M/S. DYNAMIC ORTHOPEDICS PVT. LTD.

v.

COMMISSIONER OF INCOME TAX, COCHIN, KERALA

(Civil Appeal No. 8419 of 2003)

FEBRUARY 16, 2010

[S.H. KAPADIA AND AFTAB ALAM, JJ.]

Income Tax Act, 1961:

s.115-J – Book profit – Depreciation – Assessee providing for depreciation under r.5 of Income Tax Rules, but Assessing Officer allowing depreciation as per Schedule XIV to the Companies Act – High Court upholding the view of Assessing Officer – But, similar view of High Court in ***CIT vs. Malayala Manorama Company Ltd.**** *stood reversed by judgment of Supreme Court in Malayala Manorama Company Ltd. vs. CIT** – HELD: Section 115J of the 1961 Act is a special provision relating only to certain Companies – The whole purpose of s.115J was to take care of the phenomenon of prosperous 'zero tax' Companies not paying taxes though they continued to earn profits and declare dividends – Therefore, a Minimum Alternate Tax was sought to be imposed on 'zero tax' Companies – Section 115J imposes tax on a deemed income – The said section does not make any distinction between public and private limited companies – Once a company falls within the ambit of its being MAT company, s.115 J applies and the company would be required to prepare its profits and loss accounts only in terms of parts II and III of Schedule VI to 1956 Act – Section 115J of the 1961 Act legislatively only incorporates provisions of Parts II and III of Schedule VI to 1956 Act – Such incorporation is by a deeming fiction – Therefore, s. 115J (1A) of the 1961 Act is needed to be read in strict sense – If so read, it is clear that, by legislative incorporation, only Parts II and III of Schedule VI to 1956 Act have been incorporated*

legislatively into s.115J of the 1961 Act – Therefore, the question of applicability of Parts II and III of Schedule VI to 1956 Act does not arise – If the judgement of Supreme Court in Malayala Manorama Company Limited is to be accepted, then the very purpose of enacting s.115J of the 1961 Act would stand defeated – The view of the Kerala High Court has been wrongly reversed by Supreme Court – The matter needs re-consideration by a larger Bench of the Court – Income Tax Rules, 1962 – r.5 – Companies Act, 1956 – Schedule VI – Parts II and III and Schedule XIV.

Commissioner of Income Tax vs. Malayala Manorama Company Limited* **[2002] 253 I.T.R. 378 (Kerala), approved.

***Malayala Manorama Company Limited vs. Commissioner of Income Tax* **[2008] 300 I.T.R.251, referred to.**

Case Law Reference:

[2002] 253 I.T.R. 378 (Kerala)	**approved**	**para 6**
[2008] 300 I.T.R. 251	**referred to**	**para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8419 of 2003.

From the Judgment & Order dated 5.7.2002 of the High Court of Kerala at Ernakulam in ITA No. 66 of 1999.

M.S. Ananth, Subramonium Prasad for the Appellant.

Vivek Tankha, ASG, H. Raghavendra Rao, R. Venkataramani, Lakshmi Iyengar, D.K. Singh, B.V. Balaram Das for the Respondent.

The Order of the Court was delivered by

O R D E R

S.H. KAPADIA, J. A short question which arises for

determination in this civil appeal is - whether the Income Tax Appellate Tribunal was, on the facts and circumstances of this case, justified in upholding the order of the Commissioner of Income Tax (Appeals) directing the Assessing Officer to allow the claim of depreciation as per the Income Tax Rules, 1962, for the purposes of computing the book profit under Section 115J of the Income Tax Act, 1961?

In this civil appeal, we are concerned with Assessment Year 1990-1991.

The appellant-assessee is a private limited of company engaged in the manufacture and sale of Orthopaedic appliances. In the Return of Income filed, the assessee returned an income of Rs.1,50,730/-. In the Profit and Loss Account, depreciation was provided at the rates specified in Rule 5 of the Income Tax Rules, 1962 [`Rules', for short]. While completing the assessment of income, the Assessing Officer re-computed the book profit for the purpose of Section 115J of the Income Tax Act, 1961, [`Act', for short], after allowing depreciation as per Schedule XIV to the Companies Act. The rates of depreciation specified in Schedule XIV to the Companies Act, 1956 [`1956 Act', for short] were lower than the rates specified under Rule 5 of the Rules. Being aggrieved by the assessment order, the assessee took up the matter before the Commissioner of Income Tax [Appeals] [`C.I.T.(A)', for short], who came to the conclusion that the assessee was a private limited company. It was not a subsidiary of a public company. Therefore, placing reliance on Section 355 of 1956 Act, the C.I.T. (A) held that Section 350 of 1956 Act was not applicable to the assessee and, in the circumstances, the Income Tax Officer had erred in providing depreciation at the rates specified under Schedule XIV to 1956 Act. Consequently, the C.I.T.(A) held that the assessee was right in providing depreciation in its accounts as per Rule 5 of the Rules. Aggrieved by the decision of the C.I.T.(A), I.T.A. No.115 of 1993 was preferred by the Department to the Income Tax Appellate

Tribunal [`Tribunal', for short]. By judgement and order dated 13th January, 1999, the Tribunal held that, since the assessee was a private limited company, Section 349 and Section 350 were not applicable to the facts of the case and, in the circumstances, the Income Tax Officer had erred in directing the assessee, which was a private limited company, to provide for depreciation as per Schedule XIV to 1956 Act, which was not applicable to the private limited companies [See Section 355 of 1956 Act]. Consequently, the appeal filed by the Department before the Tribunal stood dismissed.

Aggrieved by the said decision of the Tribunal, the Department preferred I.T.A. No.66 of 1999 before the High Court of Kerala which held that Section 115J of the Act was introduced in Assessment Year 1988-1989 to take care of the phenomenon of prosperous `zero tax' Companies which had continued despite the enactment of Section 80VVA of the Act. These Companies were paying no income tax though they had profits and though they were declaring dividends. Consequently, Section 115J of the Act was inserted to levy a minimum tax on book profits of certain Companies. According to the High Court, Section 115J of the Act read with Explanation clause (iv), as it stood at the material time, was a piece of legislation by incorporation and, consequently, the provisions of Section 205 of 1956 Act stood incorporated into Section 115J of the Act, hence, the Income Tax Officer was right in directing the assessee to provide for depreciation at the rate specified in Schedule XIV to 1956 Act and not in terms of Rule 5 of the Rules. Hence, this civil appeal is filed by the assessee.

To answer the controversy, we quote hereinbelow the relevant provision(s) of the Companies Act, 1956, Income Tax Act, 1961, as it stood at the material time, as also Income Tax Rules, 1962:

"Provisions of the Companies Act, 1956:

205.(1) No dividend shall be declared or paid by a company for any financial year except out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section

(2) or out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with those provisions and remaining undistributed or out of both or out of moneys provided by the Central Government or a State Government for the payment of dividend in pursuance of a guarantee given by that Government.

349.(1) In computing for the purpose of section 348, the net profits of a company in any financial year--

[a] xxxx xxxx xxxx

[b] the sums specified in sub-section (4) shall be deducted, and those specified in sub-section (5) shall not be deducted.

xxxx xxxx xxxx

[4] In making the computation aforesaid, the following sums shall be deducted:--

[a] to [j] xxxx xxxx

[k] depreciation to the extent specified in section 350.

Ascertainment of depreciation.

350. The amount of depreciation to be deducted in pursuance of clause (k) of sub-section (4) of section 349 shall be the amount calculated with reference to the written down value of the assets as shown by the books of the company at the end of the financial year expiring at the

commencement of this Act or immediately thereafter and at the end of each subsequent financial year *at the rate specified in Schedule XIV."*

Provisions of Income Tax Act, 1961:

"115J.(1A).-- Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956).

[a] to [d] xxxx xxxx xxxx

[e] the amount or amounts of dividends paid or proposed."

Provisions of Income Tax Rules, 1962:

"Depreciation.

5.(1) Subject to the provisions of sub-rule (2), the allowance under clause (ii) of sub-section (1) of section 32 in respect of depreciation of any block of assets shall be calculated at the percentages specified in the second column of the Table in Appendix I to these rules on the written down value of such block of assets as are used for the purposes of the business or profession of the assessee at any time during the previous year."

In this case, the question which arose for determination before the High Court was - whether the C.I.T.(A) was right in directing the Assessing Officer to allow the claim of depreciation made by the assessee as per the Income Tax Rules, 1962, for the purposes of computing the book profit under Section 115J of the Act, as it stood at the material time? The High Court allowed the appeal filed by the Department holding that the Assessing Officer was right in re-computing the book profit for the purpose of Section 115J of the Act after allowing depreciation as per Schedule XIV to the 1956 Act and not as

per the rates specified in Rule 5 of the Income Tax Rules, 1962, as claimed by the assessee. This view of the High Court, in the present case, was similar to the view taken by it in the case of *Commissioner of Income Tax vs. Malayala Manorama Company Limited,* reported in [2002] 253 I.T.R. 378 (Kerala), which High Court's judgement stood reversed by the judgement of this Court in the case of *Malayala Manorama Company Limited vs. Commissioner of Income Tax,* reported in [2008] 300 I.T.R.251.

In our view, with respect, the judgement of this Court in *Malayala Manorama Company Limited vs. Commissioner of Income Tax,* reported in [2008] 300 I.T.R.251. needs re-consideration for the following reasons: Chapter XII-B of the Act containing "Special provisions relating to certain Companies" was introduced in the Income Tax Act, 1961, by the Finance Act, 1987, with effect from 1st April, 1988. In fact, Section 115J replaced Section 80VVA of the Act. Section 115J [as it stood at the relevant time], inter alia, provided that where the total income of a company, as computed under the Act in respect of any accounting year, was less than thirty per cent of its book profit, as defined in the Explanation, the total income of the company, chargeable to tax, shall be deemed to be an amount equal to thirty per cent of such book profit. The whole purpose of Section 115J of the Act, therefore, was to take care of the phenomenon of prosperous `zero tax' Companies not paying taxes though they continued to earn profits and declare dividends. Therefore, a Minimum Alternate Tax was sought to be imposed on `zero tax' Companies. Section 115J of the Act imposes tax on a deemed income. Section 115J of the Act is a special provision relating only to certain Companies. The said section does not make any distinction between public and private limited companies. In our view, Section 115J of the Act legislatively only incorporates provisions of Parts II and III of Schedule VI to 1956 Act. Such incorporation is by a deeming fiction. Hence, we need to read Section 115J(1A) of the Act in the strict sense. If we so read, it is clear that, by legislative

incorporation, only Parts II and III of Schedule VI to 1956 Act have been incorporated legislatively into Section 115J of the Act. Therefore, the question of applicability of Parts II and III of Schedule VI to 1956 Act does not arise. If a Company is a MAT Company, then be it a private limited company or a public limited company, for the purposes of Section 115J of the Act, the assessee-Company has to prepare its profit and loss account in accordance with Parts II and III of Schedule VI to 1956 Act alone. If, with respect, the judgement of this Court in Malayala Manorama Company Limited [supra] is to be accepted, then the very purpose of enacting Section 115J of the Act would stand defeated, particularly when the said section does not make any distinction between public and private limited companies. It needs to be reiterated that, once a Company falls within the ambit of it being a MAT Company, Section 115J of the Act applies and, under that section, such an assessee-Company was required to prepare its profit and loss account only in terms of Parts II and III of Schedule VI to 1956 Act. The reason being that rates of depreciation in Rule 5 of the Income Tax Rules, 1962, are different from the rates specified in Schedule XIV of 1956 Act. In fact, by the Companies (Amendment) Act, 1988, the linkage between the two has been expressly de-linked. Hence, what is incorporated in Section 115J is only Schedule VI and not Section 205 or Section 350 or Section 355. This was the view of the Kerala High Court in the case of *Commissioner of Income Tax vs. Malayala Manorama Company Limited,* reported in [2002] 253 I.T.R. 378 (Kerala), which has been wrongly reversed by this Court in the case of *Malayala Manorama Company Limited vs. Commissioner of Income Tax,* reported in [2008] 300 I.T.R.251.

For the afore-stated reasons, the Registry is directed to place this civil appeal before the learned Chief Justice for appropriate directions as we are of the view that the matter needs re-consideration by a larger Bench of this Court.

R.P. Appeal referred to larger Bench.

ECONOMIC TRANSPORT ORGANIZATION

v.

M/S. CHARAN SPINNING MILLS (P) LTD. AND ANR

(Civil Appeal No. 5611 of 1999)

FEBRUARY 17, 2010

[K.G. BALAKRISHNAN, CJI., R.V. RAVEENDRAN, D.K. JAIN, P. SATHASIVAM AND J.M. PANCHAL, JJ.]

Consumer Protection Act, 1986:

ss. 2(1)(g) and 14(1)(d) – Deficiency in service – Complaint – Maintainability of – Contract of insurance – Consignment of goods – Damaged in transit – Compensation paid by insurer to consignor/assured – Execution of letter of subrogation-cum-special power of attorney by consignor in favour of insurer – Claim of compensation by consignor and insurer against carrier – Allowed by fora below – On appeal, held: Insurer, as subrogee, can file a complaint under the Act either in the name of assured (as his attorney holder) or in joint names of assured and insurer for recovery of amount due from the service provider – It can request the assured to sue the wrong doer – Insurer cannot in its own name maintain a complaint, even if its right is traced to the terms of a Letter of Subrogation-cum-Assignment – On addition of words of assignment to letter of subrogation, the complaint would be maintainable so long as it is in the name of assured and insurer figures in the complaint only as attorney holder or subrogee of assured – Document whether subrogation simpliciter or subrogation-cum-assignment is not relevant for deciding the maintainability of a complaint – On facts, presumption regarding negligence u/s. 9 was not rebutted – Loss of consignment by assured and settlement of claim by insurer established by evidence – Thus, order of fora below not interfered with – Carriers Act, 1865 – s. 9.

Insurance – Difference between 'subrogation' and 'assignment' – Held: Equitable assignment of rights and remedies of assured in favour of insurer, implied in a contract of indemnity, is known as 'subrogation' – It occurs automatically, when insurer settles the claim under the policy, by reimbursing the entire loss suffered by assured – It need not be evidenced by any writing – Assignment refers to transfer of a right by instrument for consideration – When there is absolute assignment, assignor is left with no title or interest in the property or right, which is the subject matter of assignment.

Subrogation – Principles of – Explained.

Subrogation – Three categories – Subrogation by equitable assignment; subrogation by contract; and subrogation-cum-assignment – Explained.

Insurance contract – Settlement of claim – Execution of document by assured in favour of insurer, deed of Subrogation simpliciter or Subrogation-cum-Assignment – Held: Depends upon the intention of parties as evidenced by the wording of document – Title or caption of document, by itself, may not be conclusive – If intention was to have only a subrogation, use of words "assign, transfer and abandon in favour of" would in the context be construed as referring to subrogation only.

*Reconsideration of the decision in *Oberai Forwarding Agency* **v.** *New India Assurance Co. Ltd. – Held:* **Oberai's** case *is not good law insofar as it construes a Letter of Subrogation-cum-Assignment, as a pure and simple assignment – But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision was correct.*

s. 2(d) (as amended by Amendment Act 62 of 2002) – Addition of words 'but does not include a person who avails of such services for any commercial purpose' in the definition

of 'consumer' – Applicability of amendment to complaint filed before the amendment – Held: Not applicable.

Transfer of Property Act, 1882:

s. 6 – Letter of subrogation containing terms of assignment – Held: Cannot be treated only as an assignment by ignoring the subrogation, otherwise document itself becomes invalid and unenforceable, having regard to the bar contained in s. 6 – But when letter of subrogation-cum-assignment is executed, assignment is interlinked with subrogation, and not being an assignment of a mere right to sue, will be valid and enforceable.

Words and Phrases:

'Subrogation and 'Assignment'– Meaning of.

The first respondent-assured/consignor entrusted consignment of goods for transportation to the appellant-carrier. The said consignment was insured with the second respondent-insurer covering the transit risk. The goods were damaged in an accident. The insurer settled the claim of the assured. On receiving the payment, the first respondent executed a Letter of Subrogation-cum-Special Power of Attorney in favour of the second respondent. Respondent no. 1 and 2 filed complaint before the District Consumer Forum claiming compensation. The District Forum allowed the complaint and the same was upheld by the Fora below. Hence the present appeal.

The present appeal was referred to a larger bench for reconsideration of the decision in **Oberai Forwarding Agency v. New India Assurance Co. Ltd.* **case, which in turn referred the matter to the present Constitution Bench.**

The questions which arose for consideration are:

(a) Where the letter of subrogation executed by an assured in favour of the insurer contains, in addition to words referring to subrogation, terms which may amount to an assignment, whether the document ceases to be a subrogation and becomes an assignment?

(b) Where the insurer pays the amount of loss to the assured, whether the insurer as subrogee, can lodge a complaint under the Act, either in the name of the assured, or in the joint names of the insurer and assured as co-complainants?

(c) Where the rights of the assured in regard to the claim against the carrier/service provider are assigned in favour of the insurer under a letter of subrogation-cum-assignment, whether the insurer as the assignee can file a complaint either in its own name, or in the name of the assured, or by joining the assured as a co-complainant?

(d) Whether relief could be granted in a complaint against the carrier/service provider, in the absence of any proof of negligence?

(e) and whether the decision in *Oberai's* case is a good law?

