possibility of developing balloting unit with 200 panels. Therefore, it was submitted that if in case this Court decides to uphold the prayers of the petitioners herein, the additional panel on the balloting unit after the last panel containing the name and election symbol of the last contesting candidate can be utilized as the NOTA button. Further, it was explicitly asserted in the written submission that the provision for the above facility for a negative or neutral vote can be provided in the existing electronic voting machines without any additional cost or administrative effort or change in design or technology of the existing machines. For illustration, if there are 12 candidates contesting an election, the 13th panel on the balloting unit will contain the words like "None of the above" and the ballot button against this panel will be kept open and the elector who does not wish to vote for any of the abovementioned 12 contesting candidates, can press the button against the 13th panel and his vote will be accordingly recorded by the control unit. At the time of the counting, the votes recorded against serial number 13 will indicate as to how many electors have decided not to vote for any candidate.

60. Taking note of the submissions of Election Commission, we are of the view that the implementation of the NOTA button will not require much effort except for allotting the last panel in the EVM for the same.

61. In the light of the above discussion, we hold that Rules 41(2) & (3) and 49-O of the Rules are ultra vires Section 128 of the RP Act and Article 19(1)(a) of the Constitution to the extent they violate secrecy of voting. In

we direct the Election Commission to provide necessary provision in the ballot papers/EVMs and another button called "None of the Above" (NOTA) may be provided in EVMs so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to vote while maintaining their right of secrecy. Inasmuch as the Election Commission itself is in favour of the provision for NOTA in EVMs, we direct the Election Commission to implement the same either in a phased manner or at a time with the assistance of the Government of India. We also direct the Government of India to provide necessary help for implementation of the above direction. Besides, we also direct the Election Commission to undertake awareness programmes to educate the masses.

62. The writ petition is disposed of with the aforesaid directions.

R.P. Writ Petition disposed of.

PREMLATA JOSHI

v.

CHIEF SECRETARY STATE OF UTTARAKHAND & ORS.

(Civil Appeal No.10236 of 2013 etc.)

NOVEMBER 12, 2013

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

Service Law:

Appointment by promotion - Appointment to post of Director, Medical Health - Held: In the instant case, promotion is on the basis of merit alone, where seniority should play the role only if two candidates are of equal merit and not otherwise - Government Order laid down the criteria of judging the merit and specified the categories as 'excellent', 'good' and 'unsuitable' - DPC committed the mistake by grading the officers in 'very good', 'good' and 'unfit' categories --By eliminating 'excellent' category and replacing it with 'very good' category, private respondent was severely prejudiced Since DPC did not follow the procedure as laid down even in the OM, the promotion of appellant was rightly set aside by High Court - Uttar Pradesh Medical Health (Group A) Service Rules, 1990 - r.8 -- Uttarakhand Government Servant (Criteria for Recruitment by Promotion) Rules, 2004- rr. 4 and 8 - Government Order dated 16.4.2003 - Para 2(a) - Costs.

Recovery of excess amount - Held: Since appellant has already retired and promotion given to her is because of the wrong exercise of the Department in not applying Rules/OM correctly and it was not because of any misrepresentation or suppression by the appellant, no recovery of the excess amount paid to her is called for.

CONSTITUTION OF INDIA, 1950:

Art. 226 - Writ jurisdiction - Held: High Court rightly

concluded that the criterion of merit was violated by giving promotion to the appellant on such a comparative assessment where the respondent was rated more meritorious than the appellant - It cannot, therefore, be said that High Court assumed the role of DPC.

ADMINISTRATIVE LAW:

Subordinate legislation - Government of Uttarakhand O.M. dated 16.4.2003 - Providing classification as 'excellent', 'good' and 'unsuitable' - However, ACRs also providing Grade 'very good' which is not the category in O.M. - Held: It is for the Government to consider amendment in the procedure of selection on the basis of merits - Government Order dated 16.4.2003 - Para 2(a).

The appellant's appointment on the post of Director, Medical Health was challenged by the private respondent on the ground that his ACRs were much superior to that of the appellant inasmuch as in the last 10 years under consideration he had obtained either 'excellent' or 'very good' rating; whereas in the case of appellant ACRs of only 9 years were considered out of which in one year she obtained 'good' and in the remaining 8 years 'excellent' or 'very good'. The Public Service Tribunal rejected the respondent's claim petition. However, the High Court allowed his writ petition. Since on the date of the judgment, both the appellant as well as private respondent had retired, the High Court directed to treat the private respondent as having been promoted to the post of Director, Medical Health on and from 14.7.2008 and he be paid the arrears of salary, accordingly.

In the petition for special leave filed by the appellant, limited notice was issued as regards recovery of amount already paid to her on account of promotion to the post of Director, Medical Health.

Dismissing the appeals, the Court

HELD: 1.1 Rule 8 of the U.P. Medical Health (Group A) Service Rules, 1990, as amended in 1998, states that merit is the sole consideration for promotion to the post of Director. Further, as per r.8 of the Uttarakhand Government Servant (Criteria for Recruitment by Promotion) Rules, 2004, the promotion is on the basis of merit to the post in question. The relevant Rules are statutory in nature as they are made in exercise of power vested in proviso to Article 309 of the Constitution. However, the Rules do not provide the procedure for adjudging the merit of various candidates. In the instant case, the promotion is on the basis of merit alone, where the seniority should play the role only if two candidates are of equal merit and not otherwise. [para 4,5,13 and 16] [329-G-H; 330-A; 331-F; 335-C-D; 337-F]

1.2 OM dated 16.4.2003 provides for the procedure for evaluating the comparative merit of the candidates. As per sub-para (b) of para 2 of the O.M., comparative evaluation has to be on the basis of service record and, particularly, ACRs recorded in the service record for last 10 years. Next step which the DPC is required to undertake is to classify the officers in three categories, namely, 'excellent', 'good' and 'unsuitable'. [para 13-14] [335-D-E, G-H; 336-A]

1.3 In the instant case, the procedure laid down in the OM has not been strictly adhered to by the DPC. It committed the mistake by grading the officers in 'very good', 'good' and 'unfit' category. Thus, the DPC invented and substituted the category of 'very good' in place of the category mentioned in the OM, namely, 'excellent'. This has made all the difference in evaluating the appellant vis-à-vis the private respondent and that is a serious error committed by the DPC. It is pertinent to mention that in the counter affidavit filed by the State Government before the High Court, it is admitted that DPC assigned 30 marks

to the appellant and 29 marks to the private respondent. By eliminating 'excellent' category and replacing it with 'very good' category, the private respondent was severely prejudiced as he was put along the appellant in the same lower category not specified in the OM. Such an exercise on the part of the DPC is contrary to the mandate and spirit of part 2(a) of OM dated 16.4.2003 which categorically states that selection on the basis of merit means to select the best available officer on the basis of comparative evaluation. [para 15] [336-B-C, F-H; 337-A]

1.4 Even OM dated 16.4.2003 is not entirely in sync with the grading done in the Annual Confidential Reports. Sub-para (c) of para 2 provides for classifying the officers in three categories, namely 'excellent', 'good' and 'unsuitable' and there is no category of 'very good' which is one of the grading provided in ACR. However, it is for the Government to have a re-look into the classifications mentioned in sub-para (c) of para 2 and consider amendment in the procedure of selection on the basis of merit. [para 16] [337-B-D]

B.V. Sivaiah & Ors. Vs. K.Addanki Babu & Ors. **1998 (3) SCR 782 = 1998 (6) SCC 720 - referred to.**

1.5 Since the DPC did not follow the procedure as laid down even in the OM dated 16.4.2003, the promotion of the appellant on the basis of the exercise undertaken by the DPC was clearly unwarranted and rightly set aside by the High Court. [para 16-A] [337-G-H]

1.6 The High Court rightly concluded that the criterion of merit was violated by giving promotion to the appellant on such a comparative assessment where the respondent was rated more meritorious than the appellant. It is, therefore, not correct to say that the High Court has assumed the role of the DPC. [para 17] [338-D-E]

2. In so far as payment of excess salary made to the appellant in promotional post is concerned, since the appellant has already retired and the promotion given to her is because of the wrong exercise of the Department in not applying Rules/OM correctly and it was not because of any misrepresentation or suppression by the appellant, no recovery of the excess amount paid to her is called for. [para 17] [338-E-G]

3. The private respondent shall also be entitled to cost of Rs.15,000/-which shall be paid by the Government. [para 17] [338-G]

Case Law Reference:

1998 (3) SCR 782 referred to para 16

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10236 of 2013.

From the Judgment and Order dated 05.10.2010 of the High Court of Uttarakhand at Nainital in Writ Petition (SB) No. 200 of 2009.

WITH

C.A. No. 10237 of 2013.

L. Nageswara Rao, ASG, Prasenjit Keswani, Manu Beri (for Yash Pal Dhingra), Rachana Srivastava, Utkarsh Sharma for the Appellant.

Gaurav Agarwal (for Jatin Zaveri) for the Respondents.

The Judgment of the Court was delivered by

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

2. Dispute in these appeals pertains to the validity of appointment to the post of Director, Medical Health. Ms. Premlata Joshi appellant in one of these appeals was appointed to the post of Director, Medical Health, which was in general category and available to all eligible candidates, irrespective of their category, along with one Dr. C.P. Arya, who was promoted to the post of D r

Scheduled Caste candidate. Promotion of C.P.Arya is not in question. However, Dr. Y.S.Bisht, who is private respondent in these appeals, and was also considered for the said post but was not appointed, challenged the appointment of Ms Premlata Joshi (hereinafter referred to as the "appellant"). The Public Service Tribunal, Uttarakhand, where the Original Application was filed, dismissed the said application of Dr. Bisht (hereinafter referred to as the "private respondent") vide orders dated 18th August 2009. This order was challenged by the private respondent before the High Court of Uttarakhand in the form of a Writ Petition. The High Court has allowed the said Writ Petition holding that the selection to the post was on the basis of merit and since private respondent was more meritorious than the appellant, he should have been promoted to the post of Director, Medical Health instead of the appellant. On the date of the judgment, both the appellant as well as private respondent had retired. Therefore, the direction is given by the High Court to treat the private respondent as having been promoted to the post of Director, Medical Health on and from 14.7.2008 till the date of his retirement and he be paid the arrears of salary, accordingly, after fixing his salary on the post of Director. Direction is also given to work out his pension and other retirement dues on the same post.

3. This judgment of the High Court is challenged by the appellant as well as the State of Uttarakhand (hereinafter referred to as the "official respondent"). This is how we have the instant two appeals against the same judgment filed by two parties.

4. Two posts of Director, Medical Health had fallen vacant in the year 2007. One was reserved for Scheduled Caste Candidate. Against the other post eligible candidates were entitled to be considered for promotion. The Rules, which govern the promotion to the post of Director, are contained in U.P.Medical Health (Group A) Service Rules, 1990, as amended in 1998. Rule 8 thereof states that merit is the sole

consideration for promotion to the post of Director. There is yet another set of Rules known as Uttarakhand Government Servant (Criteria for Recruitment by Promotion) Rules, 2004. Rule 8 thereof which deals with the procedure for promotion to the post reads as under:

"8. Procedure of appointment on the basis of promotion

1. The appointment of Director General, Director and Additional Director on the basis of superiority and Joint Director and senior class officers, discarding the unsuitable, on the basis of seniority will be done by Selection Committee according to Uttar Pradesh Departmental Promotion Committee Constitution (leaving the posts outside Public Service Commission) Rule, 1992.

Note: In selection committee the names of officers belonging to Schedule Caste. Schedule tribe and other backward caste will be considered according to orders given under section-3 of Uttar Pradesh Public Service Commission (reservation for schedule caste, schedule tribe and other backward caste) Act, 1994.

Explanation: For this rule the citizen of other backward caste would mean the same which has been mentioned in the sub-rule under the aforesaid Act.

2. Appointment Officer (for the post outside of Public Service Commission) will prepare the merit list of the eligible candidates according to Uttar Pradesh Selection Merit List Rule-1986: Where two separate categories are there, then-

(a) In case of different pay-scale, the candidates of upper pay scale will be kept above in the merit list.

(b) In case of similar pay scale the candidates will be kept in the merit list according to their date of appointment.

(c) If the pay scale and appointment in the category is same then the candidates having more age will be kept above in the merit list.

3. Selection Committee will prepare a list on the basis of documents mentioned in sub-rule (3) and if necessary can conduct the interview of the candidates.

4. Selection Committee will prepare a list of selected candidates on the basis of seniority of candidates as in that category where promotion has to be made and will forward it to appointment officer."

Rule 4 prescribes the criteria for appointment by way of promotion which reads as under:

"Criteria for appointment by way of promotion - The appointment on the post of Head of Department, post just below the Head of Department and any such other post of any service where the pay scale is Rupees 18300.00 or more will be made on the basis of merit and apart from these on the remaining posts, the post filled on the basis of promotion where such other posts are including where the promotion is made from non-gazetted to gazette post or from one service to other service, then discarding the ineligible, the appointment will be made on the basis of seniority."

5. As per this Rule, the promotion is on the basis of merit to the post in question.

6. The Government issued Order dated 16.4.2003 laying down the criterion for judging the merit. This criterion, inter-alia, provides that in order to ascertain merit, the ACRs of the candidates for the entire length of service shall be considered with special attention to last 10 years. Since much turns on the prescription given in this Order to adjudge the respective merit of eligible candidates for the post, we would like to produce the relevant portion thereof hereunder:

"Procedure of selection on the basis of merit -

(a) Name of all the officers should be considered who is eligible in the proportion against the available vacancy. The selection on the basis of "merit" means to select the best available officer from the whole eligible officer. Therefore, the decision should be taken after doing comparative evaluation of all the eligible officers in regard of merit.

(b) The entries of the entire service period should be seen while making selection of officers under the merit criteria but stress should be there on the entries of last 10 years.

(c) On the basis of entries of Character register of Officers, for evaluation, they have been classified under three categories:-

1. Excellent

2. Good

3. Unsuitable.

On the basis of entries of character register, after evaluating the officers and classifying those under 3 categories, the vacancies be filled first of all from the excellent categories officers in seniorities wise and thereafter if necessary the vacancies be filled from the officers of good category. The selected officers from excellent and best class a list should be again made according to their original seniority which will be their seniority list.

It is therefore stated that in future the aforesaid procedure be followed in the selection being done in the future."

7. As per the aforesaid procedure, after evaluating the ACRs of the officers they are to be put in three categories, namely 'excellent' 'good' and unsuitable'. In each category, the officers are then to be placed according to their seniority and vacant posts are to be filled on the bas Y,

first from 'excellent' category list and thereafter from 'good' category list, if after the exhaustion of 'excellent' category, posts are still available.

8. In the present case, we find that after considering the cases of eligible candidates for the post of Director, including the appellant and private respondent, DPC put both of them in "very good" category and since the appellant was senior to private respondent, she was placed above him, and therefore appointed to the post of Director as per her seniority.

9. This mode of grouping was challenged by the private respondent by filing Claim Petition before the Tribunal. His submission was that on comparison it was clear that his ACRs. were much superior to that of the appellant inasmuch as in last 10 years. The private respondent had obtained either 'excellent' or 'very good' rating. On the other hand, in the case of appellant 9 years ACRs were considered as one year ACR was not available, even these 9 years she had got 'good', in one year and in remaining 8 years either 'excellent' or 'very good'. He, thus, submitted that he was more meritorious than appellant and since the criteria was merit based, as per the procedure laid down in Government Order dated 16/4/2003, he should have been ranked above the appellant.

10. The Tribunal did not accept this plea holding that as per the said Government Order, 'excellent' remarks were to be given as 'very good' inasmuch as the officers were to be put in three categories, namely, 'very good', 'good' and 'unfit'. It held that once both the appellant and the private respondent were placed in the same category, namely, 'very good' thereafter inter-se placement in the select list was to be on the basis of their seniority. The Tribunal, accordingly, dismissed the Claim Petition of the private respondent. For proper appreciation we reproduce the discussion in the judgment of the Tribunal, verbatim, on this aspect:

> "On the basis of above Office Memorandum dated 16.4.2003; the departmental promotion committee has amalgamated excellent and very good entries and put them together as very good. Therefore, the excellent entries were considered as very good at the time of selection. Since, the respondent No.5 was senior most amongst the 7 candidates in very good category of Character Roll. The name of respondent No.5 was rightly recommended for promotion on the post of Director."

11. Unsatisfied with the outcome of the decision, private respondent approached the High Court challenging the decision of the Tribunal by filing Writ Petition under Article 226 of the Constitution. The High Court has held that since the private respondent had more number of 'excellent' remarks in the ACRs. as compared to the appellant, on the basis of parameters laid down in the Government Order dated 16.4.2003, the private respondent could not be equated with the appellant and therefore private respondent should have been appointed to the post of Director, Medical Health. On this premise, Writ Petition has been allowed and direction given, as already noted in the beginning of the judgment.

12. At the time of hearing, Mr. Rao, learned ASG appearing for the State of Uttarakhand relied upon the aforesaid reasoning and rationale given by the Tribunal. His submission was that on the application of OM dated 16.4.2003, it was permissible for DPC to classify the candidates into three categories and once it was found that appellant as well as private respondent fall in the same category, in that category the appellant was rightly placed above the private respondent in view of her seniority over him. He submitted that this exercise done by the DPC, based on the entries of character register, could not be interfered with by the High Court as the High Court could not assume the role of departmental promotion committee and make comparative assessment by itself of the two candidates, viz. the appellant and the private respondent. He also argued that it is no where challenged that grading of 'very good' to the appellant was uncalled for. Once, the appellant finds berth in 'very good' category to which private respondent wa[illegible]e

purpose of promotions both were in the same category and private respondent could not say that he was superior to the appellant. From that stage onward, it is the seniority which becomes the governing factor when two or more candidates have attained same grading.

13. The aforesaid argument appears to be attractive, in the first blush. However, a little deeper scrutiny of the procedure adopted by the DPC would expose the hollowness of this argument thereby taking entire sheen out of it. In the first place, we have to keep in mind the position contained in the relevant Rules which are statutory in nature as they are made in exercise of power vested in proviso of Article 309 of the Constitution. Rule 4 of Rules, 2004 deals with the criteria for appointment by way of promotion. For the post in question, it clearly lays down that the promotion is to "be made on the basis of merit". Rules do not provide the procedure for adjudging the merit of various candidates. For this reason, OM dated 16.4.2003 needs to be referred to which provides for the procedure for evaluating the comparative merit of the candidates. We have reproduced para 2 of the said OM hereinabove. In sub-para (a) of para 2, the expression 'merit' is defined stating as under:

> "The selection on the basis of "Merit" means to select the best available officer from the whole eligible officer. Therefore, the decision should be taken after doing comparative evaluation of all the eligible officers in regard of merit."

14. It follows from the above that while making selection on the basis of merit, DPC is required to select 'the best available officer'. For this purpose, it is also incumbent upon the DPC to undertake the "comparative evaluation of all eligible officers in regard of merit". As per sub-para (b) of para 2, for comparative evaluation the entries of the entire service period, with emphasis on the entries of last 10 years, is to be examined by the DPC. This shows that comparative evaluation has to be on the basis of service record and particularly ACRs recorded

in the service record for last 10 years. Next step which the DPC is required to undertake is to classify the officers in three categories, namely, 'excellent', 'good' and 'unsuitable'.

15. We may point out that the private respondent has questioned the propriety of putting the candidates in three categories on the ground that it is not in tune with the system of ACRs. That aspect will be discussed a little later. What we find that even the procedure laid down in the aforesaid OM has not been strictly adhered to by the DPC. The first mistake which is committed is that the DPC has graded the officers in 'very good', 'good' and 'unfit' category. Thus, the DPC invented and substituted the category of 'very good' in place of the category mentioned in the OM namely 'excellent'. This has made all the difference in evaluating appellant vis-à-vis the private respondent and that is a serious error committed by the DPC. By creating its own category of 'very good' which is not specified in OM dated 16.4.2003, the private respondent has also been included in the category of 'very good' in the absence of 'excellent' category. Had the categories mentioned in OM dated 16.4.2003 been maintained, in all likelihood the private respondent would have been rated as 'excellent'. In last 10 years, he had 9 ACRs with 'excellent' remarks and 1 ACR with 'good' remarks. On the basis of such a record, the DPC had itself awarded him 29 marks out of 30. On the other hand, the appellant's service record shows that in the last 10 years, ACR for one year was not available and as far as other 9 ACRs are concerned, she had earned three (3) 'excellent', five (5) 'very good' and one (1) 'good' entry. It is pertinent to mention that in the counter affidavit filed by the State Government before the High Court, it is admitted that DPC assigned 20 marks to the appellant and 29 marks to the private respondent. Therefore, it is anybody's guess as to whether appellant would have made her entry into the 'excellent' category. In this way, as pointed out above, by eliminating 'excellent' category and replacing it with 'very good' category, the private respondent was severely prejudiced by putting him along the appe[illegible]er

category not specified in the OM. Such an exercise on the part of the DPC is contrary to the mandate and spirit of part 2(a) of OM dated 16.4.2003 which categorically states that selection on the basis of merit means to select the best available officer on the basis of comparative evaluation.

16. We may also observe at this stage that even OM dated 16.4.2003 is not entirely in sync with the grading done in the Annual Confidential Reports. Sub-para (c) of para 2 provides for classifying the officers in three categories, namely 'excellent', 'good' and 'unsuitable' and there is no category of 'very good' which is one of the grading provided in ACR. However, we need not discuss this aspect any further and leave it to the Government to have a re-look into the classifications mentioned in sub-para (c) of para 2, more particularly when sub-para (a) specifically stipulates the criterion of comparative evaluation and the aim is to select 'best available officer' for the purposes of promotion on the basis of comparative merit. This would obviate the situation, like in the present case, where an officer with 20 marks is clubbed with another officer with 29 marks and in this way, she is able to steal march over much more meritorious officers giving undue advantage to her seniority. We leave the matter at that to be considered by the State Government for proper amendment in the procedure of selection on the basis of merit. We would, however, like to refer to the judgment of this Court in *B.V.Sivaiah & Ors. Vs. K.Addanki Babu & Ors.* 1998 (6) SCC 720 where principles of 'merit-cum-seniority' as well as 'seniority-cum- merit' are explained in detail. Here, the promotion is on the basis of merit alone, where the seniority should play the role only if two candidates are of equal merit and not otherwise.

16-A. In so far as the present case is concerned, as we have found that the DPC did not follow the procedure as laid down even in the said OM dated 16.4.2003, the promotion of the appellant on the basis of the exercise undertaken by the DPC was clearly unwarranted and rightly set aside by the High Court. It would be pertinent to mention that at the time of hearing

of SLP filed by the appellant herein, this Court issued notice on 11.2.2011 on limited aspect in the following words:

> "Issue notice on the limited question regarding recovery of amount already paid to the petitioner on account of promotion to the post of Director, Medical Health.
>
> Since respondent No.5 is present on caveat, service of notice on the said respondent is dispensed with."

It is clear from the above that even at the time of issuing notice, this Court did not consider it proper to interfere with the directions of the High Court and the only question on which notice was issued was regarding recovery of the amount already paid to the appellant on promotional post.

17. Thus, we do not find any fault with the direction of the High Court keeping in view the facts of the present case. The appellants are not correct in their arguments that the High Court has assumed the role of the DPC. In fact the High Court only referred to the exercise undertaken by the DPC itself which had awarded marks to both the appellant as well as private respondent and rightly concluded that the criterion of merit was violated by giving promotion to the appellant on such a comparative assessment where the respondent was rated more meritorious than the appellant. In so far as payment of excess salary made to the appellant in promotional post is concerned, we are of the opinion that since the appellant has already retired and the promotion given to her is because of the wrong exercise of the Department in not applying Rules/OM correctly and it was not because of any misrepresentation or suppression by the appellant, no recovery of the excess amount paid to her is called for. Subject to the aforesaid, both the appeals are dismissed. The private respondent shall also be entitled to cost of Rs.15,000/- (Rupees Fifteen Thousand) which shall be paid by the Government.

R.P.

SUKHWINDER SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No. 1023 of 2008)

NOVEMBER 12, 2013

[RANJANA PRAKASH DESAI AND MADAN B. LOKUR, JJ.]

PENAL CODE, 1860:

s.304-B - Dowry death - Conviction of husband by High Court - Held: The evidence on record discloses that after marriage, attitude of accused was hostile towards deceased - Five days prior to incident deceased had described to her father about the demands raised by accused and that there was danger to her life - Thus, harassment of dowry was soon before the death - Further, victim died of poisoning within 7 years of marriage - Therefore, presumptions u/s 304-B IPC and s.113-B of Evidence Act are attracted - Conviction upheld - Evidence Act, 1872 - s.113-B.

INVESTIGATION:

Discrepancies in timing and date of handing over of case property - Overwriting in inquest report - Held: Cases in which substratum of prosecution case is strong and substantiated by reliable evidence, lapses in investigation should not persuade the court to reject the prosecution case and unnecessary weightage should not be given to minor errors or lapses - In the instant case, the doctor clearly deposed about the date of handing over the case property to police after post-mortem - There seems to be mistake in giving dates -- Similarly, the overwriting in the inquest report is inconsequential -- It could be a mere inadvertent lapse - Further, sending the special report to magistrate the following

day has no adverse impact on prosecution case - Code of Criminal Procedure, 1973 - s.57.

The daughter of PW 2 was married to the appellant in May, 1989. On 30.6.1991, she died in the matrimonial home. The prosecution case, as revealed from the statement of PW 2, was that on 25-6-1991 when he went, along with PW-3, to the house of the appellant to meet her daughter, she was in tears and told that the appellant and the other accused were demanding a scooter and a refrigerator and that her life was in danger. On 1.7.1991, he was informed that his daughter had died on 30/06/1991. A case for offence punishable u/s 304B IPC was registered against the appellant (accused no. 4), his father, mother and brother (accused nos. 1 to 3 respectively). The trial court acquitted all the accused. The High Court convicted the appellant u/s 304B, IPC and sentenced him to 7 years RI.

Dismissing the appeal, the Court

HELD: 1.1 Admittedly, the deceased died within seven years of marriage, therefore, presumptions u/s 304-B, IPC and s.113B of the Evidence Act are attracted to the case. It is for the appellant to rebut it, which, the he has failed to do. [para 8] [345-H; 346-A]

1.2 It is not correct to say that from the date of marriage till the date of incident there was no harassment to the deceased. PW-2 has given the details of articles given to the appellant and his family as dowry and stated that after marriage the attitude of the accused was hostile towards the deceased. Besides, the demand was made on 25.06.1991 and the deceased died on 30.06.1991. Thus, the harassment for dowry was soon before the death of the deceased, as required by s. 304-B, IPC and s.113-B of the Evidence Act. Further, from the medical

evidence it is clear that the victim died of poisoning. [para 9-10] [346-G; 347-A-B, D]

1.3 As regards overwriting and discrepancies in timing and date of handing over the case property to police after post-mortem, PW-1, the doctor who did the post-mortem of the deceased, stated that post-mortem was conducted on 01/07/1991. There is no reason to disbelieve him. He stated that he handed over the case property to PW-7 on 1.7.1991. However, PW-7, in his affidavit has stated that post-mortem was conducted on 2.7.1991 and he handed over the case property to PW-4 on 2.7.1991. The evidence does not indicate any tampering with the case property. There appears to be mistake in giving the dates. Similarly, the overwriting in the inquest report is inconsequential. It could be a mere inadvertent lapse. [para 11] [347-D-E, H; 348-A, E]

1.4 Where substratum of the prosecution case is strong and substantiated by reliable evidence, lapses in investigation should not persuade the court to reject the prosecution case and unnecessary weightage should not be given to minor errors or lapses. Particularly, in offences relating to women and children, which are on rise, the courts will have to adopt a pragmatic approach. No scope must be given to absurd and fanciful submissions. [para 11] [348-B-E]

1.5 The time taken to send special report to the Magistrate also has no adverse impact on the prosecution case. The FIR was lodged promptly on 1.7.1991 at 2.10 p.m. after PW-2 got to know about his daughter's death. It reached the Magistrate at 7.00 p.m. on 2.7.1991. In the facts of the case, this time lag could not be termed as delay. In any case, requirement of sending special report to the Magistrate is an external check on the working of police agency but not in all

cases that delay will make the prosecution case doubtful. [para 12] [348-F-G]

1.6 The prosecution has established its case beyond reasonable doubt so far as the appellant is concerned. The trial court fell into a grave error in acquitting him. The trial court's order is indeed perverse. The High Court rightly interfered with it. The view taken by the High Court, is the only possible and correct view in the facts of the case and the same is confirmed. [para 13] [349-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1023 of 2008.

From the Judgment and Order dated 16.05.2007 & 17.05.2007 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 224DBA of 1996.

Vishal Yadav, S.P. Singh, Rupinder Sheroen, Ajay Pal for the Appellant.

Anvita Cowshish, Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. In this appeal judgment and order dated 16/17-05-2007 passed by the Punjab and Haryana High Court is under challenge.

2. The appellant is original accused no. 4. He was tried along with Gurdev Singh, Surjit Kaur and Jaswinder Singh, original accused nos. 1, 2 and 3 respectively, by the Additional Sessions Judge, Ludhiana in Sessions Trial No. 16 of 1994 for offence punishable under Section 304B of the IPC. Learned Sessions Judge by judgment dated 31/08/1995 acquitted all the accused. The State of Punjab carried an appeal from the said order to the High Court of Punjab and Haryana. By the impugned judgment and order dated 16/17-05-2007 the High Court set aside the order of acquittal so s

concerned. He was convicted under Section 304B of the IPC and sentenced to undergo RI for seven years. He was directed to pay compensation of Rs.20,000/- to the father of the deceased. In default he was directed to suffer RI for one year. The High Court noted that accused no. 1 Gurdev Singh was dead. So far as accused no. 2 Surjit Kaur and accused no. 3 Jaswinder Singh are concerned, the High Court gave them benefit of doubt and confirmed their acquittal. Being aggrieved by his conviction and sentence the appellant has approached this Court.

Case of the Prosecution

3. The appellant was married to deceased Karnail Kaur **("the deceased"** or **"Karnail Kaur")** in May, 1989. Accused no. 1 Gurdev Singh was his father. Accused no. 2 Surjit Kaur is his mother and accused no. 3 Jaswinder Singh is his brother. The prosecution story is unfolded by PW-2 Labh Singh, father of the deceased. He stated that on 25/06/1991 he went to meet the deceased to the house of the appellant along with PW-3 Surjit Singh. The appellant who was employed in the Army had come home on leave. The deceased was in tears. She told PW-2 Labh Singh that the appellant and the other accused were demanding a scooter and a refrigerator and that her life was in danger. PW-2 Labh Singh told her that he would meet the demand after the Sauni Crop. On 01/07/1991 he was told by Pritam Singh, a resident of Dehlon, that Karnail Kaur had died on 30/06/1991. On 01/07/1991 when he was proceeding to the police station to lodge FIR, he met PW-4 ASI Mohinder Singh, who recorded his statement. PW-4 ASI Mohinder Singh forwarded it to the police station and a formal FIR was registered at P.S. Samrala under Section 304B of the IPC against the accused. The accused were arrested. After completion of investigation they were sent up for trial.

The trial

4. The prosecution examined PW-1 Dr. Gurmit Singh, who

had conducted the post-mortem, PW-2 Labh Singh, PW-3 Surjit Singh and police witnesses PW-4 ASI Mohinder Singh, PW-5 HC Kalmit Singh, PW-6 SI Manminder Singh and PW-7 Constable Angrej Singh. The appellant and the other accused denied the prosecution case.

The view taken by the trial court

5. The trial court acquitted all the accused on the ground that evidence of PW-1 Dr. Gurmit Singh, PW-4 ASI Mohinder Singh and affidavit filed by PW-7 Constable Angrej Singh indicate that the case property, that is the contents of stomach of the deceased and other material, handed over by PW-1 Dr. Gurmit Singh to him remained in his personal custody for one day and, therefore, the possibility of its tampering cannot be ruled out. Therefore, the Chemical Analyser's report stating that poison was detected therein cannot be relied on. The trial court also held that there was delay in sending special report to the Magistrate from which it could be inferred that the FIR was ante timed. The trial court further held that while PW-2 Labh Singh stated that the deceased told him about the dowry demand in the room, PW-3 Surjit Singh stated that the deceased talked to them in the verandah. Thus, there is variance in their statements. Moreover, the deceased could not have told them about the dowry demand in the presence of the accused. The trial court, thus, concluded that the prosecution had not proved it's case beyond reasonable doubt and acquitted the accused.

The High Court's view

6. The High Court held that the inference drawn by the trial court that the case property might have been tampered with is without any basis. The High Court held that the evidence of PW-2 Labh Singh and PW-3 Surjit Singh established that the deceased was subjected to harassment for dowry and that the time taken to forward the special report to the Magistrate did not make the prosecution case suspect. Taking note of the fact that Karnail Kaur had died within seven e

High Court convicted the appellant as aforesaid. The High Court confirmed the acquittal of mother and brother of the appellant by giving them benefit of doubt.

Submissions of the counsel

7. We have heard learned counsel for the parties at some length. Mr. Vishal Yadav, learned counsel for the appellant reiterated all the points which the trial court had taken into consideration while acquitting the accused which we have quoted hereinabove and stated that the High Court erred in disturbing the trial court's well reasoned judgment. He submitted that the trial court's view was a reasonably possible view which the High Court should not have disturbed even if it felt that another view of the matter was possible. Counsel submitted that the deceased was married to the appellant in May, 1989. PW-2 Labh Singh stated that on 25/06/1991 the deceased told him about the harassment and demand for dowry. There is no evidence to show that from May, 1989 to 25/06/1991 there was harassment for dowry. Counsel submitted that in the FIR PW-2 Labh Singh stated that Pritam Singh told him that Karnail Kaur had died. But, he improved his story in the court and stated that Pritam Singh told him on 01/07/1991 that Karnail Kaur had been killed a day earlier. Thus, he is not a reliable witness. Counsel pointed out that there is overwriting in the inquest report Exhibit-PC with the intention to match it with time given in the FIR. Counsel submitted that post-mortem notes do not show presence of cyanosis. Therefore, the prosecution case that Karnail Kaur died of poisoning is doubtful. In the circumstances, impugned judgment deserves to be set aside. Ms. Anvita Cowshish, learned counsel for the State of Punjab submitted that the evidence of PW-2 Labh Singh and PW-3 Surjit Singh and the Chemical Analyser's report bear out the prosecution story and hence the appeal be dismissed.

Our view and conclusion

8. Admittedly, Karnail Kaur died within seven years of

marriage, therefore, presumptions under Section 304B of the IPC and Section 113B of the Indian Evidence Act, 1872 are attracted to this case. It is for the appellant to rebut it, which, in our opinion the appellant has failed to do.

9. We have already noted the gist of PW-2 Labh Singh's evidence. He has given the details of articles given to the appellant and his family as dowry and stated that after marriage the attitude of the accused was hostile towards the deceased. Thereafter, he has described his visit to the appellant's house along with PW-3 Surjit Singh on 25/06/1991 when the deceased, who was in tears, told him about the dowry demand of the accused. The appellant was present there. PW-3 Surjit Singh, who had accompanied PW-2 Labh Singh, corroborates PW-2 Labh Singh on this aspect. They are rustic witnesses. Their evidence must be read bearing their simple background in mind. PW-2 Labh Singh had lost his daughter. Besides, they were deposing in 1994, almost three years after the incident. Hence, allowance must be made for minor discrepancies, if any, in their evidence. In any case, by and large, their evidence is consistent. Only discrepancy which is pointed out by the appellant's counsel is that while PW-2 Labh Singh stated that the deceased told them about the demand in the room, PW-3 Surjit Singh stated that she talked to them in the verandah. Evidence of witnesses cannot be rejected on such minor inconsistencies. We also do not find any substance in the contention that the deceased could not have talked about the dowry demand in the presence of the accused. The deceased appears to have reached a point of desperation. She stated that her life was in danger. It appears that she had no option but to tell PW-2 Labh Singh about her miserable existence. One wonders whether she would have been allowed to share some moments with the father alone. Pertinently, shortly thereafter, she took poison. It is not correct to say that from the date of marriage till the date of incident there was no harassment to the deceased. PW-2 Labh Singh stated that after the marriage the attitude of the accused towards the

Besides, the demand was made on 25/06/1991 and the deceased died on 01/07/1991. Thus, the harassment for dowry was soon before the death of Karnail Kaur, as required by Section 304B of the IPC and Section 113B of the Evidence Act, 1872.

10. PW-1 Dr. Gurmit Singh did the post-mortem of the deceased. The stomach contents were sent to the Chemical Analyser. The finding of the Chemical Analyser reads thus:

> "Aluminium phosphate a pesticide was detected in the contents of exhibit NO. 1. Phosphine a constituent of aluminium phosphide was detected in the contents of exhibits No. II and No. III poison was detected in the contents of exhibit NO. IV"

Thus, the deceased died of poisoning. She had consumed Aluminium Phosphate, a pesticide.

11. PW-1 Dr. Gurmit Singh is an independent witness. He stated that post-mortem was conducted on 01/07/1991. There is no reason to disbelieve him. He stated that he handed over the case property to PW-7 Angrej Singh on 01/07/1991. PW-7 Angrej Singh in his affidavit appears to have stated that post-mortem was conducted on 02/07/1991 and he handed over the case property to PW-4 ASI Mohinder Singh on 02/07/1991. It is contended that since PW-1 Dr. Gurmit Singh stated that case property was handed over to PW-7 Angrej Singh on 01/07/1991, then, it remained in the personal custody of PW-7 Angrej Singh for a day. Therefore, the case property might have been tampered with. No suggestion was put to PW-1 Dr. Gurmit Singh that post-mortem was not conducted on 01/07/1991. PW-1 Dr. Gurmit Singh has stated that all the parcels were sealed and handed over to PW-7 Angrej Singh. PW-7 Angrej Singh has confirmed that all the parcels were sealed, they were deposited in Malkhana and then taken to the laboratory. There is, therefore, no question of any tampering with the case property. We do not see any foul play in this. There appears to

be mistake in giving the dates. It is too much to presume that the doctor and the Chemical Analyser would conspire and fabricate a false report. Similarly, the overwriting in the inquest report is inconsequential. It could be a mere inadvertent lapse. It could also be purposeful lapse. But, if such mistakes or lapses are given undue importance every criminal case will end in acquittal. While it is true that the police should not involve innocent persons, fabricate evidence and obtain convictions, it is equally true that cases in which substratum of the prosecution case is strong and substantiated by reliable evidence, lapses in investigation should not persuade the court to reject the prosecution case. The court with its vast experience should be quick to notice mischief if there is any. Incompetent prosecuting agencies or prosecuting agencies which are driven by extraneous considerations should not be allowed to take the court for a ride. Particularly in offences relating to women and children, which are on rise, the courts will have to adopt a pragmatic approach. No scope must be given to absurd and fanciful submissions. It is true that there can be no compromise on basic legal principles, but, unnecessary weightage should not be given to minor errors or lapses. If courts get carried away by every mistake or lapse of the investigating agency, the guilty will have a field day. The submissions relating to alleged overwriting and discrepancies in timings and dates, therefore, are rejected.

12. We also do not find that time taken to send special report to the Magistrate has any adverse impact on the prosecution case. The FIR was lodged promptly on 01/07/1991 at 2.10 p.m. after PW-2 Labh Singh got to know about his daughter's death. It reached the Magistrate at 7.00 p.m. on 02/07/1991. We do not think that in the facts of this case this time lag could be termed as delay. In any case, requirement of sending special report to the Magistrate is an external check on the working of police agency but not in all cases that delay will make the prosecution case doubtful. We do not find any indication in this case from any evider e

prosecution case is untrue or fabricated. We reject this submission.

13. The mother and brother of the appellant have been acquitted by giving them benefit of doubt. So far as the appellant is concerned, the prosecution has established it's case beyond reasonable doubt. The trial court fell into a grave error in acquitting him. The trial court's order is indeed perverse. The High Court rightly interfered with it. The view taken by the High Court, which is confirmed by us, is the only possible and correct view in the facts of this case. The appeal is, therefore, dismissed. The appellant is on bail. His bail bonds stand cancelled. He shall surrender before the concerned court.

R.P. Appeal dismissed.

N. MANJEGOWDA

v.

THE MANAGER, THE UNITED INDIA INSURANCE CO. LTD.

(Civil Appeal Nos. 10192-10193 of 2013)

NOVEMBER 12, 2013

[G.S. SINGHVI, SHIVA KIRTI SINGH AND C. NAGAPPAN, JJ.]

MOTOR VEHICLES ACT, 1988:

s.166 - Accident of an advocate aged 36 years - Compensation under head 'loss of future income due to disability' - Multiplier - Annual income of Advocate assessed by Tribunal on the basis of Income Tax returns - Held: Functional disability of an accident victim requires determination on the basis of nature of disability in the light of the career or profession which the claimant was pursuing - It should not be computed mechanically only on percentage of physical disability - A young Advocate is bound to suffer huge professional loss on account of injuries as have been sustained by the appellant - He was having partial sensory loss all over his limbs and lacked proper coordination in all four limbs -- It is the medical opinion that appellant requires an assistant for daily routine work - High Court erred in reducing compensation under head 'loss of future income' -- Loss of earning should be treated as 70% and appropriate multiplier should be 16 in place of 13 - On that basis, the loss of income due to disability is enhanced from Rs.6,17,500/- (as awarded by Tribunal) by Rs.4,00,000/- - Compensation under other heads calls for no interference - Claimant shall be entitled to 6% interest on total compensation from date of petition till date of payment.

The appellant, an Advocate by profession, aged

about 36 years, while riding his motor bike, met with an accident involving motor bike of respondent no.2, and sustained grievous injuries over his hands, legs and spinal cord. He preferred a claim petition u/s 166 of the Motor Vehicles Act before the Tribunal, which on the basis of Income Tax Returns, accepted annual income of the appellant to be Rs.95,000/-, assessed the whole body disability at 50%, selected 13 as the multiplier and awarded an amount of Rs.6,17,500/- under the head of 'Loss of income due to disability'; and the total compensation as Rs. 8,87,300/- . The High Court reduced compensation under the head 'Loss of Income due to disability' to Rs.1,50,000/-. The total compensation was thus reduced by a sum of Rs.4,67,500/-.

Allowing the appeals, the Court

HELD: 1.1 Functional disability of an accident victim requires determination on the basis of nature of disability in the light of the career or profession which he or she was pursuing in life. It should not be computed mechanically only on percentage of physical disability. [para 11] [358-F-G]

Rekha Jain vs. National Insurance Company Limited And Others **2013 (8) SCC 389 - relied on.**

1.2 A young Advocate is bound to suffer huge professional loss on account of injuries as have been sustained by the appellant and the condition in which the doctor found him. The appellant has been found to suffer weakness of four limbs. He has to work slowly and requires help in climbing steps, cannot run, cannot write sharply and speedily with his right hand. He was having partial sensory loss all over his limbs and lacked proper coordination in all four limbs. It is the medical opinion that the appellant requires an assistant for daily routine work. In view of the medical assessment of appellant's

condition after sustaining injuries in the accident and in the light of whole body disability of 50%, it would be certainly very difficult for the appellant to practice as an Advocate and compete with others so as to command confidence and acceptability of general clients. Unlike many other professions, legal profession requires not only sharp and focused mind but also good health and ability to put in hard work within a limited time frame. The High Court erred in opining that the accident and the injuries, which were proved to have caused 50% disability of whole body, would have no effect on the earning capacity of the appellant. [para 8 and 12] [356-G-H; 358-G; 359-A-D]

1.3 The High Court erred in reducing the loss of income due to disability. A perusal of the impugned judgment shows that there is no basis for allowing only Rs.1,50,000/- under the head 'Loss of future income.' [para 10 and 13] [357-C; 359-E]

Yadava Kumar vs. Divisional Manager, National Insurance Company Limited And Another **2010 (10) SCR 746 = 2010(10) SCC 341 - referred to.**

1.4 The amount of Rs.6,17,500/- under the head 'Loss of future income' did not require any reduction. On the other hand, the facts of the case persuade this Court that to do complete justice in the matter, the loss of earning should be treated as 70% and the appropriate multiplier should be 16 in place of 13. On that basis, the loss of income due to disability requires to be enhanced from Rs.6,17,500/- by atleast Rs.4,00,000/-. Accordingly, the impugned judgment of the High Court is set aside and the award made by the Tribunal is modified by adding Rs.4,00,000/- towards the heading 'Loss of income due to disability' with interest @ 6% p.a. from the date of petition till payment. Rest of the order of the Tribunal is confirmed. [para 13] [359-E-G; 360-A

Raj Kumar vs. Ajay Kumar **2010 (13) SCR 179 = (2011) 1 SCC 343 - cited.**

Case Law Reference:

2010 (13) SCR 179	**cited**	**para 8**
2010 (10) SCR 746	**referred to**	**para 11**
2013 (8) SCC 389	**relied on**	**para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10192-10193 of 2013.

From the Judgment and Order dated 06.09.2012 of the High Court of Karnataka at Bangalore in M.F.A. No. 2386 of 2007 (M/V).

D.L. Chidananda, Gaurav Dhingra for the Appellant.

A.K. Raina, Binay Kumar Das for the Respondent.

The Judgment of the Court was delivered by

SHIVA KIRTI SINGH, J. 1. Leave granted.

2. The appellant has preferred these appeals against final judgment and order dated 06.09.2012 whereby the High Court of Karnataka has dismissed appeal preferred by the appellant bearing M.F.A. No. 2386 of 2007 (MV) preferred for enhancement of compensation allowed in his favour by the judgment and Award dated 11.12.2006 in MVC No. 1322 of 2005 by the Additional Civil Judge (Senior Division) and Additional Member of Motor Vehicles Accident Claims Tribunal (MACT), Hassan, and partly allowed appeal preferred by the respondent-Insurance Company bearing M.F.A. No. 6612 of 2007.

3. The appellant is an Advocate by profession. On 17.4.2005 while he was riding his motor bike and his wife was

a pillion rider with him, he met with an accident involving motor bike of respondent no.2. As a result, the appellant sustained grievous injuries over his hands, legs and spinal cord. He preferred claim petition on 05.12.2005 under Section 166 of the Motor Vehicles Act before the Tribunal claiming compensation of Rs.15,00,000/- (rupees fifteen lacs) with interest at the rate of 18% p.a. from the respondent by way of just compensation for injuries, losses, medical expenses, loss of income due to disability, etc. By judgment and Award dated 11.12.2006 the Tribunal considered the relevant facts as well as evidence and awarded total compensation of Rs.08,87,300/- (rupees eight lacs eighty seven thousand and three hundred only). This included an amount of Rs.06,17,500 (rupees six lacs seventeen thousand and five hundred only) on the head of 'Loss of income due to disability'. The Tribunal also allowed interest at the rate of 6% p.a. from the date of petition till payment.

4. As noted earlier, the matter was taken in appeal to the High Court of Karnataka through two appeals, one preferred by the appellant complaining against inadequacy of the compensation and the other by the Insurance Company for reduction of the same. By the impugned judgment, the High Court reduced compensation of Rs.06,17,500/- (rupees six lacs seventeen thousand and five hundred only) under the head 'Loss of Income due to disability' to Rs.01,50,000/- (rupees one lac and fifty thousand only) and accordingly the total amount of Rs.08,87,300/- (rupees eight lacs eighty seven thousand and three hundred only) was reduced by a sum of Rs.04,67,500/- (rupees four lacs sixty seven thousand and five hundred only). The appeal of the appellant seeking enhancement of compensation was dismissed without interfering with Award of compensation on eight other heads.

5. Before noticing the submissions it is useful to indicate that there is no dispute over most of the relevant facts except what should have been accepted as the annual income of the appellant, what would be appropriate multiplier and what should be taken to be the loss of income due

At the time of the accident appellant was aged about thirty six years.

6. The accident and the injuries sustained by the appellant are not in dispute. On the basis of the evidence of a treating physician, PW.36 a Neuro Surgeon, at the time of admission in the hospital it was found that the appellant had no strength in hands and legs, there was full loss of sensation below the neck and the urinary track was blocked. The Tribunal has taken a note of all the relevant details and injuries in paragraph 11 of its judgment and Award wherein it has been accepted on the basis of medical evidence that the appellant has sustained whole body disability of 50%. That paragraph 11 reads as follows:

> "11. P.W.3 Dr. Dhananjaya I. Bhat the Neuro Surgeon of Mangala Hospital has deposed the condition of the petitioner on 19.04.2005 at Sanjeevini Hospital, Hassan for having admitted the history of accident. On examination found that there was no strength in hands and legs, full loss of sensation below the neck, the urinary track was blocked. M.R.I, revealed injury on neck spine, for which he was treated between 1 ½ to two months as inpatient. The clinical treatment, physiotherapy and medicines were carried out during the course of treatment. The follow up examination of P.W.1 on 01.10.2006 revealed that weakness of all four limbs at grade-4 out of normal 5 to the lower limb grade-3 out of normal 5 for upper limbs. The petitioner has to walk slowly require help for climbing steps, cannot run, he could not write sharply and speedy in his right hand. From his left hand not in a position to lock the shirt button, slow and difficult holding of spoon for feeding. The petitioner still having partial sensory loss over his limbs and improper co-ordination in all four limbs. The urinary dysfunction and is prone for urinary track infection and also kidney damage. The petitioner is suffering from pain and burning sensation and there is a disturbance in his sleeping. For these reasons for daily routine work of the petitioner require an assistant. For having evaluated the petitioner P.W.3 has issued certificate as per Ex.P. 166. According to him the above: deformities caused 50% whole body permanent disability. P.W.3 has been cross-examined by the learned counsel for the 2nd respondent. The cross-examination failed to bring out that the petitioner has not sustained, any disability, deformity and difficulty in doing his job. Except suggesting that the disability was excessively spoken to though that much of disability was not at all sustained, which in fact have been denied by the expert doctor. The petitioner being an advocate being suffered the above deformities certainly effects his functioning. Thus, the medical evidence is accepted holding that the petitioner has sustained whole body disability of 50%."

7. Although the appellant claimed that his earning was Rs.15,000/- p.m. (rupees fifteen thousand only) and also produced copy of his Pan Card as Ex.P.9 but on the basis of Income Tax Returns for the Assessment Year 2005-2006 showing income of Rs.95,000/- p.a. (rupees ninety five thousand only), the Tribunal accepted annual income of the appellant to be Rs.95,000/- (ninety five thousand) and selected 13 as the multiplier on the basis of the age of the appellant. According to the Tribunal the loss of earning could be 50% and hence it calculated the compensation on that head to be Rs.06,17,500/-(rupees six lacs seventeen thousand and five hundred).

8. The High Court was called upon to decide the annual income of the appellant, the correct multiplier and the loss of income out of the total sum arrived at by multiplying the annual income with the chosen multiplier. On account of the income tax returns, the High Court came to an opinion that the accident and the injuries which were proved to have caused 50% disability of whole body would have no effect on the earning capacity of the appellant. On the basis o[illegible]rt

in the case of *Raj Kumar vs. Ajay Kumar*[1] the High Court proceeded to reconsider compensation for the loss of future income and reduced it from Rs.6,17,500 to Rs.1,50,000/-.

9. On behalf of the appellant the aforesaid reduction has been challenged on the ground that the view taken by the High Court ignores the nature of injuries which has been proved by medical evidence and reduction is without any rational basis because the High Court has neither doubted the annual income of the appellant nor the multiplier chosen by the Tribunal and has not addressed the issue raised by the appellant as to what should be the correct multiplier.

10. A perusal of the impugned judgment, particularly paragraph 22 thereof, shows that there is no basis for allowing only Rs.1,50,000/- under the head 'Loss of future income.'

11. This Court in the case of *Yadava Kumar vs. Divisional Manager, National Insurance Company Limited And Another*[2] (to which one of us - G.S. Singhvi,J. was a member) held that in determining compensation in non fatal accidents the Court should award "just compensation" by taking a reasonably compassionate view of things. While disapproving the view of the High Court in not allowing any compensation for loss of future earnings to the appellant this Court allowed Rs.2,00,000/- (rupees two lacs) along with 8% interest. In that case the appellant was a Painter and had incurred disability of 33% in respect of right upper limb, 21% in left upper limb and 20% in respect of whole body. Paragraphs 15 and 16 of that report indicate the proper approach required of the Tribunal and the High Court in such matters. They are as follows:

> "15. It goes without saying that in matters of determination of compensation both the tribunal and the court are statutorily charged with a responsibility of fixing a "just compensation". It is obviously true that determination of a just compensation cannot be equated to a bonanza. At the same time the concept of "just compensation" obviously suggests application of fair and equitable principles and a reasonable approach on the part of the tribunals and the courts. This reasonableness on the part of the tribunal and the court must be on a large peripheral field. Both the courts and the tribunals in the matter of this exercise should be guided by principles of good conscience so that the ultimate result becomes just and equitable (see *Helen C. Rebello v. Maharashtra SRTC*- (1999) 1 SCC 90.
>
> 16. This Court also held that in the determination of the quantum of compensation, the court must be liberal and not niggardly inasmuch as in a free country law must value life and limb on a generous scale (see *Hardeo Kaur v. Rajasthan State Transport Corpn.* (1992) 2 SCC 567."

11. In a recent judgment in the case of *Rekha Jain vs. National Insurance Company Limited And Others*[3], this Court drew a very relevant distinction between permanent disability which was found to be 30% and functional disability which this Court held to be 100% on account of serious disfigurement of the face of the appellant because it was bound to cause loss of career for the appellant who in that case was an actress in films/T.V. features. Hence, it must be taken as a trite law that functional disability of an accident victim requires determination on the basis of nature of disability in the light of the career or profession which he or she was pursuing in life. It should not be computed mechanically only on percentage of physical disability.

12. In the present case the appellant has been found to suffer weakness of four limbs. He has to work slowly and requires help in climbing steps, cannot run, cannot write sharply

1. (2011) 1 SCC 343.
2. (2010) 10 SCC 341.
3. (2013) 8 SCC 389.

and speedily with his right hand. With his left hand he cannot lock the shirt button and has difficulty in holding of spoon for self-feeding. He was having partial sensory loss all over his limbs and lacked proper coordination in all four limbs. It is the medical opinion that for these reasons the appellant requires an assistant for daily routine work. In view of aforesaid medical assessment of appellant's condition after sustaining injuries in the accident and in the light of whole body disability of 50%, it would be certainly very difficult for the appellant to practice as an Advocate and compete with others so as to command confidence and acceptability of general clients. Unlike many other professions, legal profession requires not only sharp and focused mind but also good health and ability to put in hard work within a limited time frame. The requirement of impressing the client at the age of 36 is much more. It is only when a young Advocate has built a good impression and reputation, then in the evening of his life he may continue to command professional work on the basis of his acquired knowledge and reputation. A young Advocate is bound to suffer huge professional loss on account of injuries as have been sustained by the appellant and the condition in which the Doctor found him.

13. In the facts of the case we have no hesitation in holding that the High Court erred in reducing the loss of income due to disability. The amount on that head of Rs.6,17,500/- did not require any reduction. On the other hand, the facts of the case persuade us that to do complete justice in the matter, the loss of earning should be treated as 70% and the appropriate multiplier should be 16 in place of 13. On that basis, the loss of income due to disability requires to be enhanced from Rs.6,17,500/- by atleast Rs.4,00,000/- (rupees four lacs) although the exact amount would be a bit more. Accordingly, the impugned judgment of the High Court is set aside and the Award made by the Tribunal is modified by adding Rs.4,00,000/- (rupees four lacs) towards the heading 'Loss of income due to disability. As a result, the total compensation payable to the appellant would now be Rs.12,87,300/- (rupees twelve lacs

eighty seven thousand and three hundred only) in place of Rs.8,87,300/- (rupees eight lacs eighty seven thousand and three hundred only). Rest of the order of the Tribunal is confirmed. The enhanced amount shall also carry an interest at the rate of 6% p.a. from the date of petition till payment. The amount of compensation now found due shall be paid to the appellant within two months from the date of this order along with costs quantified at Rs.15,000/-.

14. Accordingly appeals are allowed to the aforesaid extent.

R.P. Appeals allowed.

KRISHNA KANT TIWARI

v.

KENDRIYA VIDYALAYA SANGATHAN & ANR.

(Civil Appeal No. 10239 of 2013)

NOVEMBER 12, 2013.

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

SERVICE LAW:

Pay protection - Cut off date - Teacher in State Government - Joining as primary teacher in Kendriya Vidyalaya Sangathan on 23.7.1987 and confirmed on 23.9.1989 -- Claim for protection of pay as per O.M. dated 7.8.1989 which was given effect from 1.8.1989 - Held: It is permissible for the Government to lay down the cut off date from which the benefit would be available to the employees -- Once it is stated that the order takes effect from 1.8.1989, the clause will have to be given its plain meaning as it is drafted -- Therefore, the employees like the appellant who was in the State Government service earlier, will be entitled to pay protection from that date i.e. 1.8.1989 -- He will, however, not get the pay protection prior to that date -- Interpreted this way, it will not amount to giving any retrospective effect to the Memorandum -- The last pay drawn by the claimant in State service as on 1.8.1989, directed to be protected with consequential service benefits - Government of India, Department of Personnel and Training O.M. dated 7.8.1989.

The appellant after rendering 12 years service as a teacher in the M.P. State Service, joined the Kendriya Vidyalaya Sangathan as a primary teacher on 23.9.1987. He was confirmed on the said post on 23.9.1989. Meanwhile, the Order/Memorandum dated 7.8.1989 granting pay protection was issued by the Central

Government, Department of Personnel & Training, which was to take effect from 1.8.1989.

The claim of the appellant for his pay protection was declined by the respondents on the ground that he joined the Kendriya Vidyalaya Sangathan on 23.9.1987 and since the cut off date was 1.8.1989, the appellant was not entitled to the benefit. The Central Administrative Tribunal as also the High Court declined to interfere.

Allowing the appeal in part, the Court

HELD: 1.1 It is permissible for the Government to lay down the cut off date from which the benefit would be available to the employees. However, in the instant case, the information received by the appellant under the Right to Information Act, 2005 placed before this Court indicates that three teachers were given the benefit of pay fixation in spite of the fact that they had also joined before 1.8.1989. It is also relevant to note that the cases of persons who were in service in Central/State/Autonomous/PSUs during the period from 01/01/86 to 01/01/96, and were selected in KVS and applied for pay protection, were considered and their pay was protected. [para 6-7] [365-F-H; 366-A, D]

1.2 The Circular/Memorandum dated 7.8.1989 states that the issue of pay protection of the candidates recruited through Public Sector Undertakings, etc. has been engaging the attention of the Government for quite some time. It further states that these orders take effect from the 1st day of the month in which the Office Memorandum is issued i.e. 1.8.1989. Once it is stated that the order takes effect from 1.8.1989, the clause will have to be given its plain meaning as it is drafted. Therefore, the employees who were drawn from Public Sector Undertakings, like the appellant who was in the State Government service earlier, will [illegible]y

protection from that date i.e. 1.8.1989. He will, however, not get the pay protection prior to that date. Interpreted this way, it will not amount to giving any retrospective effect to the Memorandum. [para 9] [366-H; 367-A-C]

1.3 The respondents are directed to correct the service record of the appellant protecting his last drawn pay in the Madhya Pradesh service as on 1.8.1989 and give him the consequential service benefits also on that basis. [para 10] [367-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10239 of 2013.

From the Judgment and Order dated 26.02.2007 of the High Court of Judicature at Bilaspur, Chattisgarh in Writ Petition No. 5343 of 1999.

Sanjiv Jha, Braj Kishore Mishra, Aparna Jha, Abhishek Yadav for the Appellant.

Yogmaya Agnihotri, Dharmendra Kumar Sinha for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE, J. 1. Leave granted.

2. Heard Mr. Sanjiv Jha, learned counsel in support of this appeal and Ms. Yogmaya Agnihotri, learned counsel appearing for the respondents. This appeal raises a short question as to whether the appellant was entitled to pay protection on the basis of his earlier service as a Teacher in the State of Madhya Pradesh after joining the Kendriya Vidyalaya Sangathan. The appellant's case is that under the concerned Government Memorandum dated 7th August, 1989, he is entitled to the pay fixation on the basis of the last pay drawn by him in the earlier service.

3. The facts leading to this appeal are this wise. The appellant was working as a Teacher in the M.P. State Service and he had put in a service of about 12 years whereafter he joined as a Primary Teacher in the Kendriya Vidyalaya Sangathan on 23.9.1987. He was confirmed on the post of Primary Teacher on 23.9.1989. In the meanwhile, the Order/ Memorandum dated 7th August, 1989 granting pay protection was issued by the Central Government, Department of Personnel & Training. Paragraphs 2 and 3 of this Order/ Memorandum read as follows:

> "2. The question as to how pay protection can be given in the case of candidates recruited from Public Sector Undertakings, etc. has been engaging the attention of the Government fro sometime. The matter has been carefully considered and it has been decided that in respect of candidates working in Public Sector or Autonomous bodies, who are appointed as direct recruits on selection through a property constituted agency including department authorities making recruitment directly, their initial pay may be fixed at a stage in the scale of pay attached post so that the pay and DA as admissible in the Govt. will protect the pay plus DA, already being drawn by them in their parent organization. In the event of such a stage not being available in the post which they have been recruited, they pay may be fixed at stage just below in the scale of the post to which they have been recruited so as to ensure a minimum loss to the candidates. The pay fixed under this formulation will not exceed the maximum of the scale of the post to which they have been recruited. The pay fixation is to be made by the employing Ministries/ Departments after verification of all the relevant documents to be produced by the candidates who employed in such organizations.
>
> 3. These orders take effect from the first day of month in which the office memorandum is issued i.e. 1st August, 1989."

4. The appellant continued in the service of the Kendriya Vidyalaya Sangathan until he retired some time in January, 2012. He made a representation on 17.12.1998 that by virtue of the aforesaid Government Order/Memorandum his last pay drawn ought to have been protected when he joined the Kendriya Vidyalaya Sangathan. That representation was rejected by the respondents on 25.1.1999. The respondents took the stand that paragraph 2 of the aforesaid Memorandum dated 7th August, 1989 clearly lays down the cut off date as 1st August, 1989 from which it becomes applicable and the appellant had joined the Kendriya Vidyalaya Sangathan before that date i.e. on 23.9.1987. Therefore, he was not entitled to the benefit as per the said Memorandum/Circular.

5. The appellant moved the Central Administrative Tribunal by filing an O.A. bearing No.341/1999 and the same having been rejected, he moved the High Court of Chhattisgarh at Bilaspur by filing a writ petition. The Division Bench of the High Court rejected Writ Petition No.5343 of 1999 by the impugned order dated 26th February, 2007. The Division Bench took the view that the protection was available to the employees who joined on or before 1.8.1989. Since the appellant had joined the Kendriya Vidyalaya Sangathan prior to that date, he was not entitled to that benefit. Hence, this appeal.

6. If the facts were to remain as this, there was no reason for this Court to interfere. This is because now it is accepted that it is permissible for the Government to lay down the cut off date from which the benefit would be available to the employees. The appellant is, however, making out a case of discrimination by pointing out that in the case of three teachers, namely, that of one V.P. Sharma, P.S. Shukla and P. Padmananabhan, they were given the benefit of pay fixation in spite of the fact that they had also joined prior to the aforesaid date i.e. before 1st August, 1989. This information was obtained by the appellant by making an application under the Right to Information Act, 2005 and the information is placed

before this Court in this appeal. The respondents were given an opportunity to file their counter affidavit but they have not. Ms. Yogmaya Agnihotri, learned counsel appearing for the respondents states that the old record was not available on the basis of which a response could be filed. She has, however, defended the decision of the respondents contending that as per the Memorandum, the benefit of pay protection could not be given to those who were appointed prior to 1st August, 1989.

7. It is also relevant to note that a specific query was raised by the appellant as to whether any such persons have been given the benefit of pay protection during the period from 1st January, 1986 to 1st January, 1996 and to that question the following reply has been given:

> "The cases of protection of pay who were in service in Central/State/Autonomous/PSUs State Govt. during the 4th Pay Commission covering the period from 01/01/86 to 01/01/96, who applied through proper channel and selected in KVS and applied for protection of pay have been considered and their pay has been protected. Cases where there was some confusion, clarification has been given to all the ACs and instructions have been issued to consider all such left out cases."

8. It is further submitted on behalf of the appellant that maybe the appellant may not get any benefit prior to 1st August, 1989, but as on that date his pay will have to be corrected and will have to be brought at par at least with the last pay drawn by him when he was in the Madhya Pradesh service. A further submission was that if that is not done, the effect will be that his juniors would be drawing salary higher than what he is drawing at present.

9. We have considered the rival submissions. The Circular/ Memorandum which is relied upon, states in paragraph 2 that the issue of pay protection of the candid h

Public Sector Undertakings, etc. has been engaging the attention of the Government for quite some time. Paragraph 3 thereafter states that these orders take effect from the 1st day of the month in which the Office Memorandum is issued i.e. 1st August, 1989. Once it is stated that the order takes effect from 1st August, 1989, the clause will have to be given its plain meaning as it is drafted. Therefore, the employees who were drawn from Public Sector Undertakings, like the appellant who was in the Madhya Pradesh Government service earlier, will be entitled to pay protection from that date i.e. 1.8.1989. He will, however, not get the pay protection prior to that date. Interpreted this way, it will not amount to giving any retrospective effect to the Memorandum.

10. In the circumstances, we allow this appeal in part. The O.A. No.341 of 1991 filed by the appellant will consequently stand partly allowed. The order passed by the High Court will stand interfered to that extent. The respondents are directed to correct the service record of the appellant protecting his last drawn pay in the Madhya Pradesh service as on 1.8.1989 and thereafter they will give him the consequential service benefits also on that basis. The needful shall be done in three months. In the facts of this case, we pass no order as to costs.

R.P. Appeal partly allowed.

TRIBHUVANSHANKAR
v.
AMRUTLAL
(Civil Appeal No. 10316 of 2013)

NOVEMBER 13, 2013

[ANIL R. DAVE AND DIPAK MISRA, JJ.]

MADHYA PRADESH ACCOMMODATION CONTROL ACT, 1961:

Suit for eviction - Defendant denying title of plaintiff over suit premises and setting up plea of adverse possession - Finding of trial court that there is no relationship of landlord and tenant between parties, not assailed - Held: Once a finding was recorded that there was no relationship of landlord and tenant under the Scheme of the Act, there was no necessity to enter into an enquiry with regard to the title of the plaintiff based on the sale deed or the title of the defendant as put forth by way of assertion of long possession - High Court is justified to the extent that no equitable relief could be granted in a suit instituted under the Act - But, it has committed an illegality by affirming the judgment and decree passed by trial court because by such affirmation, defendant becomes owner of the premises by acquisition of title by prescription and, therefore, impugned judgment to that extent is vulnerable and accordingly the said affirmation is set aside - Judgment of High Court is affirmed only to the extent that as relationship of landlord and tenant was not established, defendant was not liable for eviction under the Act - The issue of right, title and interest is open - In the circumstances, plaintiff is entitled under law to file a fresh suit for title and recovery of possession and such other reliefs as the law permits and defendant is entitled to resist the same by putting forth all his stand and stance including the plea of adverse possession.

ADVERSE POSSESSION:

Concept of adverse possession - Explained - Limitation - Time spent in adjudication of suit and appeals - Held: In the instant case, the suit was instituted on the basis of purchase -- The relief sought in the plaint was for delivery of possession -- It was not a forum that lacked inherent jurisdiction to pass a decree for delivery of possession -- It showed the intention of plaintiff to act and to take back the possession -- In the circumstances, after institution of the suit, the time for acquiring title by adverse possession has been arrested or remained in a state of suspension till the entire proceedings arising out of suit are terminated - Therefore, appellant-plaintiff is permitted to institute a suit.

The appellant instituted a suit under the M.P. Accommodation Control Act, 1961 for eviction of the respondent from the suit-premises and for mesne profits. The case of the appellant-plaintiff was that he had purchased the suit property under a registered sale deed dated 1.4.1976 and the respondent-defendant was in possession of the said suit property as a tenant under the vendor on a monthly rent of Rs.15/-. The defendant disputed the right, title and interest of the plaintiff, and denied the relationship of landlord and tenant. He further set up a plea of adverse possession. The trial court dismissed the suit holding that the sale deed relied upon by the plaintiff was without any sale consideration; that the relationship of landlord and tenant between the parties had not been established; and that the respondent had become the owner of the suit accommodation on the basis of adverse possession. The first appellate court allowed the appeal of the plaintiff and decreed the suit for possession holding that though the appellant-plaintiff had not been able to prove the relationship of landlord and tenant, the conclusion arrived at by the trial court that the sale-deed dated

1.4.1976 due to absence of sale consideration was invalid, was neither justified nor correct; and that there being no clinching evidence to establish that the defendant had perfected his title by adverse possession, the finding recorded by the trial court on that score was indefensible. The second appeal filed by the defendant-respondent was allowed by the High Court holding that once the plaintiff had failed to establish the relationship of landlord and tenant, the plaintiff could not have fallen back on his title to seek eviction of the tenant.

Allowing the appeal, the Court

HELD: 1.1 The finding returned by the courts below that has been concurred by the High Court to the effect that there is no relationship of landlord and tenant between the parties is absolutely impeccable and, in fact, the legality and propriety of the said finding has not been assailed. [para 14] [380-G-H]

1.2 There is a difference in exercise of jurisdiction when the civil court deals with a lis relating to eviction brought before it under the provisions of Transfer of Property Act and under any special enactment pertaining to eviction on specified grounds. However, if alternative relief is permissible within the ambit of the Act, the position would be different. It would depend upon the Scheme of the Act whether an alternative relief is permissible. That apart, the court can decide the issue of title if a tenant disputes the same and the only purpose is to see whether the denial of title of the landlord by the tenant is bona fide in the circumstances of the case. Thus, a limited enquiry pertaining to the status of the parties, i.e., relationship of landlord and tenant can be undertaken. The dictum laid down in Bhagwati Prasad and Bishwanath Agarwalla are distinguishable, for in the said cases the suits were filed under the Transfer of

Property Act where the equitable relief under O. 7, r. 7 CPC could be granted. [para 22-23] [389-A-F]

Bhagwati Prasad v. Chandramaul **1966 SCR 286 = AIR 1966 SC 735** *Biswanath Agarwalla v. Sabitri Bera and Others* **2009 (12) SCR 459 = (2009) 15 SCC 693 - distinguished.**

Rajendra Tiwary v. Basudeo Prasad and Another **2001 (5) Suppl. SCR 243 = 2002 AIR 136;** *Abdul Ghani v. Musammat Babni* **25 All 256 and** *Balmukund v. Dalu* **25 All 498;** *Firm Sriniwas Ram Kumar v. Mahabir Prasad* **1951 SCR 277 = 1951 AIR 177;** *Dr. Ranbir Singh v. Asharfi Lal* **1995 Suppl. (3) SCR 847 = (1995) 6 SCC 580;** *LIC v. India Automobiles & Co.* **1990 (3) SCR 545 = (1990) 4 SCC 286 - referred to.**

1.3 However, in the instant case, once a finding was recorded that there was no relationship of landlord and tenant under the Scheme of the Act, there was no necessity to enter into an enquiry with regard to the title of the plaintiff based on the sale deed or the title of the defendant as put forth by way of assertion of long possession. The High Court is justified to the extent that no equitable relief could be granted in a suit instituted under the Act. But, it has committed an illegality by affirming the judgment and decree passed by the trial court because by such affirmation the defendant becomes the owner of the premises by acquisition of title by prescription and, therefore, the impugned judgment to that extent is vulnerable and accordingly the said affirmation is set aside.The judgment of the High Court is affirmed only to the extent that as the relationship of landlord and tenant was not established, the defendant was not liable for eviction under the Act. The issue of right, title and interest is definitely open.[para 23 and 25] [389-F-G; 390-A-C; 391-C-D]

2.1 The suit was instituted on the basis of purchase.

A plea was advanced that the defendant had already perfected his title by prescription as he was in possession for 18 to 19 years. Under these circumstances the plaintiff is entitled under law to file a fresh suit for title and recovery of possession and such other reliefs as the law permits and the defendant is entitled to resist the same by putting forth all his stand and stance including the plea of adverse possession. [para 24-25] [390-E-F, H; 391-A, E]

Rajendra Tiwary v. Basudeo Prasad and Another **2001 (5) Suppl. SCR 243 = 2002 AIR 136 - relied on.**

2.2 Adverse possession fundamentally contemplates a hostile possession by which there is a denial of title of the true owner. By virtue of remaining in possession the possessor takes an adverse stance to the title of the true owner. In fact, he disputes the same. A party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. [para 25 and 27] [391-F-G; 392-C-D]

Secy. of State for India In Council v. Debendra Lal Khan **(1933-34) 61 IA 78:AIR 1934 PC 23;** *S.M. Karim v. Mst. Bibi Sakina* **1964 SCR 780 = 1964 AIR 1254;** *Karnataka Board of Wakf v. Govt. of India* **2004 (1) Suppl. SCR 255 = 2(004) 10 SCC 779;** *P.T. Munichikkanna Reddy and Others v. Revamma and Others* **2007 (5) SCR 491 = (2007) 6 SCC 59 - referred to.**

2.3 The fundamental policy behind limitation is that if a person does not pursue his remedy within the specified time frame, the right to sue gets extinguished. In the case at hand, the appellant l r

eviction. The relief sought in the plaint was for delivery of possession. It was not a forum that lacked inherent jurisdiction to pass a decree for delivery of possession. It showed the intention of the plaintiff to act and to take back the possession. In the circumstances, after the institution of the suit, the time for acquiring title by adverse possession has been arrested or remained in a state of suspension till the entire proceedings arising out of the suit are terminated. Be it ingeminated that if by the date of instant suit the defendant had already perfected title by adverse possession that would stand on a different footing. [para 30 and 34] [393-F; 394-D-F]

Babu Khan and Others v. Nazim Khan (dead) by L.Rs. and Others **2001 (2) SCR 1199 = 2001 AIR 1740;** *Ragho Prasad v. P.N. Agarwal* **1969 All LJ 975 - relied on.**

Mst. Sultan Jehan Begum and Ors. v. Gul Mohd. and Ors. **AIR 1973 MP 72;** *Sultan Khan s/o Jugge Khan v. State of Madhya Pradesh and Another* **1991 MPLJ 81 - stood approved.**

Halsbury's Laws of England, Fourth Edition, Volume 28, Para 605 **- referred to.**

2.5 Therefore, the appellant-plaintiff is permitted to institute a suit within a period of two months. [para 35]

Punia Pillai vs. Panai Minor through Pandiya Thevan **AIR 1947 Madras 282, and** *Amulya Ratan Mukherjee and ors. V. Kali Pada Tah and Ors.* **AIR 1975 Cal 200 - cited.**

Case Law Reference:

AIR 1947 Madras 282	**cited**	**para 8**
1966 SCR 286	**distinguished**	**para 8**
AIR 1975 Cal 200	**cited**	**para 8**

2001 (5) Suppl. SCR 243	**relied on**	**Para 10**
25 All 256	**referred to**	**para 15**
25 All 498	**referred to**	**para 15**
2009 (12) SCR 459	**distinguished**	**para 16**
1951 SCR 277	**referred to**	**para 19**
1995 (3) Suppl. SCR 847	**referred to**	**para 21**
1990 (3) SCR 545	**referred to**	**para 21**
(1933-34) 61 IA 78: AIR 1934 PC 23	**referred to**	**para 25**
1964 SCR 780	**referred to**	**para 26**
2004 (1) Suppl. SCR 255	**referred to**	**para 27**
2007 (5) SCR 491	**referred to**	**para 28**
AIR 1973 MP 72	**approved**	**para 31**
1991 MPLJ 81	**approved**	**para 32**
2001 (2) SCR 1199	**relied on**	**para 33**
1969 All LJ 975	**relied on**	**para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10316 of 2013.

From the Judgment and Order dated 08.02.2008 of the High Court of M.P. at Indore in SA No. 33 of 1995.

A.K. Chitale, Niraj Sharma, Sumit Kr. Sharma for the Appellant.

Puneet Jain, Christi Jain, Chhaya, Asgar Ali, Pratibha Jain for the Respondent.

The Judgment of the Court was de

DIPAK MISRA, J. 1. Leave granted.

2. This appeal, by special leave, is from the judgment and order of the High Court of Madhya Pradesh, Bench at Indore, in Second Appeal No. 33 of 1995 passed on 8.2.2008.

3. The appellant-plaintiff instituted Civil Suit No. 259A/86 in the Court of Civil Judge Class-II, Mhow, District Indore, for eviction of the respondent-defendant from the suit-premises and for mesne profits. The case of the appellant-plaintiff was that he had purchased the suit property vide registered sale deed dated 1.4.1976 on payment of sale consideration of Rs.4500/- to the vendor, one Kishanlal. The respondent-defendant was in possession of the said suit property as a tenant under the earlier owner Kishorilal on payment of rent of Rs.15/- per month. It was averred in the plaint that it was an oral tenancy and after acquiring the title the appellant informed the respondent about the sale by the earlier owner. Despite assurance given by the respondent to pay the rent to him, it was not honoured which compelled the appellant to send a notice on 14.12.1977 and, eventually, he terminated the tenancy with effect from 31.1.1978. The respondent, as pleaded, had replied to the notice stating, inter alia, that the appellant was neither the landlord nor the owner of the property. On the contrary, it was stated in the reply that the respondent was the owner of the premises.

4. The grounds that were urged while seeking eviction were: (i) the defendant was in arrears of rent since 1.4.1976 and same was demanded vide notice dated 14.12.1977, which was received on 3.1.1978 and despite receiving the notice, the defendant defaulted by not paying the rent within two months; (ii) that the said accommodation was bona fide required by the plaintiff for construction of his house and the accommodation is an open land; (iii) the said accommodation was bona fide required by the plaintiff for general merchant shop i.e. non-residential purpose and for the said purpose the plaintiff did

not have any alternative accommodation in his possession in Mhow City.

5. In the written statement, the defendant disputed the right, title and interest of the plaintiff, and denied the relationship of landlord and tenant. That apart, a further stand was taken that the appellant had no right under the M.P. Accommodation Control Act, 1961 (for brevity "the Act") to file the suit for eviction. It was set forth by the respondent-defendant that he was never a tenant under Kishorilal and, in fact, the accommodation was in a dilapidated condition and a 'banjar' land and the respondent was in possession for 18 to 19 years and it was to the knowledge of Kishorilal and his elder brother. For the purpose of business he had constructed a Gumti, got the gate fixed and when the business relating to sale of furniture commenced there was no objection from Kishorilal or his brother or any family member. The possession, as put forth by the respondent, was uninterrupted, peaceful and to the knowledge of Kishorilal who was the actual owner. It was also set forth that when Kishorilal desired to sell the premises, he was put to notice about the ownership of the defendant but he sold the property without obtaining sale consideration with the sole intention to obtain possession by colluding with the appellant-plaintiff. Alternatively, it was pleaded that the premises is situate in the Cantonment area and the Cantonment Board has the control over the land and neither Kishorilal nor the appellant had any title to the same.

6. The learned trial Judge framed as many as 26 issues. The relevant issues are, whether the suit accommodation was taken on rent by the defendant for running his wood business in the year 1973 from the earlier landlord Kishorilal; whether defendant is in continuous, unobstructed and peaceful possession since 18 years which was within the knowledge of Kishorilal, his elder brother and their family members; whether defendant had become owner of the suit accommodation by way of adverse possession; and whet[illegible]d

been executed without any consideration for causing damage to the title of defendant.

7. The learned trial Judge, on the basis of evidence brought on record, came to hold that the sale deed executed by Kishorilal in favour of the appellant was without any sale consideration; that the relationship of landlord and tenant between the parties had not been established; and that the respondent had become the owner of the suit accommodation on the basis of adverse possession. Being of this view, the trial court dismissed the suit.

8. Being dissatisfied with the aforesaid judgment and decree the plaintiff preferred Civil Regular Appeal No. 5 of 1994 and the lower appellate court, reappreciating the evidence on record and considering the submissions raised at the bar, came to hold that the appellant- plaintiff had not been able to prove the relationship of landlord and tenant; that the conclusion arrived at by the learned trial Judge that the sale-deed dated 1.4.1976 due to absence of sale consideration was invalid, was neither justified nor correct; and that there being no clinching evidence to establish that the defendant had perfected his title by adverse possession the finding recorded by the learned trial Judge on that score was indefensible. After so holding, the learned appellate Judge proceeded to hold that as the plaintiff had established his title and the defendant had miserably failed to substantiate his assertion as regards the claim of perfection of title by way of adverse possession, the plaintiff on the basis of his ownership was entitled to a decree for possession. To arrive at the said conclusion he placed reliance on *Punia Pillai vs. Panai Minor through Pandiya Thevan*[1], *Bhagwati Prasad v. Chandramaul*[2] and *Amulya Ratan Mukherjee* and *Ors. V. Kali Pada Tah and Ors.*[3]

1. AIR 1947 Madras 282
2. AIR 1966 SC 735.
3. AIR 1975 Cal 200.

9. Facing failure before the appellate court the defendant preferred Second Appeal No. 33 of 1995 before the High Court. The appeal was admitted on the following substantial questions of law: -

"(1) Whether a decree could be passed in favour of plaintiff though such plaintiff fails to establish the relationship of landlord and tenant?

(2) Whether the 1st Appellate Court committed the error of law in pronouncing the error of law in pronouncing the judgment and decree on question of title? And

(3) Whether the 1st Appellate Court has erred in law in holding that the possession of the defendant is not proved and that the defendant has not acquired the title by adverse possession?"

10. The learned single Judge by judgment dated 8.2.2008 adverted to Sections 12(1)(a) and 12(1)(e) of the Act and came to hold that once the plaintiff had failed to establish the relationship of landlord and tenant which is the sine qua non in a suit for eviction, the plaintiff could not have fallen back on his title to seek eviction of the tenant. Be it noted, the learned single Judge placed reliance upon *Rajendra Tiwary v. Basudeo Prasad and another*[4] wherein the decision in *Bhagwati Prasad* (supra) had been distinguished. The learned single Judge dislodged the judgment and decree passed by the lower appellate court and affirmed that of the learned trial Judge.

11. We have heard Mr. A.K. Chitale, learned senior counsel appearing for the appellant and Mr. Puneet Jain, learned counsel appearing for the respondent.

12. Questioning the legal acceptableness of the decision of the High Court the learned senior counsel has raised the following contentions: -

4. AIR 2002 SC 136.

(a) The learned single Judge has erroneously opined that a suit cannot be decreed by civil court for possession on the basis of general title even if the landlord-tenant relationship is not proved. A manifest error has been committed by the learned Judge not following the law laid down in *Bhagwati Prasad* (supra) which is applicable on all fours to the case at hand, solely on the ground that the said decision has been distinguished in *Rajendra Tiwary's* case.