Dismissing the appeal, the Court

HELD: On Questions (a) to (c):

1. The assured entrusted the consignment for transportation to the carrier. The consignment was insured by the assured with the insurer. When the goods were damaged in an accident, the assured, as the consignor-consumer, could certainly maintain a complaint under the Act, seeking compensation for the

loss, alleging negligence and deficiency in service. The fact that in pursuance of a contract of insurance, the assured had received from the insurer, the value of the goods lost, either fully or in part, does not erase or reduce the liability of the wrongdoer responsible for the loss. Therefore, the assured as a consumer, could file a complaint under the Act, even after the insurer had settled its claim in regard to the loss. [Para 10] [915-H; 916-A-C]

2.1. A contract of insurance is a contract of indemnity. The loss/damage to the goods covered by a policy of insurance, may be caused either due to an act for which the owner (assured) may not have a remedy against any third party (as for example when the loss is on account of an act of God) or due to a wrongful act of a third party, for which he may have a remedy against such third party (as for example where the loss is on account of negligence of the third party). In both cases, the assured can obtain reimbursement of the loss, from the insurer. In the first case, neither the assured, nor the insurer can make any claim against any third party. But where the damage is on account of negligence of a third party, the assured will have the right to sue the wrongdoer for damages; and where the assured has obtained the value of the goods lost from the insurer in pursuance of the contract of insurance, the law of insurance recognizes as an equitable corollary of the principle of indemnity that the rights and remedies of the assured against the wrongdoer stand transferred to and vested in the insurer. The equitable assignment of the rights and remedies of the assured in favour of the insurer, implied in a contract of indemnity, known as 'subrogation', is based on two basic principles of equity: *(a) No tort-feasor should escape liability for his wrong; (b) No unjust enrichment for the injured, by recovery of compensation for the same loss, from more than one source.* **The doctrine of subrogation will thus enable**

the insurer, to step into the shoes of the assured, and enforce the rights and remedies available to the assured. An 'assignment' on the other hand refers to a transfer of a right by an instrument for consideration. When there is an absolute assignment, the assignor is left with no title or interest in the property or right, which is the subject matter of the assignment. [Paras 11 and 13] [916-C-H; 917-A; 920-A-B]

Vasudeva Mudaliar vs. Caledonian Insurance Co. **AIR 1965 Mad. 159, referred to.**

National Fire Insurance Co. vs. McLaren **1886 (12) OR 682;** *Banque Financiere de la Cite* vs. *Parc (Battersea) Ltd.* **1999 (1) A.C. 221;** *James Nelson and Sons Ltd. vs. Nelson Line (Liverpool) Ltd. (No.1)* **1906 (2) KB 217, referred to.**

Black's Law Dictionary; *Dan B. Dobb's Law of Contract* **2nd Edn 4.3 p 404;** *Laurence P. Simpson's Handbook on Law of Suretyship* **1950 Edn. p 205;** *Insurance Law by MacGillivray & Parkington* **(7th Edn.), referred to.**

2.2. Subrogation, as an equitable assignment, is inherent, incidental and collateral to a contract of indemnity, which occurs automatically, when the insurer settles the claim under the policy, by reimbursing the entire loss suffered by the assured. It need not be evidenced by any writing. But where the insurer does not settle the claim of the assured fully, by reimbursing the entire loss, there will be no equitable assignment of the claim enabling the insurer to stand in the shoes of the assured, but only a right to recover from the assured, any amount remaining out of the compensation recovered by the assured from the wrongdoer, after the assured fully recovers his loss. [Para 14] [922-E-G]

2.3. To avoid any dispute with the assured as to the

right of subrogation and extent of its rights, the insurers usually reduce the terms of subrogation into writing in the form of a Letter of Subrogation which enables and authorizes the insurer to recover the amount settled and paid by the insurer, from the third party-wrong doer as a Subrogee-cum-Attorney. When the insurer obtains an instrument from the assured on settlement of the claim, whether it will be a deed of subrogation, or subrogation-cum-assignment, would depend upon the intention of parties as evidenced by the wording of the document. The title or caption of the document, by itself, may not be conclusive. It is possible that the document may be styled as 'subrogation' but may contain in addition an assignment in regard to the balance of the claim, in which event it will be a deed of subrogation-cum-assignment. It may be a pure and simple subrogation but may inadvertently or by way of excessive caution use words more appropriate to an assignment. If the terms clearly show that the intention was to have only a subrogation, use of the words "assign, transfer and abandon in favour of" would in the context be construed as referring to subrogation and nothing more. [Para 14] [922-G-H; 923-A-D]

2.4. The subrogations can be classified under three broad categories: (i) subrogation by equitable assignment; (ii) subrogation by contract; and (iii) subrogation-cum-assignment. In all three types of subrogation, the insurer can sue the wrongdoer in the name of the assured. This means that the insurer requests the assured to file the suit/complaint and has the option of joining as co-plaintiff. Alternatively the insurer can obtain a special power of Attorney from the assured and then to sue the wrongdoer in the name of the assured as his attorney. [Para 15] [923-D-E; 924-F-G]

2.5. The assured has no right to deny the equitable right of subrogation of the insurer in accordance with law,

even whether there is no writing to support it. But the assured whose claim is settled by the insurer, only in respect of a part of the loss may insist that when compensation is recovered from the wrongdoer he will first appropriate the same, to recover the balance of his loss. The assured can also refuse to execute a subrogation-cum-assignment which has the effect of taking away his right to receive the balance of the loss. But once a subrogation is reduced to writing, the rights inter-se between the assured and insurer will be regulated by the terms agreed, which is a matter of negotiation between the assured and insurer. [Para 15] [924-H; 925-A-B]

2.6. If a letter of subrogation containing terms of assignment is to be treated only as an assignment by ignoring the subrogation, there may be the danger of document itself becoming invalid and unenforceable, having regard to the bar contained in section 6 of the Transfer of Property Act, 1882. Section 6 of 1882 Act provides that property of any kind may be transferred except as otherwise provided by that Act or by any other law for the time being in force. Clause (e) of the said section provides that mere right to sue cannot be transferred. A transfer or assignment of a mere right to sue for compensation will be invalid having regard to section 6(e) of the TP Act. But when a letter of subrogation-cum-assignment is executed, the assignment is interlinked with subrogation, and not being an assignment of a mere right to sue, will be valid and enforceable. [Para 16] [925-C-E; 925-G-H]

2.7. The principles relating to subrogation can be summarized as:

(i) Equitable right of subrogation arises when the insurer settles the claim of the assured, for the entire loss.

When there is an equitable subrogation in favour of the insurer, the insurer is allowed to stand in the shoes of the assured and enforce the rights of the assured against the wrong-doer.

(ii) Subrogation does not terminate nor puts an end to the right of the assured to sue the wrong-doer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation.

(iii) Where the assured executes a Letter of Subrogation, reducing the terms of subrogation, the rights of the insurer *vis-à-vis* the assured will be governed by the terms of the Letter of Subrogation.

(iv) A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or petition for recovery of compensation can be filed in the name of the assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants.

(v) Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrongdoer on its own account and for its own benefit. But as the instrument is a subrogation-cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insured becomes entitled to the entire amount recovered from the wrong-doer, that is, not only the amount that the insured had paid to the assured, but also any amount received in excess of what was paid by it to the assured, if the instrument so provides. [Para 17] [927-A-H; 927-A]

3.1. Whether the document executed by the assured in favour of the insurer is a subrogation simpliciter, or a subrogation-cum-assignment is relevant only in a dispute between the assured and the insurer. It may not be relevant for deciding the maintainability of a complaint under the Act. If the complaint is filed by the assured (who is the consumer), or by the assured represented by the insurer as its attorney holder, or by the assured and the insurer jointly as complainants, the complaint will be maintainable, if the presence of insurer is explained as being a subrogee. Whether the amount claimed is the total loss or only the amount for which the claim was settled would make no difference for the maintainability of the complaint, so long as the consumer is the complainant (either personally or represented by its attorney holder) or is a co-complainant along with his subrogee. On the other hand, if the assured (who is the consumer) is not the complainant, and the insurer alone files the complaint in its own name, the complaint will not be maintainable, as the insurer is not a 'consumer', nor a person who answers the definition of 'complainant' under the Act. The fact that it seeks to recover from the wrongdoer (service provider) only the amount paid to the assured and not any amount in excess of what was paid to the assured will also not make any difference, if the assured-consignor is not the complainant or co-complainant. The complaint will not be maintainable unless the requirements of the Act are fulfilled. The remedy under the Act being summary in nature, once the consumer is the complainant or is a co-complainant, it will not be necessary for the Consumer Forum to probe the exact nature of relationship between the consumer (assured) and the insurer, in a complaint against the service provider. [Para 19] [929-G-H; 930-A-E]

3.2. If in a summary proceedings by a consumer

against a service provider, the insurer is added as a co-complainant or if the insurer represents the consumer as a power of attorney, there is no need to examine the nature of rights inter-se between the consumer and his insurer. When the complaint is by the consignor-consumer, with or without the insurer as a co-complainant, the service provider cannot require the consumer forum to consider the nature of relationship between the assured and the insurer or the nature and true purport of the document produced as a letter of subrogation. A wrong-doer cannot sidetrack the issue before the consumer forum. Once the 'consumer', that is the assured, is the complainant, the complaint will be maintainable subject to fulfillment of the requirements of the Act. [Para 20] [931-A-D]

3.3. A document should be transaction-specific. Or at least an effort should be made to delete or exclude inapplicable or irrelevant clauses. But where a large number of documentation is required to be done by officers not-conversant with the nuances of drafting, use of standard forms with several choices or alternative provisions is found necessary. The person preparing the document is required to delete the terms/clauses which are inapplicable. But that is seldom done. The result is that the documents executed in standard forms will have several irrelevant clauses. Computerisation and large legal departments should have enabled insurance companies, banks and financial institutions to (i) improve their documentation processes and omit unnecessary and repetitive clauses; (ii) avoid incorporation of other documents by vague references; and (iii) discontinue pasting or annexing of slips. But that is seldom done. If documents are clear, specific and self-contained, disputes and litigations will be considerably reduced. [Para 22] [935-B-E]

3.4. The use of the words "we hereby assign, transfer and abandon to you all our actionable rights, title and interest" in the document, is in regard to rights and remedies against (1) railway administration (2) sea carriers (3) agents of sea carriers (4) port authorities (5) customs authorities and (6) persons whomsoever is liable in respect thereof. Even though, the matter relates to carriage of goods by road, the claims or remedies against a road carrier are not even mentioned. Excluding the irrelevant clauses, the document continues to be a letter of subrogation. [Para 21] [934-G-H; 935-A]

<u>Correctness of oberia's case:</u>

4.1. There is no doubt that in *Oberia's* case the first portion which stated that all rights were assigned, transferred and abandoned in favour of the insurer and also empowered the insurer to sue in its own name, if read in isolation would amount to an assignment. But if those words are read with the other recitals and the words "in consideration of your paying to us the sum of Rs.64,137/- only in full settlement of our claim for non-delivery/ shortage and damage, under policy issued by you…." make it clear that it was a subrogation-cum-assignment. Further, the second operative portion which states that "we hereby subrogate to you the same rights as we have in consequence of or arising from the said loss or damage" are not words of assignment. When the words used are: "we hereby subrogate to you" and not "we hereby transfer or assign in your favour", having regard to the settled meaning of "subrogate", the said words could not operate as an absolute assignment, but only as an subrogation. The genesis of the document is subrogation. The inclusion of an assignment is an additional right given to the insurer. The document did not cease to be a subrogation by reason of enlargement of subrogation by granting such additional right. Thus,

***Oberai's* case was not correctly decided, as it held a 'subrogation-cum-assignment' as a mere 'assignment'. It ignored the fact that, shorn of the cover and protection of subrogation, the document, if read as a simple assignment would fall foul of section 6(e) of Transfer of Property Act and thus would be unenforceable. But the ultimate decision in *Oberai* may be correct as the complaint was filed by the insurer, in its own name and on its own behalf making a claim for the entire value of the goods, in excess of what was paid to the assured. Though the assured was belatedly impleaded as a co-complainant, the nature and contents of the complaint was not apparently changed, and continued to be one by the insurer as assignee. On those peculiar facts, the finding that the complaint under the Act by the insurer (who was not a consumer) was not maintainable, was justified. [Para 23] [937-B-H; 938-A-C]**

4.2. Para 23 of the decision in *Oberai*'s case does not mean that when the consignment is received by the carrier from the consignor and put it in the course of transportation, the carrier has provided the service and thereafter either ceases to be a service provider or ceases to be responsible for delivery of the goods, and that consequently, the consignor ceases to be a 'consumer'. All that it meant was that in a contract for carriage of goods between the consignor and the carrier, if the consignor assigns the right to claim damages to an assignee, after the goods are lost or damaged, the assignee cannot claim to be a 'consumer' under the Act. It impliedly meant that if the assignment had been done before the loss or damage to the goods, then the assignment would have been in regard to 'property' and not a mere right to sue, and the assignee as consignee would be entitled to sue the carrier. [Para 23] [938-D-G]

Question (d):

5. Section 14(1)(d) of the Act contemplates award of compensation to the consumer for any loss suffered by consumer due to the negligence of the opposite party (Carrier). Section 9 of Carriers Act does not lay down a preposition that a carrier will be liable even if there was no negligence on its part. On the other hand, it merely raises a presumption that when there is loss or damage or non-delivery of goods entrusted to a carrier, such loss, damage or non-delivery was due to the negligence of the carrier, its servant and agents. Thus, where the consignor establishes loss or damage or non-delivery of goods, it is deemed that negligence on the part of the carrier is established. The carrier may avoid liability if it establishes that the loss, damage or non-delivery was due to an act of God or circumstances beyond its control. Section 14(1)(d) of the Act does not operate to relieve the carrier against the presumption of negligence created u/s. 9 of the Carriers Act. The submission that the presumption u/s. 9 of the Carriers Act is available only in suits filed before civil courts and not in other civil proceedings under other Acts, is not tenable. It cannot be accepted that the presumption u/s. 9 of Carriers Act is not available in a proceeding under the Consumer Protection Act and that therefore, in the absence of proof of negligence, it is not liable to compensate the respondents for the loss. [Paras 27, 28 and 29] [940-D-G; 940-H; 941-A; 942-C]

Patel Roadways Ltd. v. Birla Yamaha Ltd. **2000 (4) SCC 91;** *Economic Transport Organization vs. Dharward District Khadi* Gramodyog *Sangh* **2000 (5) SCC 78, relied on.**

Amendment of s. 2(d):

6. Section 2(d) of Act was amended by Amendment Act 62 of 2002 with effect from 15.3.2003, by adding the words "but does not include a person who avails of such

services for any commercial purpose" in the definition of 'consumer'. After the said amendment, if the service of the carrier had been availed for any commercial purpose, then the person availing the service will not be a 'consumer' and consequently, complaints will not be maintainable in such cases. But the said amendment will not apply to complaints filed before the amendment. [Para 25] [939-E-G]

Conclusion:

7.1. (a) The insurer, as subrogee, can file a complaint under the Consumer Protection Act, 1986 either in the name of the assured (as his attorney holder) or in the joint names of the assured and the insurer for recovery of the amount due from the service provider. The insurer may also request the assured to sue the wrong doer (service provider).

(b) Even if the letter of subrogation executed by the assured in favour of the insurer contains in addition to the words of subrogation, any words of assignment, the complaint would be maintainable so long as the complaint is in the name of the assured and insurer figures in the complaint only as an attorney holder or subrogee of the assured.

(c) The insurer cannot in its own name maintain a complaint before a consumer forum under the Act, even if its right is traced to the terms of a Letter of subrogation-cum-assignment executed by the assured.

(d) *Oberai* is not good law insofar as it construes a Letter of subrogation-cum-assignment, as a pure and simple assignment. But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision is correct. [Para 24] [939-G-H; 939-A-D]

Oberai Forwarding Agency v. New India Assurance Co. Ltd.* **2000 (2) SCC 407, Partly overruled.

7.2. In the instant case, the loss of consignment by the assured and settlement of claim by the insurer by paying Rs.4,47,436/- is established by evidence. Having regard to the presumption regarding negligence under section 9 of Carriers Act, it was not necessary for the complainants to prove further that the loss/damage was due to the negligence of the appellant or its driver. The presumption regarding negligence was not rebutted. Therefore, the District Forum was justified in allowing the complaint brought by the assured (first respondent) represented by the insurer and the insurer for recovery of Rs.447,436. The said order was affirmed by the State Forum and the National Forum. There is no reason to interfere with the same. [Para 30] [942-D-G]

Case Law Reference:

1886 (12) OR 682	**Referred to.**	**Para 12**
1999 (1) A.C.221	**Referred to.**	**Para 12**
1906 (2) KB 217	**Referred to.**	**Para 13**
AIR 1965 Mad. 159	**Referred to.**	**Para 13**
2000 (2) SCC 407	**Partly overruled.**	**Para 24**
2000 (4) SCC 91	**Relied on.**	**Para 28**
2000 (5) SCC 78	**Relied on.**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5611 of 1999.

From the Judgment & Order dated 19.7.1999 of the National Consumer Disputes Redressal Commission in R.P. No. 368 of 1999.

G.E. Vahanvati, Sol. Genl. of India Atul Nanda, Rameeza Hakeem, Sandeep Bajaj, Kishore Rawat, Dhiraj (for M.K. Dua) Dalip K. Malhotra, Pawan K. Bhal, Rajesh Malhotra, M.M. Kashyap, Dr. Meera Agarwal, Goodwill Indeevar, S.L. Gupta, Ram Ashray, K.L. Nandwani, Laskhmi Narayanan, V. Ramasubramanian, Debasis Misra, A.K. Raina, Binay K. Das, Anil Kumar Jha, Joy Basu, Ruchi Bharda, B.K. Satija, Maiban N. Singh, Anil Nauriya, Pyoli and Sumita Hazarika for the Appellant.

B. Sen, R.K. Singh, Deepa Rai, Jay Savla, Meenakshi Ogra, Rumi Chanda, K.K. Tyagi, Iftekhar Ahmad, P. Narasimhan, A.K. Raina, Binay K. Das, R.D. Upadhyay, Dinesh Chander Yadav, Vibhuti Sushant, A.S. Rishi, Dr. Kailash Chand, Ajay Garg, Sanjay Garg, K.V. Viswanathan, Rishi Maheshwari, Shally Bhasin Maheshwari, Vikramjeet Banerjee, Megha Mukerjee, Anup Kumar (N.P. on 3.12.2008) and Abhishek Kaushik, (N.P. on 3.12.2008) for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. This appeal was referred by a two-Judge Bench to a larger bench on 30.11.2000, being of the view that the decision of this Court in *Oberai Forwarding Agency v. New India Assurance Co. Ltd*. – 2000 (2) SCC 407, required reconsideration. In turn, the three-Judge Bench has referred the matter to a Constitution Bench on 29.3.2005.

Factual Background :

2. The first respondent (also referred to as the 'Assured' or the 'consignor') is a manufacturer of the cotton yarn. It took a policy of insurance from the second respondent (National Insurance Co. Ltd, referred to as the 'Insurer'), covering transit risks between the period 11.5.1995 and 10.5.1996 in respect of cotton yarn sent by it to various consignees through rail or road against theft, pilferage, non-delivery and/or damage. The first respondent entrusted a consignment of hosiery cotton yarn

of the value of Rs.7,70,948/- to the appellant (also referred to as the 'carrier') on 6.10.1995 for transportation and delivery to a consignee at Calcutta. The goods vehicle carrying the said consignment met with an accident and the consignment was completely damaged. On the basis of a surveyor's certificate issued after assessment of the damage, the second respondent settled the claim of the first respondent for Rs.447,436/- on 9.2.1996. On receiving the payment, the first respondent executed a Letter of Subrogation-cum-Special Power of Attorney in favour of the second respondent on 15.2.1996. Thereafter, respondents 1 and 2 filed a complaint under the Consumer Protection Act, 1986 ('Act' for short) against the appellant before the District Consumer Disputes Redressal Commission, Dindigul, claiming compensation of Rs.447,436/- with interest at 12% per annum, for deficiency in service, as the damage to the consignment was due to the negligence on the part of the appellant and its servants. It was averred that the insurer as subrogee was the co-complainant in view of the statutory subrogation in its favour on settlement of the claim and the letter of subrogation-cum-special power of attorney executed by the Assured.

3. The District Forum by its order dated 8.11.1996 allowed the complaint and directed the appellant to pay Rs.447,436/- with interest at the rate of 12% per annum from the date of accident (8.10.1995) till date of payment to the Insurer, on the basis of the subrogation. The District Forum held that the failure to deliver the consignment in sound condition was a deficiency in service, in view of the unrebutted presumption of negligence arising under sections 8 and 9 of the Carriers Act, 1865. The appeal filed by the appellant before the State Consumer Disputes Redressal Commission, Madras, challenging the said order was dismissed on 2.4.1998. The appellant thereafter filed a revision before the National Consumer Disputes Redressal Commission in the year 1999. The National Commission dismissed the appellant's revision petition by a short non-speaking order dated 19.7.1999 which reads thus: "We do not

find any illegality or jurisdictional error in the order passed by the State Commission." The said order is challenged in this appeal by special leave.

The Issue

4. The appellant herein resisted the complaint on the following grounds:

(i) The Assured (consignor) had insured the goods against transit risk with the Insurer. The Insurer had already settled the claim of the Assured. As a consequence, the Assured had no surviving claim that could be enforced against the carrier. At all events, as the Assured had transferred all its interest in the claim to the Insurer, it had no subsisting interest or enforceable right.

(ii) The Insurer did not entrust the consignment to the carrier for transportation. The appellant did not agree to provide any service to the Insurer. There was no privity of contract between the Insurer and the appellant. As a result, the Insurer was not a 'consumer' as defined in the Act and a complaint under the Act was not maintainable.

(iii) The letter of subrogation was executed by the Assured (consignor), *after the goods were damaged.* This amounted to a transfer of a mere right to sue by the Assured in favour of the Insurer, which was invalid and enforceable.

(iv) There was no negligence on the part of its driver and the accident occurred due to circumstances beyond his control. The respondents did not place any evidence to prove any negligence, in spite of appellant's denial of negligence. Having regard to section 14(1)(d) of the Act, liability can be fastened on a carrier, for payment of compensation, only by establishing that the consumer had suffered loss or injury due to the negligence of the carrier as a service provider. In view of the special provision in

section 14(1)(d) of the Act, the complainants under the Act were not entitled to rely upon the statutory presumption of negligence available under section 9 of the Carriers Act, 1865 which is available in civil suits brought against carriers. In the absence of proof of negligence, it was not liable to pay compensation for damage to the goods.

5. After leave was granted in this case on 27.9.1999, a three-Judge Bench of this Court rendered its decision in *Oberai Forwarding Agency* on 1.2.2000, making a distinction between 'assignment' and 'subrogation'. This Court held that where there is a subrogation simpliciter in favour of the insurer on account of payment of the loss and settlement of the claim of the assured, the insurer could maintain an action in the Consumer Forum in the name of the assured, who as consignor was a consumer. This Court further held that when there is an assignment of the rights of the assured in favour of the insurer, the insurer as assignee cannot file a complaint under the Act, as it was not a 'consumer' under the Act. This Court held that even if the assured was a co-complainant, it would not enable the insurer to maintain a complaint under the Act, if it was an assignee of the claim. We extract below the relevant portion of the said judgment:

"17. In its literal sense, subrogation is the substitution of one person for another. The doctrine of subrogation confers upon the insurer the right to receive the benefit of such rights and remedies as the assured has against third parties in regard to the loss to the extent that the insurer has indemnified the loss and made it good. The insurer is, therefore, entitled to exercise whatever rights the assured possesses to recover to that extent compensation for the loss, but it must do so in the name of the assured.

x x x x x

19. With the distinction between subrogation and assignment in view, let us examine the letter of subrogation

executed by the second respondent in favour of the first respondent. Its operative portion may be broken up into two, namely, (i) "we hereby assign, transfer and abandon to you all our rights against the Railway Administration, road transport carriers or other persons whatsoever, caused or arising by reason of the said damage or loss and grant you full power to take and use all lawful ways and means in your own name and otherwise at your risk and expense to recover the claim for the said damage or loss"; and (ii) 'we hereby subrogate to you the same rights as we have on consequence of or arising from the said loss or damage".

20. By the first clause the second respondent assigned and transferred to the first respondent all its rights arising by reason of the loss of the consignment. It granted the first respondent full power to take lawful means to recover the claim for the loss, and to do so in its own name. If it were a mere subrogation, first, the word "assigned" would not be used. Secondly, there would not be a transfer of all the second respondent's rights in respect of the loss but the transfer would be limited to the recovery of the amount paid by the first respondent to the second respondent. Thirdly, the first respondent would not be entitled to take steps to recover the loss in its own name; the steps for recovery would have to be taken in the name of the second respondent. Thus, by the first clause there was an assignment in favour of the first respondent.

21. The second clause, undoubtedly, used the word "subrogate", but it conferred upon the first respondent "the same rights" that the second respondent had "in consequence of or arising from the said loss or damage", which meant that the transfer was not limited to the quantum paid by the first respondent to the second respondent but encompassed all the compensation for the loss. Even by the second clause, therefore, there was an

assignment in favour of the first respondent.

22. Learned counsel for the first respondent submitted that the letter of subrogation and the special power of attorney should be read together and, so read, it would be seen that the first respondent was not an assignee of the second respondent's rights but was merely subrogated to them. The terms of the letter of subrogation are clear. They cannot be read differently in the light of another, though contemporaneous, document.

23. Now, as is clear, the loss of the consignment had already occurred. All that was assigned and transferred by the second respondent to the first respondent was the right to recover compensation for the loss. There was no question of the first respondent being a beneficiary of the service that the second respondent had hired from the appellant. That service, namely, the transportation of the consignment, had already been availed of by the second respondent, and in the course of it the consignment had been lost. The first respondent, therefore, was not a "consumer" within the meaning of the Consumer Protection Act and was, therefore, not entitled to maintain the complaint.

24. By reason of the transfer and assignment of all the rights of the second respondent in the first respondent's favour, the second respondent retained no right to recover compensation for the loss of the consignment. The addition of the second respondent to the complaint as a co-complainant did not, therefore, make the complaint maintainable."

6. The referring Bench which heard this appeal considered the decision in *Oberai.* It was of the view that *Oberai* required reconsideration by a larger Bench, for the following reasons (vide order dated 30.11.2000) :

"In the case of simple subrogation in favour of an insurance company, there is no difficulty in accepting that the insurance company gets subrogated to the rights of the consumer wherein the insurance company has paid compensation to the consumer pursuant to the contract entered into between the consumer and the insurance company. As per the principle referred to in the judgment in *Oberai Forwarding Agency's* case (supra), if there was simple subrogation, then the insurance company could maintain an action in the consumer court but it had to do so in the name of the consumer. It could not sue in its own name. Certainly that was the law laid down earlier by this Court and this is also a part of the common law. That was the position before the National Commission in *Transport Corporation of India Ltd vs. Devangara Cotton Mills Ltd*., reported in 1998 (2) CPJ 16 (NC), which is referred to in paragraph 16 of the judgment in *Oberai Forwarding Agency* (supra). But in the earlier judgment in *Green Transport Co. vs. New India Assurance Co. Ltd.,* (1992) 2 CPJ 349 (NC) wherein the insurer had claimed a right of subrogation or transfer of the right of action which the insured had as against the transporter. There it was held that the complaint in the consumer court was not maintainable. In *Transport Corporation of India Ltd's* case, the National Commission distinguished the judgment in *Green Transport Co*., wherein the complaint was held not to be maintainable. In other words, this Court in *Oberai Forwarding Agency's* case (supra) felt that where there was an assignment in addition to subrogation, the complaint was not maintainable even though the original consumer as well as the Insurance Company to whom the rights stood subrogated and assigned were the complainants. The crucial reasoning is set out in paragraphs 23 and 24 of the judgment in *Oberai Forwarding Agency* (supra) which we have already set out above.

So far as paragraph 23 of the said judgment is concerned,

it states that in case the right to recover the compensation is assigned to the Insurance Company, there is no question of the Insurance Company being a 'beneficiary' of the services which the consumer had hired through the transport company. Hence, section 2(b) of the Consumer Protection Act, 1988 would not apply. This Court also observed that 'service' namely, the transportation of the consignment had already availed of by the consumer. The Insurance Company therefore, was not a consumer within the meaning of the provisions of the Consumer Protection Act, 1986 and therefore, not entitled to maintain the complaint.

It is contended for the appellant, relying on the above passages (para 23 in Oberai) that once the goods are handed over to a transporter for the purpose of transport, the services have already been rendered and that therefore, the consignor ceases to be a consumer. But it is pointed out for the respondent that the contract between the consumer and the transport company is to safely transport the goods through he entire distance and hand them over for delivery to the consignee at the opposite end. If the goods have been lost during transport, services are not fully rendered – and a cause of action has arisen to the consignor (consumer) to recover the same, the consignor continues to be a consumer after the services are rendered and will be a consumer entitled to compensation (rather than goods) against the transport company. He does not, it is contended for the respondent, cease to be consumer. There is a breach of contract and the right of the consignor is to recover compensation. If, therefore, at such a stage the consignor is still a consumer entitled to sue for compensation, he is certainly entitled in that capacity to move the consumer court as a complainant. That is how it is contended for the respondents that the consignor is in the position of a co-complainant.

So far as assignment of the rights in favour of the insurance company is concerned, it is contended for the respondents that one has to keep in mind that a simple assignment of a right to recover may, in law be bad, on the ground of 'champerty/maintenance' and that is why, in these formats, it is coupled with subrogation. Once there is subrogation the insurance company is suing in the consignor's right as 'consumer' because the consignor has not got the full services rendered in his favour, the goods not having reached their destination. An assignment coupled with rights of subrogation would be valid in law because then it will not be a case of a mere assignment of a right to sue.

In other words, on the date when the assignment is made, the consignor namely the consumer is still a consumer who has lost his goods and he is entitled to compensation for the loss of the goods by the transport company. Once the consignor receives the money from the Insurance company, the insurance company becomes subrogated as an indemnifier to all the rights of the consumer including the right to sue as a consumer. But the complaint must then be in the name of the consignor. In fact, that is the precise position on *Transport Corporation of India Ltd. vs. Davangere Cotton Mills Ltd.* – 1998 (2) CPJ 16. It was held that the consignor could still sue notwithstanding the fact that compensation was paid by the insurance company. The only extra thing that happens in the event of the assignment in favour of the insurance company is that the insurance company becomes entitled to file the complaint in its own name by virtue of the assignment. The insurance company may not be a consumer to start with but it is subrogated to the rights of the consumer (consignor) to whom services were not fully rendered.

When we came to paragraph 24 of the judgment in *Oberai Forwarding Agency* (supra), it is stated that upon the

transfer by assignment of all the rights of the consumer in favour of the insurance company, the consumer retained no right to recover compensation for the loss of consignment and therefore, the addition of the consignee as a co-complainant does not make the complaint maintainable. It is contended for the respondents that the law is well settled that there cannot be a bare assignment of a right to sue. But if such a right is coupled with the right of subrogation the action is maintainable by the assignee, who is suing for those rights and who need no longer implead the consignor. In fact, the principle in *Transport Corporation of India Ltd*., which has been accepted by the three Judge Bench itself says that if there is subrogation, the insurance company could sue in the name of consignor. The effect of the assignment is not to destroy the character of the insurance company as a person entitled to the rights of the consumer (because of subrogation) but also to provide an independent right to sue in its own name. Merely, because there is an assignment it does not follow that the complainant – insurer was not also clothed with the rights of the consignor as a consumer, if on the date of assignment the consignor was still entitled to compensation as consignor. The reasoning in paragraph 24 of the judgment appears to be closely intertwined with the reasoning in paragraph 23. As long as the goods had not been delivered, the consignor does not lose the right to claim compensation as a consumer and he still remains the consignor and to that rights, the Insurance company becomes subrogated. It is contended for the respondent that thus the insurance company is having the rights of the consignor as consumer by virtue of the rights subrogated to it and is also entitled to maintain the complaint as an assignee in its own right.

It is pointed out for the respondents that, in fact, the result of the judgment of the three judge bench has been that a large number of cases which have been decreed in favour

of the consignees in various consumer fora in this country have been rendered infructuous. The insurance company and the consignors became compelled to move the civil court once again after several years and to seek the benefit of section 14 of the Limitation Act. There was no other benefit accruing to the transporter. It is contended that a purposeful interpretation is to be given to the provisions of the Consumer Protection Act and one of the purpose is that consumers might get expeditious relief outside the civil courts.

It is contended alternatively that looking at the matter from another angle, the insurance company as a third party – indemnifier pays compensation to the consumer and redresses an immediate grievance and makes the insured to go back into this business. In such a situation, merely because a third party indemnifier pays money to the insured, the latter does not cease to be a consumer and the status of the consignor as a consumer still continues. Because there is a breach of contract the consumer can sue for compensation along with the insurance company and does not lose his right to sue for compensation. The right to sue before the consumer court is available either with the consignor or with the consignee and does not vanish into thin air, in spite of the assignor and assignee being co-complainants. In this connection, the decision in *Compania Colombia De Sequros vs. Pacific Steam Navigation Co. etc*., reported in 1964 (1) ALL ER 216 is also relied upon for the respondent. It contains an extensive discussion of the point involved. There the assignment was obtained after the accident and after the Insurance Company paid the money to the consignor.

In our view, the above contention of the respondent are substantial and a case is made out for reconsideration of *Oberai Forwarding Agency*.

7. The appellant contends that *Oberai* lays down the law correctly. It is submitted that what is executed in favour of the Insurer, though termed a 'subrogation' is an assignment, and therefore, the Insurer was not entitled to maintain the complaint. Relying on the observations in para 23 of *Oberai Forwarding Agency*, it was contended that once the goods entrusted to the appellant for transportation were lost/damaged, no 'service' remained to be rendered or performed by the appellant as carrier; that what was assigned and transferred by the Assured to the Insurer was only the right to recover compensation for the loss and there was no question of Insurer being the beneficiary of any service, for which the Assured had hired the appellant; and therefore such post-loss assignment of the right to recover compensation, did not result in the Insurer becoming a 'consumer' under the Act. The Respondents, on the other hand, contended that the decision in *Oberai* required reconsideration on several grounds, set out in the reference order.

8. On the contentions urged, the following questions arise for consideration:

(a) Where the letter of subrogation executed by an assured in favour of the insurer contains, in addition to words referring to subrogation, terms which may amount to an assignment, whether the document ceases to be a subrogation and becomes an assignment?

(b) Where the insurer pays the amount of loss to the assured, whether the insurer as subrogee, can lodge a complaint under the Act, either in the name of the assured, or in the joint names of the insurer and assured as co-complainants?

(c) Where the rights of the assured in regard to the claim against the carrier/service provider are assigned in favour of the insurer under a letter of subrogation-cum-assignment, whether the insurer as the assignee can file

a complaint either in its own name, or in the name of the assured, or by joining the assured as a co-complainant.

(d) Whether relief could be granted in a complaint against the carrier/service provider, in the absence of any proof of negligence?

Re : Questions (a) to (c) and the correctness of *Oberai*

9. A 'complaint', in the context of this case, refers to an allegation in writing made by a 'consumer' that the services availed of or hired (or agreed to be availed of or hired) suffer from 'deficiency' in any respect (vide section 2(c) of the Act). A 'consumer' is defined under section 2(d) of the Act, relevant portion of which is extracted below :

"Consumer" means any person who –

x x x x x

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid any partly promised, or under any system of deferred payment and includes and beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person ……."

"Deficiency" means any fault, imperfection, short-coming, or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service (vide section 2(g) of the Act).

10. The assured entrusted the consignment for transportation to the carrier. The consignment was insured by

the assured with the insurer. When the goods were damaged in an accident, the assured, as the consignor-consumer, could certainly maintain a complaint under the Act, seeking compensation for the loss, alleging negligence and deficiency in service. The fact that in pursuance of a contract of insurance, the assured had received from the insurer, the value of the goods lost, either fully or in part, does not erase or reduce the liability of the wrongdoer responsible for the loss. Therefore, the assured as a consumer, could file a complaint under the Act, even after the insurer had settled its claim in regard to the loss.