(b) Though three substantial questions of law were framed, yet the learned single Judge without considering all the questionss affirmed the judgment of the trial court wherein it had come to hold that the defendant had established his title by adverse possession despite the same had already been annulled on reappreciation of evidence by the lower appellate court.

(c) Assuming a conclusion is arrived at that there should have been a prayer for recovery of possession by paying the requisite court fee, the appellant, who has been fighting the litigation since decades should be allowed to amend the plaint and on payment of requisite court fee apposite relief should be granted.

13. Countering the aforesaid submissions Mr. Puneet Jain, learned counsel appearing for the respondent, has proponed thus: -

(i) The analysis made by the High Court that when the relationship between the landlord and tenant is not proven in a suit for eviction, possession cannot be delivered solely on the bedrock of right, title and interest cannot be found fault with. There is a difference between a suit for eviction based on

landlord-tenant relationship and suit for possession based on title, and once the relationship of landlord and tenant is not proven there cannot be a decree for eviction.

(ii) The High Court has correctly distinguished the decision rendered in *Bhagwati Prasad* (supra) in *Rajendra Tiwary* (supra) as the law laid down in Bhagwati Prasad is not applicable to the present case and hence, the submission raised on behalf of the appellant that once the right, title and interest is established, on the basis of general title, possession can be recovered is unacceptable.

(iii) The alternative submission that liberty should be granted to amend the plaint for inclusion of the relief for recovery of possession would convert the suit from one for eviction simpliciter to another for right, title and interest and recovery of possession which is impermissible. That apart, when the suit was dismissed and the controversy travelled to appellate court the plaintiff was aware of the whole situation but chose not to seek the alternative relief that was available which is presently barred by limitation. It is well settled in law that the Court should decline to allow the prayer to amend the plaint if a fresh suit based on the amended claim would be barred by limitation on the date of application.

14. At the very outset, we may straight away proceed to state that the finding returned by the courts below that has been concurred by the High Court to the effect that there is no relationship of landlord and tenant between the parties is absolutely impeccable and, in fact, the legality and propriety of the said finding has not been assailed by the learned senior counsel for the appellant. As far as right, title and interest is concerned, the learned trial Judge had

deed executed by the vendor of the appellant-plaintiff in his favour for lack of consideration and also returned an affirmative finding that the defendant was in possession for long and hence, had acquired title by prescription. The learned appellate Judge on reappreciation of the evidence brought on record had unsettled the findings with regard to the title of the plaintiff as well as the acquisition of title by the defendant by way of adverse possession. He had granted relief to the plaintiff on the ground that in a suit for eviction when the title was proven and assertion of adverse possession was negatived by the court, there could be a direction for delivery of possession. As has been stated earlier the High Court has reversed the same by distinguishing the law laid down in *Bhagwati Prasad* (supra) and restored the verdict of the learned trial Judge.

15. Keeping these broad facts in view, it is necessary to scrutinize whether the decision in Bhagwati Prasad which has been assiduously commended to us by Mr. Chitale is applicable to the case. In *Bhagwati Prasad* (supra) the defendant was the appellant before this Court. The case of the plaintiff was that the defendant was in possession of the house as the tenant of the plaintiff. The defendant admitted that the land over which the house stood belonged to the plaintiff. He, however, pleaded that the house had been constructed by the defendant at his own cost and that too at the request of the plaintiff because the plaintiff had no funds to construct the building on his own. Having constructed the house at his own cost, the defendant entered into possession of the house on condition that the defendant would continue to occupy the same until the amount spent by him on the construction was repaid to him by the plaintiff. In this backdrop, the defendant resisted the claim made by the plaintiff for ejectment as well as for rent. The learned trial Judge held that the suit was competent and came to the conclusion that the plaintiff was entitled to a decree for ejectment as well as for rent. The High Court agreed with the trial court in disbelieving the defendant's version about the construction of the house and about the terms and conditions

on which he had been let into possession. The High Court opined that the defendant must be deemed to have been in possession of the house as a licensee and accordingly opined that a decree for ejectment should be passed. Dealing with various contentions raised before this Court it was ruled that the defendant could not have taken any other plea barring that of a licensee in view of the pleadings already put forth and the evidence already adduced. In that context, this Court opined that the High Court had correctly relied upon the earlier Full Bench decision in *Abdul Ghani v. Musammat Babni*[5] and *Balmukund v. Dalu*[6]. An opinion was expressed by this Court that once the finding was returned that the defendant was in possession as a licensee, there was no difficulty in affirming the decree for ejectment, even though the plaintiff had originally claimed ejectment on the ground of tenancy and not specifically on the ground of licence. In that context it was observed thus: -

> "15. ... In the present case, having regard to all the facts, we are unable to hold that the High Court erred in confirming the decree for ejectment passes by the trial Court on the ground that the defendant was in possession of the suit premises as a licensee. In this case, the High Court was obviously impressed by the thought that once the defendant was shown to be in possession of the suit premises as a licensee, it would be built to require the plaintiff to file another suit against the defendant for ejectment on that basis. We are not prepared to hold that in adopting this approach in the circumstances of this case, the High Court can be said to have gone wrong in law."

16. Before we proceed to state the ratio in *Rajendra Tiwary's* case, we think it seemly to advert to the principle stated in *Biswanath Agarwalla v. Sabitri Bera and Others*[7] as

5. 25 All 256.
6. 25 All 498.
7. (2009) 15 SCC 693.

the same has been strongly relied upon by the learned senior counsel for the appellant. In the said case, the question that was posed is whether a civil court can pass a decree on the ground that the defendant is a trespasser in a simple suit for eviction. In the said case the learned single Judge of the Calcutta High Court, considering the issues framed and the evidence laid, had held that although the plaintiffs had failed to prove the relationship of landlord and tenant by and between them and the defendant or that the defendant had been let into the tenanted premises on leave and licence basis, the respondent-plaintiffs were entitled to a decree for possession on the basis of their general title. This Court took note of the relief prayed, namely, a decree for eviction of the defendant from the schedule premises and for grant of mesne profit in case the eviction is allowed at certain rates. The Court proceeded on the base that the plaintiff had proved his right, title and interest. The Court observed that the landlord in a given case, although may not be able to prove the relationship of landlord and tenant, yet in the event he proves the general title, may obtain a decree on the basis thereunder. But regard being had to the nature of the case the Court observed that the defendant was entitled to raise a contention that he had acquired indefeasible title by adverse possession. The Court referred to the decision in *Bhagwati Prasad* (supra) and, eventually, came to hold as follows: -

> "27. The question as to whether the defendant acquired title by adverse possession was a plausible plea. He, in fact, raised the same before the appellate court. Submission before the first appellate court by the defendant that he had acquired title by adverse possession was merely argumentative in nature as neither there was a pleading nor there was an issue. The learned trial court had no occasion to go into the said question. We, therefore, are of the opinion that in a case of this nature an issue was required to be framed."

Thereafter, the two-Judge Bench issued the following directions: -

> "29. However, we are of the opinion that keeping in view the peculiar facts and circumstances of this case and as the plaintiffs have filed the suit as far back as in the year 1990, the interest of justice should be subserved if we in exercise of our jurisdiction under Article 142 of the Constitution of India issue the following directions with a view to do complete justice to the parties.
>
> (i) The plaintiffs may file an application for grant of leave to amend their plaint so as to enable them to pray for a decree for eviction of the defendant on the ground that he is a trespasser.
>
> (ii) For the aforementioned purpose, he shall pay the requisite court fee in terms of the provisions of the Court Fees Act, 1870.
>
> (iii) Such an application for grant of leave to amend the plaint as also the requisite amount of court fees should be tendered within four weeks from date.
>
> (iv) The appellant-defendant would, in such an event, be entitled to file his additional written statement.
>
> (v) The learned trial Judge shall frame an appropriate issue and the parties would be entitled to adduce any other or further evidence on such issue.
>
> (vi) All the evidences brought on record by the parties shall, however, be considered by the court for the purposes of disposal of the suit.
>
> (vii) The learned trial Judge is directed to dispose of the suit as expeditiously as possible and preferably within three month[illegible]g

of the application by the plaintiffs in terms of the aforementioned Direction (i)."

17. At this stage it is necessary to dwell upon the facet of applicability of the said authorities to the lis of the present nature. As per the exposition of facts, the analysis made and the principles laid down in both the cases, we notice that the civil action was initiated under the provisions of Transfer of Property Act, 1882. In *Bhagwati Prasad's* case the Court opined that a decree for ejectment could be passed on general title as the defendant was a licensee. In *Biswanath Agarwalla's* case the Court took note of the concept of general title and the plausible plea of adverse possession and granted liberty to the plaintiff to amend the plaint seeking a decree for recovery of possession and pay the required court fee under the Court-fees Act, 1870. That apart, certain other directions were issued. We may repeat at the cost of repetition that the suits were instituted under the Transfer of Property Act. The effect of the same and its impact on difference of jurisdiction on a civil court in exercising power under the Transfer of Property Act and under special enactments relating to eviction and other proceedings instituted between the landlord and tenant, we shall advert to the said aspects slightly at a later stage.

18. Presently, we shall analyse the principles stated in *Rajendra Tiwary* (supra). In the said case the respondent-plaintiff had filed a suit for eviction under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 on many a ground. The learned trial Judge, appreciating the evidence on record, dismissed the suit for eviction holding that there was no relationship of landlord and tenant between the plaintiff and the defendant. However, he had returned a finding that the plaintiff had title to the suit premises. The appellate court affirmed the judgment of the learned trial Judge and dismissed the appeal. In second appeal the High Court reversed the decisions of the courts below and allowed the appeal taking the view that a decree for eviction could be passed against the

defendant on the basis of the title of the plaintiff and, accordingly, remanded the case to the first appellate court on the ground that it had not recorded any finding on the question of the title of the parties. It was contended before this Court that as the trial court was exercising limited jurisdiction under the Rent Act, the question of title to the suit premises could not be decided inasmuch as that had to be done by a civil court in its ordinary jurisdiction and, therefore, the High Court erred in law in remanding the case to the first appellate court for deciding the question of title of the plaintiff and passing an equitable decree for eviction of the defendant. The Court posed a question whether on the facts and in the circumstances of the case the High Court was right in law holding that an equitable decree for eviction of the defendant could be passed under Order VII Rule 7 of the Civil Procedure Code and remanding the case to the first appellate court for recording its finding on the question of title of the parties to the suit premises and for passing an equitable decree for eviction against the defendant if the plaintiffs were found to have title thereto. Answering the question the learned Judges proceeded to state thus: -

"It is evident that while dealing with the suit of the plaintiffs for eviction of the defendant from the suit premises under clauses (c) and (d) of sub-section (1) of Section 11 of the Act, courts including the High Court were exercising jurisdiction under the Act which is a special enactment. The sine qua non for granting the relief in the suit, under the Act, is that between the plaintiffs and the defendant the relationship of "landlord and tenant" should exist. The scope of the enquiry before the courts was limited to the question: as to whether the grounds for eviction of the defendant have been made out under the Act. The question of title of the parties to the suit premises is not relevant having regard to the width of the definition of the terms "landlord" and "tenant" in clauses (f) and (h), respectively, of Section 2 of the Act."

19. In course of deliberation, the two-Judge Bench distinguished the authorities in *Firm Sriniwas Ram Kumar v. Mahabir Prasad*[8] and *Bhagwati Prasad* (supra) by observing thus: -

> "15. These are cases where the courts which tried the suits were ordinary civil courts having jurisdiction to grant alternative relief and pass decree under Order VII Rule 7. A Court of Rent Controller having limited jurisdiction to try suits on grounds specified in the special Act obviously does not have jurisdiction of the ordinary civil court and therefore cannot pass a decree for eviction of the defendant on a ground other than the one specified in the Act. If, however, the alternative relief is permissible within the ambit of the Act, the position would be different."
>
> [Emphasis supplied]

20. Thereafter, the learned Judges proceeded to express thus:

> "16. In this case the reason for denial of the relief to the plaintiffs by the trial court and the appellate court is that the very foundation of the suit, namely, the plaintiffs are the landlords and the defendant is the tenant, has been concurrently found to be not established. In any event inquiry into title of the plaintiffs is beyond the scope of the court exercising jurisdiction under the Act. That being the position the impugned order of the High Court remanding the case to the first appellate court for recording finding on the question of title of the parties, is unwarranted and unsustainable. Further, as pointed out above, in such a case the provisions of Order VII Rule 7 are not attracted."
>
> [Underlining is ours]

21. At this juncture, we may fruitfully refer to the principles

8. AIR 1951 SC 177.

stated in *Dr. Ranbir Singh v. Asharfi Lal*[9]. In the said case the Court was dealing with the case instituted by the landlord under Rajasthan Premises (Control of Rent and Eviction) Act, 1950 for eviction of the tenant who had disputed the title and the High Court had decided the judgment and decree of the courts below and dismissed the suit of the plaintiff seeking eviction. While adverting to the issue of title the Court ruled that in a case where a plaintiff institutes a suit for eviction of his tenant based on the relationship of the landlord and tenant, the scope of the suit is very much limited in which a question of title cannot be gone into because the suit of the plaintiff would be dismissed even if he succeeds in proving his title but fails to establish the privity of contract of tenancy. In a suit for eviction based on such relationship the Court has only to decide whether the defendant is the tenant of the plaintiff or not, though the question of title if disputed, may incidentally be gone into, in connection with the primary question for determining the main question about the relationship between the litigating parties. In the said case the learned Judges referred to the authority in *LIC v. India Automobiles & Co.*[10] wherein the Court had observed that in a suit for eviction between the landlord and tenant, the Court will take only a prima facie decision on the collateral issue as to whether the applicant was landlord. If the Court finds existence of relationship of landlord and tenant between the parties it will have to pass a decree in accordance with law. It was further observed therein that all that the Court has to do is to satisfy itself that the person seeking eviction is a landlord, who has prima facie right to receive the rent of the property in question. In order to decide whether denial of landlord's title by the tenant is bona fide the Court may have to go into tenant's contention on the issue but the Court is not to decide the question of title finally as the Court has to see whether the tenant's denial of title of the landlord is bona fide in the circumstances of the case.

22. On a seemly analysis of the principle stated in the

9. (1995) 6 SCC 580.

10. (1990) 4 SCC 286.

aforesaid authorities, it is quite vivid that there is a difference in exercise of jurisdiction when the civil court deals with a lis relating to eviction brought before it under the provisions of Transfer of Property Act and under any special enactment pertaining to eviction on specified grounds. Needless to say, this court has cautiously added that if alternative relief is permissible within the ambit of the Act, the position would be different. That apart, the Court can decide the issue of title if a tenant disputes the same and the only purpose is to see whether the denial of title of the landlord by the tenant is bona fide in the circumstances of the case. We respectfully concur with the aforesaid view and we have no hesitation in holding that the dictum laid down in *Bhagwati Prasad* (supra) and *Bishwanath Agarwalla* (supra) are distinguishable, for in the said cases the suits were filed under the Transfer of Property Act where the equitable relief under Order VII Rule 7 could be granted.

23. At this juncture, we are obliged to state that it would depend upon the Scheme of the Act whether an alternative relief is permissible under the Act. In Rajendra Tiwari's case the learned Judges, taking into consideration the width of the definition of the "landlord" and "tenant" under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, had expressed the opinion. The dictionary clause under the Act, with which we are concerned herein, uses similar expression. Thus, a limited enquiry pertaining to the status of the parties, i.e., relationship of landlord and tenant could have been undertaken. Once a finding was recorded that there was no relationship of landlord and tenant under the Scheme of the Act, there was no necessity to enter into an enquiry with regard to the title of the plaintiff based on the sale deed or the title of the defendant as put forth by way of assertion of long possession. Similarly, the learned appellate Judge while upholding the finding of the learned trial Judge that there was no relationship of landlord and tenant between the parties, there was no warrant to

reappreciate the evidence to overturn any other conclusion. The High Court is justified to the extent that no equitable relief could be granted in a suit instituted under the Act. But, it has committed an illegality by affirming the judgment and decree passed by the learned trial Judge because by such affirmation the defendant becomes the owner of the premises by acquisition of title by prescription. When such an enquiry could not have been entered upon and no finding could have been recorded and, in fact, the High Court has correctly not dwelled upon it, the impugned judgment to that extent is vulnerable and accordingly we set aside the said affirmation.

24. Presently we shall proceed to address ourselves, which is necessary, as to what directions we should issue and with what observations/clarifications. In *Rajendra Tiwary* (supra), the two-Judge Bench had observed that the decision rendered by this Court did not preclude the plaintiff for filing the suit for enquiry of title and for recovery of possession of the suit premises against the defendant. In the said case a suit for specific performance of contract filed against the defendant was pending. The Court had directed that the suit to be filed by the plaintiff for which a three months' time was granted should be heard together with the suit already instituted by the defendant. In the present case, the suit was instituted on the basis of purchase. A plea was advanced that the defendant had already perfected his title by prescription as he was in possession for 18 to 19 years. The trial court had accepted the plea and the appellate court had reversed it. The High Court had allowed the second appeal holding that when the relationship of landlord and tenant was not established, a decree for eviction could not be passed. We have already opined that the High Court could not have affirmed the judgment and decree passed by the trial court as it had already decided the issue of adverse possession in favour of the defendant, though it had neither jurisdiction to enquire into the title nor that of perfection of title by way of adverse possession as raised by the defendant. Under these circumstances we are disposed to thi s

entitled under law to file a fresh suit for title and recovery of possession and such other reliefs as the law permits.

25. At this juncture, we think it apt to clarify the position, for if we leave at this when a fresh suit is filed the defendant would be in a position to advance a plea that the right of the plaintiff had been extinguished as he had not filed the suit for recovery of possession within the time allowed by law. It is evincible that the suit for eviction was instituted on 21.3.1978 and if the time is computed from that day the suit for which we have granted liberty would definitely be barred by limitation. Thus, grant of liberty by us would be absolutely futile. Hence, we think it imperative to state the legal position as to why we have granted liberty to the plaintiff. We may hasten to add that we have affirmed the judgment of the High Court only to the extent that as the relationship of landlord and tenant was not established the defendant was not liable for eviction under the Act. The issue of right, title and interest is definitely open. The appellant is required to establish the same in a fresh suit as required under law and the defendant is entitled to resist the same by putting forth all his stand and stance including the plea of adverse possession. The fulcrum of the matter is whether the institution of the instant suit for eviction under the Act would arrest of running of time regard being had to the concept of adverse possession as well as the concept of limitation. The conception of adverse possession fundamentally contemplates a hostile possession by which there is a denial of title of the true owner. By virtue of remaining in possession the possessor takes an adverse stance to the title of the true owner. In fact, he disputes the same. A mere possession or user or permissive possession does not remotely come near the spectrum of adverse possession. Possession to be adverse has to be actual, open, notorious, exclusive and continuous for the requisite frame of time as provided in law so that the possessor perfects his title by adverse possession. It has been held in *Secy. of State for India In Council v. Debendra Lal*

Khan[11] that the ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario.

26. In *S.M. Karim v. Mst. Bibi Sakina*[12], it has been ruled that adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.

27. In *Karnataka Board of Wakf v. Govt. of India*[13] it has been opined that adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. Thereafter, the learned Judges observed thus: -

> "11. ... Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

11. (1933-34) 61 IA 78 : AIR 1934 PC 23.
12. AIR 1964 SC 1254.
13. (2004) 10 SCC 779.

28. It is to be borne in mind that adverse possession, as a right, does not come in aid solely on the base that the owner loses his right to reclaim the property because of his willful neglect but also on account of the possessor's constant positive intent to remain in possession. It has been held in *P.T. Munichikkanna Reddy and Others v. Revamma and Others*[14].

29. Regard being had to the aforesaid concept of adverse possession, it is necessary to understand the basic policy underlying the statutes of limitation. The Acts of Limitation fundamentally are principles relating to "repose" or of "peace". In Halsbury's Laws of England, Fourth Edition, Volume 28, Para 605 it has been stated thus: -

> "605. Policy of the Limitation Acts. - The courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence."

30. These principles have been accepted by this Court keeping in view the statutory provisions of the Indian Limitation Act. The fundamental policy behind limitation is that if a person does not pursue his remedy within the specified time frame, the right to sue gets extinguished. In the present case the pivotal point is whether a good cause because a litigant cannot deprive the benefit acquired by another in equity by his own inaction and negligence, as assumed by the plaintiff, has been lost forever as he has not been able to prove the relationship of landlord and tenant in a suit for eviction which includes delivery of possession.

31. Keeping in view the aforesaid principles it is required to be scrutinized whether the time spent in adjudication of the

14. (2007) 6 SCC 59.

present suit and the appeal arrests the running of time for the purpose of adverse possession. In this regard, we may profitably refer to the decision in *Mst. Sultan Jehan Begum and Ors. v. Gul Mohd. and Ors.*[15] wherein following principles have been culled out: -

> "(1) When a person entitled to possession does not bring a suit against the person in adverse possession within the time prescribed by law his right to possession is extinguished. From this it only follows that if the former brings a suit against the latter within the prescribed period of limitation his right will not be extinguished.
>
> (2) If a decree for possession is passed in that suit in his favour he will be entitled to possession irrespective of the time spent in the suit and the execution and other proceedings.
>
> (3) The very institution of the suit arrests the period of adverse possession of the defendant and when a decree for possession is passed against the defendant the plaintiff's right to be put in possession relates back to the date of the suit.
>
> (4) Section 28 of the Limitation Act merely declares when the right of the person out of possession is extinguished. It is not correct to say that that section confers title on the person who has been in adverse possession for a certain period. There is no law which provides for 'conferral of title' as such on a person who has been in adverse possession for whatever length of time.
>
> (5) When it is said that the person in adverse possession 'has perfected his title', it only means this. Since the person who had the right of possession but allowed his right to be extinguished by his inaction, he cannot obtain the

15. AIR 1973 MP 72.

possession from the person in adverse possession, and, as its necessary corollary the person who is in adverse possession will be entitled to hold his possession against the other not in possession, on the well settled rule of law that possession of one person cannot be disturbed by any person except one who has a better title."

32. In *Sultan Khan s/o Jugge Khan v. State of Madhya Pradesh and Another*[16] a proceeding was initiated for eviction of the plaintiff under Section 248 of the M.P. Land Revenue Code, 1959. Facing eviction plaintiff filed a suit for declaration of his right, title and interest on the bedrock of adverse possession. His claim was that he had been in uninterrupted possession for more than 30 years. Repelling the contention the learned Judge observed thus: -

"It must, therefore, be accepted that filing of the suit for recovery of possession, by itself, is sufficient to arrest the period of adverse possession and a decree for possession could be passed irrespective of the time taken in deciding the suit. If this principle is applied to the proceedings under Section 248 of the Code, it must be held that in case a person has not perfected his title by adverse possession before start of the proceedings, he cannot perfect his title during the pendency of the proceedings. Adverse possession of the person in possession must be deemed to have been arrested by initiation of these proceedings."

33. We have referred to the aforesaid pronouncements since they have been approved by this Court in *Babu Khan and Others v. Nazim Khan (dead) by L.Rs. and Others*[17] wherein after referring to the aforesaid two decisions and the decision in *Ragho Prasad v. P.N. Agarwal*[18] the two-Judge Bench ruled thus: -

16. 1991 MPLI 81.

17. AIR 2001 SC 1740.

18. 1969 All LJ 975.

"The legal position that emerges out of the decisions extracted above is that once a suit for recovery of possession against the defendant who is in adverse possession is filed, the period of limitation for perfecting title by adverse possession comes to a grinding halt. We are in respectable agreement with the said statement of law. In the present case, as soon as the predecessor-in-interest of the applicant filed an application under Section 91 of the Act for restoration of possession of the land against the defendant in adverse possession, the defendant's adverse possession ceased to continue thereafter in view of the legal position that such adverse possession does not continue to run after filing of the suit, we are, therefore, of the view that the suit brought by the plaintiff for recovery of possession of the land was not barred by limitation."

34. Coming to the case at hand the appellant had filed the suit for eviction. The relief sought in the plaint was for delivery of possession. It was not a forum that lacked inherent jurisdiction to pass a decree for delivery of possession. It showed the intention of the plaintiff to act and to take back the possession. Under these circumstances, after the institution of the suit, the time for acquiring title by adverse possession has been arrested or remained in a state of suspension till the entire proceedings arising out of suit are terminated. Be it ingeminated that if by the date of present suit the defendant had already perfected title by adverse possession that would stand on a different footing.

35. In view of the aforesaid analysis, we permit the appellant-plaintiff to institute a suit as stated in paragraph 24 within a period of two months from today.

36. Resultantly, the appeal is allowed leaving the parties to bear their respective costs.

R.P. Appeal allowed.

A.M. SANGAPPA @ SANGAPPA
v.
SANGONDEPPA & ANR.
(Civil Appeal No. 10490 of 2013)

NOVEMBER 19, 2013

[P. SATHASIVAM, CJI, RANJANA PRAKASH DESAI AND RANJAN GOGOI, JJ.]

CODE OF CIVIL PROCEDURE, 1908:

O.41, r.31 - First appeal - Disposal of - Held: A regular first appeal is to be disposed of, particularly, in the light of O. 41 r.31 -- It mandates that appellate court has to frame points for determination, decision thereon, reasons for the decision and where the decree appealed from is reversed or varied, the relief to which appellant is entitled -- First appeal is a valuable right and unless restricted by law, the whole case is open for rehearing both on questions of fact and law -- Accordingly, judgment of appellate court must reflect its conscious application of mind and record findings supported by reasons, on all issues arising along with contentions put forth by both sides -- In the instant case, relevant aspects have not been noticed and adverted to by High Court -- Appeal has been decided in an unsatisfactory manner which falls short of considerations expected from the court of first appeal -- Judgment of High Court is set aside and regular first appeal is remanded to it for disposal afresh.

B.V. Nagesh and Another vs. H.V. Sreenivasa Murthy **2010 (11) SCR 784 = (2010) 13 SCC 530 - relied on.**

Case Law Reference:

2010 (11) SCR 784	**relied on**	**para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10490 of 2013.

From the Judgment and Order dated 19.08.2006 of the High Court of Karnataka at Bangalore in R.F.A. No. 238 of 2004.

Sobha for the Appellant.

Anand Sanjay M. Nuli, Lave Kumar Sharma, V.N. Raghupathy for the Respondents.

The folowing order of the Court was delivered by

O R D E R

1. Leave granted.

2. This appeal is filed against the judgment and decree dated 19.08.2006 passed in Regular First Appeal No. 238 of 2004.

3. Learned counsel for the appellant, after taking us through the impugned judgment, submitted that the same cannot be sustained since being a Regular First Appeal the High Court ought to have considered the evidence on record and findings recorded by the trial Judge. In other words, according to the counsel, the impugned judgment and order cannot be sustained in the absence of appreciation of evidence and acceptability of the findings recorded by the trial Court.

4. Learned counsel for the respondents supported the impugned decision of the High Court.

5. In the light of the limited submission, we have carefully perused the reasoning of the High Court and we agree with the contention raised by the counsel for the appellant.

6. In a series of decisions, this Court has highlighted how a regular first appeal is to be disposed of

light of Order 41 Rule 31 CPC. It mandates that the appellate Court has to frame points for determination, decision thereon, reasons for the decision and where the decree appealed from is reversed or varied, the relief to which the appellant is entitled. Such recourse has not been followed by the High Court, while disposing of the regular first appeal.

7. It is not in dispute that the first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. Accordingly, the judgment of the appellate Court must reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth by both the sides. These principles have been reiterated in *B.V. Nagesh and Another vs. H.V. Sreenivasa Murthy,* (2010) 13 SCC 530.

8. By applying the above principles, we are of the view that the relevant aspects, as mentioned above, have not been noticed and adverted to by the High Court. The appeal has been decided in an unsatisfactory manner which falls short of considerations which are expected from the court of first appeal.

9. In the light of the above conclusion, without expressing anything on the merits of the claim of both the parties, we set aside the impugned judgment of the High Court and remand the regular first appeal for fresh disposal.

10. We request the High Court to restore RFA No. 238 of 2004 (corrected as RFA Nos. 622-623 of 2007) on its file and make all endeavour for early disposal, preferably, within a period of six months from the date of receipt of copy of this order.

11. The appeal is disposed of accordingly.

R.P. Appeal disposed of.

GANESHA
v.
SHARANAPPA & ANR.
(Criminal Appeal No. 1948 of 2013)

NOVEMBER 19, 2013

[CHANDRAMAULI KR. PRASAD AND KURIAN JOSEPH, JJ.]

Code of Criminal Procedure, 1973:

s.401(3) r/w s.386(a) – Revisional power of High Court – Explained – High Court converting the acquittal into conviction – Held: High Court while exercising the powers of revision can exercise all those powers which have been conferred on the court of appeal u/s 386 but, in view of sub-s. (3) of s. 401, while exercising such power, High Court cannot convert a finding of acquittal into one of conviction -- In the instant case, High Court rightly came to the conclusion that it is one of the exceptional cases as the finding of acquittal is on a total misreading and perverse appreciation of evidence and rightly set aside the order of acquittal, but it gravely erred in converting the order of acquittal into that of conviction, instead of directing re-hearing by trial court – Order of High Court set aside, but, in the circumstances of the case, re-hearing by trial court declined – Penal Code, 1860 – s.324.

s.154 and s.2(d) r/w s.200 – 'Informant' and 'complainant' – Distinction between – Explained.

On the basis of a report given by the informant (PW-2) alleging that when he made a protest as the accused persons were grazing their cattle in his land and thereby damaging the crop the appellant assaulted him with a stick, an FIR was registered against the appellant and other accused persons. The trial court acquitted all the

accused. However, in revision, the High Court set aside the order of acquittal of the appellant and convicted him u/s 324 IPC and sentenced him to six months simple imprisonment with a fine of Rs.5000/-.

In the instant appeal, it was contended for the appellant that the High Court in revision could not convert a finding of acquittal into one of conviction.

Allowing the appeal, the Court

HELD: 1.1 Sub-s. (1) of s. 401 of the Criminal Procedure, 1973 makes it evident that the High Court, while exercising the powers of revision, can exercise any of the powers conferred on a court of appeal including the power u/s 386 of the Code. Section 386(a) authorizes the appellate court to reverse an order of acquittal, find the accused guilty and pass sentence on the person found guilty. However, sub-s. (3) of s. 401 of the Code contemplates that the power of revision does not authorize a High Court to convert a finding of acquittal into one of conviction. On the face of it, the High Court while exercising the powers of revision can exercise all those powers which have been conferred on the court of appeal u/s 386 of the Code but, in view of sub-s. (3) of s. 401 of the Code, while exercising such power, cannot convert a finding of acquittal into one of conviction. [para 9] [407-A-B, E-G]

1.2 In a case where the finding of acquittal is recorded on account of misreading of evidence or non-consideration of evidence or perverse appreciation of evidence, nothing prevents the High Court from setting aside the order of acquittal at the instance of the informant in revision and directing disposal on merits afresh by the trial court. In the event of such direction, the trial court shall be obliged to re-appraise the evidence

in light of the observation of the revisional court and take an independent view uninfluenced by any of the observations of the revisional court on merits of the case. [para 10] [407-G-H; 408-A-B]

1.3 Interference with the order of acquittal in revision is called for only in cases where there is manifest error of law or procedure and in those exceptional cases in which it is found that the order of acquittal suffers from glaring illegality, resulting into miscarriage of justice. The High Court may also interfere in those cases of acquittal caused by shutting out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue has been overlooked. In such an exceptional case, the High Court in revision can set aside an order of acquittal but it cannot convert an order of acquittal into that of an order of conviction. The only course left to the High Court in such exceptional cases is to order re-trial. [para 10] [408-B-E]

Bindeshwari Prasad Singh vs. State of Bihar **2002 (1) Suppl. SCR 495 = (2002) 6 SCC 650 – relied on.**

1.4 In the instant case, the High Court rightly came to the conclusion that it is one of the exceptional cases as the finding of acquittal is on a total misreading and perverse appreciation of evidence. On the face of it, the High Court rightly set aside the order of acquittal but it gravely erred in converting the order of acquittal into that of conviction, instead of directing re-hearing by the trial court. [para 11] [409-D-E]

1.5 Ordinarily, this Court would have set aside the order of the revisional court and directed for re-hearing by the trial court, but taking into account the nature of offence, at such a distance of time, the order of the High Court is set aside, and re-hearing by the trial court is declined. [para 11 and 13] [409-E; 4

2. It is noticed that in many of the judgments including the instant one, no distinction is made while using the words 'informant' and 'complainant'. In many of the judgments, the person giving the report u/s 154 of the Code is described as the 'complainant' or the 'de facto complainant' instead of 'informant', assuming that the State is the complainant. In a case registered u/s 154 of the Code, the State is the prosecutor and the person whose information is the cause for lodging the report is the informant. This is obvious from sub-s. (2) of s.154 of the Code which, inter alia, provides for giving a copy of the information to the 'informant' and not to the 'complainant'. However the complainant is the person who lodges the complaint. The word 'complaint' is defined u/s 2(d) of the Code to mean any allegation made orally or in writing to a Magistrate and the person who makes the allegation is the complainant, as would be evident from s.200 of the Code, which provides for examination of the complainant in a complaint-case. Therefore, these words carry different meanings and are not interchangeable. [para 12] [409-F-H; 410-A-C]

Case Law Reference:

2002 (1) Suppl. SCR 495 relied on para 10

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1948 of 2013.

From the Judgment and Order dated 03.08.2008 of the High Court of Karnataka, Circuit Bench, Gulbarga in Criminal Revision No. 147 of 2007.

Akshat Shrivastav, Inderjeet Yadav, Sidharth Shrivastava, Manjeet Kirpal for the Appellant.

Sanjay R. Hegde, V.N. Raghupathy for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Petitioner, besides three other accused, was put on trial for offence under Section 341, 323, 324 and 504 read with Section 34 of the Indian Penal Code. Judicial Magistrate, First Class, Yadgiri Taluk, Gulbarga District, Karnataka, by its judgment and order dated 14th of September, 2006 passed in CC No. 355 of 2006, acquitted them of all the charges.

2. Aggrieved by the aforesaid, the informant preferred Criminal Revision Petition No. 147 of 2007 and the High Court, by the impugned judgment and order dated 5th of August, 2008 maintained the order of acquittal of all accused persons, excepting accused no. 3, Ganesha who has been held guilty for the offence punishable under Section 324 of the Indian Penal Code and sentenced to undergo simple imprisonment for a period of six months and also to pay a fine of Rs.5,000/- , and in default of payment of fine, to undergo further simple imprisonment for a period of three months.

3. It is against this order that Ganesha has preferred this special leave petition.

4. Leave granted.

5. The prosecution was set in motion on the basis of a report given by the informant, Sharanappa, inter alia, alleging that he made a protest when he saw the accused persons grazing their cattle in his land and thereby damaging the mulberry crop. It was alleged that Ganesha, the appellant herein assaulted the informant with a Badige (stick) which caused injury near his left eye. The rest of the prosecution story is not being narrated as the accused who have allegedly participated in that have been acquitted and we are not concerned with that in the present appeal. The trial court, on appraisal of the evidence, came to the conclusion that the prosecution has not been able to prove its case beyond all reasonable doubt and, accordingly, acquitted all the accused. However, in revision, the High Court re-appraised the evidence and found th d

by the trial court to be totally perverse and contrary to the evidence on record. The High Court relied on the evidence of Sharanappa, the informant (PW-2), Maremma (PW-4), Sujatha (PW-5) and Hussainappa (PW-6), who claimed to be the eye-witnesses of the occurrence. The High Court found Maremma (PW-4) and Hussainappa (PW-6) to be the independent eye-witnesses and reliable. The High Court further observed that the evidence of Dr. Surekha (PW-1), who examined the injured and gave the wound certificate (Exhibit 2) corroborated the case of the prosecution. Accordingly, the High Court set aside the order of acquittal of the present appellant and convicted him as above. While doing so, the High Court observed as follows:

> "17. In my view, the aforesaid reasoning of the trial court is totally perverse and contrary to the evidence on record. We have seen from the evidence of P.Ws. 2, 4, 5 and 6 that all of them have come out successfully in their cross-examination and all of them have spoken to the fact of A-3 assaulting P.W. 2 with a stick near his left eye and the other accused persons catching hold of P.W.2. Furthermore, it is also clear from the evidence of P.Ws. 2 and 5 that the incident happened in the land of the complainant when the cattle belonging to the accused went to the land of the complainant for grazing the crop. Therefore, no doubt arises as to the place of incident."

6. Mr. Akshat Shrivastav, learned counsel appearing on behalf of the appellant raises a very short point. He submits that the High Court in revision could not convert a finding of acquittal into one of conviction and at most, while exercising the revisional jurisdiction, could direct for re-trial. Mr. V.N. Raghupathy, learned counsel appearing on behalf of the respondents, however, submits that the High Court having found the reasoning assigned by the trial court to be totally perverse and contrary to the evidence on record is not precluded from setting aside the order of acquittal and convicting the accused for the offence charged.

7. Having appreciated the rival submissions we find substance in the submission of learned counsel for the appellant. Section 401 of the Code of Criminal Procedure, for short 'the Code', confers power of revision to the High Court, same reads as follows:

> **"401. High Court's powers of revision.-** (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.
>
> (2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.
>
> (3) Nothing in this section shall be deemed to authorise a High court to convert a finding of acquittal into one of conviction.
>
> (4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.
>
> (5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

8. From a plain reading of sub-section (1) of Section 401 of the Code it is evident that the High Court, while exercising the powers of revision, can exercise any of the powers conferred on a court of appeal including the power under Section 386 of the Code, relevant portion whereof reads as follows:

> **"386. Powers of the Appellate Court.** - After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may -
>
> (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;
>
> xxx xxx xxx"

9. Section 386(a) thus authorizes the appellate court to reverse an order of acquittal, find the accused guilty and pass sentence on the person found guilty. However, sub-section (3) of Section 401 of the Code contemplates that the power of revision does not authorize a High Court to convert a finding of acquittal into one of conviction. On the face of it, the High Court while exercising the powers of revision can exercise all those powers which have been conferred on the court of appeal under Section 386 of the Code but, in view of sub section (3) of Section 401 of the Code, while exercising such power, cannot convert a finding of acquittal into one of conviction.

10. However, in a case where the finding of acquittal is recorded on account of misreading of evidence or non-consideration of evidence or perverse appreciation of evidence,

nothing prevents the High Court from setting aside the order of acquittal at the instance of the informant in revision and directing fresh disposal on merit by the trial court. In the event of such direction, the trial court shall be obliged to re-appraise the evidence in light of the observation of the revisional court and take an independent view uninfluenced by any of the observations of the revisional court on the merit of the case. By way of abundant caution, we may herein observe that interference with the order of acquittal in revision is called for only in cases where there is manifest error of law or procedure and in those exceptional cases in which it is found that the order of acquittal suffers from glaring illegality, resulting into miscarriage of justice. The High Court may also interfere in those cases of acquittal caused by shutting out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue has been overlooked. In such an exceptional case, the High Court in revision can set aside an order of acquittal but it cannot convert an order of acquittal into that of an order of conviction. The only course left to the High Court in such exceptional cases is to order re-trial. The view, which we have taken finds support from a decision of this Court in *Bindeshwari Prasad Singh vs. State of Bihar* (2002) 6 SCC 650, in which it has been held as follows:

> "12. .....Sub-section (3) of Section 401 in terms provides that nothing in Section 401 shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction. The aforesaid sub-section, which places a limitation on the powers of the revisional court, prohibiting it from converting a finding of acquittal into one of conviction, is itself indicative of the nature and extent of the revisional power conferred by Section 401 of the Code of Criminal Procedure. If the High Court could not convert a finding of acquittal into one of conviction directly, it could not do so indirectly by the method of ordering a retrial. It is well settled by a catena of decisions of this Court that the High Court will ordinarily not in[illegible]h

an order of acquittal except in exceptional cases where the interest of public justice requires interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice. The High Court will not be justified in interfering with an order of acquittal merely because the trial court has taken a wrong view of the law or has erred in appreciation of evidence. It is neither possible nor advisable to make an exhaustive list of circumstances in which exercise of revisional jurisdiction may be justified, but decisions of this Court have laid down the parameters of exercise of revisional jurisdiction by the High Court under Section 401 of the Code of Criminal Procedure in an appeal against acquittal by a private party."

11. In the present case, the High Court in our opinion, rightly came to the conclusion that it is one of the exceptional cases as the finding of acquittal is on a total misreading and perverse appreciation of evidence. On the face of it, the High Court rightly set aside the order of acquittal but it gravely erred in converting the order of acquittal into that of conviction, instead of directing re-hearing by the trial court. Ordinarily we would have set aside the order of the revisional court to the extent aforesaid and directed for re-hearing by the trial court, but taking into account the nature of offence, at such a distance of time we would not like to charter that course.

12. Before we part with the case, we may observe a common error creeping in many of the judgments including the present one. No distinction is made while using the words 'informant' and 'complainant'. In many of the judgments, the person giving the report under Section 154 of the Code is described as the 'complainant' or the 'de facto complainant' instead of 'informant', assuming that the State is the complainant. These are not words of literature. In a case registered under Section 154 of the Code, the State is the prosecutor and the person whose information is the cause for lodging the report is the informant. This is obvious from sub-

section (2) of Section 154 of the Code which, inter alia, provides for giving a copy of the information to the 'informant' and not to the 'complainant'. However the complainant is the person who lodges the complaint. The word 'complaint' is defined under Section 2(d) of the Code to mean any allegation made orally or in writing to a Magistrate and the person who makes the allegation is the complainant, which would be evident from Section 200 of the Code, which provides for examination of the complainant in a complaint-case. Therefore, these words carry different meanings and are not interchangeable. In short, the person giving information, which leads to lodging of the report under Section 154 of the Code is the informant and the person who files the complaint is the complainant.