11. A contract of insurance is a contract of indemnity. The loss/damage to the goods covered by a policy of insurance, may be caused either due to an act for which the owner (assured) may not have a remedy against any third party (as for example when the loss is on account of an act of God) or due to a wrongful act of a third party, for which he may have a remedy against such third party (as for example where the loss is on account of negligence of the third party). In both cases, the assured can obtain reimbursement of the loss, from the insurer. In the first case, neither the assured, nor the insurer can make any claim against any third party. But where the damage is on account of negligence of a third party, the assured will have the right to sue the wrongdoer for damages; and where the assured has obtained the value of the goods lost from the insurer in pursuance of the contract of insurance, the law of insurance recognizes as an equitable corollary of the principle of indemnity that the rights and remedies of the assured against the wrong-doer stand transferred to and vested in the insurer. The equitable assignment of the rights and remedies of the assured in favour of the insurer, implied in a contract of indemnity, known as 'subrogation', is based on two basic principles of equity : (a) *No tort-feasor should escape liability for his wrong;* (b) *No unjust enrichment for the injured, by recovery of compensation for the same loss, from more than one source.* The doctrine of subrogation will thus enable the insurer, to step into the shoes of the assured, and enforce the

rights and remedies available to the assured.

12. The term 'subrogation' in the context of insurance, has been defined in *Black's Law Dictionary* thus :

> "The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy."

Black's Law Dictionary also extracts two general definitions of 'subrogation'. The first is from *Dan B. Dobb's Law of Contract* (2nd Edn. - # 4.3 at 404) which reads thus:

> "Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant. Factually, the case arises because, for some justifiable reason, the subrogation plaintiff has paid a debt owed by the defendant."

The second is from *Laurence P. Simpson's Handbook on Law of Suretyship* (1950 Edn. Page 205) which reads thus :

> "Subrogation is equitable assignment. The right comes into existence when the surety becomes obligated, and this is important as affecting priorities, but such right of subrogation does not become a cause of action until the debt is duly paid. Subrogation entitles the surety to use any remedy against the principal which the creditor could have used, and in general to enjoy the benefit of any advantage that the creditor had, such as a mortgage, lien, power to confess judgment, to follow trust funds, to proceed against a third person who has promised either the principal or the creditor to pay the debt."

'Right of Subrogation' is statutorily recognized and described in section 79 of the Marine Insurance Act, 1963 as follows:

> (1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, the thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.
>
> (2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured and in respect of the subject matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss".

Section 140 of Contract Act, 1872, deals with the principle of subrogation with reference to rights of a Surety/Guarantor. It reads :

> "140. Rights of surety on payment or performance : Where a guaranteed debt has become due, or default of the principal – debtor to perform a guaranteed duty has been taken place, the surety, upon payment or performance of all that is liable for, is invested with all the rights which the creditor had against the principal – debtor."

The concept of subrogation was explained in the following manner by Chancellor Boyd in *National Fire Insurance Co. vs. McLaren* – 1886 (12) OR 682 :

> "The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of

securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable rights, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company."

In *Banque Financiere de la Cite* vs. *Parc (Battersea) Ltd.* [1999 (1) A.C.221], the House of Lords explained the difference between subrogations arising from express or implied agreement of the parties:

"….there was no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract. Furthermore, your Lordships drew attention to the fact that it is customary for the assured, on payment of the loss, to provide the insurer with a letter of subrogation, being no more nor less than an express assignment of his rights of recovery against any third party. Subrogation in this sense is a contractual arrangement for the transfer of rights against third parties and is founded upon the common intention of the parties. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived. The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions. One

is part of the law of contract and the other part of the law of restitution."

13. An 'assignment' on the other hand, refers to a transfer of a right by an instrument for consideration. When there is an absolute assignment, the assignor is left with no title or interest in the property or right, which is the subject matter of the assignment. The difference between 'subrogation' and 'assignment' was stated in *Insurance Law by MacGillivray & Parkington* (7th Edn.) thus :

"Both subrogation and assignment permit one party to enjoy the rights of another, but it is well established that subrogation is not a species of assignment. Rights of subrogation vest by operation of law rather than as the product of express agreement. Whereas rights of subrogation can be enjoyed by the insurer as soon as payment is made, as assignment requires an agreement that the rights of the assured be assigned to the insurer. The insurer cannot require the assured to assign to him his rights against third parties as a condition of payment unless there is a special clause in the policy obliging the assured to do so. This distinction is of some importance, since in certain circumstances an insurer might prefer to take an assignment of an assured's rights rather than rely upon his rights of subrogation. If, for example, there was any prospect of the insured being able to recover more than his actual loss from a third party, an insurer, who had taken an assignment of the assured's rights, would be able to recover the extra money for himself whereas an insurer who was confined to rights of subrogation would have to allow the assured to retain the excess.

Another distinction lies in the procedure of enforcing the rights acquired by virtue of the two doctrines. An insurer exercising rights of subrogation against third parties must do so in the name of the assured. An insurer who has taken a legal assignment of his assured's rights under

statue should proceed in his own name …"

The difference between subrogation and assignment was highlighted by the Court of Appeals thus in *James Nelson & Sons Ltd. vs. Nelson Line (Liverpool) Ltd. (No.1)* – 1906 (2) KB 217 :

> "The way in which the underwriters come in is only by way of subrogation to the rights of the assured. Their right is not that of assignees of the cause of action; ….. Therefore, they could only be entitled by way of subrogation to the plaintiffs' rights. What is the nature of their right by way of subrogation? It is the right to stand in the shoes of the persons whom they have indemnified, and to put in force the right of action of those persons; but it remains the plaintiffs' right of action, although the underwriters are entitled to deduct from any sum recovered the amount to which they have indemnified the plaintiffs, and although they may have provided the means of conducting the action to a termination. It is not a case in which one person is using the name of another merely as a nominal plaintiff for the purpose of bringing an action in which he alone is really interested; for the plaintiffs here have real and substantial interest of their own in the action."

The difference between assignment and subrogation was also explained by the Madras High Court in *Vasudeva Mudaliar vs. Caledonian Insurance Co.* – [AIR 1965 Mad. 159] thus :

> "In other words arising out of the nature of a contract of indemnity, the insurer, when he has indemnified the assured, is subrogated to his rights and remedies against third parties who have occasioned the loss. The right of the insurer to subrogation or to get into the shoes of the assured as it were, need not necessarily flow from the terms of the motor insurance policy, but is inherent in and springs from the principles of indemnity.

> Where, therefore, an insurer is subrogated to the rights and remedies of the assured, the former is to be more or less in the same position as the assured in respect of third parties and his claims against them founded on tortuous liability in cases of motor accidents. But it should be noted that the fact that an insurer is subrogated to the rights and remedies of the assured of the assured does not *ipso jure* enable him to sue third parties in his own name. It will only entitle the insurer to sue in the name of the assured, it being an obligation of the assured to lend his name and assistance to such an action. By subrogation, the insurer gets no better rights or no different remedies than the assured himself. Subrogation and its effect are therefore, not to be mixed up with those of a transfer or any assignment by the assured of his rights and remedies to the insurer. An assignment or a transfer implies something more than subrogation, and vests in the insurer the assured's interest, rights and remedies in respect of the subject matter and substance of the insurance. In such a case, therefore, the insurer, by virtue of the transfer or assignment in his favour, will be in a position to maintain a suit in his own name against third parties."

14. Subrogation, as an equitable assignment, is inherent, incidental and collateral to a contract of indemnity, which occurs automatically, when the insurer settles the claim under the policy, by reimbursing the entire loss suffered by the assured. It need not be evidenced by any writing. But where the insurer does not settle the claim of the assured fully, by reimbursing the entire loss, there will be no equitable assignment of the claim enabling the insurer to stand in the shoes of the assured, but only a right to recover from the assured, any amount remaining out of the compensation recovered by the assured from the wrongdoer, after the assured fully recovers his loss. To avoid any dispute with the assured as to the right of subrogation and extent of its rights, the insurers usually reduce the terms of subrogation into writing in the form of a Letter of Subrogation which enables and

authorizes the insurer to recover the amount settled and paid by the insurer, from the third party wrong-doer as a Subrogee-cum-Attorney. When the insurer obtains an instrument from the assured on settlement of the claim, whether it will be a deed of subrogation, or subrogation-cum-assignment, would depend upon the intention of parties as evidenced by the wording of the document. The title or caption of the document, by itself, may not be conclusive. It is possible that the document may be styled as 'subrogation' but may contain in addition an assignment in regard to the balance of the claim, in which event it will be a deed of subrogation-cum-assignment. It may be a pure and simple subrogation but may inadvertently or by way of excessive caution use words more appropriate to an assignment. If the terms clearly show that the intention was to have only a subrogation, use of the words "assign, transfer and abandon in favour of" would in the context be construed as referring to subrogation and nothing more.

15. We may, therefore, classify subrogations under three broad categories: (i) subrogation by equitable assignment; (ii) subrogation by contract; and (iii) subrogation-cum-assignment.

(15.1) In the first category, the subrogation is not evidenced by any document, but is based on the insurance policy and the receipt issued by the assured acknowledging the full settlement of the claim relating to the loss. Where the insurer has reimbursed the entire loss incurred by the assured, it can sue in the name of the assured for the amount paid by it to the assured. But where the insurer has reimbursed only a part of the loss, in settling the insurance claim, the insurer has to wait for the assured to sue and recover compensation from the wrongdoer; and when the assured recovers compensation, the assured is entitled to first appropriate the same towards the balance of his loss (which was not received from the insurer) so that he gets full reimbursement of his loss and the cost, if any, incurred by him for such recovery. The insurer will be

entitled only to whatever balance remaining, for reimbursement of what it paid to the assured.

(15.2) In the second category, the subrogation is evidenced by an instrument. To avoid any dispute about the right to claim reimbursement, or to settle the priority of inter-se claims or to confirm the quantum of reimbursement in pursuance of the subrogation, and to ensure co-operation by the assured in suing the wrongdoer, the insurer usually obtains a letter of subrogation in writing, specifying its rights vis-à-vis the assured. The letter of subrogation is a contractual arrangement which crystallizes the rights of the insurer vis-à-vis the assignee. On execution of a letter of subrogation, the insurer becomes entitled to recover in terms of it, a sum not exceeding what was paid by it under the contract of insurance by suing in the name of the assured. Even where the insurer had settled only a part of the loss incurred by the assured, on recovery of the claim from the wrongdoer, the insurer may, if the letter of subrogation so authorizes, first appropriate what it had paid to the assured and pay only the balance, if any, to the assured.

(15.3) The third category is where the assured executes a letter of subrogation-cum-assignment enabling the insurer retain the entire amount recovered (even if it is more than what was paid to the assured) and giving an option to sue in the name of the assured or to sue in its own name.

In all three types of subrogation, the insurer can sue the wrongdoer in the name of the assured. This means that the insurer requests the assured to file the suit/complaint and has the option of joining as co-plaintiff. Alternatively the insurer can obtain a special power of Attorney from the assured and then to sue the wrongdoer in the name of the assured as his attorney.

The assured has no right to deny the equitable right of subrogation of the insurer in accordance with law, even whether there is no writing to support it. But the assured whose claim

is settled by the insurer, only in respect of a part of the loss may insist that when compensation is recovered from the wrongdoer he will first appropriate the same, to recover the balance of his loss. The assured can also refuse to execute a subrogation-cum-assignment which has the effect of taking away his right to receive the balance of the loss. But once a subrogation is reduced to writing, the rights inter-se between the assured and insurer will be regulated by the terms agreed, which is a matter of negotiation between the assured and insurer.

16. If a letter of subrogation containing terms of assignment is to be treated only as an assignment by ignoring the subrogation, there may be the danger of document itself becoming invalid and unenforceable, having regard to the bar contained in section 6 of the Transfer of Property Act, 1882 ('TP Act' for short). Section 6 of Transport of Property Act, 1882, provides that property of any kind may be transferred except as otherwise provided by that Act or by any other law for the time being in force. Clause (e) of the said section provides that mere right to sue cannot be transferred. Section 130 provides the manner of transfer of actionable claims. Section 3 defines an 'actionable claim' as : (i) any debt (other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property) or (ii) any beneficial interest is movable property not in the possession, either actual or constructive of the claimant, which the civil courts recognizes as affording grounds for relief. A 'debt' refers to an ascertained sum due from one person to another, as contrasted from unliquidated damages and claims for compensation which requires ascertainment/assessment by a Court or Tribunal before it becomes due and payable. A transfer or assignment of a mere right to sue for compensation will be invalid having regard to section 6(e) of the TP Act. But when a letter of subrogation-cum-assignment is executed, the assignment is interlinked with subrogation, and not being an assignment of a mere right to sue, will be valid and enforceable.

17. The principles relating to subrogation can therefore be summarized thus :

(i) Equitable right of subrogation arises when the insurer settles the claim of the assured, for the entire loss. When there is an equitable subrogation in favour of the insurer, the insurer is allowed to stand in the shoes of the assured and enforce the rights of the assured against the wrong-doer.

(ii) Subrogation does not terminate nor puts an end to the right of the assured to sue the wrong-doer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation.

(iii) Where the assured executes a Letter of Subrogation, reducing the terms of subrogation, the rights of the insurer *vis-à-vis* the assured will be governed by the terms of the Letter of Subrogation.

(iv) A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or petition for recovery of compensation can be filed in the name of the assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants.

(v) Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrongdoer on its own account and for its own benefit. But as the instrument is a subrogation-cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insured becomes entitled

to the entire amount recovered from the wrong-doer, that is, not only the amount that the insured had paid to the assured, but also any amount received in excess of what was paid by it to the assured, if the instrument so provides.

18. We may clarify the position with reference to the following illustration: *The loss to the assured is Rs.1,00,000/- . The insurer settles the claim of the assured for Rs.75,000/- . The wrong-doer is sued for recovery of Rs.1,00,000/-.*

Where there is no letter of subrogation and insurer relies on the equitable doctrine of subrogation (The suit is filed by the assured)

(i) If the suit filed for recovery of Rs.100,000/- is decreed as prayed, and the said sum of Rs.1,00,000/- is recovered, the assured would appropriate Rs. 25,000/- to recover the entire loss of Rs. 100,000/- and the doctrine of subrogation would enable the insurer to claim and receive the balance of Rs.75,000

(ii) If the suit filed for recovery of Rs.100,000/- is decreed as prayed for, but the assured is able to recover only Rs.50,000/- from the Judgment-Debtor (wrong-doer), the assured will be entitled to appropriate Rs.25,000/- (which is the shortfall to make up Rs.100,000/- being the loss) and the insurer will be entitled to receive only the balance of Rs. 25,000/- even though it had paid Rs. 75,000/- to the assured.

(iii) Where, the suit is filed for recovery of Rs.100,000/- but the court assesses the loss actually suffered by the assured as only Rs.75,000/- (as against the claim of the assured that the value of goods lost is Rs.100,000/-) and then awards Rs.75,000/- plus costs, the insurer will be entitled to claim and receive the entire amount of Rs.75,000/- in view of the doctrine of subrogation.

Where the assured executes a letter of subrogation entitling the insurer to recover Rs. 75,000/- (The suit is filed in the name of the assured or jointly by the assured and insurer).

(iv) If the suit is filed for recovery of Rs.1,00,000/-, and if the court grants Rs.1,00,000/-, the insurer will take Rs.75,000/- and the assured will take Rs.25,000/-.

(v) If the insurer sues in the name of the assured for Rs.75,000/- and recovers Rs.75,000/-, the insurer will retain the entire sum of Rs.75,000/- in pursuance of the Letter of Subrogation, even if the assured has not recovered the entire loss of Rs.1,00,000/-. If the assured wants to recover the balance of the loss of Rs.25,000/- as he had received only Rs. 75,000/- from the insurer, the assured should ensure that the claim is made against the wrongdoer for the entire sum of Rs.100,000/- by bearing the proportionate expense. Otherwise the insurer will sue in the name of the assured for only for Rs. 75,000/-.

(vi) If the letter of subrogation executed by the assured when the insurer settles the claim of the assured uses the words that the "assured assigns, transfers and abandons unto the insurer, the right to get Rs.75,000/- from the wrong-doer", the document will be a 'subrogation' in spite of the use of words 'transfers, assigns and abandons'. This is because the insurer has settled the claim for Rs.75,000/- and the instrument merely entitles the insurer to receive the said sum of Rs.75,000/- which he had paid to the assured, and nothing more.

Where the assured executes a letter of subrogation-cum-assignment for Rs.100,000/-

(vii) If the document executed by the assured in favour of the insured provides that in consideration of the settlement of the claim for Rs.75,000/-, the assured has transferred

and assigned by way of subrogation and assignment, the right to recover the entire value of the goods lost and retain the entire amount without being accountable to the assured for any excess recovered (over and above Rs.75,000/-) and provides that the insurer may sue in the name of the assured or sue in its own name without reference to the assured, the instrument is a subrogation-cum-assignment and the insurer has the choice of either suing in the name of the assured or in its own name.

Where the assured exectues a letters of assignment in favour of a third party to sue and recover from the carrier, the value of the consignment.

(viii) If the assured, having received Rs.75,000/- from the insurer, executes an instrument in favour of a third party (not being the insurer) assigning the right to sue and recover from the carrier, damages for loss of the consignment, such a document will be an Assignment. The assignee cannot file a complaint before the consumer fora, as he is not a 'consumer'. Further, such a document being a transfer of a mere right to sue, will be void and unenforceable, having regard to section 6(e) of Transfer of Property Act, 1882. It is well settled that a right to sue for unliquidated damages for breach of contract or for tort, not being a right connected with the ownership of any property, nor being a right to sue for a debt or actionable claim, is a mere right to sue and is incapable of being transferred.

19. Whether the document executed by the assured in favour of the insurer is a subrogation simpliciter, or a subrogation-cum-assignment is relevant only in a dispute between the assured and the insurer. It may not be relevant for deciding the maintainability of a complaint under the Act. If the complaint is filed by the assured (who is the consumer), or by the assured represented by the insurer as its attorney holder, or by the assured and the insurer jointly as complainants, the

complaint will be maintainable, if the presence of insurer is explained as being a subrogee. Whether the amount claimed is the total loss or only the amount for which the claim was settled would make no difference for the maintainability of the complaint, so long as the consumer is the complainant (either personally or represented by its attorney holder) or is a co-complainant along with his subrogee. On the other hand, if the assured (who is the consumer) is not the complainant, and the insurer alone files the complaint in its own name, the complaint will not be maintainable, as the insurer is not a 'consumer', nor a person who answers the definition of 'complainant' under the Act. The fact that it seeks to recover from the wrongdoer (service provider) only the amount paid to the assured and not any amount in excess of what was paid to the assured will also not make any difference, if the assured – consignor is not the complainant or co-complainant. The complaint will not be maintainable unless the requirements of the Act are fulfilled. The remedy under the Act being summary in nature, once the consumer is the complainant or is a co-complainant, it will not be necessary for the Consumer Forum to probe the exact nature of relationship between the consumer (assured) and the insurer, in a complaint against the service provider.

20. In this context, it is necessary to remember that the nature of examination of a document may differ with reference to the context in which it is examined. If a document is examined to find out whether adequate stamp duty has been paid under the Stamp Act, it will not be necessary to examine whether it is validly executed or whether it is fraudulent or forged. On the other hand, if a document is being examined in a criminal case in the context of whether an offence of forgery has been committed, the question for examination will be whether it is forged or fraudulent, and the issue of stamp duty or registration will be irrelevant. But if the document is sought to be produced and relied upon in a civil suit, in addition to the question whether it is genuine, or forged, the question whether it is compulsorily registrable or not, and the question whether it bears the proper

stamp duty, will become relevant. If the document is examined in the context of a dispute between the parties to the document, the nature of examination will be to find out that rights and obligation of one party vis-à-vis the other party. If in a summary proceedings by a consumer against a service provider, the insurer is added as a co-complainant or if the insurer represents the consumer as a power of attorney, there is no need to examine the nature of rights inter-se between the consumer and his insurer. When the complaint is by the consignor – consumer, with or without the insurer as a co-complainant, the service provider cannot require the consumer forum to consider the nature of relationship between the assured and the insurer or the nature and true purport of the document produced as a letter of subrogation. A wrong-doer cannot sidetrack the issue before the consumer forum. Once the 'consumer', that is the assured, is the complainant, the complaint will be maintainable subject to fulfillment of the requirements of the Act.

21. At this juncture we should also take note of the fact that insurance companies, statutory corporations and banks use standardized forms to cover all types of situations and circumstances and several of the clauses in such forms may be wholly inapplicable to the transaction intended to be covered by the document. Necessarily such redundant or inapplicable clauses should be ignored while trying examining the document and make sense out of it. To demonstrate this position, we extract below the letter of subrogation-cum-special power of attorney dated 15.2.1996 executed by the assured in this case, by highlighting the irrelevant clauses by bold letters:

"Letter of Subrogation & Special Power of Attorney"
To
M/s National insurance Co. Ltd.,
Dindigal

In consideration of your paying to us a sum of Rs. 4,47,436.00 (Rupees Four Lakhs Forty Seven Thousand

Four Hundred & Thirty Six only) in respect of loss/damage to the under mentioned goods and/or duly payable thereon insured under policy no. 500703/21/24/95/007 issued by National Insurance Co. Ltd., we hereby assign, transfer and abandon to *you all our actionable rights, title and interest in and to the said goods and proceeds* thereof (to the extent provided by law) and all rights and remedies *against Railway Administration and/or sea carriers and/or agents of Sea Carriers and/or Port Authorities and/or Customs Authorities* and/or persons or persons whosoever is liable in respect thereof.

We hereby guarantee that we are the persons entitled to enforce the terms of contracts of transportations set forth *in the bills of lading and/or railway receipt and/or* any other documents of title evidencing the contract of transportation or bailment relating to land covering the property described below for transportation or bailment and agree to indemnify you for all and any losses and consequences should it turn out that we are not the persons to enforce the terms of the contract.

And we hereby subrogate to you that rights and remedies that we have in consequence of or arising from loss/damage to the under mentioned goods and we further hereby grant to you full power to take and use all lawful ways and means to demand, recover and to receive the said loss/damage, *customs penalty or refund of customs duty and all and every debt from whom it may concern.*

And we also hereby authorize you to use our name in any action or proceedings that you may bring either in your own name or in our name in relation to any of the matters hereby assigned, transferred and/or abandoned to you and we undertake for ourselves to assist and concur in any matters or proceedings which you may deem expedient or necessary in any such actions or proceedings and to execute all deeds, assignments and or documents

including any and all pleadings and releases which may be necessary therefor and generally to assist therein by all means in our power.

We hereby authorize you to file a suit or suits in courts of law against *the Union of India owning and representing Indian Railways, the Sea Carriers Charterers Agents of Sea Carriers and/or Port Authorities* or any other carriers and or bailees and/or person or persons, firm or firms, corporation or corporation, to recover the claim moneys of the aforesaid claim or claims and for the said purposes to join us as a co-plaintiffs if you so intend. We further hereby give you authority to sing, declare, verify and affirm and execute jointly and severally in our name and on our behalf, plaints, affidavits, vakalatnamas, petitions and such other applications and/or notices and documents as may be found necessary for the commencement or continuation of proceedings to recover the claim moneys.

We further undertake if called upon by you to do so ourselves to institute any such action or proceedings that you may direct on your behalf; it being understood that you are to indemnify us and any other persons whose names may necessarily be used, against any costs, charges or expenses which may be incurred in respect of any action or proceeding that may be taken by virtue of this agreement.

The payment received for herein is accepted with the understanding that the said payment shall not enure to the benefit of any carrier or bailees under the provision of any contract of carriage or otherwise; that in making the said payment the underwriter does not waive any rights of subrogation or otherwise against any carrier or bailee and acceptance of this receipt shall not prejudice or take away any rights or remedies which the said underwriter would otherwise have by virtue of such payment.

We further agree that any moneys collected from any carrier *port authorities* or any persons or persons, shall be your property, and if received in the first instance by the undersigned we undertake to make over to you immediately the amount so received.

We hereby further agree that in event of the loss packages and/or contents thereof subsequently being traced, we undertake to accept and take delivery of the same and the claim shall then be readjusted on the correct basis of the then loss/damage and in the event of any refund providing to be due to the underwriter, we undertake on demand to make such refund to you.

We hereby appoint you, your officers and agents and there successors severally our agents and attorneys-in-fact with irrevocable power to collect any and all such claims and to begin, prosecute, compromise, arbitrate or withdraw either in our own name or in your name but at your expense any and all legal proceedings which you may deem necessary to enforce such claim or claims including proceedings before any international tribunal and to execute in our name any documents which maybe necessary to carry into effect the purpose of this agreement, and for that purpose we further authorize you to do all or any of the acts, deeds and things herein mentioned, for us, on our behalf and in our name.

xxxxx

(emphasis supplied)

The use of the words "we hereby assign, transfer and abandon to you all our actionable rights, title and interest" in the document, is in regard to rights and remedies against (1) railway administration (2) sea carriers (3) agents of sea carriers (4) port authorities (5) customs authorities and (6) persons whomsoever is liable in respect thereof. Even though, the matter relates to carriage of goods by road, the claims or remedies

against a road carrier are not even mentioned. Excluding the irrelevant clauses, the document continues to be a letter of subrogation.

22. A document should be transaction-specific. Or at least an effort should be made to delete or exclude inapplicable or irrelevant clauses. But where a large number of documentation is required to be done by officers not-conversant with the nuances of drafting, use of standard forms with several choices or alternative provisions is found necessary. The person preparing the document is required to delete the terms/clauses which are inapplicable. But that is seldom done. The result is that the documents executed in standard forms will have several irrelevant clauses. Computerisation and large legal departments should have enabled insurance companies, banks and financial institutions to (i) improve their documentation processes and omit unnecessary and repetitive clauses; (ii) avoid incorporation of other documents by vague references; and (iii) discontinue pasting or annexing of slips. But that is seldom done. If documents are clear, specific and self-contained, disputes and litigations will be considerably reduced.

23. Let us now consider the decision in *Oberai.* The assured therein had executed two documents in favour of the insurer, on settlement of the claim. The first was a letter of subrogation and the second was a special power of attorney. The letter of subrogation stated as follows :

> "In consideration of your paying to us the sum of Rs.64,137 only in full settlement of our claim for non-delivery/shortage and damage under Policy No. 2142140400015 issued by you all on the under-mentioned goods, *we hereby assign, transfer and abandon to you all our rights* against the Railway Administration, road transport carriers or other persons whatsoever, caused or arising by reason of the said damage or loss and grant you full power to take and use all lawful ways and means *in your own name* and otherwise at your risk and expense to recover the claim for the said damage or loss and we hereby subrogate to you the same rights as we have in consequence of or arising from the said loss or damage.
>
> And we hereby undertake and agree to make and execute at your expense all such further deeds, assignments and documents and to render you such assistance as you may reasonable require for the purpose of carrying out this agreement."

The special power of attorney authorized the insurer to file a suit in court against the Railway Administration, for recovery of the claim on behalf of the assured, in the name of the assured, and to give a valid discharge and effectual receipt therefor. On the basis of the said documents, the complaint was initially filed by the insurer. Subsequently, the assured was added as a party. Though the claim of the assured therein was settled by the insurer for Rs.64,137/- as against the consignment value of Rs.93,925/-, the insurer appears to have sued for the full value of Rs.93,925/- which was awarded by the District Forum and affirmed by the National Commission. This Court held that where there is a subrogation simpliciter, the insurer can sue the wrong-doer in the name of the assured, and where there is an assignment, the insurer is entitled to sue the wrong-doer in his own name. This Court held that the document executed by the assured though titled as 'letter of subrogation' was, in fact, an assignment by the assured of its rights in favour of the insurer. This Court held that the use of the following words in the document amounted to an absolute assignment, as contrasted from subrogation:

> "(i) We hereby assign, transfer and abandon to you all our rights against the Railway Administration, road transport carriers or other persons whatsoever, caused or arising by reason of the said damage or loss and grant you full power to take and use all lawful ways and means in your own name and otherwise at your risk and expense to recover the claim for the said damage or loss.

(ii) We hereby subrogate to you the same rights as we have in consequence of or arising from the said loss or damage."

(23.1) There is no doubt that the first portion which stated that all rights were assigned, transferred and abandoned in favour of the insurer and also empowered the insurer to sue in its own name, if read in isolation would amount to an assignment. But if those words are read with the other recitals and the words "in consideration of your paying to us the sum of Rs.64,137/- only in full settlement of our claim for non-delivery/shortage and damage, under policy issued by you…." make it clear that it was a subrogation-cum-assignment. Further, the second operative portion which states that "we hereby subrogate to you the same rights as we have in consequence of or arising from the said loss or damage" are not words of assignment. When the words used are : "we hereby subrogate to you" and not "we hereby transfer or assign in your favour", having regard to the settled meaning of "subrogate", the said words could not operate as an absolute assignment, but only as an subrogation. The genesis of the document is subrogation. The inclusion of an assignment is an additional right given to the insurer. The document did not cease to be a subrogation by reason of enlargement of subrogation by granting such additional right. In para 22 of the judgment, this Court negatived the contention that the letter of subrogation and the special power of Attorney should be read together and if so read, the document would be a subrogation. But the special power of attorney when read with the term in the letter of subrogation, "we hereby subrogate to you the same rights as we have in consequence of or arising from the said loss of damage" will certainly show that the document was intended to be a subrogation also and not a mere assignment. With great respect to the learned Judges who decided *Oberai*, it has to be held that *Oberai* was not correctly decided, as it held a 'subrogation-cum-assignment' as a mere 'assignment'. It ignored the fact that, shorn of the cover and protection of

subrogation, the document, if read as a simple assignment would fall foul of section 6(e) of Transfer of Property Act and thus would be unenforceable. But the ultimate decision in *Oberai* may be correct as the complaint was filed by the insurer, in its own name and on its own behalf making a claim for the entire value of the goods, in excess of what was paid to the assured. Though the assured was belatedly impleaded as a co-complainant, the nature and contents of the complaint was not apparently changed, and continued to be one by the insurer as assignee. On those peculiar facts, the finding that the complaint under the Act by the insurer (who was not a consumer) was not maintainable, was justified.

(23.2) We may also refer to the frequent misconstruction of para 23 of the decision in *Oberai* by some carriers. The said para does not mean that when the consignment is received by the carrier from the consignor and put it in the course of transportation, the carrier has provided the service and thereafter either ceases to be a service provider or ceases to be responsible for delivery of the goods, and that consequently, the consignor ceases to be a 'consumer'. All that para 23 of *Oberai* meant was that in a contract for carriage of goods between the consignor (assured) and the carrier, if the consignor assigns the right to claim damages to an assignee, after the goods are lost or damaged, the assignee cannot claim to be a "consumer" under the Act. It impliedly meant that if the assignment had been done before the loss or damage to the goods, then the assignment would have been in regard to 'property' and not a mere right to sue, and the assignee as consignee would be entitled to sue the carrier. Be that as it may.

24. We therefore answer the questions raised as follows:

(a) The insurer, as subrogee, can file a complaint under the Act either in the name of the assured (as his attorney holder) or in the joint names of the assured and the insurer for recovery of the amount due from the service provider.

The insurer may also request the assured to sue the wrong doer (service provider).

(b) Even if the letter of subrogation executed by the assured in favour of the insurer contains in addition to the words of subrogation, any words of assignment, the complaint would be maintainable so long as the complaint is in the name of the assured and insurer figures in the complaint only as an attorney holder or subrogee of the assured.

(c) The insurer cannot in its own name maintain a complaint before a consumer forum under the Act, even if its right is traced to the terms of a Letter of subrogation-cum-assignment executed by the assured.

(d) *Oberai* is not good law insofar as it construes a Letter of subrogation-cum-assignment, as a pure and simple assignment. But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision is correct.

25. We may also notice that section 2(d) of Act was amended by Amendment Act 62 of 2002 with effect from 15.3.2003, by adding the words "but does not include a person who avails of such services for any commercial purpose" in the definition of 'consumer'. After the said amendment, if the service of the carrier had been availed for any commercial purpose, then the person availing the service will not be a 'consumer' and consequently, complaints will not be maintainable in such cases. But the said amendment will not apply to complaints filed before the amendment.

Re : Question (d)

26. Section 14(1)(d) of the Act provides that the Forum under the Act can direct payment of compensation awarded by it to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party. This, according to

the appellant, makes it mandatory for the complainant to establish negligence on the part of the opposite party, i.e. the carrier. It is further contended that presumption of negligence under Section 9 of the Carriers Act, 1865 (which provides that in any suit brought against a common carrier for the loss, damage or non-delivery of the goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery of goods was owing to the negligence or criminal act of the carrier, his servants and agents) is applicable only to a civil suit, and not to a complaint under the Act which specifically contemplates establishment of negligence by evidence. It is submitted that in this case the compensation has been awarded even though no evidence was led by the complainants about negligence of the driver of appellant.

27. It is no doubt true that Section 14(1)(d) of the Act contemplates award of compensation to the consumer for any loss suffered by consumer due to the negligence of the opposite party (Carrier). Section 9 of Carriers Act does not lay down a preposition that a carrier will be liable even if there was no negligence on its part. On the other hand, it merely raises a presumption that when there is loss or damage or non-delivery of goods entrusted to a carrier, such loss, damage or non-delivery was due to the negligence of the carrier, its servant and agents. Thus where the consignor establishes loss or damage or non-delivery of goods, it is deemed that negligence on the part of the carrier is established. The carrier may avoid liability if it establishes that the loss, damage or non-delivery was due to an act of God or circumstances beyond its control. Section 14(1)(d) of the Act does not operate to relieve the carrier against the presumption of negligence created under Section 9 of the Carriers Act.

28. The contention of appellant that the presumption under section 9 of the Carriers Act is available only in suits filed before civil courts and not in other civil proceedings under other

Acts, is not tenable. This Court in *Patel Roadways Ltd.* v. *Birla Yamaha Ltd*. [2000 (4) SCC 91] has observed:

> "The principle regarding the liability of a carrier contained in S.9 of Carriers Act namely, that the liability of a carrier is that of an insurer and that in a case of loss or damage to goods entrusted to the carrier the plaintiff need not prove negligence, are applicable in a proceeding before the Consumer Forum. The term "suit" has not been defined in Carriers Act nor it is provided in the said Act that the term 'suit' will have the same meaning as in Civil PC. Therefore, the term 'suit' has to be understood in its ordinary dictionary meaning. In that sense, term 'suit' is a generic term taking within its sweep all proceedings initiated by a party for valuation of a right vested in him under law. It is true that a proceeding before Consumer Forum is ordinarily a summary proceeding and in an appropriate case where the commission feels that the issues raised are too contentious to be decided in summary proceedings it may refer parties to Civil Court. That, however, does not mean that proceedings before the Consumer Forum is to be decided by ignoring the express statutory provision of Carriers Act in a proceeding in which a claim is made against a common carrier. A proceeding before the Consumer Forum comes within the sweep of term 'suit."