13. In the result, we allow this appeal, set aside the order of the High Court and decline to direct re-hearing by the trial court.

R.P. Appeal allowed.

TAMIL NADU MERCANTILE BANK LTD.

v.

STATE THROUH DEPUTY SUPERINTENDENT OF POLICE AND ANR.

(Criminal Appeal No. 1958 of 2013 etc.)

NOVEMBER 20, 2013

[R.M. LODHA AND SHIVA KIRTI SINGH, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.482 - Quashing of criminal proceedings - Respondents-accused defrauding the Bank in collusion with Bank officials - Charge-sheet against respondents-accused and Bank officials for offences punishable u/ss 406, 409, 420 and 120-B IPC filed - High Court quashing criminal proceedings against non-bank officials-accused respondents - Held: High Court erred in interfering with criminal proceedings on the ground that bank could recover the loss caused by fraud through orders of Debt Recovery Tribunal or through the proceedings under the Negotiable Instruments Act or civil proceedings -- Even if the accused voluntarily at a later stage settles the monetary claim, that cannot be made a ground to quash the criminal proceedings unless the well established principles for exercise of power u/s 482 are made out -- Criminal proceedings can continue even if the allegation discloses a civil dispute also -- It is only when the dispute is purely civil in nature but still the party chooses to initiate criminal proceedings, criminal proceedings may be quashed - In the instant proceedings, it is not a case requiring interference in exercise of power u/s 482 -- The proceedings cannot be termed as an abuse of the process of court because the allegations if accepted in entirety are most likely to make out criminal offence alleged against accused-respondents -- The interest of justice is also not attracted in the instant case to warrant interference with the criminal

proceedings - Judgment of High Court set aside - Penal Code, 1860 - ss.406, 409, 420 and 120-B.

An FIR was registered against 10 accused persons for offences punishable u/ss 406, 409, 420 and 120B IPC. Accused nos. 1 to 5 were Managing Director/Managing Partner/Director/Proprietor of different private limited companies and partnership firms etc. and accused nos. 6 to 10 were Managers and officials of the appellant Bank. The allegations against the accused were that they defrauded the appellant Bank of Rs. 2.51 Crores. The modus operandi of the accused as alleged was that accused nos. 1 to 5 would present cheques drawn in their favour to the appellant Bank knowing well that the drawers of the said cheques did not have sufficient funds in their accounts. Thereafter the accused Branch Manager and other officials, in the garb of arrangement known as 'Local Bill Discounting' would credit the cheque amounts to the current accounts of the drawees who would immediately withdraw the amounts. The charge-sheet was filed against all the 10 accused. Accused nos. 1 to 5 filed petitions u/s 482 Cr P C and the High Court quashed the criminal proceedings against them holding, inter alia, that the dispute was of a civil nature, and the Bank could recover the loss through Debt Recovery Tribunal or through proceedings under Negotiable Instruments Act.

Allowing the appeals, the Court

HELD: 1.1 In A. Ravishanker Prasad & Ors., this Court reiterated the settled propositions of law which permit exercise of inherent power u/s 482 Cr.P.C. (i) to give effect to an order under the Code; (ii) to prevent abuse of process of the court and (iii) to otherwise secure the ends of justice. It was reiterated that such extraordinary power should be exercised sparingly and with great care and caution. [para 8] [418-B-D]

CBI vs. A. Ravishanker Prasad & Ors. **2009(6) SCC 351 - relied on.**

1.2 Criminal proceedings can continue even if the allegation discloses a civil dispute also. It is only when the dispute is purely civil in nature but still the party chooses to initiate criminal proceedings, the criminal proceeding may be quashed. For such purpose also the court, save and accept in very exceptional circumstances, would not look to any document relied upon by the defence. In the instant case, the High Court erred in interfering with criminal proceedings on the ground that the bank could recover the loss caused by fraud through orders of Debt Recovery Tribunal or through the proceedings under the Negotiable Instruments Act or civil proceedings. Even if the accused voluntarily at a later stage settles the monetary claim, that cannot be made a ground to quash the criminal proceedings unless the well established principles for exercise of power u/s 482 Cr.P.C. are made out.[para 9-10] [418-E-H; 419-A-B]

Monica Kumar (Dr.) vs. State of U.P. **2008 (9) SCR 943 = 2008 (8) SCC781 - relied on.**

1.3 On going through the relevant facts, particularly, the charge- sheet, it is not a case requiring interference in exercise of power u/s 482 Cr.P.C. The proceedings cannot be termed as an abuse of the process of court because the allegations if accepted in entirety are most likely to make out criminal offence alleged against the accused-respondents. The interest of justice is also not attracted in the instant case to warrant interference with the criminal proceedings. [para 12] [419-E-G]

Rajeshwar Tiwari vs. Nanda Kishore Roy **2010 (10) SCR 444 = 2010 (8) SCC 442 - referred to.**

1.4 The High Court ought to have taken note of the fact that on two previous occasions the respondents accused failed to get any relief u/s 482 Cr.P.C. and they did not challenge the order passed by the High Court at the instance of the appellant bank for concluding the trial within a limited time. Therefore, the common judgment and order under appeal cannot be sustained in law and is set aside. [para 13-14] [419-G-H; 420-A-B]

Case Law Reference:

2009(6) SCC 351	**relied on**	**para 8**
2008 (9) SCR 943	**relied on**	**para 10**
2010 (10) SCR 444	**referred to**	**para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1958 of 2013.

From the Judgment and Order dated 17.09.2009 of the High Court of Madras in Criminal Original Petition No. 12646 of 2007.

WITH

Crl. A. No. 1959 of 2013.

Indu Malhotra, ASG, Vivek Jain, Apoorva Bhumesh, N. Kumar, N. Sood, Kush Chaturvedi, Vikas Mehta for the Appellant.

Siddharth Dave, R. Anand Padmanabhan, Pramod Dayal, A. Santha Kumaran, M. Yogesh Kanna, Geetha Kovilan for the Respondents.

The Judgment of the Court was delivered by

SHIVA KIRTI SINGH, J. 1. Leave granted.

2. By the common judgment and

in CRLOP No.12646/2007 and 18297/2009, the learned Single Judge of the Madras High Court has allowed two petitions both under Section 482 of the Code of Criminal Procedure (for brevity.P.C.) preferred by the respondents and quashed criminal proceedings against some of the accused in Criminal Case No. 462 of 2004 pending before the learned Magistrate-II Tiruppur for offences punishable under Sections 406, 409, 420 and 120(b) IPC.

3. Before granting relief to the five petitioners out of ten accused, the High Court noted the relevant facts in brief which disclose that out of ten accused in the charge-sheet dated 20th September 2004, the first five accused are Managing Director/ Managing Partner/Director/Proprietor of different private limited companies, partnership firms/proprietary firms. Some of them are related to each other and some are family friends. Accused nos. 6 to 10 are Managers and Officials of Tamil Nadu Mercantile Bank Limited (hereinafter referred to as 'Bank'), Tiruppur alleged to have colluded with the respondents in perpetration of a fraud against the bank. They are not the parties before this Court.

4. Considering the stage of the proceedings, it is not necessary or desirable to go into the facts of the criminal case in detail. It is sufficient to notice that the respondents accused were operating current accounts with the bank from the year 2000. Allegedly a fraud was perpetrated by them in collusion with the Branch Manager of the appellant Bank and other accused during the period September, 2002 and May, 2003 to the tune of Rs.2.51 crores approximately. The fraud was discovered in June, 2003 after the erstwhile Branch Manager of the appellant Bank was transferred and a new Branch Manager took over. On discovering the fraud the new Branch Manager lodged a complaint with police station, Central Crime Branch, Coimbatore leading to First Information Report dated 20th June 2003 bearing Crime No.13 of 2003 against the accused respondents and concerned officers of the Bank.

According to the allegations, the fraud was based upon a simple modus operandi. The accused presented cheques drawn in their favour to the Tiruppur Branch of the Bank for encashment knowing well that there was not enough balance in the accounts of the drawers because the cheques were drawn by parties known to them. Thereafter, the Branch Manager, in the garb of understanding or arrangement known as 'Local Bill Discounting' credited the accounts of the accused presenting such cheques before they were sent to the drawee bank for clearance. Immediately on the account being credited with the cheque amount, such amount was withdrawn. Later, when the cheques returned unhonoured on account of insufficient balance, the accused, for clearing the debt used to deposit similar cheques for even higher amounts. Against such cheques also the accounts of the accused were credited with higher amounts and the money used to be withdrawn. Due to repeat of such trick several times, by the time the fraud was discovered, the Trippur Branch had been defrauded to the tune of appoximately Rs.2.51 crores. According to the charge-sheet, accused Senthil Kumar presented 1278 cheques during the period, accused Sanjay presented 99 cheques, accused Murugananthan presented 90 cheques, accused K.M.M. Murali presented 6 cheques and accused Mahamuni presented 3 cheques.

5. On the basis of FIR, Police initiated investigation and ultimately filed a charge-sheet on 20th September, 2004 against ten persons as noted earlier. But prior to that, the accused respondent and some others filed a petition under Section 482 Cr.P.C. for quashing of the FIR. On filing of reply by the informant that petition filed on 7.6.2004 was withdrawn. After the charge-sheet, on 18.10.2004 the accused respondents along with other accused filed another petition under Section 482 Cr.P.C for quashing of the FIR. That was dismissed on 9.2.2005 taking note of the charge-sheet already submitted. That order was not challenged. The concerned petitions which have been allowed by th d

in the year 2007 and 2009 respectively seeking quashing of the entire criminal proceedings but without disclosing any fresh cause of action. In the petition of 2007, the High Court initially granted interim stay but the appellant bank intervened, got impleaded and succeeded in vacation of the stay order on 13.9.2007. Thereafter the appellant filed a criminal original petition No.28663 of 2007 seeking orders for expediting the trial of the criminal case No.462 of 2004. The High Court allowed that prayer on 20th September 2007 and directed to complete the trial within four months. This order was also not challenged by the accused respondents.

6. A perusal of the judgment and order under appeal shows that the High Court has been persuaded to quash the criminal proceedings against the accused respondents mainly on the grounds that :

(1) The dispute between the Bank and the accused respondent is of civil nature,

(2) Although some of the alleged fraudulent operations were performed by the accused in the name of a company viz. Shri Deepadharani Yarns Pvt. Ltd., the company has not been arrayed as an accused while three of its Directors are so arrayed, and

(3) The bank has a remedy for recovering the money in question for which it has obtained an order of the DRT and can also take recourse to proceedings under Section 138 of the Negotiable Instruments Act or civil proceedings.

7. On behalf of the appellant all the three aforesaid grounds for exercise of inherent power under Section 482 of the Cr.P.C have been seriously assailed. It has been contended by the learned counsel for the appellant that the practice of the bank to permit overdraft facility to credit worthy customers cannot be equated with simple civil contracts and agreements. In the latter case, a party may not be permitted to initiate criminal

proceedings only on breach of terms of the agreement by the other party, unless it can be shown that the guilty party acted with dishonest or fraudulent intentions since the conception of the contract or agreement. But in the former case, a customer of Bank committing fraud will stand on a different footing.

8. The aforesaid submission has merits. In the case of *CBI vs. A. Ravishanker Prasad & Ors.,*[1] the accused respondents who were customers of a nationalized bank sought to justify the fraudulent transactions on the basis of agreements evident from letter of credit, open cash credit and also on the ground that loan had been repaid under a settlement and therefore, criminal proceedings on account of forgery, cheating, corruption etc. should not be permitted. This court set aside the order of the High Court interfering with a criminal proceeding and reiterated the settled propositions of law which permit exercise of inherent power under Section 482 Cr.P.C. (i) to give effect to an order under the Code; (ii) to prevent abuse of process of the Court and (iii) to otherwise secure the ends of justice. It was reiterated that such extraordinary power should be exercised sparingly and with great care and caution.

9. This judgment also supports the other submission on behalf of the appellant that the High Court erred in interfering with criminal proceeding on the ground that bank could recover the loss caused by fraud through orders of Debt Recovery Tribunal or through the proceedings under the Negotiable Instruments Act or civil proceedings. Even if the accused voluntarily at a later stage settles the monetary claim, that cannot be made a ground to quash the criminal proceedings unless the well established principles for exercise of power under Section 482 Cr.P.C. are made out.

10. It is also a law settled by this Court and reiterated in the case of *Monica Kumar (Dr.) vs. State of U.P.*[2] that criminal

1. 2009 (6) SCC 351.
2. 2008 (8) SCC 781.

proceedings can continue even if the allegation discloses a civil dispute also. It is only when the dispute is purely civil in nature but still the party chooses to initiate criminal proceeding, the criminal proceeding may be quashed. For such purpose also the Court, save and accept in very exceptional circumstances would not look to any document relied upon by the defence.

11. In reply, learned counsel for the respondent accused has placed reliance upon judgment of this Court in the case of *Rajeshwar Tiwari vs. Nanda Kishore Roy*[3], wherein this Court quashed the criminal proceedings against the appellant which was initiated by private complainant by merely alleging that acting on behalf of the employer the appellant had deducted a particular amount wrongly as income tax from his monthly salary. This Court found that the employer was under statutory obligation to deduct income tax and the allegation did not make out a case for adjudication by the Magistrate on criminal side. In paragraph 29 of the report on which reliance has been placed, only the established law has been reiterated that when adequate materials are available to show that a proceeding is of civil nature or that it is an abuse of process of court, the High Court could be justified in quashing the same.

12. On going through the relevant facts, particularly the charge- sheet, we find that it is not a case requiring interference in exercise of power under Section 482 Cr.P.C. The proceedings cannot be termed as an abuse of the process of court because the allegations if accepted in entirety are most likely to make out criminal offence alleged against the accused respondents. The interest of justice is also not attracted in the present case to warrant interference with the criminal proceedings.

13. In our considered view, the High Court ought to have taken note of the fact that on two previous occasions the respondents accused failed to get any relief under Section 482

3. 2010 (8) SCC 442.

Cr.P.C. and they did not challenge an order passed by the High Court at the instance of the appellant bank for concluding the trial within a limited time.

14. For all the aforesaid reasons, we find and hold that the common judgment and order under appeal cannot be sustained in law and is fit to be set aside. We order accordingly.

15. Appeals are allowed with a direction to the learned Magistrate to conclude the trial expeditiously in accordance with law without being influenced by any observations made in this order.

R.P. Appeals allowed.

DUDDILLA SRINIVASA SHARMA AND ORS.

v.

V. CHRYSOLITE

(Civil Appeal No. 10492 of 2013)

NOVEMBER 21, 2013

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

SERVICE LAW:

Recruitment - Candidates shortlisted by fixing higher qualification - Held: A person who fulfils the eligibility conditions as per the recruitment rules cannot be excluded even from appearing in the qualifying written examination by fixing higher educational qualification bench mark - Further, when there is a particular provision for short listing the candidates in the Rules or Instructions, the short listing is to be resorted to in accordance with the criterion mentioned in those Rules or Instructions - In the instant case, a specific criterion for shortlisting was prescribed, which was not followed - High Court rightly quashed the selection - However, the appellants continuing by virtue of interim orders, shall continue till selections are made and shall be allowed to participate in the selection process - Those of the appellants who get so selected, shall retain their seniority from the date of the initial appointment - Andhra Pradesh Judicial Ministerial Service Rules, 2003 - r. 8 - Circular dated 1.7.1996.

In the process of recruitment to 17 posts of Junior Assistants in the office of the District and Sessions Judge, the bench mark for short-listing the candidates was raised as degree qualification instead of the intermediate which was the statutory qualification for the post in question and had been prescribed in the Notification inviting applications. The High Court in a writ petition quashed the selection.

Dismissing the appeal, the Court

HELD: 1.1 A person who fulfils the eligibility conditions as per the recruitment rules cannot be excluded even from appearing in the qualifying written examination by fixing higher educational qualification bench mark. That would be permissible where the post is to be filled by main written examination (with marks obtained therein to be included in the total marks) followed by viva-voice test OR where the post is to be filled by interview mode alone. [para 17] [433-E-G]

1.2 When a particular criterion for short listing is adopted, the validity thereof is to be examined keeping in view whether the same is rational and having nexus with the objective sought to be achieved. It would depend on the facts and circumstances of each case as to whether a particular criterion is valid or not. At the same time, it also becomes clear that whenever there is a particular provision for short listing the candidates in the Rules or Instructions, then the short listing is to be resorted to in accordance with the criterion mentioned in those Rules or Instructions. [para 12] [429-D-F]

S.B.Mathur & Ors. vs. Chief Justice of Delhi High Court & Ors. **1988 (2) Suppl. SCR 772 = (1989) Supp.(1) SCC 34;** *Union of India v. S. Vinod Kumar;* **1996 (7) Suppl. SCR 142 =1996 (6) SCC 580;** *Andhra Pradesh Public Service Commission v. Baloji Badhavath;* **2009 (5) SCR 688 = 2009 (5) SCC 1- referred to.**

1.3 In the instant case, the candidates who applied were to appear in the qualifying examination and Circular Instruction dated 1.7.1996 issued by the High Court administration very categorically provided for the procedure of short listing of candidates as well. Two things which emerge from the record, germane to the decision in this case, are as: (i) A[illegible].

Judicial Ministerial Services Rules 2003, read with Annexure I thereto the educational qualification prescribed for the post of Junior Assistant is intermediate examination conducted by A.P. State Board of intermediate examination or any equivalent examination. Thus, all those who fulfil this educational qualification become eligible to be considered for the post; and (ii) The selection process was to start with qualifying written examination and as per guideline 7(a) of the Instructions dated 1.7.1996 this qualifying examination was for the purpose of screening/ short listing of the applicants whereby those who secured first class or 60 percent and above were to be preferred to others. Therefore, a specific criteria for shortlisting prescribed is the marks obtained in qualifying examination. Thus, having regard to the specific provision of short-listing, the High Court has taken the correct view. [para 13, 14 and 17] [429-F-G; 430-C-F; 433-G]

2. The appellants were given appointments by order dated 16.6.2010. However, even after setting aside of their appointments they have continued in service because of interim order passed by this Court. However, since large number of candidates were excluded from consideration by adopting wrong methodology, the appointments of the appellants cannot be saved. At the same time the appellants be allowed to continue till the selection process for filling up the said 17 posts of Junior Assistants is taken afresh by the authorities. This is to ensure that there is no undue disruption in the Ministerial functioning of the District Court. The appellants shall also be allowed to participate in said selection process. Those appellants who get selected will continue to be in service and they will be treated in service from their initial appointment by orders dated 16.6.2010 protecting their seniority. [para 18] [434-A-E]

Case Law Reference:

1996 (7) Suppl. SCR 142	**referred to**	**para 10**
2009 (5) SCR 688	**referred to**	**para 10**
1988 (2) Suppl. SCR 772	**referred to**	**para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10492 of 2013.

From the Judgment and Order dated 25.10.2010 of the High Court of Andhra Pradesh at Hyderabad in WP (C) No. 9437 of 2010.

A. Subba Rao, Annam D.N. Rao, Sudipto Sircar, Mansha M., for the Appellants.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. The appellants have filed the present petition under Article 136 of the Constitution of India for Special Leave to Appeal against the final judgment and order of the High Court of Andhra Pradesh at Hyderabad dated 25.10.2010 allowing Writ Petition (C) No. 9437 of 2010 filed by the Respondent herein and quashing the recruitment of the appellants herein to the post of Junior Assistants in the Unit of District and Sessions Judge, Adilabad under category IV of the A.P. Judicial Ministerial Service Rules 2003 pursuant to the Notification dated 4.12.2009 bearing Reference No. Dis. 6184 of 2009.

2. Since the appellants were in service when their recruitment was quashed, along with Special Leave Petition the appellants had also filed I.A. praying for stay of the impugned judgment of the High Court. While issuing notice in the Special Leave Petition on 16.12.2010 this Court had granted interim stay as prayed for. As a consequence, the appellants continue in the employment.

3. Though the notices have been duly served upon the respondent, the respondent has not put in his appearance. Accordingly, we had no option but to proceed with the matter. The Counsel for the appellant was heard at length.

4. Leave granted.

5. The matter relates to the appointment to the post of Junior Assistants in the office of District and Sessions Judge, Adilabad, Andhra Pradesh. The Principal District and Sessions Judge had issued Notification dated 4.12.2009 inviting applications for 17 posts of Junior Assistants. This was in compliance with the directions given by the High Court of Andhra Pradesh. All the appellants herein also applied for the said post. The respondent herein as well as her sister V. Buelah were also the applicants. The educational qualification prescribed for the post included passing of intermediate examination conducted by the A.P. State Board of intermediate examination or any equivalent examination. The appellants as well as the respondent and her sister fulfilled these qualifications. However, since the authorities had received large number of applications, the District Judge decided to raise the bench mark for short listing the candidates and only those candidates having degree qualification were sent letters for participating in the selection process. The Respondent and her sister got excluded in this short listing process.

6. Challenging their exclusion both the respondent and her sister filed the Writ Petition No. 8923 of 2010 in the High Court of Andhra Pradesh. Notice was issued. However when the petition was taken up on 20.10.2010 the Court found that the examination for the said post had already been conducted on 18.4.2010. Thus, vide orders dated 20.4.2010 a Division Bench of the High Court dismissed the Writ Petition with liberty to the respondents to take appropriate action in accordance with law. Thereafter, the respondent filed Writ Petition No. 9437 of 2010 praying for issuance of a writ order or directions, more particularly one in the nature of Writ of Mandamus, declaring

action of the authorities in prescribing degree qualification as against the prescribed intermediate qualification shown in the Notification dated 4.12.2009 as illegal, arbitrary and violative of Article 21 of the Constitution of India. Interim orders were passed in this Writ Petition to the effect that any appointment made to the post of Junior Assistants shall be subject to the result of the Writ Petition. This Writ Petition, after contest, has been allowed by the High Court vide impugned judgment dated 25.10.2010 holding that the selection procedure and recruitment process followed by the District Judge for recruitment to the 17 posts of Junior Assistants is unsustainable and the orders appointing the appellants to the said post has been quashed. This is how the appellants are before us questioning the validity of the said judgment.

7. We may record at this stage that for the 17 posts of Junior Assistants, 9,366 applications were received from the candidates who had the intermediate qualification. On the premise that it is very large number for 17 posts, the District Judge decided to short list the candidates. For this purpose reliance was placed on Circular Instructions vide ROC No. 2318/96-C1(1) dated 1.7.1996, Clause 7(E) whereof reads as under:

> "7(E) The Selection Committee shall screen all the applications from the list "A" to "C" and shortlist the same, keeping in view that nor more than 25 candidates will be considered for each vacancy."

8. As per the official respondents even in the notification dated 4.12.2009 vide which applications for the aforesaid post were invited it was categorically provided in Clause (XI) thereof as under:-

> "Mere applying will not give any right to any person to be called for either written examination and interview as the application of the candidates will be short listed as per guidelines issued by Hon'ble High C[illegible]e"

9. Taking shelter of the aforesaid provisions the authorities tried to justify their action to notify only those candidates who had higher qualification i.e. who were graduates. In this manner the official respondent short listed the application enhancing the minimum qualification to degree and even after short listing more than 3,800 candidates appeared for written examination. However, this explanation given by the official respondents, did not convince the High Court. A perusal of the judgment of the High Court would reveal that the High Court was more swayed by the fact that in the advertisement it was no where stated that there can be short listing of candidates on the basis of academic qualifications. It thus held that since the eligibility prescribed in the A.P. Judicial Ministerial Service Rules, 2003 mentions passing of intermediate examination, all those who fulfil this qualification were eligible to participate in the selection process. The High Court also referred to guideline 7 (a) of the Instructions dated 1.7.1996 as per which marks secured in the qualifying examination is the criteria enlisted for the parties of screening/ shortlisting of the applicants for the post in Ministerial Services.

10. It was argued by learned Counsel for the petitioner that when large number of applications are received for a particular post, it is always permissible for the recruitment agency to short list the candidates by fixing higher bench mark and such a higher bench mark can be on the basis of academic qualifications as well. The learned Counsel relied upon the following two judgments of this Court in support of his aforesaid plea:-

(i) *Union of India v. S. Vinod Kumar;* 1996 (6) SCC 580

(ii) *Andhra Pradesh Public Service Commission v. Baloji Badhavath;* 2009 (5) SCC 1.

11. We may record, at the outset, that general observations of the High Court in the impugned judgment to the effect that

short listing of the applicants could not be on the basis of higher qualification, may not be correct. In this behalf we may refer to the judgment of this court in the case of *S.B.Mathur & Ors. vs. Chief Justice of Delhi High Court & Ors.* (1989) Supp.(1) SCC 34. That was a case of departmental promotion. However, zone of consideration was limited to a multiple of 3 to 5 times of the number of vacancies. This criterion was upheld. The test laid down was that criterion adopted should be reasonable, based on rational & intelligible differentia which has nexus to the object sought to be achieved. The justification given by this Court in adopting such a course of action is found in the following passage from the said judgments.

> "In the case before us, zone has been restricted by prescribing that out of the total number of candidates who satisfy the eligibility requirement, the zone of consideration will be limited to a multiple of 3 to 5 times of the number of vacancies and the persons to be considered will be determined on the basis of their seniority in the combined seniority list. It appears to us that there is nothing unreasonable in this restriction. It was open to the Delhi High Court to restrict the zone of consideration in any reasonable manner and limiting the zone of consideration to a multiple of the number of vacancies and basing it on seniority according to the combined seniority list, in our view, cannot be regarded as arbitrary or capricious or mala fide. Nor can it be said that such restriction violates the principle of selection on merit because even experience in service is a relevant consideration in assessing merit. We may also refer, in this connection, to the decision of this Court in V.J. Thomas v. Union of India where it has been pointed out that even though minimum eligibility criterion is fixed for enabling one to take the examination, yet the examination can be confined on a rational basis to recruits up to a certain number of years. In adopting such a policy which underlay the Note to clause (4) of Appendix I to the new Rules in que g

which is arbitrary or amounting to denial of equal opportunity in the matter of promotion. It had the desired effect of not having a glut of Junior Engineers taking examination compared to fewer number of vacancies. Length and experience were given recognition by the Note. The promotion can be thus by stages exposing the promotional avenue gradually to persons having longer experience. This seems to be the policy underlying the Note and there was nothing arbitrary or unconstitutional in it. Such a limitation caters to a well known situation in service jurisprudence that there must be some ratio of candidates to vacancies. If for taking an examination this aspect of classification is introduced, it is based on rational and intelligible differentia which has a nexus to the object sought to be achieved (see SCC p. 13 para 13). In view of what we have pointed out above, the submission of Mr Thakur in this connection must also be rejected."

12. Therefore, what follows from the above is that whenever a particular criterion for short listing is adopted, the validity thereof is to be examined keeping in view whether the same is rationale and having nexus with the objective sought to be achieved. It would depend on the facts and circumstances of each case as to whether a particular criteria is valid or not. At the same time, it also becomes clear that whenever there is a particular provision for short listing the candidates in the Rules or Instructions, then the short listing is to be resorted to in accordance with the criterion mentioned in those Rules or Instructions.

13. In the instant case the candidates who applied were to appear in the qualifying examination and Circular Instruction dated 1.7.1996 issued by High Court administration very categorically provided for the procedure of short listing of candidates as well. Guideline 7(a) of the said Instructions dated 1.7.1996, in this behalf, reads as follows:

"Ministerial Service: For the purpose of screening/ short listing of the applications for the posts in Ministerial Services, the Committee shall take into consideration the marks secured in the qualifying examination and those who secured first class or 60% and above in the qualifying examination may be preferred to others, subject however to the rider that those having qualification in Type writing (Higher Grade) or Shorthand and those possessing Law Degree are not denied consideration".

14. Two things which emerge from the record, germane to the decision in this case, are as follows:

(i) As per Rule 8 of A.P. Judicial Ministerial Services Rules 2003, read with Annexure I thereto the educational qualification prescribed for the post of Junior Assistant is intermediate examination conducted by A.P. State Board of intermediate examination for any equivalent examination. Thus, all those who fulfil this educational qualification become eligible to be considered for the post.

(ii) The selection process was to start with qualifying written examination and as per guideline 7(a) of the instructions dated 1.7.1996 this qualifying examination was for the purpose of screening/ short listing of the applicants whereby those who secured first class for 60 percent and above were to be perfect to others. Therefore, a specific criteria for short listing prescribed by the respondents is the marks obtained in qualifying examination.

15. Two judgments relied upon by the learned Counsel were cited before the High Court also and the High Court has dealt with and discussed these cases in its impugned judgment in the following manner:

"Standing Counsel for the High Co n

Union of India v. S. Vinodh Kumar; 1996 (6) SCC 580 and *Andhra Pradesh Public Service Commission v. Baloji Badhavath;* 2009 (5) SCC 1 of the Supreme Court in support of his contention to uphold shortlisting of candidates by the 2nd respondent in this case. In S. Vinod Kumar (supra), the Supreme Court upheld fixing of cut off marks by the competent authority during the course of recruitment and further upheld that decision not to lower the cut off marks in the interest of general merit, even if some of the vacancies remained unfilled, as such decision cannot be termed arbitrary. The railway administration fixed cut off mark differently for the purpose of filling up vacancies in general category and reserved category. The Supreme Court upheld the same holding that the said fixing of cut off mark is neither arbitrary nor offends the principles of equality enshrined under Article 14 of the Constitution of India. It was further observed therein that power of the employer to fix cut off marks is neither denied nor disputed and that if the cut off marks were fixed on rational basis, no exception can be taken thereof. The question of fixing cut off mark in the recruitment process arises only after the applicants/ candidates are given opportunity to participate in the selection process. Fixing of cut off marks during the course of recruitment process after giving opportunity to the candidates to participate in the process, is totally different from preventing entry of the candidates to participate in the recruitment process by shortlisting the candidates at the threshold of recruitment process by denying even opportunity to the eligible candidates to participate in the recruitment process by way of attending written test or screening test. Thus, *S. Vinod Kumar* (supra) is no answer for the respondents to support shortlisting of eligible candidates by applying criterion of possessing higher educational qualifications than prescribed by the 2003 Rules.

In *Baloji Badhavath* (supra), the Supreme Court

upheld rules as well as action of the Andhra Pradesh Public Service Commission in conducting preliminary examination for all the qualified candidates before shortlisting the candidates for the purpose of attending written examination, particularly when several lakhs of candidates applied for recruitment to Group-I services in the State. Of course, the quesiton therein was with regard to non fixing of lesser minimum marks to be secured by candidates belonging to reserved categories when compared to candidates belonging to open category and its validity qua proviso to Article 335 of the Constitution. The Supreme Court noticed the following rule position with regard to short listing:

"35. Rule 4 of the Andhra Pradesh Public Service Commission Rules of Procedure which refers to Rules 22 and 22-A of the Andhra Pradesh State and Subordinate Service Rules, 1996 would apply only where short listing is done. The first part of the said Rule empowers the commission to restrict the number of candidates to be called for interview to such extent as it may deem fit. While shortlisting, however, it may hold a written test or provide for a preferential or higher qualification and experience and only for that purpose it is required to take into account the requirements with reference to Rules 22 and 22 A of the Andhra Pradesh State and Subordinate Service Rules, 1996 and the rule of reservation in favour of local candidates."

The Supreme Court further observed:

"By reason of providing for a preliminary examination, the right of the reserved category candidates has not been taken away. The means cannot be allowed to defeat the ends which the constitutional scheme seeks to achieve."

With regard to conducting of preliminary examination which

is not part of main examination, the Supreme Court observed:

> "29. Indisputably, the preliminary examination is not a part of the main examination. The merit of the candidate is not judged thereby. Only an eligibility criterion is fixed. The papers for holding the examination comprise of General Studies and Mental Ability. Such a test must be held to be necessary for the purpose of judging the basic eligibility of the candidates to hold the tests."

Ultimately the Supreme Court upheld action of Andhra Pradesh Public Service Commission in conducting preliminary test before conducting main examination for shortlisting the candidates for main examination without even fixing minimum marks differently for open and reserved categories of candidates."

16. We do not find any fault in the aforesaid discussion of the High Court pertaining to the said two judgments and are of the opinion that these judgments do not advance the case of the appellants. On the contrary para 29 of Baloja Badhawath case supports the view taken by the High Court.

17. We fail to understand how a person who fulfils the eligibility conditions as per the recruitment rules can be excluded even from appearing in the qualifying written examination by fixing higher educational qualification bench mark. That would be permissible where the post is to be filled by main written examination (with marks obtained therein to be included in the total marks) followed by viva-voice test OR where the post is to be filled by interview mode alone. Thus, having regard to the specific provision of shortlisting, we are of the opinion that the impugned judgment of the High Court has taken the correct view.

18. The High Court has quashed the selections. These

appellants were given appointments vide order dated 16.6.2010. However, even after the setting aside of their appointment they have continued in service because of interim order passed by this Court. In this manner they have served for more than 3 years as Junior Assistants. However, since large number of candidates were excluded from consideration by adopting wrong methodology, the appointments of the appellants cannot be saved. At the same time we are of the opinion that the appellants be allowed to continue till the selection process for filling up the said 17 posts of Junior Assistants is taken afresh by the official respondents. This is to ensure that there is no undue disruption in the Ministerial functioning of the District Court, Adilabad. At the same time we direct that the Principal District and Session Judge shall initiate fresh selection for appointment to the aforesaid posts within one month from the date of this order and complete the selection process within six months from thereafter. The appellant shall also be allowed to participate in the said selection process. Those appellants who get selected will continue to be in service and they will be treated in service from their initial appointment vide orders dated 16.6.2010 protecting their seniority. Those of the appellants who fail in the fresh selection process, their services shall be terminated.

19. Subject to the aforesaid observations the present appeal is dismissed, with no order as to cost.

R.P. Appeal dismissed.

SUBHASISH MONDAL @ BIJOY
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 1391 of 2008)

NOVEMBER 21,

[SUDHANSU JYOTI MUKHOPADHAYA AND V. GOPALA GOWDA, JJ.]

PENAL CODE, 1860:

s.302 -Double murder -- Accused charged with murder of his elder brother and mother - Circumstantial evidence - Conviction by courts below - Held: The guilt of accused has been proved beyond reasonable doubt - The recoveries made from the place of incident, the injuries on the person of accused, the evidence of witnesses that accused was seen loitering around after the incident, all point towards the guilt of the accused - Besides, accused held a strong grudge against his mother and elder brother as his mother had given the name of his elder brother for employment on compassionate ground on the death of his father - The motive of vengeance is established and in cases in which only circumstantial evidence is available, motive assumes a great importance - Further, accused has simply pleaded innocence - No other explanation has been offered by him in spite of the incriminating circumstances that pointed to his guilt - This is a suspicious facet of this case - All these circumstances, which form a reliable chain of events, proved the hypothesis that accused is guilty of the gruesome murder of his elder brother and mother - Conviction and sentence of accused-appellant sustained - Evidence - Circumstantial evidence - Criminal law - Motive.

On the basis of a written report lodged by PW-1, an FIR was registered to the effect that PW-1 heard screams

coming from the next door quarter and when he along with others went to the said quarter, he found dead body of its occupant and his mother seriously injured. She was taken to the hospital, but she succumbed to her injuries. During the investigation, it transpired that the deceased were the elder brother and the mother of the accused-appellant, who killed them as his mother gave the name of his elder brother for employment on compassionate ground on the death of his father. The trial court convicted the appellant u/s 302 IPC and sentenced him to imprisonment for life. The High Court affirmed the conviction and the sentence.

Dismissing the appeal, the Court

HELD: 1.1 The guilt of the accused has been proved beyond reasonable doubt. The evidence on record is that someone entered and exited the quarter of the deceased through an exit hole of the bathroom and the door of the room in which the deceased were found, was closed from inside. The Investigating Officer (P.W 12) stated that he arrested the accused on his way to his sister's house (P.W 2) and that he found some scratch marks and injuries on his body which was later examined by the doctor (P.W. 11), who opined that the injuries were caused due to scuffling with another person and could have been inflicted if the accused was an assailant and the victims tried to save themselves from his assault. P.W. 8, the Medical Officer who examined the body of the elder brother of the accused stated in his evidence that the injuries may be caused by incriminating substance such as 'nora', which was recovered from the scene of the crime. The accused-appellant's motive of vengeance as he was angry at being denied his father's job led him murdering his elder brother and mother. The motive of vengeance is established and in cases in which only circumstantial evidence is available

great importance. This, along with the fact that the accused-appellant was seen loitering around after the occurrence and the silver chain that he took from his sister, P.W. 2, was found at the site of the murder all point to the guilt of the accused. It is also on record that the accused-appellant was addicted to wine and mixed with anti-social elements. Further, a railway ticket was found by P.W.1, for the date of 31.8.2001 from Howrah which presumably belonged to the accused as he lived in Howrah and the murder happened in Kharagpur. All these circumstances which form a reliable chain of events proved the hypothesis that the accused is guilty of the gruesome murder of his family - his elder brother and his mother. [para 8-10 and 12] [442-D-F; 443-C-H; 444-A; 445-D-F]

Bhagwan Dass v. State (NCT of Delhi) **2011 (6) SCR 330 = (2011) 6 SCC 396;** *Wakkar v. State of U.P.* **(2011) 3 SCC 306 - relied on.**

1.2 Further, the accused has simply pleaded innocence. No explanation has been offered by the accused in spite of the incriminating circumstances that pointed to his guilt. This is a suspicious facet of this case, the mere denial of guilt on the part of the accused. [para 12] [445-C-D]

Harivardan Babubhai Patel v. State of Gujarat **(2013) 7 SCC 45, relied on.**

1.3 The conviction of the appellant-accused u/s 302, IPC and sentence of life imprisonment as awarded by the trial court and upheld by the High Court is sustained. [para 13]

Case Law Reference:

2011 (6) SCR 330	**relied on**	**para 10**
(2011) 3 SCC 306	**relied on**	**para 10**
(2013) 7 SCC 45	**relied on**	**para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1391 of 2008.

From the Judgment and Order dated 29.11.2006 of the High Court at Calcutta in CRA No. 398 of 2003.

Rutwik Panda for the Appellant.

Shagun Matta, Anip Sachthey for the Respondent.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. This appeal is filed by the appellant- Subhashish Mondal @ Bijoy, against the final judgment and order dated 29.09.2006, passed by the High Court at Calcutta in Criminal Appeal No. 398 of 2003, whereby the High Court dismissed the appeal of the appellant and upheld the verdict of the trial court convicting him under Section 302 of the Indian Penal Code (in short "IPC") on the charge of double murder of his brother and mother and sentencing him to imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo further simple imprisonment for three months. The present appeal is filed urging certain grounds and legal contentions, praying to set aside the impugned judgment and order of the High Court and to reverse the conviction and sentence passed by the courts below.

2. The facts of the case are stated in brief. The appellant, Subhasis Mondal was charged with the murder of his elder brother, Debasis Mondal and his mother, Bithika Mondal at their house in Kharagpur town, based on the FIR filed by one Srinivas Rao who used to reside in the quarter beside the quarter of the victims. The trial court found him guilty for the double murder of his brother and mother and sentenced him to imprisonment for life under Section 302 of the IPC. Against the judgment and order of the trial court[illegible]n

appeal before the High Court pleading innocence and lack of evidence and prayed for reversal of the conviction and sentence. The High Court dismissed the appeal and upheld the verdict of the trial court. Being aggrieved by the judgment and order of the High Court, the appellant has filed the present appeal.

3. The prosecution case giving birth to the sessions trial was that the appellant, on the night of September 1, 2001, had allegedly killed both his elder brother and his mother at their railway quarter No.2 D/2, Old Settlement, Kharagpur Town and this fact of the gruesome murder of both the victims came to light when an FIR was lodged by one A. Srinivas Rao who was also a Railways Employee and who used to reside in the quarter just beside the quarter of the victims. Mr. Srinivasa Rao in his written complaint dated 1st September, 2001 alleged that he heard screaming sounds coming from the next door quarter and so he, along with his relatives and other neighbours went to quarter No.2 D/2 and found the dead body of Debasis, the brother of the appellant and his mother, Bithika in a precarious condition with serious injuries on her person. Bithika was subsequently taken to the hospital for treatment but she succumbed to her injuries. On getting this information, the police visited the place of occurrence and there, Mr. Rao presented his written complaint about the murder without any mention of the assailant as it was still unknown. On receipt of the written complaint, the case was investigated into and the police collected evidence from which it was reasonably felt that the appellant committed the murder of his mother and elder brother and thus, a charge sheet was submitted against the appellant under Section 302 of the IPC. The learned Additional Sessions Judge framed charge under Section 302, IPC against the appellant for murder of his mother and elder brother and the appellant pleaded not guilty to the charge and claimed trial.

4. The prosecution examined in all 12 witnesses which included A. Srinivas Rao and some of the people of the locality,

P.W 2 - Rupali Sen, the sister of the appellant and his deceased elder brother and daughter of his deceased mother, the doctor who conducted the Post Mortem examination, the doctor who examined the appellant soon after his arrest by the Investigating Officer(I.O) and the I.O himself. The learned trial judge after considering the prosecution evidence, both oral and documentary, and after hearing the contentions of both the appellant and the State finally came to the conclusion that the appellant coming from Calcutta on 31st August, 2001 made his entry into the quarter of Debasis in the night of September 1, 2001 and finding his mother and brother defenceless, killed them both to take revenge since Debasis got employment on compassionate ground on the death of his father and the appellant was deprived of an employment opportunity. The trial court reached this conclusion, mainly on the oral testimony of P.W.2 Rupali Sen, sister of the appellant and on several circumstances which was gathered from both oral and documentary evidence of the prosecution. The trial court on appreciation of evidence on record held the appellant guilty of the murder of his brother and mother under Section 302 of the IPC and sentenced him to life imprisonment.