29. Again in *Economic Transport Organization vs. Dharward District Khadi Gramodyog Sangh* - 2000 (5) SCC 78, this Court reiterated the principle stated in *Patel Roadways* and added the following :

> "Even assuming that section 9 of the Carriers Act, 1865 does not apply to the cases before the Consumer Fora under Consumer Protection Act, the principle of common law above-mentioned gets attracted to all these cases coming up before the Consumer Fora. Section 14(1)(d) of the Consumer Protection Act has to be understood in that

> light and the burden of proof gets shifted to the carriers by the application of the legal presumption under the common law. Section 14(1)(d) has to be understood in that manner. The complainant can discharge the initial onus, even if it is laid on him under section 14(1)(d) of the Consumer Protection Act, by relying on section 9 of the Carrier Act. It will, therefore, be for the carrier to prove absence of negligence."

We reiterate the said settled position and reject the contention of the appellant that the presumption under section 9 of Carriers Act is not available in a proceeding under the Consumer Protection Act and that therefore, in the absence of proof of negligence, it is not liable to compensate the respondents for the loss.

Conclusion

30. The loss of consignment by the assured and settlement of claim by the insurer by paying Rs.4,47,436/- is established by evidence. Having regard to the presumption regarding negligence under section 9 of Carriers Act, it was not necessary for the complainants to prove further that the loss/damage was due to the negligence of the appellant or its driver. The presumption regarding negligence was not rebutted. Therefore, the District Forum was justified in allowing the complaint brought by the assured (first respondent) represented by the insurer and the insurer for recovery of Rs.447,436. The said order was affirmed by the State Forum and the National Forum. We find no reason to interfere with the same. The appeal is, therefore, dismissed.

N.J. Appeal dismissed.

R. RAVINDRA REDDY AND ORS.
v.
H. RAMAIAH REDDY AND ORS.
(Special Leave Petition (Civil) No. 6286 of 2009)

FEBRUARY 17, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Limitation: Cause of action – Land Tribunal granted occupancy rights in respect of suit properties in 1975 – Suit filed in 2005 challenging the order granting occupancy rights – Held: Suit is barred by limitation as records show that father of plaintiffs had knowledge of grant of occupancy rights – Land Reforms.

Karnataka Land Reforms Act, 1961: s.132 – Question regarding occupancy rights – Jurisdiction of civil court – Held: Civil Court does not have jurisdiction to decide such a question – Such question is in the domain of Land Tribunal – Land Reforms – Jurisdiction.

On death of 'DAR', his son, 'PR' and grandson 'HRR', the respondent no.1 succeeded to his estate. They both constituted a joint family in respect of the ancestral properties and were in joint possession of the properties. In 1972, there was a partition of properties between 'PR' and his son 'HRR'. One 'AR' was an attesting witness to the registered partition deed. The said 'AR' filed an application in 1974 under Section 48 of the Karnataka Land 'Reforms Act, 1961, claiming occupancy rights in respect of suit lands on the ground that he had been cultivating the suit lands. 'PR' was impleaded as a party, but, 'HRR" was not made party although the properties were joint properties. On 11th December, 1975, the occupancy rights were recorded in the name of 'AR'. The order stated that 'PR' had agreed to the claim of

occupancy rights of 'AR'. This order was never challenged by 'PR' as having been obtained by fraudulent means.

In 1986 after death of 'PR', his second wife filed partition suit. A compromise was entered between the parties and matter was disposed of in the year 2004. Meanwhile, in 1996, 'AR' sold some of the lands in favour of respondent no.2 to 5. In 2005, respondent no.2 to 5 tried to disturb the possession of sons of 'HRR', the petitioners. The petitioners filed suit for declaration that they were coparceners of undivided Hindu Joint Family of 'DAR'. They also prayed for declaration that order dated 11th December, 1975 passed by Land Tribunal was illegal and not binding on them and their inheritance right and title to the properties.

Trial Court held that the suit was barred by limitation and was also not maintainable in view of the bar of Section 132(2) of the Karnataka Land Reforms Act, 1961. High Court upheld the decision of the trial court.

In Special Leave Petition, petitioners contended that the suit was within the limitation period and that they had no knowledge nor consent of occupancy rights granted by the Land Tribunal; and that since the proceedings before the Land Tribunal were vitiated by fraud and collusion, the bar under Section 132(2) of 1961 Act would not apply to the facts of the case.

Dismissing the Special Leave Petition, the Court

HELD: 1. The order of Land Tribunal was passed on 11th December, 1975, whereas the suit was filed by the Petitioners in 2005 seeking declaration, partition and permanent injunction in respect of the properties which were the subject matter of the order of the Tribunal. The Trial Court, as well as the High Court, had dealt with the

aspect of limitation and had found that it was on record that notice of the proceedings before the Land Tribunal was given in the village in respect of the application filed by 'AR'. It was also on record that the father of the petitioners was quite aware of the orders of the Land Tribunal since in an earlier suit, he had taken a specific stand that one of the suit properties, was a tenanted property, and that the Land Tribunal had conferred occupancy rights in favour of 'AR'. The High Court observed that inspite of the same, father of the petitioners did not question the correctness of the order of the Tribunal. It was on that basis that the courts below held that the petitioners had knowledge of the concession made by 'PR' in favour of 'AR' and negated their contention that they were not aware of the same till they signed the compromise petition. Therefore, the cause of action for the suit cannot be said to have arisen only in 2004-05 when the respondent Nos.2 to 5 purportedly attempted to disturb the possession of the petitioners. [Paras 27 and 28] [956-C-H; 957-A-C]

2.1. Regarding the second issue, although ouster of jurisdiction of the Courts is not to be readily inferred, it is quite clear from the provisions of Sections 132(2) and 133(1)(i) of the Karnataka Land Reforms Act, 1961 that the jurisdiction of the Civil Court in matters to be decided by the Tribunal, and to question a decision of the Tribunal stands ousted by Section 132 of the 1961 Act. [Para 29] [957-D]

Saraswati & Ors. V. Lachanna **(1994) 1 SCC 611;** *Shiv Kumar Chadha v. Municipal Corporation of Delhi & Ors.* **(1993) 3 SCC 161;** *Swamy Atmananda & Ors. v. Sri Ramakrishna Tapovanam & Ors.* **(2005) 10 SCC 51;** *Sudhir G. Angur & Ors. v. M. Sanjeev & Ors.* **2006 (1) SCC 141;** *Jatinder Singh & Anr. v. Mehar Singh & Ors.* **AIR 2009 SC 354;** *Balawwa & Anr. v. Hasanabi & Ors.* **(2000) 9 SCC 272;**

K.D. Sharma v. Steel Authority of India Ltd. **(2008) 12 SCC 481;** *Mudakappa v. Rudrappa* **AIR 1994 SC 1190 – referred to.**

2.2. The jurisdiction of the Civil or Criminal Court or Officer or Authority stood ousted in matters where a decision had to be taken as to whether the land in question was agricultural land or not and whether the person claiming to be in possession is or is not a tenant of the said land from prior to 1st April, 1974. In the instant case, the question as to whether 'AR' was an occupancy tenant or not and whether 'PR" had given his consent to such claim is in the domain of the Land Tribunal and it has been correctly held by the Courts below that the Civil Court had no jurisdiction to decide such a question. As far as fraud is concerned, it is no doubt true, that fraud vitiates all actions taken pursuant thereto. However, in the instant case, there is nothing to suggest that 'AR' committed any fraud on 'PR' , who willingly accepted the claim of 'AR' to occupancy rights over the land in question. In that view of the matter, there is no reason to interfere with the judgment and order of the High Court. [Paras 30, 31 and 32] [958-E-H; 959-A-B]

Case law reference:

(1994) 1 SCC 611	**referred to**	**Para 11**
(1993) 3 SCC 161	**referred to**	**Para 12**
(2005) 10 SCC 51	**referred to**	**Para 13**
2006 (1) SCC 141	**referred to**	**Para 14**
AIR 2009 SC 354	**referred to**	**Para 15**
(2000) 9 SCC 272	**referred to**	**Para 16**
(2008) 12 SCC 481	**referred to**	**Para 22**

AIR 1994 SC 1190 referred to Para 23

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 6286 of 2009.

From the Judgment & Order dated 19.12.2008 of the High Court of Karnataka, Bangalore in RFA No. 845 of 2006 (PAR).

Raju Ramchandran, S.S. Padmaraj, Shankar Divate for the Petitioners.

Kailash Vasudev, Girish Ananthamurthy, Imran Pasha, Vaijayanthi Girish for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. One Dodda Appanna Reddy owned vast properties in Halasahalli Thippasandra Village, Sarjapura Hobli, Anekal Taluk, Bangalore Urban District. He died in 1968 leaving behind his only son, Pilla Reddy, and grandson, H. Ramaiah Reddy, the Respondent No.1 herein, to succeed to his estate. The petitioners herein are the sons of H. Ramaiah Reddy.

2. After Appanna Reddy's death Pilla Reddy and H. Ramaiah Reddy constituted a joint family in respect of the ancestral properties and were in joint possession and enjoyment of the various properties, including the suit schedule properties.

3. In 1972, there was a partition of the properties between Pilla Reddy and his son, H. Ramaiah Reddy, in respect of the joint family and ancestral properties. One Annaiah Reddy, a professional document writer at the Sub-Registrar's office at Anekal Taluk, was an attesting witness to the registered partition deed. Pilla Reddy executed two Wills, both scribed by Annaiah Reddy, in 1972 and in 1979. The said Annaiah Reddy filed an application on 30th December, 1974, for grant of tenancy rights in respect of the suit schedule lands under Section 48 of the

Karnataka Land Reforms Act, 1961, hereinafter referred to as "the 1961 Act", claiming occupancy rights on the ground that he had been cultivating the suit lands. Only Pilla Reddy was impleaded as a party to the proceedings, although, the properties were said to be ancestral properties. It appears that on 11th December, 1975, the tenancy rights of the lands in question were recorded in the name of Annaiah Reddy.

4. In 1986, one Sunkamma claiming to be the second wife of Pilla Reddy, filed a partition suit after the death of Pilla Reddy, seeking partition and separate possession of his various properties. In 1996, Annaiah Reddy sold some of the lands in favour of Respondent Nos.2 to 5 herein and as contended by the petitioners, they had no knowledge of the grant of occupancy rights in favour of Annaiah Reddy. The said matter ultimately reached this Court by way of Civil Appeal No.1348 of 2001 preferred by H. Ramaiah Reddy. During the pendency of the said appeal, H. Ramaiah Reddy and Sunkamma entered into a compromise which was recorded and the appeal was disposed of by an order dated 26th October, 2004. Inasmuch as, the Respondent Nos.2 to 5 tried to disturb the possession of the petitioners on the strength of their purported purchase of the suit lands from Annaiah Reddy, the petitioners filed the above-mentioned suit, being No.1457/2005, in the Court of the Principal Civil Judge (Senior Division), Bangalore Rural District at Bangalore, *inter alia*, for a declaration that they were coparceners of the undivided Hindu Joint Family of late Dodda Appanna Reddy and for partition of the scheduled properties by metes and bounds and to put the plaintiffs in separate possession of their legitimate 1/4th share each in the schedule properties. They also prayed for a declaration that the order dated 11th December, 1975, passed by the Land Tribunal, Anekal Taluk, was illegal and not binding on the plaintiffs and their inheritance right and title to the schedule properties. A further declaration was sought for that the sale deeds executed by Annaiah Reddy in favour of the Defendant Nos.2 to 4 were illegal and not binding on the petitioners. Along with the said

relief, the petitioners also prayed for a mandatory injunction to direct the Tahsildar, Anekal Taluk, to effect the mutation and revenue entries in respect of the schedule properties in the joint names of the petitioners and the first defendant. Consequential reliefs were also prayed for.

5. In the said suit, the petitioners prayed for granting ad-interim injunction against the respondents, for the purpose of deciding the suit. The Trial Court formulated 11 issues and one additional issue. Of the said 12 issues, the 6th issue was 'Whether the suit was barred by limitation?' and the additional issue was 'Whether the suit was maintainable in view of Section 132(2) of the Karnataka Land Reforms Act?'.

6. The Trial Court decided to hear the said two issues as preliminary issues. After hearing the parties, the Trial Court answered issue No.6 in the affirmative and additional issue No.1 in the negative and held that the suit was barred by limitation and was also not maintainable in view of the bar of Section 132(2) of the Karnataka Land Reforms Act, 1961. In view of its said findings, the Trial Court dismissed the plaintiff's suit. Aggrieved by the said judgment and decree of the Trial Court, the petitioners preferred the Regular First Appeal No.845 of 2006 (PAR) before the Karnataka High Court at Bangalore. The High Court also dismissed the appeal endorsing the view taken by the Trial Court that the petitioners' suit was clearly barred by limitation and also by virtue of Section 132(2) of the 1961 Act and that Civil Court had no jurisdiction to entertain and try the same.

7. It is against the said judgment and order of the Karnataka High Court in RFA No.845/2006 (PAR) that the instant appeal has been filed.

8. On behalf of the petitioners it was urged by Mr. Raju Ramchandran, learned Senior Advocate, that since the petitioners were third parties to the proceedings before the Land Tribunal, the order passed therein did not bind them and

they were separately entitled to file the suit for partition notwithstanding the orders of the Land Tribunal. It was also submitted that since the proceedings before the Land Tribunal were vitiated by fraud and collusion, the bar under Section 132(2) of the 1961 Act would not apply to the facts of the instant case and as such the Trial Court was not justified in holding that the suit was barred under the said provisions. According to the petitioners, since the suit had been brought within a period of 3 years from the date of knowledge of the order of the Land Tribunal and the sale transaction, it was not barred by limitation and the Trial Court erred in dismissing the same on the ground of limitation.

9. Elaborating on his submissions, Mr. Ramchandran submitted that in order to be recognized and recorded as an occupant under Section 45 of the 1961 Act, the person concerned would be entitled to make an application to the Tribunal constituted under Section 48 of the Act and every such application would have to be made before the expiry of the period of 6 months from the date of commencement of Section (1) of the Karnataka Land Reforms (Amendment) Act, 1978. Mr. Ramchandran contended that the inquiry by the Tribunal contemplated under Section 48-A(5) had necessarily to be confined to the determination of the claim of tenancy of the applicant and in the event such a question arose during the pendency of a civil or criminal proceeding, no civil or criminal Court or officer would be entitled to decide the question whether such land was agricultural land or not and whether the person claiming to be in possession is or is not the tenant of the suit land from prior to 1st March, 1974, in view of Section 133(1)(i) of the aforesaid Act.

10. Reference was also made to Rule 17 of the Karnataka Land Reforms Rules, 1977 (hereinafter referred to as the '1974 Rules') which prescribes the procedure to be followed by the Tribunal in respect of a summary inquiry under Section 34 of the 1961 Act. It was urged that since the procedure was

summary in nature, questions relating to fraud or the validity of a concession made by the petitioners' grand-father could only be gone into by a Civil Court and not in the summary proceedings before the Tribunal. Mr. Ramchandran submitted that it would be evident from the frame of the suit that no such question, as contemplated under Section 48-A, was involved in the suit which was essentially one for declaration that the petitioners were coparceners of the undivided Hindu Joint Family of late Dodda Appanna Reddy and partition of the scheduled property by metes and bounds and to put the plaintiff in separate possession of their legitimate 1/4th share each in the scheduled properties. A further prayer was made to declare that the order dated 11th December, 1975, passed by the Land Tribunal, Anekal Taluk, in Case No.LRF/A.T.C./154/75-76, was illegal and not binding on the petitioners and did not affect their inheritance rights and title to the scheduled properties. A further declaration was sought that the sale deeds executed by Late Annaiah Reddy in favour of the defendant Nos.2 to 4 was a sham transaction and not binding on the petitioners. Mr. Ramchandran submitted that the Tribunal was not competent to determine the said questions which could only be decided by the Civil Court.

11. In support of his aforesaid submissions, Mr. Ramchandran firstly referred to the decision of this Court in *Saraswati & Ors. vs. Lachanna* [(1994) 1 SCC 611], in which a similar provision in the A.P. (Telangana Area) Tenancy and Agricultural Lands Act, 1950, where the Civil Court's jurisdiction had been barred, fell for consideration and it was held that a suit relating to redemption of usufructuary mortgage filed in the Civil Court was not barred and was maintainable, having regard to the provisions of Section 9 of the Code of Civil Procedure. This Court held that bar on the power of the Civil Court to entertain a suit could not be inferred with, where the statute did not create a right or after creating a right did not provide a forum for adjudication of any dispute arising out of such right.

12. Mr. Ramchandran also referred to the decision of this Court in the case of *Shiv Kumar Chadha vs. Municipal Corporation of Delhi & Ors.* [(1993) 3 SCC 161], where the same principle was reiterated and it was held that the Court's jurisdiction to go into the question as to whether the order was a nullity being vitiated by jurisdictional error was not barred.

13. Reference was also made to the decision of this Court in the case of *Swamy Atmananda & Ors. vs. Sri Ramakrishna Tapovanam & Ors.* [(2005) 10 SCC 51], where a dispute over title under the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973, was claimed to be barred under Section 53 of the Act. This Court held that such a dispute was not one that was required to be decided under the provisions of the aforesaid Act, and, accordingly, the jurisdiction of the Civil Court in terms of Section 9 of the Civil Procedure was not excluded. It was emphasized that the ouster of the Civil Court's jurisdiction was not to be readily inferred.

14. Mr. Ramchandran lastly referred to the decision of this Court in *Sudhir G. Angur & Ors. vs. M. Sanjeev & Ors.* [2006 (1) SCC 141], wherein, while considering the provisions of the Mysore Religious and Charitable Institutions Act, 1927, this Court held that the jurisdiction of the Civil Court in regard to matters containing serious allegations of forgery, fraud and diversion of trust properties, could not be inquired into in a summary manner and could only be gone into by a Court.

15. On the question of limitation, Mr. Ramchandran submitted that the High Court erred in deciding the question of limitation without considering the fraudulent nature of the consent said to have been given by Pilla Reddy, although, he had no independent right or title over the property to give consent for granting occupancy rights in favour of Annaiah Reddy. Mr. Ramchandran submitted that the High Court erred in holding that the suit was barred by limitation without taking evidence in that regard. In support of his aforesaid submission, Mr. Ramchandran referred to the decision of this Court in

Jatinder Singh & Anr. vs. Mehar Singh & Ors. [AIR 2009 SC 354], in which this Court set aside the decision of the High Court for having failed to take notice of an application filed by the Appellant therein under Order 41 Rule 27 CPC while deciding the second appeal. This Court held that when such an application was pending, it was the duty of the High Court to deal with the same on merits and not having been done so, there was no other alternative, but to set aside the judgment of the High Court and to remit the appeal for a fresh decision in the second appeal after taking into consideration the application under Order 41 Rule 27 CPC.

16. In the same context, reference was also made to a subsequent decision of this Court in *Balawwa & Anr. vs. Hasanabi & Ors.* [(2000) 9 SCC 272], in which the question of ouster of the Civil Court's jurisdiction fell for consideration in view of the Karnataka Land Reforms Act, 1961. This Court held that the jurisdiction of the Civil Court is ousted only in respect of such reliefs as could be granted by the Special Tribunal under the Special Statute but in other respects the jurisdiction of the Civil Court was not ousted.

17. Mr. Ramchandran submitted that the preliminary issue relating to the bar of jurisdiction of the Civil Court, as envisaged under Section 133 (2) of the 1961 Act, could not have been decided without taking evidence as to the character of the lands in question. Mr. Ramchandran submitted that the order of the High Court was not capable of being entertained and was liable to be set aside.

18. On the other hand, appearing for the Respondent No.1, Mr. Kailash Vasudev, learned Senior Advocate, pointed out from the plaint of OS No.1457 of 2005, filed by R. Ravindra Reddy in the Court of Principal Civil Judge (Senior Division), Bangalore Rural District, Bangalore, that a fraud had been perpetrated by the said Annaiah Reddy only to deprive the plaintiffs of their right and share in the scheduled properties. Mr. Vasudev pointed out that in the same breath it had also

been admitted that Pilla Reddy had conceded grant of tenancy rights in favour of late Annaiah Reddy, though without knowledge and consent of the plaintiffs. Mr. Vasudev submitted that the question of obtaining the consent of the plaintiffs by their grandfather, Pilla Reddy, for grant of tenancy rights in favour of Annaiah Reddy, did not arise since he was holding the tenancy rights in respect of the said land.

19. Mr. Vasudev also referred to paragraph 16 of the plaint where it was stated that the cause of action for the suit arose in January 2005 as the plaintiffs/respondents were continuously demanding partition and separate possession of their share in the scheduled properties and the petitioners herein failed to effect partition, but the other respondents were continuing to make attempts to trespass/interfere with and to disturb the Respondent No.1's possession and enjoyment of the scheduled properties.

20. Mr. Vasudev then brought to our notice the proceedings before the Land Tribunal, Bangalore District, Anekal Taluk, in Case No.LRF/A.T.C./154/ 75-76 dated 11th December, 1975, in which the Petitioner was shown as M. Annaiah Reddy and H. Pilla Reddy was shown as the Respondent. In the proceedings under Section 48-A of the 1961 Act, the application filed by M. Annaiah Reddy was disposed of by the following order :-

> "All the above mentioned Sy. Nos. lands are situated at Halasahalli Thippasasndra Village, Sarjapura Hobli. The petitioner claims occupancy right in the above mentioned Sy. Nos. and produced the order copy dated 30.12.74. The date for enquiry was fixed on 11.12.75 and on the same day the enquiry was conducted and the respondent agreed that occupancy rights claimed by the petitioner in the above said Sy. Nos. Therefore all the members of the Tribunal have unanimously accepted the contention of the petitioner and the respondent and resolved to grant

occupancy rights in favour of petitioner to the extent of lands in the above-said Sy. Nos. as per possession."

21. Mr. Vasudev submitted that it would be amply clear from the said order that Pilla Reddy had agreed to the claim of occupancy rights by M. Annaiah Reddy. Furthermore, such order had never been questioned by H. Pilla Reddy as being fraudulent or having been obtained by fraudulent means.

22. Mr. Vasudev referred to the decision of this Court in *K.D. Sharma vs. Steel Authority of India Ltd.* [(2008) 12 SCC 481], in which the issue relating to fraud perpetrated on Court was considered in detail and it was held that fraud practised on the Court would vitiate all judicial acts, since fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another.

23. Mr. Vasudev also referred to the decision of this Court in *Mudakappa vs. Rudrappa* [AIR 1994 SC 1190], in which this Court held that the Tribunal under the Karnataka Land Reforms Act was entitled to decide the question as to whether the joint family or one of its members was a tenant in respect of the land in question and that such decision was subject to review under Articles 226 and 227 of the Constitution.

24. Mr. Vasudev submitted that since the preliminary objections made on behalf of the Respondent No.1 herein had been duly accepted relating to the maintainability of the suit, on account of the bar imposed under Section 133(1)(i) and (2) of the 1961 Act and the bar of limitation, no interference was called for with the impugned judgment of the High Court.

25. As has been mentioned hereinbefore, out of 11 issues and the additional issue formulated by the Trial Court, issue No.6 and the additional issue relating to the bar of limitation and maintainability in view of Section 132(2) of the 1961 Act, were taken up for consideration as preliminary issues. In fact, in view of the decision on the said two issues, no other issue

was either taken up for consideration or decided. Our inquiry in this petition is, therefore, confined to the said two issues alone.

26. The Trial Court answered issue No.6 in the affirmative and additional issue No.1 in the negative holding that the suit was barred by limitation and was not maintainable in view of the bar of Section 132(2) of the 1961 Act. We have considered the submissions made on behalf of the respective parties in respect of the two issues and we agree with the views expressed by the Trial Court as also the High Court on the said two issues.

27. As far as the question of limitation is concerned, the order of the Land Tribunal, Anekal, was passed on 11th December, 1975, whereas the suit was filed by the Petitioners herein in 2005 seeking declaration, partition and permanent injunction in respect of the properties which were the subject matter of the order of the Tribunal. An attempt has been made to bring the said suit within the period of limitation by indicating that the Respondent Nos.2 to 5 had tried to disturb the possession of the Petitioners during the year 2004-05 on the ground of their alleged purchase of the suit lands from Annaiah Reddy. It was sought to be urged that Pilla Reddy had admitted the claim of the Respondents on having acquired occupancy rights before the Tribunal, without the knowledge and consent of the Petitioners. Both the Trial Court, as well as the High Court, have dealt with this aspect of the matter and have found that it was on record that notice of the proceedings before the Land Tribunal had been given in the village in respect of the application filed by Annaiah Reddy. It is also on record that the father of the Petitioners was quite aware of the orders of the Land Tribunal as in OS No.75 of 1986 he had taken a specific stand that one of the suit properties, namely, Survey No.46, is a tenanted property, and that the Land Tribunal, Anekal, had conferred occupancy rights in favour of M. Annaiah Reddy. The High Court has observed that inspite of the same, the father of

the Petitioners did not question the correctness of the order of the Tribunal. It is on that basis that the Courts below held that the Petitioners had knowledge of the concession made by Pilla Reddy in favour of Annaiah Reddy and negated their contention that they were not aware of the same till they signed the compromise petition before this Court in the appeal arising out of OS No.75 of 1986.

28. We are, therefore, unable to accept Mr. Ramchandran's submissions that the cause of action for the suit arose only in 2004-05 when the Respondent Nos.2 to 5 purportedly attempted to disturb the possession of the Petitioners.

29. As far as the second issue is concerned, although ouster of jurisdiction of the Courts is not to be readily inferred, it is quite clear from the provisions of Sections 132(2) and 133(1)(i) of the 1961 Act that the jurisdiction of the Civil Court in matters to be decided by the Tribunal, and to question a decision of the Tribunal stands ousted by Section 132 of the 1961 Act which provides as follows :-

> *"132. Bar of jurisdiction* – (1) No civil court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Deputy Commissioner, an officer authorized under sub-section (1) of Section 77, the Assistant Commissioner, the prescribed authority under Section 83, the Tribunal, the Tehsildar, the Karnataka Appellate Tribunal or the State Government in exercise of their powers of control.
>
> (2) No order of the Deputy Commissioner, an officer authorized under sub-section (1) of Section 77, the Assistant Commissioner, the prescribed authority under Section 83, the Tribunal, the Tehsildar, the Karnataka Appellate Tribunal or the State Government made under this Act shall be questioned in any civil or criminal court."

Furthermore, Section 133(1)(i) and (2) of the Act read as follows :-

> *"133. Suits, proceedings, etc., involving questions required to be decided by the Tribunal.-* (1) Notwithstanding anything in any law for the time being in force.-
>
> (i) no civil or criminal court or officer or authority shall, in any suit, case or proceedings concerning a land decide the question whether such land is or not agricultural land and whether the person claiming to be in possession is or is not a tenant of the said land from prior to 1st March, 1974;
>
> (ii) x x x
>
> (ii) x x x
>
> (iii) x x x
>
> (2) Nothing in sub-section (1) shall preclude the civil or criminal court or the officer or authority from proceeding with the suit, case or proceedings in respect of any matter other than that referred to in that sub-section."

30. It is clear from the above that the jurisdiction of the Civil or Criminal Court or Officer or Authority stood ousted in matters where a decision had to be taken as to whether the land in question was agricultural land or not and whether the person claiming to be in possession is or is not a tenant of the said land from prior to 1st April, 1974. In the instant case, the question as to whether Annaiah Reddy was an occupancy tenant or not and whether Pilla Reddy had given his consent to such claim is in the domain of the Land Tribunal and it has been correctly held by the Courts below that the Civil Court had no jurisdiction to decide such a question.

31. As far as fraud is concerned, it is no doubt true, as

submitted by Mr. Ramchandran, that fraud vitiates all actions taken pursuant thereto and in Lord Denning's words 'fraud unravels everything'. However, in the instant case, there is nothing on record to suggest that Annaiah Reddy committed any fraud on Pilla Reddy, who willingly accepted the claim of Annaiah Reddy to occupancy rights over the land in question.

32. In that view of the matter, we see no reason to interfere with the judgment and order of the High Court impugned in these proceedings and the Special Leave Petition is, accordingly, dismissed.

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

D.G. Special Leave Petition dismissed

SESHAMBAL (DEAD) THROUGH L.RS.

v.

M/S. CHELUR CORPORATION CHELUR BUILDING AND ORS.

(Civil Appeal No. 565 of 2005)

FEBRUARY 17, 2010

[MARKANDEY KATJU AND T.S. THAKUR, JJ.]

Rent Control:

Kerala Buildings (Lease and Rent Control) Act, 1965 – s.11(3) – Eviction petition – On ground of bonafide personal requirement – Dismissed by Rent Controller as also the Appellate Authority – Order upheld by High Court – Meanwhile the original owners died – Their LRs, i.e. three daughters sought eviction on the basis of requirement pleaded by the original owners – Whether eviction proceedings could be continued by LRs of deceased-owners – Held: On facts, No – The limited requirement pleaded in the eviction petition by the original owners was their own personal occupation and not occupation of their family members, dependant or otherwise – In any event, the LRs of deceased-owners were all married and settled in their respective matrimonial homes in different cities and at different places – The deceased owners thus did not have any dependant family member for whose personal occupation they could have sought eviction – On the death of original owners, their right to seek eviction on ground of personal occupation became extinct.

Eviction suit – Dismissed by Rent Controller – Revision petition – High Court affirmed the order of Rent Controller, but, noticing that the demised premises was large and located in a popular commercial area of the city, and also the fact that the rent had not been revised for number of years, it tentatively enhanced the rent – Held: The revision was not adequate –

Keeping in view the totality of the circumstances, rent further revised by Supreme Court, albeit tentatively.

Code of Civil Procedure, 1908 – Suit – Subsequent development – Effect of – Held: If subsequent to the filing of the suit, certain developments take place that have a bearing on the right to relief claimed by a party, such subsequent events cannot be shut out from consideration.

The premises in dispute, located in the city of Cochin, was let out to respondent no.1. The original owners of the premises filed petition before the Rent Controller seeking eviction of respondent no.1-tenant on the ground that they required the same for their *bonafide* personal occupation within the meaning of Section 11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965. The Rent Controller held that the owners had failed to establish their *bonafide* requirement of the premises. The Appellate Authority affirmed the decision taken by the Rent Controller.

Aggrieved, the owners filed revision petition before the High Court, which dismissed the same. However, the High Court enhanced the rent of the premises to Rs.10,000/- p.m. Meanwhile the original owners passed away. Their LRs, i.e. three daughters sought eviction on the basis of requirement pleaded by the original owners.

In appeal to this Court, dispute arose as to whether the proceedings instituted by the deceased-owners of the demised property could be continued by their LRs.

The LRs of deceased-owners contended that it was permissible for them to continue the eviction proceedings and seek eviction of the tenant on the basis of the requirement pleaded by the erstwhile owners in the eviction petition filed by them; that the rights and obligations of the parties got crystallized as on the date

of the filing of the petition and that the subsequent development of the death of original owners was irrelevant to the maintainability or continuance of the eviction proceedings after the death of the original owners.

Disposing of the appeal, the Court

HELD: 1.1. The eviction petition was filed in terms of Section 11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965. In the eviction petition the owners had pleaded their own requirement for the premises to be occupied by them for residential as well as commercial purposes. The eviction petition was totally silent about the requirements of any member of the family of the owners-petitioners leave alone any member of their family who was dependant upon them. That being so the parties went to trial before the Rent Controller on the basis of the case pleaded in the petition and limited to the requirement of the owners for their personal occupation. [Paras 8 and 9] [970-D; 971-D-E]

1.2. Neither before the Rent Controller nor before the Appellate Authority was it argued that the requirement in question was not only the requirement of the petitioner-owners of the premises but also the requirement of any other member of their family whether dependant upon them or otherwise. Not only that, even in the petition filed before this Court, the requirement pleaded was that for the deceased-widowed owner of the demised premises and not of any member of her family. Super added to all this is the fact that the legal representatives who now claim to be the family members of the deceased are all married daughters of the deceased couple each one settled in their respective matrimonial homes in different cities and at different places. That none of them was dependant upon the deceased-petitioner is also an

undisputed fact. Even otherwise in the social milieu to which we are accustomed, daughters happily married have their own families and commitments financial and otherwise. Such being the position it is difficult to see how the legal representatives of the deceased-owners can be allowed to set up a case which was never set up before the Courts below so as to bring forth a requirement that was never pleaded at any stage of the proceedings. Allowing the legal heirs to do so would amount to permitting them to introduce a case which is totally different from the one set up before the Rent Controller the Appellate Authority or even the High Court. [Para 9] [971-E-H; 972-A-C]

1.3. The position may indeed have been differentiated if in the original petition the petitioner-owners had pleaded their own requirement and the requirement of any member of their family dependant upon them. In such a case the demise of the original petitioners or any one of them may have made little difference for the person for whose benefit and bona fide requirement the eviction was sought could pursue the case to prove and satisfy any such requirement. [Para 9] [972-C-E]

1.4. While it is true that the right to relief must be judged by reference to the date suit or the legal proceedings were instituted, it is equally true that if subsequent to the filing of the suit, certain developments take place that have a bearing on the right to relief claimed by a party, such subsequent events cannot be shut out from consideration. What the Court in such a situation is expected to do is to examine the impact of the said subsequent development on the right to relief claimed by a party and, if necessary, mould the relief suitably so that the same is tailored to the situation that obtains on the date the relief is actually granted. [Para 10] [972-G-H; 973-A-B]

1.5. In the present case, the requirement pleaded in the eviction petition by the original petitioners was their own personal requirement and not the requirement of the members of their family whether dependant or otherwise. Indeed if the deceased landlords had any dependant member of the family, even in the absence of a pleading, it could be assumed that the requirement pleaded extended also to the dependant member of their family. That unfortunately, for the appellants is neither the case set up nor the position on facts. The deceased couple did not have any dependant member of the family for whose benefit they could have sought eviction on the ground that she required the premises for personal occupation. [Para 18] [977-B-E]

1.6. On the death of the petitioners in the original eviction petition their right to seek eviction on the ground of personal requirement for the demised premises became extinct and no order could on the basis of any such requirement be passed at this point of time. [Para 19] [977-E-F]

Pasupuleti Venkateswarlu v. Motor and General Traders **1975 (1) SCC 770;** *Om Prakash Gupta v. Ranbir B. Goyal* **2002 (2) SCC 256;** *Hasmat Rai v. Raghunath Prasad* **1981 (3) SCC 103;** *Baba Kashinath Bhinge v. Samast Lingayat Gavali* **1994 Supp (3) SCC 698;** *Ramesh Kumar v. Kesho Ram* **1992 Supp (2) SCC 623 and** *Kedar Nath Agrawal (dead) and Anr. v. Dhanraji Devi (dead) by LRs. and Anr.* **2004 (8) SCC 76, relied on.**

Shantilal Thakordas v. Chimanlal Maganlal Telwala **1976 (4) SCC 417, distinguished.**

Shamshad Ahmad v. Tilak Raj Bajaj **(2008 (9) SCC 1;** *Maganlal v. Nanasaheb* **2008 (13) SCC 758;** *Pratap Rai Tanwani v.. Uttam Chand* **(2004 (8) SCC 490;** *Gaya Prasad*

v. Pradeep Srivastava **(2001) 2 SCC 604;** *Kamleshwar Prasad v. Pradumanju Agarwal* **1997 (4) SCC 413;** *Shakuntala Bai v. Narayan Das* **2004 (5) SCC 772;** ***G.C.*** *Kapoor v. Nand Kumar Bhasin* **2002 (1) SCC 610;** *Pukhraj Jain v. Padma Kashypa* **(1990 (2) SCC 431 and** *Phool Rani & Ors. v. Naubat Rai Ahluwalia* **1973 (1) SCC 688, referred to.**

2. There is one other aspect which must be adverted to at this stage. The High Court had, while disposing of the revision petition filed before it, come to the conclusion that the demised premises is large and located in a popular commercial area of the city of Cochin. It has found that the rent for the premises was very low and had not been revised since the year 1973. The High Court accordingly revised the rent to Rs.10,000/- per month payable w.e.f. 1.11.2003 onwards leaving it open to the parties to get the fair rent determined for the demised premises. During the pendency of this appeal, the appellants had filed an application seeking a direction against the respondent for payment of rent @ Rs.50,000/- per month. The application supported by an affidavit, inter-alia, alleges that the market rent of the premises in question was not less than Rs.50,000/- per month as in September 2005 when the application was filed. A Valuation Certificate issued by a Chartered Engineer & Approved Valuer, is also enclosed with the application, according to which the market value of the plot in question was not less than Rs.7,00,000/- per cent and the current market rent for the building not less than Rs.8/- per square feet. As per the lease deed entered between the deceased owners and the respondents, the premises in question is constructed over an area measuring about 20 cents. The covered area is said to be 5000 sq. ft. or so. In the circumstances while the High Court was justified in tentatively revising the rent for the premises, the revision was not adequate. Keeping in view the

totality of the circumstances, instead of Rs.10,000/- determined by the High Court, the respondents shall pay Rs.15,000/- per month towards rent w.e.f. 1.11.2003. The same shall stand revised to Rs.25,000/- per month w.e.f. 1.1.2009. The revision ordered by this Court is also tentative and shall not prevent the parties from seeking determination of the fair rent for the premises by instituting proceedings before the competent Court/ authority in accordance with law. [Paras 20 and 21] [977-F-H; 978-A-G]

Case Law Reference:

2008 (9) SCC 1	referred to	Para 6
2008 (13) SCC 758	referred to	Para 6
2004 (8) SCC 490	referred to	Para 6
(2001) 2 SCC 604	referred to	Para 6
1997 (4) SCC 413	referred to	Para 6
2004 (5) SCC 772	referred to	Para 6
2002 (1) SCC 610	referred to	Para 6
1975 (1) SCC 770	relied on	Para 7
2002 (2) SCC 256	relied on	Para 7
1981 (3) SCC 103	relied on	Para 7
1994 Supp (3) SCC 698	relied on	Para 7
1992 Supp (2) SCC 623	relied on	Para 14
2004 (8) SCC 76	relied on	Para 16
1976 (4) SCC 417	distinguished	Para 17
(1990 (2) SCC 431	referred to	Para 17
1973 (1) SCC 688	referred to	Para 18

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 565 of 2005.