5. The appellant appealed against the judgment of the trial court in the High Court pleading innocence, and submitted that there were no eye witnesses to depose against the appellant and that he should be acquitted. The High Court held that there was sufficient material on record to lend support to the conclusion of the trial court that the appellant, feeling himself deprived of the job of his father held a deep grudge against his mother and elder brother and as he resided in Calcutta, he perhaps came on 31st August, 2001 and on 1st September, 2001, he entered into the room through the exit hole of the bathroom and thereafter again escaped through the said hole and this was corroborated by the oral testimony of P.W 2 - Rupali Sen, and also from the circumstance that no article was stolen, the door of the room was closed from inside and the appellant himself received some injuries and

finally, the silver chain of the appellant was recovered near the body of the victims. Thus, all these circumstances together clearly established the fact beyond any reasonable doubt that it was the appellant who killed his elder brother and mother on the night of 1st September, 2001. The High Court held that the prosecution with the help of circumstantial evidence, established a complete chain of events that there was no scope to hold otherwise than to lend support to the guilt of the appellant for the commission of the gruesome double murder. The appeal was accordingly dismissed and the orders of conviction and sentence passed against the appellant under Section 302 of the IPC by the trial court were confirmed.

6. The appellant had filed this appeal against the same and the matter has come before us. The amicus curiae appearing on behalf of the appellant, Mr. Rutwik Panda has contended that the order of dismissal of appeal and upholding the order of conviction as against the appellant is manifestly unjust and illegal as it is against the evidence on record and that the judgment and decision of both the courts below are based on surmises and conjectures and are liable to be set aside. It was further contended that the courts below ought to have considered that there were glaring discrepancies and contradictions in the evidence of the prosecution witnesses making them unreliable and unbelievable and their evidence was insufficient and untrue. It was also contended that this Court should acquit the appellant on benefit of doubt and the question of improbability of the involvement of the accused in the case on hand and further, that the sentence imposed upon the appellant is too severe.

7. The learned counsel for the respondent-State, Mr. Anip Sachtey has argued that although there were no eye-witnesses to prove the involvement of the appellant behind the gruesome double murder of his mother and elder brother, the circumstances taken as a whole would present only one hypothesis pointing out the guilt of the appellant. He has also

contended that the door of the room where the victims were murdered was locked from inside and the murderer entered and exited through an exit hole of the bathroom, and it is clear that only a person having full knowledge of the quarter could have entered and exited that way. Further, not a single article was stolen and from the evidence of P.W.2, Rupali Sen, the sister of the appellant, it is clear that the appellant felt himself deprived of the job of his deceased father which went to his elder brother(the deceased) and so he held a long-standing grudge against both his mother and his elder brother. He contended that the appellant had the motive of vengeance in committing this gruesome double murder of his own mother and elder brother and the order of conviction and sentencing the appellant must be upheld and there is no ground to interfere with the order of conviction or sentence handed to the appellant.

8. We have heard the rival legal contentions and perused the evidence on record. We have to come to the conclusion that the guilt of the accused has been proved beyond reasonable doubt. The contention that the conviction is based entirely on circumstantial evidence with an incomplete chain of events is not tenable. We will examine the evidence on record. The evidence before us is that someone entered and exited the quarter of the deceased through an exit hole of the bathroom and the door of the room in which the brother and mother of accused was found, was closed from inside. The investigation also revealed that a silver chain was found at the scene of the crime, which the P.W.2 stated later on in her deposition that it belonged to her, and the accused had taken that silver chain with locket of Goddess Kali from her prior to the occurrence. She identified the silver necklace lying on the floor by the side of the dead body of Debasis, her elder brother and also said that he put a locket of Shiva on the said chain later on. She further stated on record that her brother, the accused used to mix with antisocial elements and was addicted to wine and on account of this, their mother was not inclined to give the service of their deceased father to the accused at

the employment on compassionate ground be given to the elder brother, Debasis and that if it is given to the accused, then he will be spoiled. The complainant, P.W 1, A. Srinivasa Rao has deposed stating that he found Debasis in a pool of blood and his mother, Bithika in a pool of blood in the bathroom. He also stated that he found one 'shil' (iron slab), one silver chain with locket and one railway ticket, and four buttons.

9. The P.W 12, the Investigating Officer, Mr. Mallick, the S.I. of Police attached to Kharagpur Police Station deposed that he found the dead body of Debasis, the elder brother of the accused in a pool of blood and was informed that his injured mother was sent to the hospital. He seized one silver chain with lockets of Goddess Tara and God Shiva, and other articles like 'shil', 'nora', blood stained mat, chappal, button etc under a seizure list prepared and signed by him (marked as Exs. 2/2 and 3/1). He further stated that he arrested the accused at Subhaspally on his way to his sister's house (P.W 2, Rupali Sen) and that he found some scratch marks and injuries on his body which was later examined by the doctor, P.W. 11, who opined that the injuries were caused due to scuffling with another person and could have been inflicted if the accused was an assailant and the victims tried to save themselves from his assault. Legature marks on the neck may be caused to the assailant if the victim had dragged the assailant after pulling the chain which was put on by him at his neck. P.W. 8, the Medical Officer who examined the body of Debasis, the elder brother of the accused stated in his evidence that the injuries may be caused by incriminating substance such as 'nora', which was recovered from the scene of the crime.

10. From the evidence of the witnesses discussed above, it is apparent that the accused had a clear motive to have committed the brutal murder of his elder brother and his mother and the circumstances point to the guilt of the accused. He held a strong grudge against his mother and elder brother as his mother had given the name of his brother for the job of his

deceased father instead of his name. The motive of vengeance is established and in cases in which only circumstantial evidence is available, motive assumes a great importance. In the case of *Bhagwan Dass v. State (NCT of Delhi)*[1], this Court citing the case of *Wakkar v. State of U.P.*[2] held that in cases of circumstantial evidence, motive is very important, unlike cases of direct evidence. In the case at hand, it is evident that the prosecution case that the motive of the accused in killing his elder brother and mother was out of vengeance has to be accepted. The trial court has stated that it was crystal clear that there was a family feud between the accused and the deceased over the service in the railway workshop on the death of their father.

11. The accused was arrested on the same day of the occurrence, when he was on his way to his sister's house. When charged with the offence under Section 302 of the IPC, the accused pleaded his innocence and made one solitary statement that everything is false. There was no attempt of explanation of circumstances or plea of alibi on the part of the accused. The counsel for the accused simply pleaded that the accused be acquitted on the principle of benefit of doubt and that there is no chain of circumstances that can lead to the hypothesis that the accused is guilty of the murder of his elder brother and mother. The judgment of this Court in the case of *Harivardan Babubhai Patel v. State of Gujarat*[3] speaks of this very aspect of a case wherein the accused has merely denied his guilt and failed to give any explanation under Section 313 of the CrPC of the incriminating circumstances against him. The relevant portion is extracted below,

> "28.Another facet is required to be addressed to. Though all the incriminating circumstances which point to the guilt of the accused has been put to him, yet he chose not to

1. (2011) 6 SCC 396.
2. (2011) 3 SCC 306.
3. (2013) 7 SCC 45.

give any explanation under S.313 of the CrPC except choosing the mode of denial. It is well settled in law that when the attention of the accused is drawn to the said circumstances that inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for building the chain of circumstances... In the case at hand, though a number of circumstances were put to the accused, yet he has made a bald denial and did not offer any explanation whatsoever. Thus, it is also a circumstance that goes against him."

12. In the present case too, the accused has simply entered a plea of innocence. No other explanation has been offered by the accused in spite of the incriminating circumstances that pointed to his guilt. It is our view that this is a suspicious facet of this case, the mere denial of guilt on the part of the accused. This, along with the fact that he was seen loitering around after the occurrence and the silver chain that he took from his sister, P.W. 2, was found at the site of the murder all point to the guilt of the accused. His motive of vengeance as he was angry at being denied his father's job led to him murdering his elder brother and mother. It is also on record that he was addicted to wine and mixed with anti-social elements. Further, a railway ticket was found by the complainant, P.W.1, A. Srinivasa Rao for the date of 31st August, 2001 from Howrah which presumably belonged to the accused as he lived in Howrah and the murder happened in Kharagpur. All these circumstances which form a reliable chain of events proved the hypothesis that the accused is guilty of the gruesome murder of his family - his elder brother and his mother.

13. For the aforesaid reasons we sustain the conviction of the appellant-accused under Section 302 of the IPC and sentencing him for life imprisonment as awarded by the trial court and upheld by the High Court. We do not find any merit in the appeal and it is hereby dismissed.

R.P. Appeal dismissed.

PATHAN MOHAMMED SULEMAN REHMATKHAN
v.
STATE OF GUJARAT & ORS.
(Special Leave Petition (C) No.32507 of 2013)

NOVEMBER 22, 2013

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

Administrative Law:

Policy decision – Setting up of International Financial Services Centre – Joint venture company with 50:50 public private participation – Approval by Central Government – Allotment of land to Company – Challenged on the basis of report of CAG that State Government did not adopt a uniform policy in alienation and allotment of land – Held: A decision taken in good faith, with good intentions, without any extraneous considerations, cannot be belittled, even if that decision was ultimately proved to be wrong — Non-floating of tenders or absence of public auction or invitation alone is not a sufficient reason to characterize the action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise of power — Keeping in view the various orders passed by State Government and resolutions allotting lands to fourth respondent and also the notification issued under Special Economic Zones Act, 2005, High Court has rightly held that it cannot be said that State Government has acted against public interest — Government has noticed development and employment opportunities that the project would bring into the State — Decision taken by Government was also transparent – Further, these are purely policy decisions taken by State Government and, while so, it has examined the benefits the project would bring into the State and to its people — It is open to the State and the authorities to take economic and management decision

depending upon the exigencies of a situation guided by appropriate financial policy notified in public interest — That is what has been done in the instant case – Public Interest Litigation.

Comptroller and Auditor General of India:

Power of CAG – Explained.

Arun Kumar Agrawal v. Union of India & others **(2013) 7 SCC 1;** *Centre for Public Interest Litigation & Ors. v. Union of India & Ors.* **2012 (3) SCR 147 = AIR** *2012 SC 3725 – referred to.*

Case Law Reference:

(2013) 7 SCC 1	**referred to**	**para 6**
2012 (3) SCR 147	**referred to**	**para 10**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 32507 of 2013.

From the Judgment & Order dated 04.10.2013 of the High Court of Gujarat at Ahmedabad in WPPIL NO. 97 of 2013.

Y.N. Oza, D.N. Ray, Srushti Thula, Lokesh K. Choudhary, Sumita Ray for the Appellant.

Kabir H., Jesal (for Hemantika Wahi), for the Respondents.

The following Order of the Court was delivered

ORDER

K.S. RADHAKRISHNAN, J. 1. The State of Gujarat, it is seen, in the year 2005 thought of developing an International Financial Services City at Ahmedabad at par with the globally benchmarked financial centres such as Sinjuku-Tokyo, Lujiazui-Shanghai, La Defense Paris, London Dockyard, having

offshore banking facilities. The State conducted detailed study through its wholly owned company called Gujarat State Financial Services Limited (GSFSL). The study report was prepared in February 2006 which strongly recommended for execution of the project after undertaking a feasibility study. Since the project was first of its kind in the country and involved commercial risk, the State Government thought of undertaking the project of a public-private partnership so that the responsibility and the risk, if any, could be shared.

2. The State organized the "Vibrant Gujarat Urban Summit" in the year 2007. The third respondent, Infrastructure Leasing & Financial Services Ltd. (ILFS) showed its commitment for development of the national financial services centre and a Memorandum of Understanding was signed with the State Government on 16.2.2007. On 15.5.2007, a joint venture agreement was executed between the State represented by the Gujarat Urban Development Company Limited (GUDC) and the third respondent for forming a 50:50 joint venture company in the name of Gujarat International Financial Tech City Limited i.e. GIFT Company Ltd. on 22.3.2011 and 7.6.2011 the State Government issued and allotted 412 acres of land to the fourth respondent i.e. GIFT Company Ltd. and 250 acres of land to its wholly owned subsidiary i.e. GIFT SEZ Limited with a right to mortgage while retaining ownership thereof with the State Government.

3. On 18.8.2011, the fifth respondent, Government of India, issued a notification under Special Economic Zones Act, 2005, for the area of 261 acres of land for development, operation and maintenance of the project. The Government of India on 27.12.2011, accorded approval to the GIFT SEZ Limited for setting up of an International Financial Services Centre. Facts reveal, by April 2013, out of the estimated investment of Rs.9,700 crore for the entire proposed project, an amount of Rs.450 crore has already been spent by fourth respondent towards development expenses in cr[illegible]e.

Fourth respondent has already constructed around 12.8 kms. of roads in the township. The fourth respondent has also constructed a water treatment plant and sewerage treatment plant having respective capacity of 3 MLD and 2.2 MLD and distict cooling system, including power sub-station for 66 KV, utility tunnel of around 2.2 kms. and automated waste collection system for load of around 5 TPD. The fourth respondent has also constructed an artificial water body known as "Samriddhi Sarovar" having circumference of 1.5 kms, and a water pumping station at Nabhoi and a pipeline of almost 12 kms. has been laid to provide water from Narmada canal to the township. Various other activities are also going-on on a war-footing.

4. The project picked up momentum and nobody challenged the joint venture agreement or the decisions taken by the State Government to allot lands to the fourth respondent for creating infrastructure for development and operation of the project. The Comptroller and Auditor General of India (CAG), however, had made certain remarks in his report no.2 of 2013 for the year ending on 31st March, 2011, stating that the performance audit revealed a number of system and compliance deficiencies and the State Government did not adopt a uniform policy in alienation and allotment of land. Further, it was also stated that the delay in finalization has resulted in blocking up of revenue of the Government and there was no mechanism for review and correction of incorrect orders issued by the subordinate officers to safeguard Government revenue and that no proper monitoring system existed in the Department to ascertain and vacate encroachment cases. Relevant portion of the CAG report reads as follows :-

> "3.5.13 Inconsistent decision to allot land at token amount Gujarat Urban Development Company Limited (GUDC), a Government Company was authorised by Government in May 2007 to undertake the Gujarat International Finance City project (GIFT city) in a joint venture with Infrastructure

Leasing & Financial Services Ltd. (IL&FS) for setting up an International Finance City. Subsequently, a Company called GIFT Company Ltd, (the Company) was formed by IL&FS and GUDC as a joint venture.

As per the direction of the Government in Revenue Department, Collector, Gandhinagar handed over advance possession of Government land admeasuring 26,77,814 sq.mt. valued by the DLVC/SLVC during September 2007 to December 2008 at Rs.500 crore situated at fourteen survey numbers of four Talukas of Gandhinagar district to GUDC for setting up the GIFT city. The GUDC proposed (June 2007) to Government for relaxation in payment of occupancy price for the land. Chief Secretary, Principal Secretaries of Revenue Department, Finance Department and UDUHD opined that the land shall be allotted at market value as per the extant policy on valuation of Government land. However, moratorium period of two years shall be allowed for payment of 50 per cent of the value of land and remaining 50 per cent payable as a soft loan. Meanwhile, Ministry of Commerce and Industry, Govt. of India accorded a formal approval in January 2008 to GIFT Company Ltd., for the proposed Multi Services SEZ covering an area of 10,11,750 sq.mt. (250 acres).

As per GR dated 22.11.2004, if the allotment could not be made within completion of two years from the date of DLVC's valuation, it was to be refixed afresh. The land was allotted in April/June 2011 by Government to the Company after expiry of two years from the date of valuation of DLVC, though fresh valuation was not done. Scrutiny of Cabinet note indicated that Collector, Gandhinagar had stated that the value of the allotted land was approximately Rs.2,760 Crore. However, Cabinet allotted 10,11,744 sq.mt. of land to GIFT SEZ Ltd., and 16,66,070 sq.mt. to GIFT Company Ltd., for a nominal price of rupee one with the condition that during the first pl

surplus amount received by the developers shall be divided between Government and the two Companies in 50:50 ratio. During the execution of subsequent phases, the surplus amount, which may be received over and above the base cost of the project shall be divided between Government and the GIFT Company Ltd., in 80:20 ratio.

We noticed that land was allotted without ascertaining its value as on the date of allotment. Advance possession of land was given to an organisation other than Boards/ Corporations/ SEZ in contravention of the Government policy. Land was allotted negating the views of Finance Department, Revenue Department and UDUHD without collecting occupancy price to a minimum extent of Rs.500 crore as on the dates of advance possession of land.

After this was pointed out, the Government stated (July 2012) that it was a Public Private Partnership (PPP) project and development rights were only given and ownership rights vested with the Government. The reply is not acceptable as the Government land is allotted at new and restricted tenure wherein the allottee is not entitled to sell, transfer or mortgage the land without the permission of the Collector. However, in this case, the Government authorised the allottee to mortgage/lease the land without seeking permission from the Collector/Government. Further, the State Government has produced no records to indicate that allotment for the GIFT city was on the basis of PPP. The State Government despite repeated requests did not produce to audit the Joint Venture Agreement signed between Government/GUDC and IL&FS. Non production of the records to audit has the consequential effect of limiting the scope of audit.

3.5.14 Conclusion

The performance audit revealed a number of system and

compliance deficiencies. Government did not adopt a uniform policy in alienation and allotment of land. Delay in finalisation of valuation also resulted in blocking up of revenue of the Government. There was no mechanism for review and revision of incorrect orders issued by the subordinate officers to safeguard Government revenue. No proper monitoring system exists in the Department to ascertain and vacate encroachment cases."

5. The petitioner herein filed a Public Interest Petition before the Gujarat High Court primarily based on the report of CAG seeking a declaration that the action of the State Government for allotting land in favour of the respondent company was illegal and void and sought for an investigation by the Central Bureau of Investigation and also for other consequential reliefs. The Gujarat High Court after hearing all the parties at length and, after elaborately considering the materials on record, framed the following questions :

"(i) Whether the report of the CAG by itself can legally be made the basis for the reliefs claimed in the petition?

(ii) Whether the decision of the State Government to develop an international finance service city on the basis of a public private partnership model with a social objective could be termed as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the sole object of equality clause embodied in Article 14 of the Constitution of India?

(iii) Whether the petition deserves to be dismissed on the ground of delay and laches?

6. The Gujarat High Court felt, though the Writ Petition could have been dismissed on the ground of delay, the Court still examined all the contentions raised by the parties and recorded a clear finding on all the iss rt

placed reliance on the judgment of this Court in *Arun Kumar Agrawal v. Union of India & others* (2013) 7 SCC 1 and held that having regard to the powers conferred on the CAG, CAG is not entitled to question the merits of the policy objectives of the State Government. The Court also held that it cannot be said that the State Government had given largesse to an individual according to its sweet will and whims and took the view that the Government took a conscious commercial decision after perusing the pros and cons of the entire matter and that the action of the respondent was not based on extraneous considerations or vitiated by malafide exercise of powers. Holding so, the writ petition was dismissed by the impugned order, against which this special leave petition has been preferred.

7. We heard Shri Y.N. Oza, learned counsel for the petitioner and perused the records, as well as counter affidavit and reply affidavit filed by the parties before the Gujarat High Court. The entire case of the petitioner is based on the CAG report. The applicability and the binding characteristics of such report were considered by the High Court. In *Arun Agrawal's* case (supra), this Court held as follows:-

> "We may, however, pointed out that since the report is from a constitutional functionary, it commands respect and cannot be brushed aside as such, but it is equally important to examine the comments what respective Ministries have to offer on the CAG's Report. The Ministry can always point out, if there is any mistake in the CAG's report or the CAG has inappropriately appreciated the various issues."

8. CAG is a key figure in the system of parliamentary control of finance and is empowered to delve into the economy, efficiency and effectiveness with which the departmental authorities or other bodies had used their resources in discharging their functions. CAG is also the final audit authority and is a part of the machinery through which the legislature

enforces the regulatory and economy in the administration of public finance, as has been rightly pointed out by the High Court. But we cannot lose sight of the fact that it is the Government which administers and runs the State, which is accountable to the people. State's welfare, progress, requirements and needs of the people are better answered by the State, also as to how the resources are to be utilized for achieving various objectives. If every decision taken by the State is tested by a microscopic and a suspicious eye, the administration will come to stand still and the decisions-makers will lose all their initiative and enthusiasm. At hindsight, it is easy to comment upon or criticize the action of the decision maker. Sometimes, decisions taken by the State or its administrative authorities may go wrong and sometimes it may achieve the desired results. Criticisms are always welcome in a Parliamentary democracy, but a decision taken in good faith, with good intentions, without any extraneous considerations, cannot belittled, even if that decision was ultimately proved to be wrong.

9. We have extensively referred to these principles in *Arun Agrawal's* case (supra), where we have held as follows:-

> "This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that [illegible]y

proved to be wrong, that itself is not a ground to hold that the decision was mala fide or taken with ulterior motives."

10. Reference in this regard may also be made to the judgment of this Court in *Centre for Public Interest Litigation & Ors. v. Union of India & Ors.* AIR 2012 SC 3725, wherein it was held that when the CAG report is subject to scrutiny by the Public Accounts Committee and the Joint Parliamentary Committee, it would not be proper to refer the findings and conclusions contained therein. The Court even went on to say that it is not necessary to advert to the reasoning and suggestions made, as well.

11. We have gone through the salient features of the Project referred to in the various orders passed by the State Government and the resolutions dated 22.3.2011 and 7.6.2011 allotting lands to fourth respondent and also the notification dated 18.8.2011 issued under the Special Economic Zones Act, 2005, and we are in agreement with the High Court that it cannot be said that the State has acted against public interest. The Government has noticed the development and the employment opportunities that the project would bring into the State. The decision taken by the Government was also transparent and that the Government has also got substantial stake in the Public-Private Partnership and has also taken care of its interests while entering into the various agreements. Learned senior counsel fairly submitted that he is not attributing any motives or stating that the decision was taken for extraneous reasons, but contended that the Government had, without any application of mind, parted with a large tracks of land worth crores of rupees to the private party, which is not in the interest of the State.

12. We are of the view that these are purely policy decisions taken by the State Government and, while so, it has examined the benefits the project would bring into the State and to the people of the State. It is well settled that non-floating of tenders or absence of public auction or invitation alone is not

a sufficient reason to characterize the action of a public authority as either arbitrary or unreasonable or amounted to *mala fide* or improper exercise of power. The Courts have always held that it is open to the State and the authorities to take economic and management decision depending upon the exigencies of a situation guided by appropriate financial policy notified in public interest. We are of the view that is what has been done in the instant case and the High Court has rightly held so. We, therefore, find no reason to entertain this Special Leave Petition and the same is dismissed.

RP SLP dismissed.

ASHOK KUMAR AGGARWAL
v.
NEERAJ KUMAR & ANR.
(Criminal Appeal No. 1839 of 2013)

NOVEMBER 22, 2013

[DR. B.S. CHAUHAN AND S.A. BOBDE, JJ.]

Contempt of Court:

Contempt proceedings – Held: Proceedings of contempt are quasi criminal in nature and the burden and standard of proof required is the same as in criminal cases — Charges have to be proved beyond reasonable doubt and alleged contemnor becomes entitled to the benefit of doubt as it would be very hazardous to impose sentence in contempt proceedings on some probabilities.

Contempt petition — Filed under Art. 215 of the Constitution – On the allegation of suppression of facts by respondents before Special Judge dealing with bail application of contempt-petitioner – Held: Power under Art. 215 of the Constitution can be exercised only in accordance with the procedure prescribed by law — High Court was required to examine as to whether proper procedure was adopted in bringing the petition under Art. 215 of the Constitution and as to whether the limitation as prescribed u/s 20 of the 1971 Act was attracted in the case — High Court did not advert to any of such issue of paramount importance — More so, no reasoning has been given to reach a conclusion that no deliberate attempt was made by respondents to cause any prejudice to appellant — As both the parties had raised issues on facts as well as on law, High Court ought to have dealt with the case adverting to all relevant issues, particularly, when appellant had made an allegation that his liberty had been jeopardised by

respondents by interfering with the course of justice by misleading the court — Judgment and order impugned is set aside and the case remitted to the High Court to decide it afresh answering all the factual and legal issues raised by the parties – Contempt of Courts Act, 1971 – s.20 – Constitution of India, 1950 – Art.215.

In a case registered against unknown officers of the Enforcement Directorate, alleging false implication of suspects under the Foreign Exchange Regulation Act, 1973, a look out notice through the Interpol was issued against the appellant, who was a Deputy Director, Enforcement, and was absconding. The appellant was arrested on 23.12.1999 in India from a hotel where he was staying under a fictitious name. During the course of proceedings, the Special Judge was shown a document purported to have been emanated from the Interpol Singapore on 29.12.1999 on the basis whereof the respondents-officers argued that the appellant had been in Singapore from 10.2.1999 to 14.2.1999 though his passport which had been impounded did not contain any such stamp and, therefore, he was possessing and using a forged passport with the same number. The Special Judge accepted the submissions and, by order dated 6.1.2000, rejected the application of the appellant for bail. Subsequently, a letter dated 7.1.2000 was received from Interpol Singapore that earlier communication dated 29.12.1999 was incorrect and the appellant did not enter Singapore from 10.2.1999 to 14.2.1999. This fact was admitted by the investigating officer on 27.1.2000. On 29.1.2000, the appellant was granted bail. On 1.6.2001 the appellant filed an application u/s 340 read with s.195, CrPC before the Special Judge for taking action against the respondents for suppressing the material facts. The said application was dismissed by the Special Judge by order dated 5.2.2007. The appellant filed a criminal contempt petition which was disposed of [illegible]t

observing that the suppression or misrepresentation was not deliberate.

In the instant appeal, it was contended that the High Court could not have proceeded with the case under Article 215 of the Constitution ignoring the limitation prescribed under the Act 1971. More so, in a criminal case where two views are possible the court must decide in favour of the person proceeded against.

Disposing of the appeal, the Court

HELD: 1.1. The judgment and order dated 5.2.2007 of the Special Judge makes it crystal clear that he had given an elaborate judgment deciding two issues, namely, one relating to limitation u/s 20 of the Contempt of Courts Act, 1971 and, secondly, as to whether the suppression of material fact was intentional or motivated on the part of respondents and after hearing the matter, the Special Judge negated both the issues against the appellant holding that the application was barred by limitation as provided u/s 20 of the Act 1971, as cognizance could not be taken within one year of the date on which the contempt had been committed. On the second issue, a finding has been recorded that there was no suppression of material fact by the respondents intentionally and deliberately as there was no motive to obstruct the administration of justice or to interfere with due course of proceedings. [para 7] [467-E-H; 468-A]

1.2. The High Court, while dealing with the contempt petition under Art. 215 of the Constitution, has taken note of the facts of the case as well as of the respective submissions advanced by the counsel for the parties, *inter-alia*, the submissions advanced by the respondents in respect of maintainability of the petition and limitation etc. However, without adverting to any of the issues so

raised, the High Court abruptly came to the conclusion that the respondents did not intentionally suppress the material facts. [para 9] [468-E-F]

1.3. Proceedings of contempt are quasi criminal in nature and the burden and standard of proof required is the same as in criminal cases. Charges have to be proved beyond reasonable doubt and alleged contemnor becomes entitled to the benefit of doubt as it would be very hazardous to impose sentence in contempt proceedings on some probabilities. [para 11] [469-F-G]

Sahdeo alias Sahdeo Singh v. State of Uttar Pradesh & Ors., **2010 (2) SCR 1086 = (2010) 3 SCC 705 – relied on.**

2.1. Power under Art. 215 of the Constitution can be exercised only in accordance with the procedure prescribed by law. Therefore, the High Court was required to examine as to whether the proper procedure has been adopted in bringing the petition under Art. 215 of the Constitution and as to whether the limitation as prescribed u/s 20 of the Act 1971 was attracted in the case. The High Court did not advert to any of such issue of paramount importance. More so, no reasoning has been given to reach a conclusion that no deliberate attempt was made by the respondents to cause any prejudice to the appellant. [para 12-13] [469-H; 470-A-C]

Dr. L.P. Misra v. State of U.P., **AIR 1998 SC 3337;** *Three Cheers Entertainment Pvt. Ltd. & Ors. v. C.E.S.C. Ltd.*, **2008 (14) SCR 789 = AIR 2009 SC 735;** and *R.S. Sujatha v. State of Karnataka & Ors*. **2010 (14) SCR 227 = (2011) 5 SCC 689 – relied on.**

2.2. As both the parties had raised issues on facts as well as on law, the High Court ought to have dealt with the case adverting to all relevant issues, particularly, when the appellant had made an alle y

had been jeopardised by the respondents by interfering with the course of justice by misleading the court. The judgment and order impugned is set aside and the case remitted to the High Court to decide afresh answering all the factual and legal issues raised by the parties. [para 13-14] [470-C-E]

Pallav Sheth v. Custodian & Ors., **2001 (1) Suppl. SCR 387 = (2001) 7 SCC 549;** *Chhotu Ram v. Urvashi Gulati & Anr*., **(2001) 7 SCC 530;** *J.R. Parashar, Advocate & Ors. v. Prasant Bhushan, Advocate & Ors*. **2001 (2) Suppl. SCR 239 = (2001) 6 SCC 735;** and *Biman Bose v. State of W.B. & Ors.,* **(2004) 13 SCC 95 – cited.**

Case Law Reference:

2001 (1) Suppl. SCR 387	**cited**	**Para 10**
(2001) 7 SCC 530	**cited**	**Para 10**
2001 (2) Suppl. SCR 239	**cited**	**Para 10**
(2004) 13 SCC 95	**cited**	**Para 10**
2010 (2) SCR 1086 227	**relied on**	**para 11**
AIR 1998 SC 3337 227	**relied on**	**para 12**
2008 (14) SCR 789 227	**relied on**	**para 12**
2010 (14) SCR 227	**relied on**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1839 of 2013.

From the Judgment and Order dated 30.07.2007 of the High Court of Delhi at New Delhi in Contempt Case (Criminal) No. 8 of 2007

M.P. Jha for the Appellant.

Nikhil Nayyar for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and final order dated 30.07.2007 passed by the High Court of Delhi at New Delhi in Contempt Case (Criminal) No. 8 of 2007 rejecting the said application filed by the appellant.

2. Facts and circumstances as stated by the parties, giving rise to this appeal are that:

A. The appellant had been working as Deputy Director, Enforcement of Delhi Zone under the Directorate of Enforcement from 6.11.1996, and in that capacity, he conducted raids on various suspects under the provisions of Foreign Exchange Regulation Act (FERA), 1973 including one S.C. Barjatya, an alleged Hawala operator, as he had received an information that an amount of US$ 1.5 lakhs had been transferred from the account of Royalle Foundation in Swiss Bank Corporation, Zurich to the account of one S.K. Kapoor in HSBC Bank, Hong Kong. Subsequently, the said Shri S.C. Barjatya filed a complaint that the above transaction is forged and he is being falsely implicated. In view thereof, case No. RC S18/E0001/1999 was registered on 29.1.1999 against unknown officers of the Enforcement Directorate (hereinafter referred to as 'ED') and while enquiring into this complaint, the statements of various other persons were recorded. Passport of the appellant was seized on 4.3.1999. The statement of one Abhishek Verma was recorded under Section 161 of Code of Criminal Procedure, 1973, (hereinafter referred to as 'Cr.P.C.'), who had been arrested in that case. He was later enlarged on bail by the court and his statement under Section 164 Cr.P.C. was recorded, wherein he had stated that the appellant had been threatening him and extorting money from him while seeking information in respect of dealings in foreign exchange.

B. A look out notice was issued against the appellant through the Interpol as he was abscond s

arrested on 23.12.1999 from Saharanpur where he was staying in a hotel under a fictitious name. The appellant was remanded to police custody for 5 days in the first instance, which was later extended to another 2 days till 31.12.1999. During the police custody, the appellant alleged to have been physically abused and humiliated.

C. The appellant moved a bail application on 24.12.1999 which came for hearing on 3.1.2000 and 4.1.2000. During the course of proceedings, the learned Special Judge was shown a document purported to have been emanated from the Interpol Singapore on 29.12.1999 and sent to Interpol New Delhi in response to a requisition sent by Central Bureau of Investigation (hereinafter referred to as the 'CBI') through the Interpol Delhi on 16.12.1999. On the basis of the said information received from Interpol Singapore, the respondents- officers argued that the appellant had been in Singapore from 10.2.1999 to 14.2.1999 and though his passport which had been impounded did not contain any such stamp, and therefore he was possessing and using a forged passport with the same number. The Special Judge accepted the submissions and rejected the application of the appellant for bail vide order dated 6.1.2000.

D. The respondents had been seeking more information from the Interpol Singapore and in response to the same, a reply dated 7.1.2000 was received that earlier communication dated 29.12.1999 was incorrect and the appellant did not enter into Singapore on the aforesaid dates i.e. 10.2.1999 to 14.2.1999. The said information dated 7.1.2000 was further confirmed by Interpol Singapore vide letter dated 12.1.2000.

In further correspondence, the **Interpol Singapore admitted its mistake vide communication dated 12.1.2000.**

E. Respondent No. 2 filed a remand application dated 13.1.2000 seeking further judicial custody of the appellant for 14 days. **In that application also, it was not disclosed that the respondents had received** a communication from Interpol

Singapore that **earlier communication** informing about the appellant **being in Singapore was not correct**. The respondents **continued to withhold the said information and did not** bring it to the notice of the court. Even in a bail application filed by the appellant on 25.1.2000, claims were made that the appellant had not gone to Singapore on the aforesaid dates. Reply to the said application was filed by the CBI on 27.1.2000 denying the said facts without bringing the real facts to the knowledge of the court. It was only on 27.1.2000 when the appellant's counsel insisted that the appellant had not gone to Singapore in February 1999 that the respondent no. 2, the investigating officer, admitted that the appellant did not visit Singapore on the dates as alleged earlier and the investigating agency had subsequently received information from Interpol Singapore that the information furnished earlier was not factually correct. After taking into consideration the above fact, the appellant was granted bail wherein all the aforesaid facts had been incorporated in the bail order dated 29.1.2000.

F. As per the appellant, on 26.7.2000, in another case before the Central Administrative Tribunal, he came to know about the subsequent communication sent by Interpol Singapore in this respect and thus, the appellant filed a Criminal Writ Petition No. 600 of 2001 before the High Court of Delhi to take action against the respondents which was disposed of vide order dated 28.5.2001 observing that the appellant may seek relief before the court of Special Judge where, according to the appellant, the CBI had misrepresented or concealed the correct information. Thus, in view of the observations made by the High Court, the appellant filed an application under **Section 340 read with Section 195 Cr.P.C**. on 1.6.2001 before the Special Judge for taking action against the respondents for suppressing the material facts. However, the said application was dismissed by the Special Judge vide order dated 14.2.2002.

G. Aggrieved, the appellant took [illegible] h

Court by filing an Appeal No. 199 of 2002. The High Court disposed of the said appeal vide judgment and order dated 16.12.2005 remanding the matter to the Special Judge to hear the parties on the application dated 1.6.2001 only on the issue of initiation of contempt proceedings and to answer the same in accordance with law. In view thereof, the Special Judge heard the said application and dismissed the same vide order dated 5.2.2007.

H. Aggrieved, the appellant filed Criminal Contempt Petition No. 8 of 2007 on 16.5.2007 before the High Court of Delhi under **Article 215** of the Constitution read with the provisions of the Contempt of Courts Act, 1971 (hereinafter referred to as the 'Act 1971'). On receiving notice in the said case, the respondents filed reply.

I. The High Court disposed of the said petition after hearing the parties vide impugned judgment and order dated 30.7.2007 observing that the suppression or misrepresentation was not deliberate.

Hence, this appeal.

3. Shri Ram Jethmalani, learned senior counsel appearing on behalf of the appellant has submitted that the respondents had been fully aware, after receiving the communication from Interpol Singapore, that information furnished to them earlier by the said Singapore authorities was not factually correct. In spite of the fact that the matter had been listed time and again before learned Special Judge, such information was withheld and being under the same impression that the appellant had travelled to Singapore, his judicial custody was extended. Even in the application filed by the respondents for remand for a further period, such a material fact had not been disclosed. It was only at a much later stage when the appellant had already suffered unwarranted judicial custody and the counsel for the appellant had been insisting that appellant did not visit Singapore between 10.2.1999 and 14.2.1999, the Investigating

Officer/Respondent no.2 revealed that they have received information from the Interpol Singapore on 7.1.2000 that the version of the appellant was correct. Therefore, the appellant had been subjected to humiliation, insult and remained in judicial custody for a long time. Even the remand application dated 13.1.2000 was filed without disclosing such a fact. The appellant could be bailed out only on 29.1.2000 after remaining in jail for 36 days. It was the solemn duty of the investigating officer not to suppress the material fact from the court and the appellant would not have to face 36 days judicial custody in jail. The appellant had been approaching the authorities and courts time and again, however, could not get any relief from any authority or court. The application of contempt filed earlier was rejected by the Special Court. When the appellant approached the High Court by filing a criminal writ petition, the case was remanded to the Special Court on a particular issue. After remand, the case was considered and the same was also dismissed by the Special Judge. The High Court while dealing with the case under Article 215 of the Constitution, without giving any reason whatsoever, recorded a findings of fact that there was no deliberate attempt to cause any prejudice to the appellant. Hence, a finding not based on any reasoning or substantiated by any evidence, is not a judgment-in-fact. Therefore, the appeal deserves to be allowed.

4. Shri Ranjit Kumar, learned senior counsel appearing on behalf of both the respondents, has vehemently opposed the appeal raising a large number of issues, *inter-alia,* issue of limitation, jurisdiction of the court to entertain the contempt application; and referred to a large number of judgments to submit that the findings of fact recorded by the High Court that there was no deliberate attempt to cause any prejudice to the appellant was correct. Respondents had been working with all sincerity and their work has always been appreciated and a large number of certificates to that extent had been issued to them. Therefore, the appeal is liable to be dismissed.

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

6. There is no dispute on the factual matrix of the case. The appellant had been arrested on the suspicion that he was having two passports and on the strength of one of them, he had visited Singapore between 10.2.1999 and 14.2.1999 and such a fact had been affirmed by the Interpol Singapore on queries from the Indian authorities. However, on 7.1.2000, the Interpol Singapore by a Memo dated 7.1.2000 informed the Indian investigating agency that the information furnished by them earlier was factually incorrect and the appellant had not visited Singapore between 10.2.1999 and 14.2.1999. Subsequent thereto, the appellant filed a Criminal Writ Petition No. 600 of 2001 before the Delhi High Court; a case before the Special Judge, an appeal before the High Court and again the matter had been agitated before the Special Judge. After loosing the battle, the appellant approached the High Court under Article 215 of the Constitution. The appellant was arrested on 23.12.1999 and was released on bail on 24.1.2000, thus, he remained in jail for 36 days.

7. It is also on record that the Singapore authorities had apologized for furnishing wrong information by them. The judgment and order dated 5.2.2007 of the learned Special Judge makes it crystal clear that the learned Special Judge had given an elaborate judgment deciding two issues, namely, one relating to limitation under Section 20 of the Act 1971 and, secondly, as to whether the suppression of material fact was intentional or motivated on the part of respondents and after hearing the matter, the learned Special Judge negated both the issues against the appellant holding that the application was barred by limitation as provided under Section 20 of the Act 1971 as cognizance could not be taken after one year of the date on which the contempt had been committed. On the second issue, a finding has been recorded that there was no suppression of material fact by the respondents intentionally and deliberately as there was no motive to obstruct the

administration of justice or to interfere with due course of proceedings.

8. Earlier before the appellate court in Criminal Appeal No. 199 of 2002, the same issues had been agitated and the matter was remanded to the learned Special Court to decide the specific issue so far as it relates to the initiation of contempt proceedings vide its judgment and order dated 16.12.2005. Even the order dated 29.1.2000 makes it evident that the first bail application of the appellant was rejected on 6.1.2000 considering the issues raised by the investigating agency, particularly the Interpol message suggesting that the appellant had visited Singapore on his passport no. S-243227 and remained there from 10.2.1999 to 14.2.1999, whereas the passport impounded by the CBI during the investigation did not show any entry relating to his aforesaid travel to Singapore. However, on 27.1.2000, the investigating officer admitted before the said court that a message was received from Interpol Singapore to the effect that the appellant did not visit Singapore from 10.2.1999 to 14.2.1999.

9. The High Court while dealing with the contempt petition under Article 215 of the Constitution has taken note of the facts referred to hereinabove as well as of the respective submissions advanced by the learned counsel for the parties, *inter-alia*, the submissions advanced by the respondents in respect of maintainability of the petition and limitation etc. However, without adverting to any of the issues so raised, the court abruptly came to the conclusion that the respondents did not intentionally suppress the material facts. The relevant part of the judgment reads as under:

> *"We find that although information was available with the CBI that the petitioner had not visited Singapore prior to 13.1.2000* ***yet there appears to be no deliberate attempt to cause any prejudice to the petitioner****. The application for bail which came up before the Court was supported by an affidavit setting*

petitioner had not visited Singapore during the period when his passport was with the CBI which fact was duly confirmed by the public prosecutor. In that view of the matter, we are of the opinion that there was no deliberate concealment of material to the prejudice of the petitioner. The petition is, therefore, dismissed." (Emphasis added)

10. The respondents before this Court had also adverted to the issue of the procedure adopted by the appellant moving the Trial Court as well as the High Court in contempt matter and the procedure adopted by those Courts and also to the issue of limitation. It is submitted that the High Court could not have proceeded with the case under Article 215 of the Constitution ignoring the limitation prescribed under the Act 1971. More so, in a criminal case where two views are possible the court must decide in favour of the person proceeded against. In order to fortify his submissions, Shri Ranjit Kumar, learned senior counsel placed reliance on the judgments in *Pallav Sheth v. Custodian & Ors.,* (2001) 7 SCC 549; *Chhotu Ram v. Urvashi Gulati & Anr.,* (2001) 7 SCC 530; *J.R. Parashar, Advocate & Ors. v. Prasant Bhushan, Advocate & Ors.,* (2001) 6 SCC 735; and *Biman Bose v. State of W.B. & Ors.,* (2004) 13 SCC 95.

11. This Court in *Sahdeo alias Sahdeo Singh v. State of Uttar Pradesh & Ors.,* (2010) 3 SCC 705, after placing reliance on a large number of earlier judgments of this Court, held that proceedings of contempt are quasi criminal in nature and the burden and standard of proof required is the same as in criminal cases. Charges have to be proved beyond reasonable doubt and alleged contemnor becomes entitled to the benefit of doubt as it would be very hazardous to impose sentence in contempt proceedings on some probabilities.

12. In *Dr. L.P. Misra v. State of U.P.,* AIR 1998 SC 3337; *Three Cheers Entertainment Pvt. Ltd. & Ors. v. C.E.S.C. Ltd.,* AIR 2009 SC 735; and *R.S. Sujatha v. State of Karnataka & Ors.,* (2011) 5 SCC 689, this Court held that the power under

Article 215 of the Constitution can be exercised only in accordance with the **procedure prescribed by law**.

13. In view of the above, the High Court was required to examine as to whether the proper procedure has been adopted in bringing the petition under Article 215 of the Constitution and as to whether the limitation as prescribed under Section 20 of the Act 1971 was attracted in the case. The High Court did not advert to any of such issue of paramount importance. More so, no reasoning has been given to reach a conclusion that no deliberate attempt was made by the respondents to cause any prejudice to the appellant.

Thus, we are of the considered opinion that as both the parties had raised issues on facts as well as on law, the High Court ought to have dealt with the case adverting to all relevant issues, particularly when the appellant had made an allegation that his liberty had been jeopardised by the respondents by interfering with the course of justice by misleading the court.

14. As a result, we set aside the judgment and order impugned and remit the case to the High Court to decide afresh answering all the factual and legal issues raised by the parties.

The appeal stands disposed of accordingly.

R.P. Appeal disposed of.

MANOHARAN

v.

SIVARAJAN & ORS.

(Civil Appeal No.10581 of 2013)

NOVEMBER 25, 2013

[SUDHANSU JYOTI MUKHOPADHAYA AND V. GOPALA GOWDA, JJ.]

Code of Civil Procedure, 1908:

s.149 – Deficiency in court fee – Suit — Application by plaintiff-appellant for extension of time to pay balance court fee – Rejected by trial court – High Court rejecting appellant's application for condonation of delay in filing regular first appeal – Held: s.149 prescribes a discretionary power which empowers the court to allow a party to make up the deficiency of court fee payable on plaint etc. — It is also a usual practice that court provides an opportunity to the party to pay court fee within a stipulated time – Further, subject to submission of an affidavit by appellant of his income, court fee could have been waived or provided by District Legal Services Authority – Appellant deserved waiver of court fee so that he could contest his claim on merits which involved his substantive right — Trial court erred in rejecting the case of appellant due to non-payment of court fee – Delay in filing regular first appeal, having been explained, High Court erred in rejecting the application for condonation of delay in filing the appeal – Judgments and decrees of trial court and High Court, set aside – Delay by appellant in payment of court fee is condoned – Case remanded to trial court for payment of court fee – Liberty given to appellant to approach District Legal Service Authority/Taluk Legal Service Committee for grant of legal aid for sanction of court fee – Trial court shall adjudicate on rights of parties on merits – Legal Services Authorities Act,

1987 – s.12(h) – Kerala State Legal Services Authorities Rules, 1998 – r.12 – Constitution of India, 1950 – Arts. 39-A r/w Art.21— Social justice – Court fee.

Constitution of India, 1950:

Art.39-A – Equal justice and free legal aid – Application of plaintiff for extension of time to pay balance court fee, rejected by trial court – Held: Art. 39A is equally applicable to district judiciary — It is the duty of courts to see that justice is meted out to people irrespective of their socio economic and cultural rights or gender identity – Art. 39A provides for holistic approach in imparting justice to litigating parties — It not only includes providing free legal aid via appointment of counsel for the litigants, but also includes ensuring that justice is not denied to litigating parties due to financial difficulties – Social justice.

The appellant filed a suit with the averments that he had obtained a loan of Rs.2,20,000/- from respondent no. 1 and executed a sale deed with respect to the land in question in favour of respondent no. 1, who in turn executed an agreement of re-conveyance deed in favour of the appellant in respect of the said property; that respondent no. 1 instead of issuing a deed of re-conveyance, sold the property to respondents nos. 2 and 3. The appellant, therefore, sought a decree for mandatory injunction, for declaring the sale deed executed by respondent no. 1 in favour of respondents nos. 2 and 3 as null and void and for execution of reconveyance deed in his favour. The suit was valued at Rs.3,03,967 and the court fee was assessed as Rs. 28,797/-. The appellant paid 1/10th of the court fee. However, the application of the appellant for extension of time to pay the balance court fee was rejected by the trial court. The appellant filed a regular first appeal with an application for condonation of delay in filing the appeal. The High Court rejected r

condonation of delay.

In the instant appeal filed by the plaintiff, the points that arose for consideration were: (i) Whether the Sub-Judge was justified in rejecting the suit for non- payment of court fee? (ii) Was the appellant entitled to condonation of delay for non- payment of court fee before the Sub-Judge? (iii) Whether the High Court was right in rejecting the application for condonation of delay in filing the regular first appeal by the appellant? and (iv) What Order?

Allowing the appeal, the Court

HELD:

Point no. 1

1.1. Section 149 of the Code of Civil Procedure, 1908 prescribes a discretionary power which empowers the court to allow a party to make up the deficiency of court fee payable on plaint, appeals, applications, review of judgment etc. This Section also empowers the court to retrospectively validate insufficiency of stamp duties etc. It is also a usual practice that the court provides an opportunity to the party to pay court fee within a stipulated time on failure of which the court dismisses the appeal. [para 8] [479-A-C]

1.2. In the instant case, it is the claim of the appellant that he was unable to pay the requisite amount of court fee due to financial constraints. It is the usual practice of the court to use this discretion in favour of the litigating parties unless there are manifest grounds of mala fide. However, no opportunity was given by the Sub-Judge for payment of court fee by the appellant. Therefore, the decision of the Sub-Judge is wrong and is liable to be set aside and is, accordingly, set aside. [para 8] [479-C-D, E-F]

Point No.2

2.1 In *Kameshwar Prasad Singh*'s case, this Court has held that power to condone the delay in approaching the court has been conferred upon the courts to enable them to do substantial justice to parties by disposing the cases on merits. In the case in hand, the appellant had moved the court claiming his substantive right to his property. The original suit filed by him did not deserve the dismissal for non- payment of court fee. He rather deserved more compassionate attention from the court of Sub-Judge in the light of the directive principle laid down in Art. 39A of the Constitution of India which is equally applicable to district judiciary. It is the duty of the courts to see that justice is meted out to people irrespective of their socio economic and cultural rights or gender identity. [para 9-10] [479-F-G; 483-F-G]

State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr. **2000 (3) SCR 764 = (2000) 9 SCC 94 – relied on.**

2.2. Further, s.12(h) of the Legal Services Authorities Act, 1987 provides that every person enumerated therein who has to file or defend a case, shall be entitled to legal services under the Act. Rule 12 of the Kerala State Legal Services Authorities Rules, 1998 states that any person whose annual income from all sources does not exceed Rupees Twelve Thousand shall be entitled to legal services under clause (h) of s. 12 of the Act. Therefore, subject to the submission of an affidavit by the appellant of his income, the court fee could have been waive or provided by the District Legal Services Authority, instead of rejection of the suit. [para 11] [483-H; 484-A, C-E]

2.3. Art. 39A provides for holistic approach in imparting justice to the litigating parties. It not only includes providing free legal aid via appointment of counsel for the litigants, but also in

justice is not denied to litigating parties due to financial difficulties. [para 13] [485-D-E]

State of Maharashtra V. Manubhai Pragaji Vashi and Others **1995 (2) Suppl. SCR 733 = (1995) 5 SCC 730 – referred to.**

2.4. Therefore, in the light of the legal principle laid down by this Court, the appellant deserved waiver of court fee so that he could contest his claim on merits which involved his substantive right. The Sub-Judge erred in rejecting the case of the appellant due to non-payment of court fee. The findings and the decision of the Sub-Judge is set aside and the delay by the appellant in payment of court fee which resulted in rejection of his suit is condoned. [para 13] [485-E-G]

Point No. 3

3.1. The High Court's opinion that the appellant has not given any ground for delay in filing the regular first appeal is not sustainable since the appellant has categorically claimed that he was not aware of the rejection of the suit of the appellant for delayed payment of court fee by the sub Judge, and has explained the delay. There is no reason in rejecting the application filed by the appellant for condonation of delay in filing the appeal before the High Court. [para 6, 16] [478-D-E; 487-E]

Muneesh Devi v. U.P. Power Corporation Ltd. and Ors. **2013 (9) SCALE 640 – referred to.**

Point No. 4

4. The judgments and decree of both the trial court and the High Court are set aside and the case is remanded to the trial court for payment of court fee. If for any reason, it is not possible for the appellant to pay the court fee, he is at liberty to approach the jurisdictional District Legal Service Authority and Taluk Legal Services

Committee for grant of legal aid for sanction of court fee amount payable on the suit before the trial court. If such application is filed, the same shall be considered so as to get the right of the appellant adjudicated by the trial court by securing equal justice as provided under Art. 39A of the Constitution of India read with the provision of s.12(h) of the Legal Services Authorities Act and Kerala State Legal Services Authorities Rules. The trial court shall adjudicate on the rights of the parties on merits and dispose of the matter expeditiously. [para 18] [488-A-D]

Case Law Reference:

2013 (9) SCALE 640	**para 9**
1995 (2) Suppl. SCR 733	**para 12**
2000 (3) SCR 764	**para 14**

CIVIL APPELLATE JURISDICTIN : Civil Appeal No. 10581 of 2013.

From the Judgment and order dated 21.03.2012 of the High Court of Kerala at Ernakulam in RFA No 678 of 2011

Basanth R., M. Gireesh Kumar, Sriram P., Vijay Kumar for the Appellant.

Dr. K.P. Kylasanatha Pillay, Dilip Pillai, B. V. Deepak, Asha Joseph, Giffara S., P. A. Noor Muhamed for the respondents.

The Judgment of the Court was delivered by

V. GOPALA GOWDA J. 1. Leave granted.

2. This appeal is filed by the appellant questioning the correctness of the judgment and final Order dated 21.03.2012 passed by the High Court of Kerala at Ernakulam in RFA No. 678 of 2011 urging various facts and legal contentions in justification of his claim.

3.Necessary relevant facts are

appreciate the case of the appellant and also to find out whether the appellant is entitled for the relief as prayed in this appeal.

The appellant approached the respondent no. 1 - a money lender, for a loan of 2,20,000/-. The respondent no. 1 agreed to give him the loan in return of execution of a sale deed with respect to 3 cents of land in re-survey No. 111/13-1 in Block No. 12 of Maranalloor village by the appellant in his favour. It was agreed upon between the parties that the respondent no. 1 will reconvey the property in favour of the appellant on repayment of the loan. The appellant accordingly executed sale deed No. 575 of 2001 at sub Registrar's office at Ooruttambalam with respect to 3 cents of land in Re-survey No.111/13-1 in Block no.12 of Maranalloor village in favour of respondent no.1. The respondent no. 1 executed an agreement of re-conveyance deed in favour of the appellant regarding the above mentioned property on the same day.

4. The learned senior counsel, Mr. Basanth R. appearing on behalf of the appellant argued that the appellant approached the respondent no.1 several times with money for re-conveying the property in favour of the appellant as was agreed upon between them but the respondent no. 1 evaded from doing so.

5. It is also the case of the appellant that respondent no.1, instead of issuing a deed of re-conveyance, sold the property to Respondent nos. 2 and 3 without the knowledge of the appellant. The appellant sent a legal notice to the respondent no.1 requesting him to appear before the sub Registrar's office for the execution of re-conveyance deed regarding the plaint schedule property to which the respondent no. 1 did not oblige. The appellant then filed a suit being OS No. 141/2007 before the Court of sub Judge, Neyyattinkara for mandatory injunction, for declaration of the sale deed executed by Respondent no.1 in favour of Respondent nos. 2 and 3 as null and void, for execution of re-conveyance deed in his favour and also for consequential reliefs. The suit was valued at 3,03,967/- and the court fee was valued at 28,797/-. The appellant paid 1/10th of

the court fee i.e., 2880/- at the time of filing the suit. The Court of sub Judge, Neyyattinkara granted injunction in favour of the appellant restraining the respondents from carrying out new construction activities including the parts of the plaint schedule property until further orders.

6. The court of sub Judge, Neyyattinkara heard the application for extension of time sought by the appellant for paying the balance court fee. However, the application was rejected and the file was closed by the learned sub Judge. The appellant then filed Regular First Appeal No. 678 of 2011 along with an application for condonation of delay in filing the appeal. The High Court dismissed the application for condonation of delay on the ground that the delay in filing the appeal was not explained by the appellant and consequently, dismissed the Regular First Appeal filed by the appellant. The High Court's opinion that the appellant has not given any ground for delay in filing the Regular First Appeal is not sustainable since the appellant has categorically claimed that he was not aware of the rejection of the suit of the appellant for delayed payment of court fee by the learned sub Judge.

7. In the light of the facts and circumstances of the case, the following points would arise for our consideration:

1. Whether the learned sub Judge was justified in rejecting the suit for non- payment of court fee?
2. Was the appellant entitled to condonation of delay for non- payment of court fee by the learned sub Judge?
3. Whether the High Court was right in rejecting the application for condonation of delay filed by the appellant against the decision of the learned sub judge who rejected the suit of the appellant for non-payment of court fee?
4. What Order?

Answer to Point no. 1

8. Section 149 of the Civil Procedure Code prescribes a discretionary power which empowers the Court to allow a party to make up the deficiency of court fee payable on plaint, appeals, applications, review of judgment etc. This Section also empowers the Court to retrospectively validate insufficiency of stamp duties etc. It is also a usual practice that the Court provides an opportunity to the party to pay court fee within a stipulated time on failure of which the Court dismisses the appeal. In the present case, the appellant filed an application for extension of time for remitting the balance court fee which was rejected by the learned sub Judge. It is the claim of the appellant that he was unable to pay the requisite amount of court fee due to financial difficulties. It is the usual practice of the court to use this discretion in favour of the litigating parties unless there are manifest grounds of mala fide. The Court, while extending the time for or exempting from the payment of court fee, must ensure bona fide of such discretionary power. Concealment of material fact while filing application for extension of date for payment of court fee can be a ground for dismissal. However, in the present case, no opportunity was given by the learned sub Judge for payment of court fee by the appellant which he was unable to pay due to financial constraints. Hence, the decision of the learned sub Judge is wrong and is liable to be set aside and accordingly set aside.

Answer to Point no.2

9. In the case of *State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr.,*[1] it was held that power to condone the delay in approaching the Court has been conferred upon the Courts to enable them to do substantial justice to parties by disposing the cases on merit. The relevant paragraphs of the case read as under:

"11. Power to condone the delay in approaching the Court

1. (2000) 9 SCC 94.

has been conferred upon the Courts to enable them to do substantial justice to parties by disposing of matters on merits. This Court in *Collector, Land Acquisition, Anantnag v. Mst. Katiji* (1987)ILLJ 500 SC held that the expression 'sufficient cause' employed by the legislature in the Limitation Act is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice-that being the life purpose for the existence of the institution of Courts. It was further observed that a liberal approach is adopted on principle as it is realised that:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judicia[illegible]n account of its power to legalize [illegible]al

grounds but because it is capable of removing injustice and is expected to do so.

XXX XXX XXX

12. After referring to the various judgments reported in *New India Insurance Co. Ltd. v. Shanti Misra* [1976] 2 SCR 266, *Brij Inder Singh v. Kanshi Ram* (1918)ILR 45 P.C. 94, *Shakuntala Devi Jain v. Kuntal Kumari* [1969]1 SCR 1006, *Concord of India Insurance Co. Ltd. v. Nirmala Devi* [1979] 118 ITR 507(SC), *Lala Mata Din v. A. Narayanan* [1970] 2 SCR 90, *State of Kerala v. E.K. Kuriyipe* 1981 (Supp) SCC 72, *Milavi Devi v. Dina Nath* (1982)3 SCC 366a, *O.P. Kathpalia v. Lakhmir Singh* AIR 1984 SC 1744, *Collector, Land Acquisition v. Katiji* (1987) ILLJ 500 SC, *Prabha v. Ram Parkash Kalra* 1987 Supp(1)SCC 399, *G. Ramegowda, Major v. Sp. Land Acquisition Officer* [1988] 3 SCR 198, *Scheduled Caste Co-op. Land Owning Society Ltd. v. Union of India* AIR 1991 SC 730, *Binod Bihari Singh v. Union of India* AIR 1993 SC 1245, *Shakambari & Co. v. Union of India* AIR 1992 SC 2090, *Ram Kishan v. U.P. SRTC* 1994 Supp(2)SCC 507 and *Warlu v. Gangotribai* AIR 1994 SC 466, this Court in *State of Haryana v. Chandra Mani* 2002(143) ELT 249(SC) held ;

'……The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach injustice oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any

legal principles are involved for decision by the Courts or whether cases require adjustment and should authorize the officers to take a decision to give appropriate permission for settlement. In the event of decision to file the appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants.'

To the same effect is the judgment of this Court in *Special Tehsildar, Land Acquisition, Kerala v. K.V. Ayisumma* AIR 1996 SC 2750.

13. In *Nand Kishore v. State of Punjab* (1995)6 SCC 614 this Court under the peculiar circumstances of the case condoned the delay in approaching this Court of about 31 years. In *N. Balakrishnan v. M. Krishnamurthy* 2008(228)ELT 162(SC) this Court held that the purpose of Limitation Act was not to destroy the rights. It is founded on public policy fixing a life span for the legal remedy for the general welfare. The primary function of a Court is to adjudicate disputes between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. The object of providing legal remedy is to repair the damage caused by reason of legal injury. If the explanation given does not smack mala fides or is not shown to have been put forth as a part of a dilatory strategy, the Court must show utmost consideration to the suitor. In this context it was observed in 2008(228) ELT 162(SC) :

It is axiomatic that condonat

of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncontainable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammelled by the conclusion of the lower Court."

10. In the case in hand, it is clear from the evidence on record that the appellant could not pay court fee due to financial difficulty because of which his suit got rejected. It is also pertinent to note that the appellant had moved the Court claiming his substantive right to his property. The appellant faced with the situation like this, did not deserve the dismissal of the original suit by the Court for non- payment of court fee. He rather deserved more compassionate attention from the Court of sub Judge in the light of the directive principle laid down in Article 39A of the Constitution of India which is equally applicable to district judiciary. It is the duty of the courts to see that justice is meted out to people irrespective of their socio economic and cultural rights or gender identity.

11. Further, Section 12(h) of the Legal Services Authorities

Act, 1987 provides that every person who has to file or defend a case shall be entitled to legal services under this Act if that person is:

"in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court"

Further, Section 12 of the Kerala State Legal Services Authorities Rules, 1998 states that:

"12. Any person whose annual income from all sources does not exceed Rupees Twelve Thousand shall be entitled to legal services under clause (h) of Section 12 of the Act".

Therefore, subject to the submission of an affidavit of his income, the court fee of the appellant could have been waivered or provided by the District Legal Services Authority, instead of rejection of the suit.

12. Further, in the case of *State of Maharashtra V. Manubhai Pragaji Vashi and Others,*[2] it has been held that:

"17. ..... we have to consider the combined effect of Article 21 and Article 39A of the Constitution of India. The right to free legal aid and speedy trial are guaranteed fundamental rights under Article 21 of the Constitution. The preamble to the Constitution of India assures 'justice, social, economic and political'. Article 39A of the Constitution provides 'equal justice' and 'free legal aid'. The State shall secure that the operation of the legal system promotes justice. It means justice according to law.

2. (1995) 5 SCC 730

In a democratic polity, governed by rule of law, it should be the main concern of the State, to have a proper legal system. Article 39A mandates that the State shall provide free legal aid by *suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.* The principles contained in Article 39A are fundamental and cast a duty on the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunities and further mandates to provide free legal aid in any way-by legislation or otherwise, so that justice is not denied to any citizen by reason of economic or other disabilities. The crucial words are (the obligation of the State) to *provide free legal aid 'by suitable legislation or by schemes' of 'in any other way',* so that opportunities for securing justice are not denied to any citizen by reason of economic or *other disabilities.*(Emphasis supplied)……."

13. Further, Article 39A of the Constitution of India provides for holistic approach in imparting justice to the litigating parties. It not only includes providing free legal aid via appointment of counsel for the litigants, but also includes ensuring that justice is not denied to litigating parties due to financial difficulties. Therefore, in the light of the legal principle laid down by this Court, the appellant deserved waiver of court fee so that he could contest his claim on merit which involved his substantive right. The Court of sub Judge erred in rejecting the case of the appellant due to non- payment of court fee. Hence, we set aside the findings and the decision of the Court of sub Judge and condone the delay of the appellant in non-payment of court fee which resulted in rejection of his suit.

Answer to Point no. 3

14. Having answered Point nos. 1 and 2 in favour of the appellant, we are inclined to answer point no. 3 as well in his favour.

In the case of *Muneesh Devi v. U.P. Power Corporation Ltd. and Ors.,*[3] it was held as under:

"15. In the application filed by her for condonation of delay, the Appellant made copious references to the civil suit, the writ petition and the special leave petition filed by her and the fact that the complaint filed by her was admitted after considering the issue of limitation. She also pleaded that the cause for claiming compensation was continuing. The National Commission completely ignored the fact that the Appellant is not well educated and she had throughout relied upon the legal advice tendered to her. She first filed civil suit which, as mentioned above, was dismissed due to non payment of deficient court fees. She then filed writ petition before the High Court and special leave petition before this Court for issue of a mandamus to the Respondents to pay the amount of compensation, but did not succeed. It can reasonably be presumed that substantial time was consumed in availing these remedies. It was neither the pleaded case of Respondent No. 1 nor any material was produced before the National Commission to show that in pursuing remedies before the judicial forums, the Appellant had not acted bona fide. Therefore, it was an eminently fit case for exercise of power under Section 24-A(2) of the Act. Unfortunately, the National Commission rejected the Appellant's prayer for condonation of delay on a totally flimsy ground that she had not been able to substantiate the assertion about her having made representation to the Respondents for grant of compensation."

15. In the case in hand, the High Court, vide its impugned judgment dated 21.03.2012 held that the appellant has not provided sufficient grounds for delay in filing the appeal. This decision of the High Court is unsustainable in law. The appellant has categorically stated that he went to his advocate's office

3. 2013 (9) SCALE 640.

at Neyyattinkara on 24.05.2011 to enquire about the status of the suit. His advocate informed him that the learned sub Judge has rejected the suit on 11.8.2008 for non-payment of balance court fee. The advocate claimed that he has informed the same to the appellant through a postal card but the appellant claims that the same has not reached him and he was under the impression that his application for extension of time for payment of court fee will be allowed by the learned sub Judge. He further claimed that he had applied for procurement of the certified copy of the decision of the learned sub Judge on the same day.

16. The learned senior counsel Mr. K.P. Kylasantha Pillay, appearing on behalf of the respondents alleged that the appeal of the appellant before this court is based on wrong and frivolous grounds. The material produced by them in support of their contention is totally based on the merit of the case. Since, we are not deciding the merit of the case, the material produced by the respondents in support of their contention becomes irrelevant. We have condoned the delay in paying the court fee by the appellant while answering point nos. 1 and 2. We see no reason in rejecting the application filed by the appellant for condonation of delay in filing the appeal before the High Court as well.

17. In view of the aforesaid reasons, the impugned judgment passed by the High Court is not sustainable and is liable to be set aside as per the principle laid down by this Court in as much the High Court erred in rejecting the application for condonation of delay filed by the appellant. We accordingly, condone the delay in filing the appeal in the High Court as well.

Answer to Point no. 4

18. In view of the reasons assigned while answering point nos. 1,2 and 3 in favour of the appellant, the impugned judgment passed by the High Court is set aside and the application filed by the appellant for condonation of delay is allowed. Therefore, we allow the appeal by setting aside the

judgments and decree of both the trial court and the High Court and remand the case back to the trial court for payment of court fee within 8 weeks. If for any reason, it is not possible for the appellant to pay the court fee, in such event, he is at liberty to approach the jurisdictional district legal service authority and Taluk Legal Services Committee seeking for grant of legal aid for sanction of court fee amount payable on the suit before the trial court. If such application is filed, the same shall be considered by such committee and the same shall be facilitated to the appellant to get the right of the appellant adjudicated by the trial court by securing equal justice as provided under Article 39A of the Constitution of India read with the provision of Section 12(h) of the Legal Services Authorities Act read with Regulation of Kerala State. We further direct the trial court to adjudicate on the rights of the parties on merit and dispose of the matter as expeditiously as possible.

19. The appeal is allowed in terms of the observations and directions given as above to the trial court. There will be no order as to costs.

R.P. Appeal Allowed.

GOJER BROTHERS PRIVATE LIMITED
v.
THE STATE OF WEST BENGAL AND OTHERS
(Civil Appeal Nos. 10757-58 of 2013)

NOVEMBER 28, 2013

[G.S. SINGHVI AND C. NAGAPPAN, JJ.]

Land Acquisition Act, 1894:

s.5-A r/w s.4(1) and 6 – Non-compliance of s. 5-A – Effect of – Land in question acquired at the instance of school, after decree of eviction against school had been upheld by all courts including Supreme Court – Objections of land-owner summarily rejected – Writ petition dismissed by single Judge – Division Bench of High Court going into merits of objections and rejecting the same – Held: Non-consideration of objections filed u/s 5A(1) has resulted in denial of effective opportunity of hearing to appellant — The manner in which the Joint Secretary to the Government approved the recommendation made by Land Acquisition Collector favouring acquisition of the property is reflective of total non-application of mind by the competent authority — Division Bench of High Court by going into merits of objections raised by appellants, has substituted itself for Land Acquisition Collector which was clearly impermissible – Judgments of single Judge and Division Bench of High Court are set aside – Notification issued u/s 4(1) would be deemed to have lapsed with passage of time – Time allowed to Management to shift the school at alternate site, and further directions issued.

The appellant had leased the land in question to one 'KH', who set up a school thereon. The appellant filed a title suit for eviction of 'KH' on the ground of breach of condition of lease. During the pendency of the suit, 'KH' constituted a trust for running the school and handed

over the management of the school to the trust. The suit was decreed and the decree was consistently sustained by appellate courts including the Supreme Court. Thereafter, the management of the school approached the State Government for acquisition of the land in question. The State Government issued a notification dated 9.6.2005, u/s 4(1) of the Act. The appellant filed objections dated 22.6.2005 u/s 5A(1) of the Act. The Land Acquisition Collector recommended that the land be acquired for the purpose of school. The Joint Secretary to the State Government approved the recommendation and the State Government issued declaration u/s 6(1) of the Act. The appellant challenged the notification issued u/s 4(1) and the declaration issued u/s 6(1) in a writ petition on the grounds that neither the Land Acquisition Collector nor the State Government applied mind to the objections filed u/s 5A(1) and the exercise undertaken in terms of s.5A(2) read with s.6(1) was an eye wash. The Single Judge dismissed the writ petitions. The Division Bench of the High Court went into the merits of the objections and rejected the same.

Allowing the appeals, the Court

HELD: 1.1. The ambit and scope of s.5A of the Land Acquisition Act, 1894 has been considered by this Court in several judgments. If the report prepared by the Land Acquisition Collector in the instant case is scrutinized in the light of the principles laid down in the judgments of this Court, the Single Judge and the Division Bench of the High Court committed serious error by approving the acquisition proceedings ignoring that the report was prepared in clear violation of mandate of s.5A and the State Government mechanically accepted the report leading to the issuance of declaration u/s 6(1). In the original and supplementary objections filed by the appellant, it had claimed that the [illegible] of

acquisition was vitiated due to malafides and colourable exercise of power. The history of litigation between the parties was also cited by the appellant to substantiate its plea that the acquisition proceedings were initiated only after the management of the school lost legal battle up to this Court. It was also pleaded that the acquisition was meant to bye-pass the direction given by this Court to the management of the school to handover the possession of the school. The Land Acquisition Collector did not deal with any of the objections and summarily rejected the same as if compliance of s.5A(2) was an empty formality. The State Government also did not apply mind and mechanically approved the one line recommendation made by the Land Acquisition Collector. [para 17 and 22] [504-B; 512-D-H; 513-A]

Surinder Singh Brar and others v. Union of India and others **2012 (12) SCR 1077 =2013 (1) SCC 403;** *Raghbir Singh Sehrawat v. State of Haryana and others* **2011 (14) SCR 1113 = (2012) 1 SCC 792,** *Kamal Trading Private Limited v. State of West Bengal* **2011 (13) SCR 529 = (2012) 2 SCC 25,** *and Usha Stud and Agricultural Farms Private Limited and others v. State of Haryana and others* **(2013) 4 SCC 210** - referred to.

1.2. Non-consideration of the objections filed u/s 5A(1) has resulted in denial of effective opportunity of hearing to the appellant. The manner in which the Joint Secretary to the Government approved the recommendation made by the Land Acquisition Collector favouring acquisition of the property is reflective of total non-application of mind by the competent authority to the recommendation made by the Land Acquisition Collector and the report prepared by him. [para 23] [513-B-C]

1.3. What the Division Bench of the High Court has done is to substitute itself for the Land Acquisition Collector, examined the objections raised by the appellant

on merits and concluded that no prejudice has been caused on account of violation of the mandate of s.5A(2). This was clearly impermissible. Therefore, the impugned order cannot be sustained. The impugned order as also the one passed by the Single Judge in writ petition Nos. 1634 and 1931 of 2005 are set aside. [para 24-25] [513-C-E]

1.4. The notification issued u/s 4(1) of the Act would be deemed to have lapsed with the passage of time. [para 26] [513-F]

Padma Sundara Rao (Dead) and others v. State of Tamil Nadu **2002 (2) SCR 383 = (2002) 3 SCC 533 – followed.**

1.5. Keeping in view the fact that about 900 students are receiving education in the school, time allowed to the management to shift the school at alternate site and further directions are issued. [para 29] [514-C]

Case Law Reference:

2012 (12) SCR 1077	**referred to**	**Para 13**
2011 (13) SCR 529	**referred to**	**Para 17**
(2013) 4 SCC 210	**referred to**	**Para 17**
2002 (2) SCR 383	**followed**	**para 26**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 10757-58 of 2013.

From the Judgment and order dated 19.06.2013 of the High Court of Calcutta in APO No. 124 of 2012 in WP No. 1634 of 2005 and APO No. 126 of 2012 in WP No. 1931 of 2005.

Mukul Rohatgi, Indu Malhotra, Himanshu Shekhar, Abhijit Guhary for the Appellants.

Gopal Subramanium, Soumya Ghosh, Maitrayee Banerjee, Kunal Chatterji, Soumitra G. Chaudhuri, Shagun Matta, Mohit Paul for the Respondents.

The Judgment of the Court was delivered by

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

2. One of the questions which arises for consideration in these appeals filed against order dated 19.06.2013 passed by the Division Bench of the Calcutta High Court in A.P.O. No.126 of 2012 in Writ Petition No. 1931/2005 and A.P.O. No.124 of 2012 in Writ Petition No. 1634 of 2005 is whether the learned Single Judge and the Division Bench of the High Court had correctly appreciated the scope of Section 5A of the Land Acquisition Act, 1894 (for short, 'the Act') and rightly rejected the appellant's challenge to the acquisition of land measuring 20 cottahs.

3. A portion of the land purchased by the appellant on 20.07.1964 had been leased out on 26.5.1955 to Kuldeep Harbans Singh who set up a school, i.e., Central Model School. After five years of purchasing the land, the appellants filed Title Suit No. 100/69 for eviction of Kuldeep Harbans Singh on the ground of breach of the conditions of lease. During the pendency of the suit, Kuldeep Harbans Singh constituted Guru Nanak Education Trust (for short, 'the trust') for running the school and management of the school was handed over to the trust.

4. The suit was decreed by District Judge, Alipore vide judgment dated 8.5.1979. First Appeal No. 14/80 filed by the trust was dismissed on 28.2.1990 for non prosecution, but the same was restored only to be dismissed on merits vide judgment dated 15.9.1997. The special leave petition filed by the trust was dismissed by this Court on 6.4.1998.

5. After dismissal of the first appeal, the appellant secured possession of the property in possession of the trust but the same had to be restored in furtherance of order passed by the High Court in Writ Petition No. 4394/1987 filed by the Guardian

Association. That petition was finally dismissed on 18.6.1996.

6. In the meanwhile, four members of the Managing Committee of the school filed Title Suit No. 59/1994 for grant of a declaration that the decree passed in Title Suit No. 100/1969 was legally unenforceable. We have been informed by learned counsel for the parties that the said suit is still pending.

7. Having failed to convince the High Court and this Court to overturn the decree of eviction, the management of the school approached the State Government for the acquisition of 20 cottah, 6 chhatak, 23 sq. ft. of land total measuring 14,738 sq. ft. Thereupon, Joint Secretary, School Education Department, Government of West Bengal sent letter dated 12.5.2005 to the Land Acquisition Collector to proceed with the acquisition of land specified in the schedule. That letter reads as under:

"Government of West Bengal
School Education Department
Secondary Branch
Bikash Bhavan, Salt Lake, Kol-91

——-

No.580-SE(S)/7B-1/2005 Dated the 12th May, 2005
From: Shri S. Mahapatra,
Jt. Secretary to the Govt. of West Bengal.

To The Land Acquisition Collector,
4, Bankshall Street, Kolkata-1.

Sub: Proposal for acquisition of 20 Cottah 6 Chhatak 23 sq. ft. of land comprised in premises No.220/2, AJC Boss Road, in ward no.64 of Kolkata Municipal Corporation, P.S. Beniapukur, Kolkata – 700017 under Act I of Land Acquisition Act, 1894.

Sir,

I am directed to inform you th d

to accord approval for acquisition of the land mentioned in the schedule below for Model School, 220/2, AJC Bose Road, Kolkata – 700017 since 1955, under Act I of the Land Acquisition Act, 1894.

Central Model School is a English Medium Co-educational Higher Secondary School running 1955. It was recognized by the West Bengal Board of Secondary Education, WB in the year 1963. 450 no. of students have been reading in the school now. There is a long standing dispute over ownership of the said land. This premises was requisitioned in the year 1967 and the possession was handed over to the Secretary of the school in 1971. The order of requisition was rescinded in the same year and since then the school has been facing considerable problem of existence. Now the authority of the school has come up with a proposal of acquisition of aforesaid land for running the school with building facilities of playground and sufficient open space. They have undertaken to bear the amount of compensation as per rule leading to acquisition of the entire land.

The School Education Dept. is of the view that in the interest of students of the school, it is felt necessary to acquire the land, his dept. also agrees to pay Rs.10/- as a token grant towards payment of compensation money for such acquisition to make it a Govt. proposal in support of the school.

You are requested to please proceed with the acquisition of the land mentioned below immediately with the publication of notice u/s 4 and u/s 6 and to hand over formal possession to the Secretary, managing Committee of Central Model School on behalf of the Govt. in School Education Dept., West Bengal.

The amount of compensation duly ascertained and approved by Competent Authority may pleased be communicated to the said school as well as the School Education Dept. early to facilitate the necessary payment.

Sd/- 12.05.05
Joint Secretary

Land Schedule
Premises No. 220/2, AJC Bose Road, War No.64.
Kolkata Municipal Corporation, P.s. Beniapukur,
Kolkata – 700017, Area: 20 Cottah 6 Chhatak 23 Sq.ft.
In:A sketch map of the land proposed to be acquired."

(taken from the SLP paper book)

8. In furtherance of the direction given by the State Government, notification dated 9.6.2005, which was published in Kolkata Gazette Extraordinary dated 10.06.2005, was issued under Section 4(1) of the Act. The appellant filed objections dated 22.6.2005 (8-1/2 typed sheets through their advocate) under Section 5A(1) of the Act. The Land Acquisition Collector issued notice dated 11.07.2005 under Section 5A(2) requiring the appellant to appear on 20.07.2005 for personal hearing. The Land Acquisition Collector issued another notice dated 26.07.2005 and fixed the date of hearing as 29.07.2005, on which date the appellant filed additional objections consisting of three pages.

9. The Land Acquisition Collector is shown to have conducted hearing on 29.07.2005 and submitted report with the recommendation that the land mentioned in the notification issued under Section 4(1) be acquired for the purpose of school. The Joint Secretary to the State Government and 1st Land Acquisition Collector approved the recommendation on

the same day, i.e., 29.7.2005. Thereafter, the State Government issued declaration under Section 6(1) of the Act, which was published on 21.09.2005.

10. The appellant challenged Section 4(1) notification in Writ Petition No. 1634 of 2005 and the declaration issued under Section 6(1) in Writ Petition No. 1931 of 2005. One of the grounds on which the appellant questioned the declaration was that neither the Land Acquisition Collector nor the State Government applied mind to the objections filed under Section 5A(1) and the exercise undertaken in terms of Section 5A(2) read with Section 6(1) was an eye wash.

11. The learned Single Judge dismissed the writ petitions by recording the following observations:

> "The petitioners have apparently been given an opportunity of hearing under Section 5A. Notices of hearing were issued. The allegation that no report under Section 5A had been prepared is an after thought, not substantiated by the materials on record. There is nothing in the writ petition to show that the petitioners made any request to the Land Acquisition Collector to allow the petitioners inspection of the report under Section 5A of the Land Acquisition Act, or to furnish the petitioners with a copy of the said report.
>
> As held by the Supreme Court in K. Karim Miya vs. State of Gujarat reported in AIR 1977 SC 497, unless there are weighty reasons, a report in a public enquiry under Section 5A should be made available to the persons who take part in the enquiry. However, failure to furnish a copy of the report of the enquiry under Section 5A, and that too, in the absence of any request or demand, cannot vitiate the enquiry, if it is otherwise, not open to any valid objection.
>
> Under Section 5A (2), a person interested in land can at best endeavour to show that the declared purpose for which land is sought to be acquired is not a public purpose,

> or alternatively, satisfy the Collector that the land proposed to be acquired is not suitable for the purpose for which it is proposed to be acquired. For example, where land is proposed to be acquired for construction of a multi-storeyed building to sub-serve a public purpose, persons interested may be able to convince the Collector that the land is not suitable for construction of multi-storeyed building, and should, therefore, not be acquired. Similarly, persons interested in the land might be able to show that the declared purpose of acquisition is not a public purpose, but a private purpose, which is not the case here, as discussed above. The ultimate decision is, however, of the appropriate government, which is final.
>
> If acquisition is for a public purpose and the appropriate government is of the view that the site proposed to be acquired is suitable for the public purpose, objections of the persons interested are of no consequence. The right, if any, of persons interested, is to claim compensation in accordance with law.
>
> An acquisition for public purpose should not, therefore, be interfered with by Court in proceedings under Article 226 of the Constitution of India on the ground of any procedural irregularity in compliance of Section 5A. The Court is only to examine whether the land has been acquired for a public purpose. In this case, it is reiterated that the acquisition is for a public purpose of running a school. The school has been run at the said premises for decades. This in itself shows that the said premises has, in the past, sub-served and will continue to sub-serve the public purpose of running a school. This Court is, therefore, not inclined to interfere with the acquisition on the ground of alleged non-compliance of Section 5A(2)."

12. The Division Bench of the High Court summoned the record of hearing conducted by the Land Acquisition Collector but did not deal with the laconic nature [illegible]s

made by him. Instead, it went into the merits of the objections and rejected the same by recording the following observations:

> "We have examined on merits, the objection regarding public purpose and we are satisfied that the purpose for which acquisition had been made cannot be said to be a private one camouflaged as a public purpose actuated by consideration of malice in the facts of the instant case. The objections which were raised were purely legal on both the counts as to the affect of the legal proceedings have been dealt with by us and no other objection as to suitability etc. was raised.
>
> The next submission raised by the learned senior Counsel with respect to the appropriate Government using the word "approved" while approving the proposal of the Land Acquisition Officer it was bereft of reasons and no decision by-such Government for the purpose of section 5A(2) of the Act, as such the decision of the Government suffered with patent illegality, some reasons ought to be mentioned with regard to the satisfaction but the same having not been given in the instant case, the declaration under section 6 of the Act could not be said to be made in accordance with law.
>
> In our opinion, in the facts of the case it has to be seen whether any prejudice has been caused by not writing detailed order or there is any non-application of mind in that regard by appropriate government. The kind of objections which were raised assumes significance so far as rejection is concerned. A challenge to the existence of public purpose merely on account of various litigations and over reach of binding Court's order would not come in the way of exercise of sovereign power of eminent domain of the State provided the exercise of such power was otherwise for a public purpose under the Land Acquisition Act, as held by the Apex Court in the case reported in State of Andhra Pradesh vs. Gowadhan Lal (Supra).

The question of legality of provisions of Section 5A has to be seen from the facts of each case. The rule of reasons is based upon the principles of natural justice and they cannot be fitted in a straitjacket formula. The report of the Land Acquisition Officer is clear and categorical in the instant case and while approving the report, the appropriate Government was clearly satisfied as to the objections which were raised and have been squarely dealt with by the Land Acquisition Officer in accordance with law. There were legal objections not factual ones and the same have been examined by us on merits in the instant writ petition they were dealt with and no prejudice was caused to the appellants in that regard by not passing a detailed order by appropriate government. Thus, we find that the submission to be bare legs.

Learned Senior Counsel appearing for the appellants next submitted that effective hearing had not been granted to the appellants. Section 5A of the Land Acquisition Act, 1894 contemplates effective hearing and not formal compliance. He has referred to the decision of the Hon'ble Supreme Court in *Radhy Shyam (Dead) through LRs and others vs. State of Uttar Pradesh and Ors.,* (2011) 5 SCC 553 in which Maneka Gandhi vs. Union of India has been quoted where it has been laid down that the "audi alteram partem" rule is intended to inject justice into the law and the Court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It is also held that "audi alteram partem" rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.

In the instant case, we find that the [illegible]"

has been duly observed and it cannot be mechanically applied to a straitjacket formula as observed and it has to meet the situational modifications. Considering the nature of the case, we are of the considered opinion that the observations made in the decision of Maneka Gandhi vs. Union of India (supra) have not been violated in the instant case and they have been duly observed and the process of reasons adopted by the Land Acquisition Officer qualifies to the aforesaid requirement of "audi alteram partem".

13. The Division Bench distinguished the judgment of this Court in *Surinder Singh Brar v. Union of India* (2013) 1 SCC 403 by observing that factual situation in the cases before it is altogether different.

14. We have heard Shri Mukul Rohatgi and Ms. Indu Malhotra, learned senior advocates for the appellant, Shri Gopal Subramanium, learned senior counsel for respondent nos. 3 and 4, Shri Soumitra G. Chaudhuri, learned counsel for the State of West Bengal and perused the record. We have also gone through the record of acquisition, which was summoned vide order dated 25.7.2013.

15. Since the main ground on which the appellant has assailed the impugned order relates to violation of Section 5A(2), i.e., non-application of mind by the Land Acquisition Collector and the State Government to the objections filed by the appellant, it will be useful to notice the contents of report dated 29.07.2005. The same reads as under:

"OBJECTION HEARING U/S 5A IN RESPECT OF PREMISES NO. 220/2, A.J.C BOSE ROAD, KOLKATTA

Received L.A. proposal along with plan for acquisition of land with building comprising premises No. 220/2, A.J.C. Bose Road, Kolkatta for public purpose namely for accommodation of Central Model School from Joint

Secretary School Education Dept., secondary Branch vide their memo No. 580-s.e (s)/7B-1/2005 dated 12.5.2005 and the said proposal vetted by the Govt. in land and land reforms dept. vide their memo No.1287-s.a./1E-06/05 dated 17.05.2005.

After observing formalities PER was prepared on 9.6.2005.

Notification u/s 4 being No. 4-LA/D/2005/S.E. Dept. dated 9.6.2005 was published in the Calcutta gazettes on 10.6.05. The substance of notification in form 30 was served to the interested persons. The substance of notification was displaced and also published in two daily newspaper in Asian Age and 10.06.2005 and Ganashakti on 11.06.2005 on the spot on 15.06.2005. After that on receipt of notice on objection petition filed bythe Abhijit Guha Roy, Advocate, on behalf of M/s. Gojet Brothers Private Limited.

Notice U/s 5A of the L.A. Act were served upon the inserted persons including the receiver is fixing on 20.07.2005 and 29.07.2005 for hearing. But receiver refused to accept the notice of hearing through the receiver received the substance of notification in form 3D of the L.A/ Act.

On the date of hearing 29.07.2005 owners and Advocate were present.

The contentions of their submissions were that the acquisition proceedings in respect of the premises in questions does not cover the public purpose and acquisition proceedings is bad in law. They have submitted two letters dated 22.06.05 and 29.07.05 issued by Abhijit Guha Roy, Advocate, High Court addressed to the 1st Land Acquisition Collector, Kolkata along with order of the Hon'ble High Court and apex Court

suit matter between the parties. There is no stay and or any injunction restraining the Govt. for acquisition of the premises for a public purpose.

Proposal for acquisition of land issued by the school Education, secondary branch vetted by the land and Land reforms dept have been received in this office wherein it appears that the school education Dept, Secondary branch agreed to pay Rs.10/- as a token grant towards payment of compensation money for such acquisition to make it a Govt. proposal in support of the school. On the P.E.R. it was recommended to acquire the land as proposed by Govt. for a public purpose.

No further objection from any corner has been received in this office till date including the receiver.

Hence I overruled the objection filed by the parties and recommend to proceed with acquisition for a public purpose.

Submitted to the 1st L.A.C. for his kind approval.

sd/- C.A. Rahim 29.07.05
LAND Acquisition Collector, Kolkata.
Approved
sd/- K.S. Bandyopadhyay
29.07.2005
1st Land Acquisition Collector, Kolkata."

16. A reading of the report shows that in the first four paragraphs, the Land Acquisition Collector recorded the facts relating to the acquisition proceedings. In the sixth paragraph he briefly noted the objections of the appellant and recorded his conclusion in the following words:

'Hence I overruled the objection filed by the parties and

recommend to proceed with acquisition for a public purpose.'

17. The ambit and scope of Section 5A had been considered in several judgments, but we do not consider it necessary to burden this judgment by noticing various judicial precedents and feel that it would be sufficient to take cognizance of four recent judgments in *Raghbir Singh Sehrawat v. State of Haryana and others* (2012) 1 SCC 792, *Kamal Trading Private Limited v. State of West Bengal* (2012) 2 SCC 25, *Surinder Singh Brar and others v. Union of India and others* (supra) and *Usha Stud and Agricultural Farms Private Limited and others v. State of Haryana and others* (2013) 4 SCC 210.

18. In *Raghbir Singh Sehrawat v. State of Haryana* (supra), the Court referred to the earlier precedents on the subject and culled out the following propositions:

"39. In this context, it is necessary to remember that the rules of natural justice have been ingrained in the scheme of Section 5-A with a view to ensure that before any person is deprived of his land by way of compulsory acquisition, he must get an opportunity to oppose the decision of the State Government and/or its agencies/instrumentalities to acquire the particular parcel of land. At the hearing, the objector can make an effort to convince the Land Acquisition Collector to make recommendation against the acquisition of his land. He can also point out that the land proposed to be acquired is not suitable for the purpose specified in the notification issued under Section 4(1). Not only this, he can produce evidence to show that another piece of land is available and the same can be utilised for execution of the particular project or scheme.

40. Though it is neither possible nor desirable to make a list of the grounds on which the lan[illegible]e

the Collector to make recommendations against the proposed acquisition of land, but what is important is that the Collector should give a fair opportunity of hearing to land. Only thereafter, he should make recommendations supported by brief reasons as to why the particular piece of land should or should not be acquired and whether or not the plea put forward by the objector merits acceptance. In other words, the recommendations made by the Collector must reflect objective application of mind to the objections filed by the landowners and other interested persons."

19. In *Kamal Trading Private Limited* (supra), this Court considered the report prepared by the Land Acquisition Collector, which is substantially similar to report which was challenged by the appellant before the High Court and held:

"14. It must be borne in mind that the proceedings under the LA Act are based on the principle of eminent domain and Section 5A is the only protection available to a person whose lands are sought to be acquired. It is a minimal safeguard afforded to him by law to protect himself from arbitrary acquisition by pointing out to the concerned authority, inter alia, that the important ingredient namely 'public purpose' is absent in the proposed acquisition or the acquisition is mala fide. The LA Act being an ex-proprietary legislation, its provisions will have to be strictly construed.

15. Hearing contemplated under Section 5A(2) is necessary to enable the Collector to deal effectively with the objections raised against the proposed acquisition and make a report. The report of the Collector referred to in this provision is not an empty formality because it is required to be placed before the appropriate Government together with the Collector's recommendations and the record of the case. It is only upon receipt of the said report that the Government can take a final decision on the

objections. It is pertinent to note that declaration under Section 6 has to be made only after the appropriate Government is satisfied on the consideration of the report, if any, made by the Collector under Section 5A(2). As said by this Court in Hindustan Petroleum Limited, the appropriate Government while issuing declaration under Section 6 of the LA Act is required to apply its mind not only to the objections filed by the owner of the land in question, but also to the report which is submitted by the Collector upon making such further inquiry thereon as he thinks necessary and also the recommendations made by him in that behalf.

16. Sub-section (3) of Section 6 of the LA Act makes a declaration under Section 6 conclusive evidence that the land is needed for a public purpose. Formation of opinion by the appropriate Government as regards the public purpose must be preceded by application of mind as regards consideration of relevant factors and rejection of irrelevant ones. It is, therefore, that the hearing contemplated under Section 5A and the report made by the Land Acquisition Officer and his recommendations assume importance. It is implicit in this provision that before making declaration under Section 6 of the LA Act, the State Government must have the benefit of a report containing recommendations of the Collector submitted under Section 5A(2) of the LA Act. The recommendations must indicate objective application of mind."

20. In *Surinder Singh Brar v. Union of India* (supra), this Court extensively considered the report prepared by the Land Acquisition Officer and the decision taken by the administration of Union Territory of Chandigarh and observed:

"68.A cursory reading of the reports of the LAO may give an impression that he had applied mind to the objections filed under Section 5A(1) and assigned reasons for not entertaining the same, but a careful

no doubt that the officer concerned had not at all applied mind to the objections of the landowners and merely created a facade of doing so. In the opening paragraph under the heading "Observations", the LAO recorded that he had seen the revenue records and conducted spot inspection. He then reproduced the Statement of Objects and Reasons contained in the Bill which led to the enactment of the Punjab New Capital (Periphery) Control Act, 1952 and proceed to extract some portion of reply dated 31.7.2006 sent by the Administrator to Surinder Singh Brar.

69.In the context of the statement contained in the first line of the paragraph titled "Observations", we repeatedly asked Shri Sudhir Walia, learned counsel assisting Dr. Rajiv Dhawan to show as to when the LAO had summoned the revenue records and when he had conducted spot inspection but the learned counsel could not produce any document to substantiate the statement contained in the two reports of the LAO. This leads to an inference that, in both the reports, the LAO had made a misleading and false statement about his having seen the revenue records and conducted spot inspection. That apart, the reports do not contain any iota of consideration of the objections filed by the landowners. Mere reproduction of the substance of the objections cannot be equated with objective consideration thereof in the light of the submission made by the objectors during the course of hearing. Thus, the violation of the mandate of Section 5A(2) is writ large on the face of the reports prepared by the LAO.

70. The reason why the LAO did not apply his mind to the objections filed by the appellants and other landowners is obvious. He was a minion in the hierarchy of the administration of the Union Territory of Chandigarh and could not have even thought of making recommendations contrary to what was contained in the letter sent by the

Administrator to Surinder Singh Brar. If he had shown the courage of acting independently and made recommendation against the acquisition of land, he would have surely been shifted from that post and his career would have been jeopardized. In the system of governance which we have today, junior officers in the administration cannot even think of, what to say of, acting against the wishes/dictates of their superiors. One who violates this unwritten code of conduct does so at his own peril and is described as a foolhardy. Even those constituting higher strata of services follow the path of least resistance and find it most convenient to tow the line of their superiors. Therefore, the LAO cannot be blamed for having acted as an obedient subordinate of the superior authorities, including the Administrator. However, that cannot be a legitimate ground to approve the reports prepared by him without even a semblance of consideration of the objections filed by the appellants and other landowners and we have no hesitation to hold that the LAO failed to discharge the statutory duty cast upon him to prepare a report after objectively considering the objections filed under Section 5A(1) and submissions made by the objectors during the course of personal hearing.

76. Section 5A, which embodies the most important dimension of the rules of natural justice, lays down that any person interested in any land notified under Section 4(1) may, within 30 days of publication of the notification, submit objection in writing against the proposed acquisition of land or of any land in the locality to the Collector. The Collector is required to give the objector an opportunity of being heard either in person or by any person authorised by him or by pleader. After hearing the objector(s) and making such further inquiry, as he may think necessary, the Collector has to make a report in respect of land notified under Section 4(1) with his recommendations on the objections e

to the Government along with the record of the proceedings held by him. The Collector can make different reports in respect of different parcels of land proposed to be acquired.

77. Upon receipt of the Collector's report, the appropriate Government is required to take action under Section 6(1) which lays down that after considering the report, if any, made under Section 5-A(2), the appropriate Government is satisfied that any particular land is needed for a public purpose, then a declaration to that effect is required to be made under the signatures of a Secretary to the Government or of some officer duly authorised to certify its orders. This section also envisages making of different declarations from time to time in respect of different parcels of land covered by the same notification issued under Section 5(1). In terms of clause (ii) of the proviso to Section 6(1), no declaration in respect of any particular land covered by a notification issued under Section 4(1), which is published after 24-9-1989 can be made after expiry of one year from the date of publication of the notification. To put it differently, a declaration is required to be made under Section 6(1) within one year from the date of publication of the notification under Section 4(1).

78. In terms of Section 6(2), every declaration made under Section 6(1) is required to be published in the Official Gazette and in two daily newspapers having circulation in the locality in which the land proposed to be acquired is situated. Of these, at least one must be in the regional language. The Collector is also required to cause public notice of the substance of such declaration to be given at convenient places in the locality. The declaration to be published under Section 6(2) must contain the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area or a plan is made in respect of land and the place where such plan can be inspected.

79. Section 6(3) lays down that the declaration made under Section 6(1) shall be conclusive evidence of the fact that land is needed for a public purpose. After publication of the declaration under Section 6, the Collector is required to take order from the State Government for the acquisition of land to be carved out and measured and planned (Sections 7 and 8). The next stage as envisaged is issue of public notice and individual notice to the persons interested in the land to file their claim for compensation. Section 11 envisages holding of an enquiry into the claim and passing of an award by the Collector who is required to take into consideration the provisions contained in Section 23.

84. What needs to be emphasised is that hearing required to be given under Section 5A(2) to a person who is sought to be deprived of his land and who has filed objections under Section 5A(1) must be effective and not an empty formality. The Collector who is enjoined with the task of hearing the objectors has the freedom of making further enquiry as he may think necessary. In either eventuality, he has to make report in respect of the land notified under Section 4(1) or make different reports in respect of different parcels of such land to the appropriate Government containing his recommendations on the objections and submit the same to the appropriate Government along with the record of proceedings held by him for the latter's decision. The appropriate Government is obliged to consider the report, if any, made under Section 5A(2) and then record its satisfaction that the particular land is needed for a public purpose. This exercise culminates into making a declaration that the land is needed for a public purpose and the declaration is to be signed by a Secretary to the Government or some other officer duly authorised to certify its orders. The formation of opinion on the issue of need of land for a public purpose and suitability there[illegible]or

issue of a declaration under Section 6(1). Any violation of the substantive right of the landowners and/or other interested persons to file objections or denial of opportunity of personal hearing to the objector(s) vitiates the recommendations made by the Collector and the decision taken by the appropriate Government on such recommendations. The recommendations made by the Collector without duly considering the objections filed under Section 5A(1) and submissions made at the hearing given under Section 5A(2) or failure of the appropriate Government to take objective decision on such objections in the light of the recommendations made by the Collector will denude the decision of the appropriate Government of statutory finality. To put it differently, the satisfaction recorded by the appropriate Government that the particular land is needed for a public purpose and the declaration made under Section 6(1) will be devoid of legal sanctity if statutorily engrafted procedural safeguards are not adhered to by the concerned authorities or there is violation of the principles of natural justice. The cases before us are illustrative of flagrant violation of the mandate of Sections 5A(2) and 6(1)."

21. In *Usha Stud and Agricultural Farms Private Limited v. State of Haryana* (supra), the Court reiterated the propositions laid down in *Raghbir Singh Sehrawat's case* (supra) and *Kamal Trading Private Limited v. State of West Bengal* (supra) and observed:

"30.The ratio of the aforesaid judgments is that Section 5-A(2), which represents statutory embodiment of the rule of audi alteram partem, gives an opportunity to the objector to make an endeavour to convince the Collector that his land is not required for the public purpose specified in the notification issued under Section 4(1) or that there are other valid reasons for not acquiring the same. That section also makes it obligatory for the Collector to submit

report(s) to the appropriate Government containing his recommendations on the objections, together with the record of the proceedings held by him so that the Government may take appropriate decision on the objections. Section 6(1) provides that if the appropriate Government is satisfied, after considering the report, if any, made by the Collector under Section 5-A(2) that particular land is needed for the specified public purpose then a declaration should be made. This necessarily implies that the State Government is required to apply mind to the report of the Collector and take final decision on the objections filed by the landowners and other interested persons. Then and then only, a declaration can be made under Section 6(1)."

22. If the report prepared by the Land Acquisition Collector is scrutinized in the light of the principles laid down in the afore-mentioned judgments, we do not find any difficulty in holding that the learned Single Judge and the Division Bench of the High Court committed serious error by approving the acquisition proceedings ignoring that the report was prepared in clear violation of mandate of Section 5A and the State Government mechanically accepted the report leading to the issue of declaration issued under Section 6(1). In the original and supplementary objections filed by it, the appellant had claimed that the entire exercise of acquisition was vitiated due to malafides and colourable exercise of power. The history of litigation between the parties was also cited by the appellant to substantiate its plea that the acquisition proceedings were initiated only after the management of the school lost legal battle up to this Court. It was also pleaded that the acquisition was meant to bye-pass the direction given by this Court to the management of the school to handover the possession of the school. Unfortunately, the Land Acquisition Collector did not deal with any of the objections and summarily rejected the same as if compliance of Section 5A(2) was an empty formality. The State Government also did not apply m y

approved the one line recommendation made by the Land Acquisition Collector.

23. In our view, non-consideration of the objections filed under Section 5A(1) has resulted in denial of effective opportunity of hearing to the appellant. The manner in which the Joint Secretary to the Government approved the recommendation made by the Land Acquisition Collector favouring acquisition of the property is reflective of total non-application of mind by the competent authority to the recommendation made by the Land Acquisition Collector and the report prepared by him.

24. In the result, the appeals are allowed, the impugned order as also the one passed by the learned Single Judge in writ petition Nos. 1634 and 1931 of 2005 are set aside.

25. What the Division Bench of the High Court has done is to substitute itself for the Land Acquisition Collector, examined the objections raised by the appellant on merits and concluded that no prejudice has been caused on account of violation of the mandate of Section 5A(2). This was clearly impermissible. Therefore, the impugned order cannot be sustained.

26. In view of the above, we do not consider it necessary to pronounce upon the legality of the notification issued under Section 4(1) of the Act because the same would be deemed to have lapsed with the passage of time. In this connection, reference can usefully be made to the Constitution Bench judgment of this Court in *Padma Sundara Rao (Dead) and others v. State of Tamil Nadu* (2002) 3 SCC 533.

27. At this stage, Shri Gopal Subramanium, learned senior counsel for respondent nos. 3 and 4 made a request that his clients may be allowed sufficient time to explore the possibility of shifting the school to an alternative accommodation and the

State Government may be directed to allot land for construction of the school building.

28. Shri Mukul Rohatgi, learned senior counsel appearing for the appellant graciously agreed that sufficient time may be given to the management of the school to shift from the present site provided that an undertaking is filed before this Court to vacate the premises by the end of the specified period.

29. Keeping in view the fact that about 900 students are receiving education in the school, we accept the request made by Shri Subramanium and issue the following directions:

1. The management of the school shall handover vacant possession of the portion of the ground floor of the building in which the school is currently housed on or before 31.5.2015.

2. Within a week from today, the management of the school may make a representation to the State Government for allotment of an alternative site for construction of a school building and for other ancillary purposes.

3. If any such representation is made by the management for allotment of the alternative site, the State Government shall consider the same sympathetically and pass appropriate order within a period of next three months.

4. Within four weeks from today, the management shall file an undertaking in the form of an affidavit before this Court that the portion of the ground floor of the building, which is in their possession will be handed over to the representative of the appellant on or before 31.05.2015.

5. If the management of the school fails to handover vacant possession of the portion of the ground floor of the building, which is in their possession on or before 31.05.2015, then the concerned official shall mak[illegible]e

punished under the Contempt of Courts Act, 1971. Not only this, the appellant shall be entitled to secure possession and, for this purpose, it shall be free to seek assistance of the local police. In that eventuality, the Commissioner of Police shall provide the required police assistance to the appellant.

R.P. Appeal allowed.

STATE OF WEST BENGAL & ORS.

v.

SANKAR GHOSH

(Civil Appeal No. 10729 of 2013)

NOVEMBER 28, 2013

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

Service Law:

Effect of acquittal in criminal case on dismissal order after departmental inquiry – Held: There is no rule of automatic reinstatement on acquittal by a criminal court even though the charges levelled against the delinquent before the Enquiry Officer as well as the criminal court are the same – Further, Regulation 4 of 1968 Regulations indicates that even if there is identity of charges levelled against the accused before the criminal court as well as before the Enquiry Officer, an order of discharge or acquittal of a police officer by a Criminal Court shall not be a bar to award of punishment in departmental proceedings – In the instant case, charges leveled against the respondent in departmental proceedings were proved beyond any shadow of doubt – Besides, there is evidence that stolen money was recovered from the possession of the respondent – A motorcycle and a private car used in commission of the offence were also recovered from his home – Trial court acquitted the respondent merely because the witness could not identify him during TI parade – Therefore, it cannot be said that respondent was honourably acquitted – Order of disciplinary authority dismissing the respondent from service, upheld – Police Regulations of Calcutta, 1968 – Regulation 4.

The respondent, a Sapoy in Kolkata Armed Police, on deputation in Traffic Department of Kolkata Police, was prosecuted for committing offices punishable u/ss 392,

395 and 412 IPC and ss. 25 and 27 of the Arms Act for his complicity in the commission of a dacoity using a motor cycle. A departmental inquiry was also initiated against him with regard to the said offences. The Enquiry Officer found him guilty of the charges and, ultimately, he was dismissed from service. However, in the criminal case, he was acquitted by the Court of Session. On such acquittal the appellant filed an O.A. before the West Bengal Administrative Tribunal which directed the disciplinary authority to reinstate him in view of the acquittal order passed by the Court of Session. The High Court upheld the order of the Tribunal.

In the instant appeal, the question for consideration before the Court was: whether the respondent, who was dismissed from service following disciplinary proceedings, was entitled to be reinstated on acquittal by the criminal court on the ground of identity of charges in the departmental as well as criminal proceedings.

Allowing the appeal, the Court

HELD:1.1. There is no rule of automatic reinstatement on acquittal by a criminal court even though the charges levelled against the delinquent before the Enquiry Officer as well as the criminal court are the same. On the other hand, Regulation 4 of Chapter 19 of the Police Regulations of Calcutta, 1968, which is applicable to the case in hand, specifically provides that acquittal or discharge in a criminal proceeding shall not be a bar to award punishment in a departmental proceeding in respect of the same cause or matter. It indicates that even if there is identity of charges levelled against the respondent before the criminal court as well as before the Enquiry Officer, an order of discharge or acquittal of a police officer by a criminal court shall not be a bar to the award of the departmental punishment. [para 16-18] [527-C-D, G-H; 528-A, C-D]

1.2. In the instant case, the respondent was a member of the disciplined force. He was dismissed from service due to his involvement in the criminal case, wherein he was charged with the offences u/s 395/412 IPC and s.25/27 of the Arms Act. It is the stand of the department that being a member of the disciplined force, his involvement in such a heinous crime tarnished the image/prestige of the Police Force in the estimation of the members of public in general. Before the Enquiry Officer from the side of the department, four witnesses were examined. The Enquiry Officer believed the evidence of PW3 and concluded that the charges levelled against the respondent were proved beyond any shadow of doubt, except the charge that the respondent stayed out without permission. [para 10-11] [523-G-H; 524-A-B; 525-B-C]

1.3. Both the Disciplinary Authority as well as the trial court were of the view that there are vital evidence on record regarding recovery of stolen money and fire arms. PW3, the SI, deposed further that the money was recovered from the house of the respondent so also the motor bike as well as the car which were used during the commission of crime. The trial court, however, had to acquit the respondent since the witness could not identify him during the TI Parade. On going through the judgment of the trial court, it cannot be said that the respondent was honourably acquitted. [para 13] [525-H; 526-A-C]

Deputy Inspector General v. S. Samuthiram **2012 (11) SCR 174 =** (2013) 1 SCC 598; and *Commissioner of Police, New Delhi & Anr. V. Mehar Singh* **(2013) 7 SCC 685 – referred to.**

1.4 The Tribunal as well as the High Court have not considered the provision of Regulation 4 of Chapter 19 of the Police Regulation, Calcutta 1968 and have committed a mistake in holding that since the respondent was acquitted by a criminal court c

reinstatement was automatic. The finding recorded by the Tribunal which was confirmed by the High Court cannot be sustained. Therefore, the order of the Tribunal, which was affirmed by the High Court is set aside. [para 18] [528-D-E]

Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. & Anr. **(1993) 3 SCC 679,** *Sulekh Chand & Salek Chand v. Commissioner of Police & Ors.* **1994 (4) Suppl. SCR 119 =1994 Supp. (3) SCC 674 and** *G.M. Tank v. State of Gujarat & Ors.* **2006 (2) Suppl. SCR 253 = (2006) 5 SCC 446 – cited.**

Case Law Reference:

(1993) 3 SCC 679	**cited**	**para 9**
1994 (4) Suppl. SCR 119	**cited**	**para 9**
2006 (2) Suppl. SCR 253	**cited**	**para 9**
2012 (11) SCR 174	**referred to**	**para 14**
(2013) 7 SCC 685	**referred to**	**para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10729 of 2013.

From the Judgment and order dated 20.08.2010 of the High Court of Calcutta in W. P. S. T. 570 of 2009.

Kalyan Bandopadhyay, Soumitra G. Chaudhuri (for Anip Sachthey) for the appellants.

Nikhil Goel (for A. Venayagam Balan) for the respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J.1. Leave granted.

2. We are, in this case, concerned with the question whether the respondent, who was dismissed from service following disciplinary proceedings, is liable to be reinstated on

acquittal by a criminal court on the ground of identity of charges in the departmental as well as criminal proceedings.

3. The respondent was working as a Sepoy in the 2nd Battalion of the Kolkata Armed Police. At the time of the incident, he was working as a Sepoy on deputation in the Traffic Department of Kolkata Police. He was arrested by the police in connection with Khardah P.S. Case No.383 dated 12.11.2013 and charged for the offences under Sections 392, 395 and 412 of the Indian Penal Code read with Sections 25 and 27 of the Arms Act for his complicity in the commission of a dacoity using a motor cycle bearing Registration No.WB-24/F-3050. On his arrest, he was produced before the Sub-Divisional Magistrate, Barrackpore, and he was remanded to police custody till 28.11.2003 and then to judicial custody till 30.3.2004. Later, he was released on 1.4.2004. The department placed the respondent under suspension w.e.f. 26.11.2003 and was later served with a charge sheet on 1.6.2004. The operative portion of the charge sheet reads as follows :-

> "You Sepoy 14610 Sankar Ghosh of 2nd Bn., K.A.P. working on deputation to Traffic Department, Kolkata Police, presently under suspension w.e.f. 26.11.2003 F.N. are charged with gross misconduct unbecoming of a member of the Kolkata Police Force in that :-
>
> (1) You were arrested on 26.11.2003 by Khardah P.S. for your direct complicity in commission of dacoity vide Khardah P.S. Case No.383 dated 12.11.2003 u/S. 392 IPC adding Section 395/412 CPC and 25/27 Arms Act by using a motor cycle T.V.S. Victor Blue coloured bearing Regd No.24F/3050
>
> (2) You were produced before the Ld. SDJM Barrackpore on the same day (2611.03) and resumed P.C. till 28.11.2003 and then to J.C. till 30.3.2004. You were released from Dum Dum Central J

(3) It appears from the record that you have no stay out permission from the competent authority and you were involved in the criminal case in the jurisdiction of Khardah P.S. and also arrested from outside the Kolkata Police jurisdiction.

(4) You being a member of the disciplined force, your involved in such type of heinous crime tarnished the image/ prestige of the Kolkata Police force in the estimation of the members of the public in large.

You are hereby directed to state whether you plead guilty to the charges or want an open enquiry into the matter. Your written reply should reach within 7 (seven) days of the receipt of this charge.

Deputy Commission of Police
Traffic Department, Kolkata."

4. The respondent replied to the charge sheet and a detailed enquiry was conducted by the Enquiry Officer. On conclusion of the enquiry, the Enquiry Officer after perusing the materials on record and after hearing the parties drew up his report on the enquiry on 10.11.2004. The Enquiry Officer found the respondent guilty of the charges levelled against him. The Disciplinary Authority, after considering the Enquiry Report as well as after hearing the respondent, concurred with the views expressed by the Enquiry Officer and ultimately decided to impose the penalty of dismissal from service. The respondent was, therefore, served with the notice to show cause as to why he should not be dismissed from service. A detailed reply was submitted by the respondent. After considering the reply, the Disciplinary Authority dismissed the respondent from the Police Force w.e.f. 27.12.2004. The respondent then filed an appeal before the Appellate Authority.

5. The Appellate Authority gave a personal hearing to the respondent on 28.2.2005. The Appellate Authority after having

noticed that the order of dismissal was not passed by the appropriate authority, set aside the order and left it to the appropriate authority to pass appropriate orders based on the Enquiry Report. The Deputy Commission of Police, 2nd Battalion, Kolkata Armed Police, who is the competent authority, after considering the entire matter passed a final order dismissing the respondent from service w.e.f. 2.6.2005. Against the said order, the respondent filed an appeal before the Appellate Authority i.e. the Joint Commissioner of Police (A.P.), Kolkata Police. The Appellate Authority after considering the entire matter, rejected the appeal vide its order dated 25.8.2005.

6. The Additional Sessions Judge, Barrackpore, who was trying the criminal case levelled against the respondent and five other accused persons for committing the offence under 395/ 412 IPC read with Section 25(1)(a)/27/35 of the Arms Act, in the meanwhile found that the charges levelled against the accused persons including the respondent were not found proved and consequently vide judgment dated 7.12.2007 acquitted all the accused persons. The respondent on his acquittal in the criminal case filed O.A. No.3961 of 2008 before the West Bengal Administrative Tribunal. The Tribunal after perusing the judgment of the Sessions Court acquitting the respondent and others took the view that the said judgment should have a bearing on the decision of the Enquiry Officer regarding disciplinary proceedings. Holding so, the appeal was disposed of with a direction to the Disciplinary Authority to reinstate the respondent in view of the acquittal order passed by the Sessions Court in the criminal case.

7. Aggrieved by the said order, the State of West Bengal along with two others, filed W.P.S.T. No.570 of 2009 before the Calcutta High Court. The High Court dismissed the appeal upholding the order of the Tribunal, against which this appeal has been preferred.

8. Mr. Kalyan Bandopadhyay, lear[illegible]e,

appearing for the State of West Bengal submitted that the Tribunal and the High Court have committed an error in directing reinstatement of the respondent in service considering the mere fact that the respondent along with others was acquitted by the Criminal Court. Learned senior counsel submitted that the respondent was not honourably acquitted by the Criminal Court. The acquittal was by way of giving benefit of doubt since the accused persons could not be identified during the T.I. parade. Further, it was also pointed out that the High Court has not properly appreciated Regulation 4 of Chapter 19 of the Police Regulations of Calcutta, 1968, which was applicable to the respondent.

9. Mr. Nikhil Goel, learned counsel appearing for the respondent, submitted that the Tribunal and the High Court have correctly applied the ratio laid down by this Court in *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. & Anr.* [(1993) 3 SCC 679], *Sulekh Chand & Salek Chand v. Commissioner of Police & Ors.* [1994 Supp. (3) SCC 674] and *G.M. Tank v. State of Gujarat & Ors.* [(2006) 5 SCC 446] and ordered reinstatement of the respondent. Learned counsel also submitted that since the accused persons could not be identified in the TI Parade, their complicity could not be established. Consequently, the acquittal of the respondent was an honourable acquittal. Going by the various judicial precedents laid down by this Court, learned counsel submitted that the respondent was rightly reinstated in service and the order passed by the Tribunal as well as the High Court calls for no interference.

10. We may, at the very outset, point out that the respondent was a member of the disciplined force. He was working as a Sepoy in the 2nd Battalion of the Kolkata Armed Force and at the relevant point of time he was working as Sepoy on deputation with the traffic department of Kolkata Police. It is true that the respondent was dismissed from service due to his involvement in the criminal case, wherein he was

charged with the offences under Sections 395/412 IPC and Sections 25/27 of the Arms Act. It is also the stand of the department that being a member of the disciplined force, his involvement in such a heinous crime tarnished the image/ prestige of the Kolkata Police Force in the estimation of the members of public in general. Before the Enquiry Officer from the side of the department, four witnesses were examined, including Jiban Chakraborty, the S.I. Police. Exh. A-3 to A-12 are the documents produced before the Enquiry Officer. PW3, S.I. Jiban Chakraborty, the Inspector of Police before the Enquiry Officer deposed as follows :

> "During investigation he arrested some suspects into this case. In pursuance to the statement of the suspects he arrested the C.O. from his residence situated in 389, Milangarh, Natagarh under P.S. Ghosla (24 Pgs.-N) on 26.11.03 at 01.05 hrs. He prepared the arrest memo (Exhibit No.A5). He conducted in search at this residence and recovered a sum of Rs.10,000/- from his possession being the stolen recovered money of the said case. He also recovered the motor cycle bearing No.WB24F-3050 from his house. During investigation he also recovered one private car. He stated that both the motor cycle and the private car were used during the commission of the crime. During investigation he came to know that the O.C. is a Constable of Kolkata Police posted to 2nd Bn of Kolkata Police working on deputation traffic deptt. The C.O. was produced before the Ld. Court of SDJM, Barrackpore and was remanded to P.O. till 29.11.03 on further production, the C.O. was remanded to jail custody and enlarged on Bail on 30.3.04. After completion of investigation he submitted charge-sheet against the C.O. & others u/s 395/ 412 CPC, 25/27/35 Arms Act
>
> During cross examination, the P.W. stated that he seized motor cycle was registered in the name of Sri Swapan Ghosh and the same was seized f[illegible]of

Swapan Ghosh. During cross examination the P.W. stated that it is not a fact that the C.O. has no complicity into the case. After thorough investigation & enquiry prima facie charge established against the C.O. and others.

11. The Enquiry Officer believed the evidence of PW3 and concluded that the charges levelled against the respondent were proved beyond any shadow of doubt, except the charge that the respondent stayed out without permission. PW3 had categorically stated that he conducted a search at the residence of the respondent and recovered a sum of Rs.10,000/- from his possession being the stolen money. He had also recovered the motor cycle bearing No.WB24F-3050 from the respondent's house which was used for the commission of the crime. During the investigation, he had also recovered one private car from the respondent's residence. Investigation revealed that both the motor cycle and the private car were used during the commission of the crime.

12. We have gone through the judgment of the Sessions Court. Sessions Court though acquitted the accused persons including the respondent, concluded as follows :-

"While there are vital evidence on the record regarding recovery of money, recovery of firearm, recovery of unused writing pad of Dr. R.P. Mitra, but the most vital missing link is the identification made by him in the TI Parade but because of the time lag between the date of incident and the date of TI Parade and the date of his statement u/s 164 Cr.P.C. (1.12.03) and the further time lag of about six days for the TI Parade on 6.12.03 does not convince my mind to accept such evidence relating to identity of the accused persons during the trial could not be bridged by the prosecution through any evidence. The prosecution, therefore, fails as the identity of the accused persons has not been established before the Court during the trial."

13. We, therefore, notice that both the Disciplinary Authority

as well as the Sessions Court were of the view that there are vital evidence on record regarding recovery of money, fire arms and recovery of unused writing pad of Dr. R.P. Mitra, PW3, the SI deposed further that the money was recovered from the house of the respondent so also the motor bike as well as the car. The Sessions Court, however, had to acquit the respondent since Dr. R.P. Mitra could not identify him during the TI Parade. On going through the judgment of the Sessions Court, it cannot be said that the respondent was honourably acquitted.

14. In *Deputy Inspector General v. S. Samuthiram* [(2013) 1 SCC 598], this Court in paragraph 24, 25 and 26 of the judgment has elaborately examined the meaning and scope of the "honourable acquittal" and held as follows :-

"26. As we have already indicated, in the absence of any provision in the service rules for reinstatement, if an employee is honourably acquitted by a criminal court, no right is conferred on the employee to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal court and the enquiry conducted by way of disciplinary proceeding is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond reasonable doubt, the accused is assumed to be innocent. It is settled law that the strict burden of proof required to establish guilt in a criminal court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient. There may be cases where a person is acquitted for technical reasons or the prosecution giving up other witnesses since few of the other witnesses turned hostile, etc. In the case on hand the prosecution did not take steps to examine many of the crucial witnesses on the ground that the complainant and his wife turned hostile. The court, therefore, acquitted the accused giving the benefit of doubt. We are not p[illegible]n

the instant case, the respondent was honourably acquitted by the criminal court and even if it is so, he is not entitled to claim reinstatement since the Tamil Nadu Service Rules do not provide so."

15. The judgment of *S. Samuthiram* (supra) was later followed by another Bench of this Court in *Commissioner of Police, New Delhi & Anr. V. Mehar Singh* [(2013) 7 SCC 685].

16. We indicate that the respondent could not lay his hand to any rule or regulation applicable to the Police Force stating that once an employee has been acquitted by a Criminal Court, as a matter of right, he should be reinstated in service, despite all the disciplinary proceedings. In otherwise there is no rule of automatic reinstatement on acquittal by a Criminal Court even though the charges levelled against the delinquent before the Enquiry Officer as well as the Criminal Court are the same. On this aspect, reference may be made to para 27 of the judgment in *S. Samuthiram* (supra), which reads as under:-

"27. We have also come across cases where the service rules provide that on registration of a criminal case, an employee can be kept under suspension and on acquittal by the criminal court, he be reinstated. In such cases, the reinstatement is automatic. There may be cases where the service rules provide that in spite of domestic enquiry, if the criminal court acquits an employee honourably, he could be reinstated. In other words, the issue whether an employee has to be reinstated in service or not depends upon the question whether the service rules contain any such provision for reinstatement and not as a matter of right. Such provisions are absent in the Tamil Nadu Service Rules."

17. Regulation 4 of Chapter 19 of the Police Regulations of Calcutta, 1968, which is applicable to the case in hand, specifically provides that acquittal or discharge in a criminal proceeding shall not be a bar to award punishment in a

departmental proceeding in respect of the same cause or matter. The said Regulation is extracted below for easy reference :

"4. Discharge or acquittal not a bar to departmental punishment. – An order of discharge or acquittal of a Police Officer shall not be a bar to the award of departmental punishment to that officer in respect of the same cause or matter."

18. Above rule indicates that even if there is identity of charges levelled against the respondent before the Criminal Court as well as before the Enquiry Officer, an order of discharge or acquittal of a police officer by a Criminal Court shall not be a bar to the award of the departmental punishment. The Tribunal as well as the High Court have not considered the above-mentioned provision and have committed a mistake in holding that since the respondent was acquitted by a Criminal Court of the same charges, reinstatement was automatic. We find it difficult to support the finding recorded by the Tribunal which was confirmed by the High Court. We, therefore, allow the appeal and set aside the order of the Tribunal, which was affirmed by the High Court. However, there will be no order as to costs.

R.P. Appeal allowed.

MAA BINDA EXPRESS CARRIER AND ANR.
v.
NORTHEAST FRONTIER RAILWAY AND ORS.
(Civil Appeal No. 10751 of 2013)

NOVEMBER 29, 2013

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

Government Contracts:

Tenders – Cancellation of tender process for deficiencies therein – Held: Submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept – Bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of Government – All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders — To that extent the tenderer has an enforceable right – In the instant case, there were serious deficiencies in the entire tender process, which would have resulted in substantial financial loss to Railways and it was neither in public interest nor necessitated by any legal compulsion – Therefore, the decision to cancel the tender process was in no way discriminatory or mala fide – It did not violate any fundamental right of the appellant nor could the action of respondent be termed unreasonable so as to warrant any interference from the Court – Costs.

Tenders – Terms of – Judicial review of – Held: Power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party — Award of a contract is

essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision – This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers – Judicial review.

In response to a notice dated 12.7.2011 inviting tenders for the grant of a three year lease of 23 tonnes of space in VPH (Parcel Van) on train No.15960/15959 Kamrup Express, the bid of the appellant for a sum of Rs.1,46,872/- per trip for the proposed lease was found to be the highest. However, the tender process was discharged by the railway administration on account of technical and administrative reasons. The communication dated 6.9.2011, in that regard sent to the appellant, was assailed in a writ petition before the High Court. The Single Judge allowed the writ petition with a direction that so long as the appellant undertook to accept the penalty clause as a part of the contract between the parties, the railway administration would consider its bid for acceptance and resultant allotment of the contract. However, the writ appeal filed by the Railways was allowed and the writ petition of the appellant dismissed.

Dismissing the appeal, the Court

HELD: 1. Submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders

are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. [para 8] [537-A-C]

2.1. Power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party. In the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. In *Michigan Rubber (India) Ltd.,* principles of law applicable in this regard to the process for judicial review have been identified. [para 8-10] [536-H, E-F; 538-A-B]

Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors. **1998 (3) Suppl. SCR 421 = (1999) 1 SCC 492** *Meerut Development Authority v. Association of Management Studies and Anr. etc.* **2009 (6) SCR 663** = (2009) 6 SCC 171 and *Air India Ltd. v. Cochin International Airport Ltd.* **(2000) 1 SCR 505;** *Tata Cellular v. Union of India* **1994 (2) Suppl. SCR 122 = (1994) 6 SCC 651, and** *Jagdish Mandal v. State of Orissa and Ors.* **2006 (10) Suppl. SCR 606 = (2007) 14 SCC 517;** *Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.* **2012 (8) SCR 128 = (2012) 8 SCC 216 – relied on.**

2.2. Award of a contract is essentially a commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for *bona fide* and cogent reasons

provided such relaxation is permissible under the terms governing the tender process. [para 8] [537-C-E]

2.3. In the instant case, it is not in dispute that tender documents were not accompanied by the terms and conditions applicable to the proposed contract. That being so, award of a contract without specifying the terms subject to which the same had to be worked was bound to result in serious administrative and legal complications. The absence of a penalty clause from the tender documents was similarly a serious deficiency in the entire tender process. That apart, not only is the reserve price higher than the amount offered by the appellant but even the market survey has brought forth rates higher than what was offered by the appellant. Allotment of any contract at the rate offered by the appellant would, therefore, result in a substantial financial loss to the railways which is neither in the public interest nor necessitated by any legal compulsion. Time lag in such matters plays an important role as it indeed has in the case at hand. [para 7] [535-G-H; 536-A-B, E-G]

2.4. Therefore, the decision to cancel the tender process was in no way discriminatory or *mala fide*. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. In as much as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order passed by the Single Judge and dismissing the writ petition. [para 11] [539-E-G]

Case Law Reference:

1998 (3) Suppl. SCR 421	**relied on**	**para 6**
2009 (6) SCR 663	**relied on**	**para 9**
1994 (2) Suppl. SCR 122	**relied on**	**para 9**
2006 (10) Suppl. SCR 606	**relied on**	**para 9**
2012 (8) SCR 128	**relied on**	**para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10751 of 2013.

From the Judgment and order dated 06.06.2012 of the High Court of Guwahati, Assam in Writ Appeal No. 79 of 2012

Dr. Abhishek Manu Singhvi, C. Mukund, Priyankar Saha, Ekta Bhasin, Pankaj Sain, Amit Bhandari, Charul Sarin, Bijoy Kumar Jainfor the appellants.

R.P. Bhatt, A.K. Srivastava, Vikas Malhotra, P. Agrawala, Rajat Mathur, Shreekant N. Terdal for the respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. This appeal arises out of a judgment and order dated 6th June, 2012 passed by a Division Bench of the Gauhati High Court whereby Writ Appeal (C) No.79 of 2012 has been allowed; judgment and order dated 4th February, 2012 passed by a Single Bench of that Court set aside and Writ Petition (C) No.4668 of 2011 filed by the appellants dismissed.

3. In terms of a notice dated 12th July, 2011 Divisional Commercial Manager, Tinsukia invited tenders for the grant of a three year lease of 23 tonnes of space in VPH (Parcel Van) on train No.15960/15959 Kamrup Express. Among those who responded to the tender notice was the appellant herein who

offered a sum of Rs.1,46,872/- per trip for the proposed lease. The tender process was discharged by the railway administration on account of technical and administrative reasons no matter the appellant's offer was the highest. A communication dated 6th September, 2011, addressed to the appellant was in that regard issued to the appellant who assailed the same in W.P. (C) No.4668 of 2011 before the High Court of Gauhati.

4. In their counter affidavit the railways defended the cancellation/discharge of the tender not only on the ground that the appellant had acquired no vested right for allotment of the contract in its favour merely because its bid was found to be the highest, but also on the ground that the power to cancel/ withdraw the tender notice had been specifically reserved by the railway administration in its favour. That apart, the cancellation of the tender process was sought to be justified also on the ground that the railway administration had discovered a serious deficiency in the same in as much as the tender forms had been issued without enclosing therewith the terms and conditions subject to which the contract could be allotted or awarded. It was also contended that an all important penalty clause had not been incorporated in the tender documents. These omissions and deficiencies were according to the respondent sufficient for cancellation of the tender process to be followed by a fresh process in due course.

5. A learned Single Judge of the High Court of Gauhati before whom the matter was argued took the view that the discharge of the tender process had caused prejudice to the appellant by reason of his rates having become public. It was also held by the learned Single Judge that every public authority was required to act fairly while granting contracts and that reasons for cancellation of the tender process should have been set out in the communication sent to the appellant instead of being disclosed subsequently in the affidavit filed in opposition to the writ petition. The learned Sing y

allowed the writ petition with a direction that so long as the appellant undertook to accept the penalty clause as a part of the contract between the parties the railway administration would consider its bid for acceptance and resultant allotment of the contract within 15 days of receipt of the undertaking.

6. Aggrieved by the judgment and order abovementioned, the railway administration preferred Writ Appeal (C) No.79 of 2012 before the Division Bench of the High Court of Gauhati. Relying upon the decision of this Court in *Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors.* (1999) 1 SCC 492 the Division Bench held that the appellant acquired no right to claim the award of the contract merely by reason of its bid being the highest. It further held that the scope of judicial review being limited in tender matters, the Court had to restrain itself from interfering with the process so long as the decision of the competent authority was not against public interest, irrational, *mala fide* or illegal. It was also held that merely because the order discharging tender process was silent as to the reasons for the decision the same did not prevent the Court from looking into the records to find out the basis on which the cancellation was ordered. So also the argument that exposure of rates offered by the appellant would result in prejudice to the appellant was rejected as a ground to justify interference with the decision of the railway administration which was otherwise held to be legal and bona fide. The present appeal assails the said decision as seen earlier.

7. We have heard learned counsel for the parties at some length. The material facts are not in dispute. It is not in dispute that tender documents were not accompanied by the terms and conditions applicable to the proposed contract. That being so, award of a contract without specifying the terms subject to which the same had to be worked was bound to result in serious administrative and legal complications. It is also not in dispute that no tender Box Opening Committee had been nominated with the approval of the Controlling Officer nor was any

verification of tender documents conducted by the Division concerned for their genuineness. The absence of a penalty clause from the tender documents was similarly a serious deficiency in the entire tender process. Cancellation of the tender process could not, in that view, be said to be *mala fide* to call for interference by the High Court. The respondents have, in their written submissions filed before us, referred to Circular No.12 of 2006 by which guidelines for leasing out existing space in trains for the purposes of operating parcel services have been issued. These guidelines, *inter alia,* stipulate that a tender Committee shall be put together which requirement was also not complied with while issuing the tender notice in the instant case. That apart, the Ministry of Railways has, by Circular No.13 dated 31st May, 2012, revised the rate structure for booking of parcel and luggage services. The revised rate for Kamrup Express is Rs.4756/- per ton. The reserve price calculated on that basis comes to Rs.1,84,100/-. The offer made by the appellant was much below that amount. Besides, a market survey conducted in terms of an interim order passed by the High Court had revealed that the contract could fetch Rs.2,25,000/- per trip which was substantially higher than Rs.1,46,872/- quoted by the appellant. Suffice it to say that not only is the reserve price applicable as on date higher than the amount offered by the appellant but even the market survey has brought forth rates higher than what was offered by the appellant. Allotment of any contract at the rate offered by the appellant would, therefore, result in a substantial financial loss to the railways which is neither in the public interest nor necessitated by any legal compulsion. Time lag in such matters plays an important role as it indeed has in the case at hand.

8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotme

to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for *bona fide* and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See: *Meerut Development Authority v. Association of Management Studies and Anr. etc.* (2009) 6 SCC 171 and *Air India Ltd. v. Cochin International Airport Ltd.* (2000) 1 SCR 505).

10. The scope of judicial review in contractual matters was further examined by this Court in *Tata Cellular v. Union of India* (1994) 6 SCC 651, *Raunaq International Ltd.'s* case (supra) and in *Jagdish Mandal v. State of Orissa and Ors.* (2007) 14 SCC 517 besides several other decisions to which we need

not refer. In *Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.* (2012) 8 SCC 216 the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words:

> *"19. From the above decisions, the following principles emerge:*
>
> *(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;*
>
> *(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;*
>
> *(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;*
>
> *(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and*

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

(emphasis supplied)

11. As pointed out in the earlier part of this order the decision to cancel the tender process was in no way discriminatory or *mala fide*. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. In as much as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order passed by the Single Judge and dismissing the writ petition.

12. In the result this appeal fails and is hereby dismissed with costs assessed at Rs.25,000/-

R.P. Appeal dismissed.

PURUSHOTTAM
v.
STATE OF KARNATAKA & ORS.
(Civil Appeal No. 10747 of 2013)

NOVEMBER 29, 2013.

[SURINDER SINGH NIJJAR AND A.K. SIKRI, JJ.]

Bangalore Development Authority Act, 1976:

s.38-A (as amended w.e.f. 21.4.1984) – Grant of area reserved for civic amenities – Civic amenity site earmarked for 'bank', allotted for installing a petrol pump – Held: Under s.38A (1), BDA would have the authority to lease, sell or otherwise transfer any area reserved for the purpose for which such area is reserved, and no other — In case, a disposition is made for a purpose other than the one for which it is reserved, it shall be null and void — High Court has rightly declared the allotment of civic amenity site in question for establishment of a petrol pump as null and void — Bangalore Development Authority (Civic Authority Site) Allotment Rules, 1989 – r.3.

The instant appeals arose out of the order of the High Court, whereby it declared allotment of civic amenity site no. 2 (which was earmarked for use as bank) for establishment of a petrol pump, as null and void.

Dismissing the appeals, the Court

HELD: 1.1 This Court in *B.S. Muddappa's* case, while interpreting s.38A of the Bangalore Development Authority Act, 1976 as substituted w.e.f. 21.4.1984, has held that once an area has been stamped with the character of a particular civic amenity by reservation of that area for the purpose, it cannot be diverted to any other

use even when it is transferred to another party. The legislative intent of the Bangalore Development Authority (Amendment) Act, 1991which came into force w.e.f. 16.1.1991 is to prevent the diversion of the user of an area reserved for a public park or playground or civic amenity to another user. [para 10-12] [548-G; 549-A-C, G-H]

Bangalore Medical Trust Vs. B.S. Muddappa & Ors. **1991 (3) SCR 102 = 1991 (4) SCC 54 - relied on.**

1.2. Besides, on the interpretation of s.38A(1) and (2) of the BDA Act the inescapable conclusion is that u/s 38A (1), BDA would have the authority to lease, sell or otherwise transfer any area reserved for the purpose for which such area is reserved, and no other. This clearly means that the Government can pass on the responsibility to another concern, be it individual, company or corporation, for the purposes of carrying on the activity for which the plot has been reserved as *a civic amenity*. It does not empower the BDA to convert the area reserved for civic amenities for activities which do not fall within the definition of civic amenities. Sub-s. (2) of s.38A is an embargo that even such sale or disposal otherwise of an area reserved for *public parks*, *playground* would not be permitted to private parties. Though such spaces, *playgrounds* and *parks* can be transferred to public authorities, but their user would be limited to the purposes for which they are reserved under the scheme. In case, a disposition is made for a purpose other than the one for which it is reserved, the Act has declared that, it shall be *null and void*. Rule 3 of the Bangalore Development Authority (Civic Authority Site) Allotment Rules, 1989 cannot be permitted to override the statutory provision contained in s. 38A(1) and (2). Even otherwise, the rule only reiterates the statutory provision in s.38A(1) and (2). [para 14] [552-B-G]

1.3. It cannot be said that the site was never allotted as a bank and, therefore, it could be allotted as a *petrol pump*. The High Court upon perusal of the pleadings as well as annexure 'C' appended to the writ petition, has recorded that the site in question was originally earmarked as park/playground in 1984 and subsequently, civic amenity site no. 2 was earmarked exclusively for use as "bank". [para 14] [552-G-H; 553-D]

1.4. Further, it cannot be said that the term civic amenities would permit BDA to change the reservation from one particular user to another without the necessary amendment in the development plan. This would be contrary to the law laid down by this Court in the case of *B.S. Muddappa.* [para 17] [554-C]

1.5. It was not the case of respondent nos. 4 to 14 (writ petitioners in the High Court) that petrol pump is not a civic amenity, therefore, the site could not have been allotted to open a petrol pump. Their grievance was that civic amenity site no.2 had been earmarked for a bank and could not be allotted for a petrol pump without making necessary amendment in the development plan. Therefore, the High Court has rightly distinguished the judgment in *Aicoboo Nagar Residents Welfare Association* and not relied upon the same. [para 18] [554-F-G]

Aicoboo Nagar Residents Welfare Association & Anr. Vs. Bangalore Development Authority, Bangalore & Anr. **ILR 2002 Kar. 4705 – distinguished.**

R.K. Mittal & Ors. Vs. State of Uttar Pradesh & Ors. **2011(15) SCR 877 = 2012 (2) SCC 232 - cited.**

Case Law Reference:

1991 (3) SCR 102	**relied on**	**para 3**
ILR 2002 Kar. 4705	**distingu**	

2011 (15) SCR 877 cited para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10747 of 2013.

From the judgment order dated 05.09.2011 of the HIgh Court of Karnataka at Bangalore in W.P. No. 5428 of 2006.

WITH

C.A. Nos. 10748, 10749 and 10750 of 2013.

V. Giri, Shyam Divan, V. Lakshimi Narayana, Sharan Thakur, B.S. Gautham, Dr. Sushil Balwada, Rajeev Mishra, Sanand Ramakrishnan, S.K. Kulkarni, M. Gireesh Kumar, Ankur S. Kulkarni, Shanth Kumar V. Mahale, Harish S. R. Hebbar, Rajesh Mahale, Anitha Shenoy for the appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted.

2. These four appeals arising out of SLP (C) No.31690 of 2011, SLP (C) No.31695 of 2011, SLP (C) No.33184 of 2011 and SLP (C) No.33319 of 2011, impugn the judgment of a Division Bench of Karnataka High Court rendered in Writ Petition No. 5428 of 2006 (BDA-PIL), and Writ Petition No. 5173 of 2006 (GM-RES/PIL), whereby the High Court has declared the allotment of civic amenity site no. 2 to Bharat Petroleum Corporation (respondent No. 3) for establishment of a petrol pump, null and void. The writ petitions have been allowed. The allotment dated 4th August, 2005 made in favour of respondent No. 3 has been set aside.

3. The facts as narrated in C.A. No. 10747 of 2013 arising out of SLP (C) No. 31690 of 2011 are as under:-

. On 29th August, 1990 a Notification was issued by the State of Karnataka Government under Section 2bb(vi) of the Bangalore Development Authority

Act, 1976 (hereinafter referred to as "BDA Act, 1976") to the effect that the amenities such as liquefied petroleum gas godowns, retail domestic fuel depots, petrol retail outlets are the *"civic amenities"* for the purposes of the aforesaid Act.

. Thereafter, the State Government issued another Notification on 29th April, 1994, inviting objections or suggestions to the Revised Comprehensive Development Plan of Bangalore City Planning Area, prepared under Karnataka Town and Country Planning Act, 1961, (Karnataka Act 11 of 1963), which had been provisionally approved by the Government.

. On 5th January, 1995, Site No.2 is reserved for civic amenities (hereinafter referred to as "CA Site No.2")

. On 31st January, 2000, Bangalore Development Authority (hereinafter referred to as "BDA") passed Resolution No. 28 of 2000 empowering the Chairman or the Commissioner to allot Civil Amenity Site to any Government Body, State or Central Government undertaking.

. On 1st January, 2001, BDA allotted CA Site No.2 and 3 in HRBR Layout III Block each measuring 2195.35 sq. mtrs. and 629.18 sq. mtrs. in favour of Bangalore Water Supply and Sewerage Board (hereinafter referred to as "BWSSB") on lease for a period of 30 years for the purpose of service station and pump house.

. On 28th March, 2002, a detailed representation was submitted by one Mr. Padmanabha Reddy on the subject : Requisition for Allotment of Civic Amenity Site No.2 & 3 in HRBR III Block, Bangalore – 43 as park. It is

representation that the III Block of the HRBR Layout is a residential layout, with homes situated, chock-a-block, with absolutely no ventilation space. It was pointed out that in these circumstances, the provision for a park/ventilation space is a crying-need of the locality. The representation also mentions that the objectors had an opportunity to go through the Revised Comprehensive Development Plan – 2011 (RCDP) pertaining to District No.7, which clearly showed that, a *squarish block of land*, situated on the western side of Civic Amenity site wherein the BWSSB has already housed the Twin Ground Level reservoirs had been earmarked for a park. The other surprise in store in the RCDP was the earmarking of CA Site No.2, which was the bone of contention, as Commercial Area/Zone. It is pointed out that in reality, much before 1995, when the RCDP had allegedly been finalized, the BDA had already accomplished the task of converting this *squarish block of land* into residential sites and either allotted or auctioned such sites. The land had been clearly shown as earmarked for a park or a playground. Another similar block of land, which was also earmarked to be developed as a park has continued to be used as a burial ground. The representationist also brought to the notice of the BDA sentiments expressed by this Court in the case of *Bangalore Medical Trust Vs. B.S. Muddappa & Ors.*[1] Particular attention of the authorities was drawn to Paragraphs 18, 19, 24, 25, 27, 37 and 48 with the comment that the observations made in the aforesaid paragraphs reflect the aspirations of the respondent Nos. 4 to 14 (petitioners in the High Court). Legally it was stated that the action of the

1. (1991) 4 SCC 54.

BDA is contrary to Section 38A(2) of the BDA Act, 1976. It was ultimately stated that the land on which, now, reservoirs had been developed was beyond "redemption and resumption". The other area earmarked for the park can not be used as a park since it has already been used as a graveyard. Their only intention was to save the remaining part which has now been allotted for the use as the petrol pump.

- On 9th February, 2005, the State Government passed an order for continuation of revised CDP 1995 till 2015.
- On 30th June, 2005, Bharat Petroleum Corporation (respondent No.3) requested BDA to allot land for development of a retail outlet.
- On 4th August, 2005, BDA allotted CA Site No.2 in favour of respondent No.3.
- Thereafter, on 7th October, 2005, the lease deed was duly executed between BDA and respondent No.3 for a period of 30 years. Dealership licence was granted in favour of wife of the appellant by respondent No.3 on 4th February, 2006.
- Thereafter on 21st February, 2006, BDA has approved the plan for establishment of petrol pump in favour of respondent No.3. Aggrieved by the aforesaid action, Writ Petition No. 5428 of 2006 and others were filed in public interest to challenge the decision of BDA dated 21st February, 2006 with a prayer to quash the allotment of CA Site No.2 in favour of respondent No.3 for establishing a petrol pump and to convert the same to a park for the elderly and a playground for the young.

4. By the impugned judgment, t of

Karnataka High Court on interpretation of Section 38A concluded that the allotment was in violation of Section 38A sub-section (2). The High Court has concluded that CA Site No.2 at the time of its allotment to respondent No.3 was expressly earmarked for use as "bank". Therefore, in terms of Section 38A of the BDA Act, 1976 could not have been leased, sold or otherwise transferred for a purpose other than the one *for which such area is reserved*. Since the site in question was earmarked/reserved for "bank", it could not have been allotted for use as a petrol pump. The High Court also held that the allotment of the site was null and void as it was not in consonance of Section 38A sub-section (2). The High Court further observed that even though both "bank" and "petrol pump" are civic amenities within the meaning of Section 2(bb) of the BDA Act, 1976, yet the mandate of Section 38A is clear and unambiguous. It is for the *very civic amenity*, for which the area is reserved, for which it has to be put to use.

5. We have heard the learned counsel for the parties.

6. It is submitted by the learned counsel that the High Court has erred in holding that any area of particular *civic amenity* cannot be subsequently changed to another user which also falls within the definition of a *civic amenity*. It is submitted by the learned senior counsel appearing for all the appellants that the High Court has failed to appreciate that the sites still remain allotted to a *civic amenity.* Merely, because the user has been changed from *public park* to *bank* and now to *petrol pump* would not violate the provisions contained in Section 38A(1) and (2). It is submitted that since the Notification was duly issued that *petrol pump* would be a *civic amenity* as provided under Section 2(bb)(vi) of the Act, there was no violation of Section 38A(2).

7. Learned counsel for the appellants have submitted that in fact there is no resolution passed by the BDA to show that the site in question has been earmarked for a bank. It is further submitted that the change of purpose or user for a particular piece of land as a civic amenity is permissible under Rule 3(1)

of the Bangalore Development Authority (Civic Amenity Site) Allotment Rules, 1989 (hereinafter referred to as "BDAA Rules, 1989") as amended. According to the learned senior counsel, once the land is reserved as a civic amenity and allotted in favour of a Government department or statutory authority of the Central Government, the BDA Rules, 1989 has no application. It was further submitted that the Division Bench has erred in distinguishing the earlier judgment of the Division Bench of the same Court *Aicoboo Nagar Residents Welfare Association & Anr. Vs. Bangalore Development Authority, Bangalore & Anr.*[2] in which it has been clearly laid down that "the use of site as a civic amenity for the distribution of petroleum products also would come within the scope of civic amenity".

8. Learned counsel appearing for the BDA and the State of Karnataka have supported the case pleaded by the appellants. Learned counsel appearing for respondent Nos. 4 to 14, however, submitted that the High Court has correctly interpreted Section 38A(1) and (2) that any area reserved for a particular civic amenity cannot be diverted to any other civic amenity on the ground that civic amenity is a general term. According to the learned counsel, the judgment of the High Court is in consonance with the law laid down by this Court in the case of *B.S. Muddappa* (supra). The aforesaid judgment has been subsequently followed by this Court in *R.K. Mittal & Ors. Vs. State of Uttar Pradesh & Ors.*[3] It has been submitted that in view of the law declared by this Court, the impugned judgment of the High Court does not call for any interference.

9. We have considered the submissions made by the learned counsel for the parties.

10. In our opinion, it is no longer necessary for us to consider the issues raised by the appellants on first principle, as the issue is no longer *res integra*. In the case of *B.S. Muddappa* (supra), this Court examined the entire issue

2. ILR 2002 Kar. 4705.
3. (2012) 2 SCC 232.

wherein, it has been held "that the legislative intent of the Bangalore Development Authority (Amendment) Act, 1991 (hereinafter referred to as "BDA (Amendment) Act, 1991"), which came into force w.e.f. 16th January, 1991 is to prevent the diversion of the user of an area reserved for a public park or playground or civic amenity to another user.

11. Original Section 38A of the BDA Act, 1976 has been substituted with the present Section 38A w.e.f. 21st April, 1984, which reads as under:-

"'38-A. Grant of area reserved for civic amenities etc.—

(1) The Authority shall have the power to lease, sell or otherwise transfer any area reserved for civic amenities for the purpose for which such area is reserved.

(2) The Authority shall not sell or otherwise dispose of any area reserved for public parks and playgrounds and civic amenities, for any other purpose and any disposition so made shall be null and void:

Provided that where the allottee commits breach of any of the conditions of allotment, the Authority shall have right to resume such site after affording an opportunity of being heard to such allottee."

12. Interpreting the aforesaid provision, this Court has held as under:-

"This new Section 38-A, as clarified in the Statement of Objects and Reasons and in the Explanatory Statement attached to L.A. Bill 6 of 1991, removed the prohibition against lease or sale or any other transfer of any area reserved for a civic amenity, provided the transfer is for the same purpose for which the area has been reserved. This means that once an area has been stamped with the character of a particular civic amenity by reservation of that area for purpose, it cannot be diverted to any other use even when it is transferred to another party. The rationale of this restriction is that the scheme once sanctioned by

the government must operate universally and the areas allocated for particular objects must not be diverted to other objects. This means that a site for a school or hospital or any other civic amenity must remain reserved for that purpose, although the site itself may change hands. This is the purpose of sub-section (1) of Section 38-A as now substituted. Sub-section (2) of Section 38-A, on the other hand, emphasises the conceptual distinction between 'public parks and playgrounds' forming one category of 'space' and 'civic amenities' forming another category of sites. While public parks and playgrounds cannot be parted with by the BDA for transfer to private hands by reason of their statutory dedication to the general public, other areas reserved for civic amenities may be transferred to private parties for the specific purposes for which those areas are reserved. There is no prohibition, as such, against transfer of open spaces reserved for public parks or playgrounds, whether or not for consideration, but the transfer is limited to public authorities and their user is limited to the purposes for which they are reserved under the scheme. The distinction is that while public parks and playgrounds are dedicated to the public at large for common use, and must therefore remain with the State or its instrumentalities, such as the BDA or a Municipal Corporation or any other authority, the civic amenities are not so dedicated, but only reserved for particular or special purposes.....

24. Protection of the environment, open spaces for recreation and fresh air, playgrounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the Act by establishing the BDA. The public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed by

sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens.

25. Reservation of open spaces for parks and playgrounds is universally recognised as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill-effects of urbanisation.

27. The statutes in force in India and abroad reserving open spaces for parks and playgrounds are the legislative attempt to eliminate the misery of disreputable housing condition caused by urbanisation. Crowded urban areas tend to spread disease, crime and immorality. As stated by the U.S. Supreme Court in *Samuel Berman v. Andrew Parker:* (L Ed pp. 37-38 : US pp. 32-33)

> "… They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.
>
> … The concept of the public welfare is broad and inclusive …. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values …." (Per Douglas, J.)."

13. In our opinion, the aforesaid observations are a complete answer to all the submissions made by the learned counsel for the appellants.

14. This apart on the interpretation of Section 38A(1) and (2), the inescapable conclusion is that under Section 38A (1), BDA would have the authority to lease, sell or otherwise transfer any area reserved for the purpose for which such area is reserved, and no other. This clearly means that the Government can pass on the responsibility to another concern, be it individual, company or corporation for the purposes of carrying on the activity for which the plot has been reserved as *a civic amenity*. It does not give a licence to the BDA to convert the area reserved for civic amenities for activities which do not fall within the definition of civic amenities. Sub-section (2) of Section 38 is an embargo that even such sale or disposal otherwise of an area reserved for *public parks*, *playground* would not be permitted to private parties. Though such spaces, *playgrounds* and *parks* can be transferred to public authorities, but their user would be limited to the purposes for which they are reserved under the scheme. In case, a disposition is made for a purpose other than the one for which it is reserved, the Act has declared that, it shall be *null and void*. In our opinion, Rule 3 of which the support is sought by the appellants can not be permitted to override the statutory provision contained in Section 38A(1) and (2). Even otherwise, the rule only reiterates the statutory provision in Section 38A(1) and (2). We also do not find any substance in the submission that the site was never allotted as a bank, and, therefore, it could be allotted as a *petrol pump*. The High Court upon perusal of the pleadings as well as annexure 'c' appended to the writ petition has recorded the following facts :

> "In so far as the factual matrix is concerned, it is necessary to record that the site in question was originally earmarked as park/playground in 1984. This [illegible]s

acknowledged at the hands of the Bangalore Development Authority in paragraph 5 of its counter affidavit. Subsequently, three civic amenity sites came to be carved out, in the area earlier earmarked for park/play ground. The first of these is presently being used by the Bangalore Water supply and Sewerage Board. The second site, which is the one in question was earmarked for use as a "bank". So far as the instant aspect of the matter is concerned, our attention has been invited to Annexure-C appended to the writ petition, wherein civic amenity site no.2 has been shown as earmarked for "bank". The aforesaid Annexure-C came to be executed on 06.01.1996. Civil amenity site no.2 is indicted therein, as measuring 2195.35 sq. meters. In the column titled "purpose for which earmarked", Annexure-C specifies "bank". It is the contention of the petitioners that, civic amenity site no.2 which was earmarked exclusively for use as "bank" has never undergone any change at the hands of the Bangalore Development Authority. Civic amenity site no. 3 is not relevant for the instant case, and as such we refrain, for reasons of brevity, from recording any details in connection therewith."

15. Upon consideration of the submissions of the learned counsel for the parties, the High Court has concluded -

"We are satisfied that civil amenity site no. 2, at the time of its allotment to respondent no.3 was expressly earmarked for use as "bank". The aforesaid position has remained unaltered to this day. In terms of the mandate contained in Section 38-A of the Bangalore Development Authority Act, 19776 it could not have been leased, sold or otherwise, transferred for purpose other than the one "….for which such area is reserved". Since the civil amenity site in question was earmarked/reserved for "bank", we are satisfied that it could not have been allotted for use as a "petrol station".

16. From the above, it is evident that in fact, the site had

been originally earmarked to be developed as a *public park/ playground* in 1984. However, since the same has been converted to a residential area, respondents Nos. 4 to 14 have very fairly stated that it could not at this stage be restored to its original purpose without causing havoc in the lives of the residents. They have, therefore, not insisted that the site be restored to its original purpose.

17. We also do not find any merit in the submission that the term civic amenities would permit BDA to change the reservation from one particular user to another without the necessary amendment in the development plan. This would be contrary to the law laid down by this Court in the case of *B.S. Muddappa* (supra).

18. We also do not find any substance in the submissions that the High Court has wrongly distinguished the judgment of the earlier Division Bench of the High Court in *Aicoboo Nagar Residents Welfare Association* (supra). A perusal of the paragraph 10 of the aforesaid judgment clearly shows that in that case, the High Court considered the legality of allotment of civic amenity site no.3. There was, in fact, no change in the activity/purpose, as the site had not been reserved for any specific purpose. The other question was whether the lease in favour of the government company for opening of petrol and diesel outlet would fall within the definition of civic amenity. In the present case, it was not the case of the respondent nos. 4 to 14 that petrol pump is not a civic amenity, therefore, the site could not have been allotted to open a petrol pump. The grievance of the respondents (writ petitioners in the High Court) was that civic amenity site no.2 had been earmarked for a bank and could not be allotted for a petrol pump without making necessary amendment in the site. Therefore, the High Court has rightly distinguished the aforesaid judgment and not relied upon the same.

19. We, therefore, find no merit in the appeals and the same are hereby dismissed.

R.P.

N.ANANTHA REDDY
v.
ANSHU KATHURIA & ORS.
(Civil Appeal Nos.10779-10780 of 2013)

DECEMBER 2, 2013

[R.M. LODHA AND SHIVA KIRTI SINGH, JJ.]

Review:

Review jurisdiction – Held: Is extremely limited and unless there is mistake apparent on the face of the record, the order/judgment does not call for review — The mistake apparent on record means that the mistake is self evident, needs no search and stares at its face — Review jurisdiction is not an appeal in disguise – It does not permit rehearing of the matter on merits — In the instant case, the High Court while considering the application for review, had a fresh look at the question whether the appellant could be impleaded in the suit and, in the light of the view which it took, it recalled its earlier order dated 08.06.2011 — The course followed by High Court is clearly flawed — High Court exceeded its review jurisdiction by reconsidering the merits of the order dated 08.06.2011 — High Court was not at all justified to review the order dated 08.06.2011 – Impugned order is set aside.

In a suit for injunction restraining the Municipal Corporation and the Assistant City Planner, respondents nos. 2 and 3, respectively, from interfering with the construction being put up by the plaintiff (respondent no. 1), the appellant (i.e. plaintiff's neighbor) filed applications for impleadment and interim relief claiming infringement of his right of light and air, if the construction by the plaintiff was commenced and completed. The trial court allowed the applications and the High Court by its order dated 8.6.2011 dismissed the revision petitions filed by

the plaintiff. However, in the applications for review filed by the plaintiff, the High Court, by order dated 13.12.2011, recalled its order dated 8.6.2011 and directed the trial court to reconsider the applications for impleadment afresh.

Allowing the appeals, the Court

HELD: 1.1. The review jurisdiction is extremely limited and unless there is mistake apparent on the face of the record, the order/judgment does not call for review. The mistake apparent on record means that the mistake is self-evident, needs no search and stares at its face. Review jurisdiction is not an appeal in disguise. The review does not permit rehearing of the matter on merits. [para 9] [561-F-G]

1.2. In the instant case, the High Court while considering the application for review, had a fresh look at the question whether the appellant could be impleaded in the suit filed by respondent No. 1 and, in the light of the view which it took, it recalled its earlier order dated 08.06.2011. The course followed by the High Court is clearly flawed. The High Court exceeded its review jurisdiction by reconsidering the merits of the order dated 08.06.2011.The High Court was not at all justified to review the order dated 08.06.2011. The impugned order dated 13.12.2011 is set aside. [para 9, 11 and 12] [561-E-F; 562-F]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10779-780 of 2013.

From the Judgment and Order dated 13.12.2011 of the High Court of A. P. at Hyderabad in RCMP No. 5278 and 5279 of 2011 in CRP No. 3459 and 3465 of 2010.

Bina Madhavan, Praseena E. Jos[illegible]ar

Sagar, Shivendra Singh, Rahul Pandey (for Lawyers Knit & Co.) for the Appellant.

G. Ramakrishna Prasad, B. Suyodhan, Filza Moonis, Mohd, Wasay Khan, D. Bharat Kumar, Sayooj Mohandas M., Abhijit Sengupta for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The respondent No. 1 herein filed a suit for declaration and perpetual injunction against the Greater Hyderabad Municipal Corporation (respondent No. 2 herein) and the Assistant City Planner (respondent No. 3 herein). In the suit, the respondent No. 1 (plaintiff) prayed that notice dated 23.12.2009 issued under Section 452 of the Greater Hyderabad Municipal Corporation Act, 1955 be declared as illegal, void and not legally tenable. It was further prayed that the defendants (respondent Nos. 2 and 3 herein) have no right to interfere with the construction being put up by the plaintiff. The plaintiff also prayed for perpetual injunction restraining the two defendants, their officers/officials/servants from interfering with the suit scheduled property and by directing them not to demolish or cause any damage to the suit schedule property.

3. The appellant, who is plaintiff's neighbour, made applications for his impleadment in the suit and the application for interim relief. The applicant did not claim any right, title or interest in the suit schedule property but claimed that there is infringement of his right of light and air if the construction by the plaintiff is commenced and completed and, therefore, he is a proper party in the matter.

4. The trial court heard the plaintiff and the proposed party and by order dated 20.07.2010 allowed the said applications. The trial court, while allowing the said applications made by the present appellant, observed as follows :-

> "The claim of petitioner is that, though he is not claiming right over the property of plaintiff, his grievance is only about the construction being made by the plaintiff because it is effecting his right for light and air. The objection of the plaintiff is that because he is challenging the notice issued by the Municipality in respect of the construction, since the petitioner is not having any right over the suit property, he is not necessary party. I have considered other submissions also made and the citations relied by the either side. Under Order 1 Rule 10 a party would become necessary party or proper party if he is having only over the subject matter to be adjudication under the suit and then can be impleaded. In this case though the third party petitioner is not claiming any title over the property. Even if the pleadings of the plaintiff have to be considered, the title of the plaintiff over the suit property is not in dispute. What is in dispute among the plaintiff and the defendants already on record is about the construction being made by the plaintiff. Because the defendants already on record have said to have issued notice to the plaintiff stating that the construction is illegal. Challenging the said notice the present suit is filed. The present suit is filed after withdrawing the previous suit for injunction filed against Municipality said to be filed before issuance of the notice under Section 452 of Municipal Act. In that case the petitioner had already been impleaded on his application as he was expressing the grievance of the infringement of his right for light and air in view of the construction of the plaintiff. Having considered the decisions relied by either party to my considered opinion, the decision relied by the third party petitioner is that similar facts as of the present case on hand wherein the Court held that though the said third party is not a necessary party, but he is proper party in respect of his grievance to the suit proceedings there in and ordered his impleading in the suit. The facts in the decisions relied by the Learned Counsel for plaintiff are not similar to the facts on hand. The[illegible]e

decisions relied by Learned Counsel for third party petitioner in 2005 (6) ALD NOC 223 (Between : Neelam Ajit Vs. S. Suresh Reddy and another), I hold that the third party petitioner can be impleaded in the suit and as well as the application for injunction as Defendant No. 3 and Respondent No. 3 respectively."

5. The above order of the trial court was challenged by the respondent No. 1 (plaintiff) before the High Court. The High Court, after hearing the parties, by its order dated 08.06.2011 dismissed the Civil Revision Petitions filed by the respondent No. 1 herein by observing as follows :

"4. It is to be noted that the vendor of the plaintiff and the vendor of the first respondent herein are neighbours, having purchased common property and dividing the same into two portions and one portion comprising an extent of 790 sq. yards was purchased by the first respondent and the other portion comprising of 580 sq. yards was purchased by the vendor of the plaintiff. It is further stated that both the parties made constructions in their respective plots and allegations and counter allegations were made against one another alleging deviations from the sanctioned plan and violation of the building rules.

5. It is not disputed that previously in the similar circumstances, this Court by common order dated 25.10.2010 in CRP Nos. 2870 and 3882 of 2010, dismissed the said revision petitions and confirmed the orders passed by the trial court, permitting the first respondent to come on record as defendant in the said suit OS No. 960 of 2010 and copy of the said order is placed on record. The issue raised in the present revision petitions virtually covered by the said earlier order dated 25.10.2010 in CRP Nos. 2870 and 3882 of 2010 and adopting the reasons mentioned therein, the present revision petitions are also dismissed."

6. The respondent No. 1 then made applications for review of the order of the High Court dated 08.06.2011.

7. The High Court by the impugned order recalled its earlier order dated 08.06.2011 and directed the trial court to consider the applications for impleadment afresh.

8. While recalling the order dated 08.06.2011, the High Court observed thus:

"11. During enquiry of the review applications, the petitioner filed several documents including the sale deeds and the sanctioned plan and also photographs in support of his contention that while making the construction he has left the space towards set backs as required under the rules and the construction is in accordance with the sanctioned plan and the question of petitioner's construction causing obstruction to the free flow of light and air to the first respondent's six storied building does not arise. The said documents were not filed before the trial Court and hence, there was no occasion for the trial Court to refer to the same in the impugned order. The trial court ordered impleadment of the first respondent herein mainly on the ground that in the earlier suit, which was filed by the plaintiff against the municipality for mere injunction, the first respondent was impleaded on his application. It is stated that the earlier suit was withdrawn and subsequently, plaintiff filed the present suit for declaration that the notice issued under section 452 of the Municipal Corporation Act is illegal. Admittedly, no relief is sought in the present suit against the first respondent. The question as to whether or not the first respondent herein would be a proper and necessary party having regard to the nature of the relief prayed for in the present suit is a matter to be considered independently, irrespective of impleadment of the first respondent herein in the earlier suit, which was filed only for injunction. The trial court has to consider the question as to whether or not the first respo d

necessary party to the present suit in the light of the documents now sought to be filed by the petitioner. Order 1 Rule 10 CPC contemplates the impleadment of proper and necessary party, whose presence before the Court is necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The question as to whether or not the first respondent is a proper and necessary party, who can be impleaded in terms of Order 1 Rule 10 CPC has to be considered keeping in view the relief prayed for in the present suit and the dispute that is required to be settled pertaining to the impugned notice issued by the Municipal Corporation. The impugned order passed by the trial court permitted impleadment of the first respondent on the premise that he was previously impleaded in another suit, which was filed for injunction is therefore held unsustainable and the same is accordingly set aside."

9. A careful look at the impugned order would show that the High Court had a fresh look at the question whether the appellant could be impleaded in the suit filed by the respondent No. 1 and, in the light of the view which it took, it recalled its earlier order dated 08.06.2011. The course followed by the High Court is clearly flawed. The High Court exceeded its review jurisdiction by reconsidering the merits of the order dated 08.06.2011. The review jurisdiction is extremely limited and unless there is mistake apparent on the face of the record, the order/judgment does not call for review. The mistake apparent on record means that the mistake is self evident, needs no search and stares at its face. Surely, review jurisdiction is not an appeal in disguise. The review does not permit rehearing of the matter on merits.

10. The order passed by the High Court on 08.06.2011, on a careful reading, shows that the High Court instead of repeating the reasons which it had given in other revision petitions being CRP Nos. 2870 and 3882 of 2010, while it was fully conscious of the fact that those civil revisions arose from

a different suit followed its order in CRP Nos. 2870 and 3882 of 2010. The High Court was fully conscious of the factual and legal position while it was considering the civil revision petitions filed by the present respondent No. 1. In the order upon which reliance was placed by the High Court while dismissing the civil revision petitions, the High Court had noted thus :-

> "No doubt, no relief is sought for against the proposed party in the suit. The object of Order 1 Rule 10(2) C.P.C. to implead a third party to the suit is that the dispute in the suit would be resolved in the presence of all, in order to avoid multiplicity of proceedings. There must be some semblance of right to the proposed party. If the petitioner violates the building plan without leaving set backs, cellar etc., then certainly it would cause inconvenience to the neighbours. The proposed party is one of the neighbours. Therefore, to safeguard his interest, in view of the fact that he has got some semblance of right, though no relief is claimed against him, he would be necessary and proper party to come on record. That is why the trial Court rightly impleaded him as a party to the suit and I.A. and there are no grounds to interfere with the same. The revision is devoid of merits and is liable to be dismissed."

11. In our view, the High Court was not at all justified to review the order dated 08.06.2011.

12. The impugned order dated 13.12.2011 is, accordingly, set aside. Appeals are allowed as above. No costs.

R.P. Appeals allowed.