From the Judgment & Order dated 17.2.2003 of the High Court of Kerala at Ernakulam in C.R.P.No. 558 of 1994 (F).

K.V. Vishwanathan, Neha S. Verma, P.B. Subramanyan, Abhishek Kaushik, V. Mohan for the Appellants.

L. Nageswara Rao, Roy Abraham, Seema Jain, Himinder Lal for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by Special Leave arises out of an order passed by the High Court of Kerala at Ernakulam whereby C.R.P. No.558 of 1994 has been dismissed and the orders passed by the Rent Controller and the Rent Control Appellate Authority dismissing the eviction petition filed against the tenant wife affirmed. In a nutshell, the facts giving rise to the controversy are as under:

2. Late Shri K. Sachindanda Iyer and his wife late Smt. A Sheshambal Sachindanda Iyer owners of the premises in dispute let out the same to respondent No.1 for a period of three years in terms of a lease dated 12th April, 1983. On the expiry of the lease period the owners filed RCP No.116 of 1986 before the Rent Controller at Ernakulam seeking eviction of the tenant-occupant on the ground that they required the same for their bona fide personal occupation within the meaning of Section 11(3) of the Kerala Buildings (Lease and Rent Control Act), 1965. The prayer for eviction was opposed by the tenant, inter alia, on the ground that the owners did not require the demised premises and that the tenant would find it difficult to shift its business to any other premises on account of non-availability of a suitable accommodation for being so. The Rent Controller eventually came to the conclusion that the owners had failed to establish their bona fide requirement of premises. The Rent Controller held that the owners had shifted their residence

from Cochin and were living with their daughter and son-in-law who were running a nursing home in that city.

3. Aggrieved by the order passed by the Rent Controller, the owners appealed to the Appellate Authority who affirmed the decision taken by the Rent Controller holding that the owners were residing with their daughter and son-in-law at Ernakulam in a building owned by the owners. The Appellate Authority also found that the owners had a cottage at Kodaikanal and that being fairly old had no reason to shift back to Ernakulam in search of better medical facilities especially when their own son-in-law was running a nursing home at Coimbatore where such facilities were available to them. Absence of any medical evidence to show that the owners suffered from any illness was also cited as a ground for dismissal of the prayer for eviction.

4. Aggrieved by the orders passed by the Rent Controller and the Appellate Authority the owners brought up the matter before the High Court of Kerala in a revision with a view to have the concurrent findings recorded by the Courts below set aside. The High Court, as noted earlier, has refused to intervene in the matter and dismissed the revision petition. The High Court held that it was not expected to reappraise the evidence produced by the parties in the exercise of its revisional jurisdiction and that the limited question that fell for its consideration was whether the procedure followed by the Rent Controller and the Appellate Authority was illegal, irregular or improper. The High Court noted that the rent of the premises paid by the tenant had not been revised since the year 1973. The same was, therefore, enhanced to Rs.10,000/- p.m. w.e.f. 1.11.2003 onwards with liberty to the parties to approach the competent Court for fixation of fair rent for the demised premises. The present appeal, as seen earlier, calls in question the correctness of the above orders.

5. It is not in dispute that during the pendency of the revision petition before the High Court the landlord Shri K. Sachindanda Iyer passed away on 24th April, 1996 leaving

behind his wife Smt. A. Sheshambal Sachindanda Iyer as the sole revision petitioner seeking eviction of the respondent-tenant. Consequent upon the dismissal of the revision petition the present appeal was filed by Smt. A. Sheshambal Sachindanda Iyer alone who too passed away before this appeal could be heard for final disposal. IA No.7/2008 filed on 14th November, 2008 sought substitution of the legal representatives of the appellant on the basis of a Will left behind by the deceased according to which the property in question has to devolve upon the three daughters left behind by the deceased. It is common ground that two of the daughters are living in India one each at Coimbatore and Bihar the third daughter is settled in America.

6. The short question that was, in the above backdrop, argued by learned counsel for the parties at considerable length was whether the proceedings instituted by the deceased-owners of the demised property could be continued by the legal heirs left behind by them. Mr. K.V. Vishwanathan, learned senior counsel, appearing for the legal heirs of the deceased-appellant contended that it was permissible for the legal heirs to continue the present proceedings and seek eviction of the tenant on the basis of the requirement pleaded by the erstwhile owners in the eviction petition filed by them. The rights and obligations of the parties, argued Mr. Vishwanathan, get crystallized as on the date of the filing of the petition. Any subsequent development, according to the learned counsel, would be irrelevant to the maintainability or the continuance of the proceedings after the death of the original petitioners. Reliance in support of that submission was placed by the learned counsel upon the decisions of this Court in *Shamshad Ahmad vs. Tilak Raj Bajaj* (2008 (9) SCC 1), *Maganlal vs. Nanasaheb* (2008 (13) SCC 758), *Pratap Rai Tanwani vs. Uttam Chand* (2004 (8) SCC 490), *Gaya Prasad vs. Pradeep Srivastava* (2001 (2) SCC 604), *Kamleshwar Prasad vs. Pradumanju Agarwal* (1997 (4) SCC 413), *Shakuntala Bai vs. Narayan Das* (2004 (5) SCC 772), *G.C. Kapoor vs. Nand*

Kumar Bhasin (2002 (1) SCC 610) and *Shantilal Thakordas vs. Chimanlal Maganlal Telwala* (1976 (4) SCC 417).

7. On behalf of the respondent-tenants Mr. L. Nageswara Rao, learned senior counsel, placed heavy reliance on the decisions of this Court in *Pasupuleti Venkateswarlu vs. Motor and General Traders* (1975 (1) SCC 770), *Om Prakash Gupta vs. Ranbir B. Goyal* (2002 (2) SCC 256), *Hasmat Rai vs. Raghunath Prasad* (1981 (3) SCC 103) and *Baba Kashinath Bhinge vs. Samast Lingayat Gavali* (1994 Supp (3) SCC 698). It was argued by Mr. Rao that the legal position as to whether the Court could take note of the subsequent developments stood settled by the above decisions which left no manner of doubt that all such developments as have an impact on the rights and obligations of the parties must be taken into consideration by the Court and the relief suitably moulded.

8. The eviction petition, as noted earlier, was filed in terms of Section 11(3) of the Kerala Buildings (Lease and Rent Control Act), 1965, which reads:

> "Section 11(3): A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building if he bona fide needs the building for his own occupation or for the occupation by any member of his family dependent on him.
>
> Provided that the Rent Control Court shall not give any such direction if the landlord has another building of his own in his possession in the same city, town or village except where the Rent Control Court is satisfied that for special reasons, in any particular case it will be just and proper to do so;
>
> Provided further that the Rent Control Court shall not give any direction to a tenant to put the landlord in possession, if such tenant is depending for his livelihood mainly on the income derived from any trade or business carried on in

such building and there is no other suitable building available in the locality for such person to carry on such trade or business:

Provided further that no landlord whose right to recover possession arises under an instrument of transfer inter vivos shall be entitled to apply to be put in possession until the expiry of one year from the date of the instrument:

Provided further that if a landlord after obtaining an order to be put in possession transfer his rights in respect of the building to another person, the transferee shall not be entitled to be put in possession unless he proves that he bona fide needs the building for his own occupation or for the occupation by any member of his family dependent on him."

9. It is not in dispute that in the eviction petition the owners had pleaded their own requirement for the premises to be occupied by them for residential as well as commercial purposes. The eviction petition was totally silent about the requirements of any member of the family of the owners-petitioners leave alone any member of their family who was dependant upon them. That being so the parties went to trial before the Rent Controller on the basis of the case pleaded in the petition and limited to the requirement of the owners for their personal occupation. Neither before the Rent Controller nor before the Appellate Authority was it argued that the requirement in question was not only the requirement of the petitioner-owners of the premises but also the requirement of any other member of their family whether dependant upon them or otherwise. Not only that, even in the petition filed before this Court the requirement pleaded was that for the deceased-widowed owner of the demised premises and not of any member of her family. Super added to all this is the fact that the legal representatives who now claim to be the family members of the deceased are all married daughters of the deceased couple each one settled in their respective

matrimonial homes in different cities and at different places. That none of them was dependant upon the deceased-petitioner is also a fact undisputed before us. Even otherwise in the social milieu to which we are accustomed, daughters happily married have their own families and commitments financial and otherwise. Such being the position we find it difficult to see how the legal representatives of the deceased-appellant can be allowed to set up a case which was never set up before the Courts below so as to bring forth a requirement that was never pleaded at any stage of the proceedings. Allowing the legal heirs to do so would amount to permitting them to introduce a case which is totally different from the one set up before the Rent Controller the Appellate Authority or even the High Court. The position may indeed have been differentiated if in the original petition the petitioner-owners had pleaded their own requirement and the requirement of any member of their family dependant upon them. In such a case the demise of the original petitioners or any one of them may have made little difference for the person for whose benefit and bona fide requirement the eviction was sought could pursue the case to prove and satisfy any such requirement.

10. Confronted with the above position Mr. Vishwanathan made in generous submission. He contended that the rights and obligations of the parties get crystalized at the time of institution of the suit so that any subsequent development is not only inconsequential but wholly irrelevant for determination of the case before this Court. Learned counsel sought to extend that principle to the case at hand in an attempt persuade us to shut out the subsequent event of the death of the original petitioners from consideration. We regret to say that we do not see any basis for the submission so vehemently urged before us by Mr. Vishwanathan. While it is true that the right to relief must be judged by reference to the date suit or the legal proceedings were instituted, it is equally true that if subsequent to the filing of the suit, certain developments take place that have a bearing on the right to relief claimed by a party, such

subsequent events cannot be shut out from consideration. What the Court in such a situation is expected to do is to examine the impact of the said subsequent development on the right to relief claimed by a party and, if necessary, mould the relief suitably so that the same is tailored to the situation that obtains on the date the relief is actually granted. That proposition of law is, in our view, fairly settled by the decisions of this Court in *Pasupuleti Venkateswarlu* case (supra). Krishna Iyer J. (as His Lordship then was) has in his concurring judgment lucidly summed up legal position in the following words:

> "……..If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice - subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed……."

11. To the same effect is the decision of this Court in *Om Prakash Gupta's* case (supra) where the Court declared that although the ordinary rule of civil law is that the rights of the

parties stand crystalised on the date of the institution of the suit yet the Court has power to mould the relief in case the following three conditions are satisfied:

> "……..(*i*) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (*ii*) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (*iii*) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise……"

12. In *Hasmat Rai's* case (supra), this Court observed that if the tenant is in a position to show that the need or requirement no more exists because of subsequent events, it would be open to him to point out such events and the court, including the appellate court, has to examine, evaluate and adjudicate upon the same.

13. To the same effect is the decision of this Court in *Baba Kashinath Bhinge's* case (supra) where relying upon the decision in *Hasmat Rai's* case (supra) this Court held that in a case of bona fide requirement it is necessary to establish that the landlord needs the premises and the need subsists till a decree is passed in his favour. In a case where such need is available at the time of the filing of the petition but becomes extinct by the time the matter attains finality in appeal for revision no decree will be justified. For that purpose the Court should take all the subsequent events into consideration and mould the relief accordingly. Following passage provides a complete answer to the question raised before us:

> "Equally it is settled by this Court in series of judgments and a reference in this behalf would be sufficient by citing *Hasmat Rai v. Raghu Nath Prasad* that in a case of bona fide requirement, *it is always necessary, till the decree of*

eviction is passed that the landlord should satisfy that the need is bona fide and the need subsists. In a case where the need is available at the time of filing the petition, but at the time of granting decree it may not continue to subsist, in that event, the decree for eviction could not be made. Similarly pending appeal or revision or writ petition, the need may become more acute. The court should take into account all the subsequent events to mould the relief. The High Court may not be justified in omitting to consider this aspect of the matter but that does not render the judgment illegal for the subsequent discussion we are going to make."

(emphasis supplied)

14. Reference may also be made to *Ramesh Kumar vs. Kesho Ram* (1992 Supp (2) SCC 623) where Venkatachaliah, J. (as His Lordship then was) expressed a similar view in the following words:

"The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a 'cautious cognizance' of the subsequent changes of fact and law to mould the relief."

15. Similarly, in *Maganlal's* case (supra) all that this Court held was that if the litigation keeps extending and number of developments sprouting up during the long interregnum, the Court should adopt a pragmatic approach in the matter and determine whether or not the development pending finalization of the litigation is such as would completely non-suit the party concerned. This decision is, in our view, no authority for this proposition that subsequent developments having material

impact on the rights and obligations of the parties can be ignored by a Court simply because such rights and obligations have to be determined by reference to the date on which the litigation was instituted.

16. The decision of this Court in *Kedar Nath Agrawal (dead) and Anr. vs. Dhanraji Devi (dead) by LRs. and Anr.* (2004 (8) SCC 76) has reiterated the legal position after a detailed review of the case law on the subject. That was also a case where two applicants seeking eviction of the tenant had passed away during the pendency of the eviction petition and the question was whether the three married daughters left behind by the couple could continue with the same. This Court observed:

"31. In view of the settled legal position as also the decisions in Pasupuleti Venkateswarlu[5] and Hasmat Rai[1], in our opinion, the High Court was in error in not considering the subsequent event of death of both the applicants. In our view, it was power as well as the duty of the High Court to consider the fact of death of the applicants during the pendency of the writ petition. Since it was the case of the tenant that all the three daughters got married and were staying with their in-laws, obviously, the said fact was relevant and material….."

17. The decisions of this Court in *Pratap Rai Tanwani's* case (supra), *Gaya Prasad's* case (supra), *Kamleshwar Prasad's* case (supra), *Shakuntala Bai's* case (supra), *G.C. Kapoor's* case (supra), and *Shantilal Thakordas vs. Chimanlal Maganlal Telwala* (1976 (4) SCC 417), *Pukhraj Jain vs. Padma Kashypa* (1990 (2) SCC 431) do not, in our opinion, lend any support to the proposition that subsequent developments cannot be noticed by the Court especially when such developments have an impact on the right of a party to the relief prayed for.

18. We may in particular refer to the decision of this Court

in *Shantilal Thakordas's* case (supra) in which this Court had overruled the earlier decision rendered in *Phool Rani & Ors. vs. Naubat Rai Ahluwalia* (1973 (1) SCC 688) and held that the law permitted the eviction of the tenant for the requirement of the landlord for occupation of the landlord as residence for himself and members of his family and that such a requirement was both of the landlord and the members of his family so that upon the death of this landlord the right to sue survived to the members of the family of the deceased. That is not the position in the instant case. As noticed earlier, the requirement pleaded in the eviction petition by the original petitioners was their own personal requirement and not the requirement of the members of their family whether dependant or otherwise. Indeed if the deceased landlords had any dependant member of the family we may have even in the absence of a pleading assumed that the requirement pleaded extended also to the dependant member of their family. That unfortunately, for the appellants is neither the case set up nor the position on facts. The deceased couple did not have any dependant member of the family for whose benefit they could have sought eviction on the ground that she required the premises for personal occupation.

19. In the light of what we have stated above, we have no hesitation in holding that on the death of the petitioners in the original eviction petition their right to seek eviction on the ground of personal requirement for the demised premises became extinct and no order could on the basis of any such requirement be passed at this point of time.

20. There is one other aspect to which we must advert at this stage. The High Court had, while disposing of the revision petition filed before it, come to the conclusion that the demised premises is large and located in a popular commercial area of the city of Cochin. It has found that the rent for the premises was very low and had not been revised since the year 1973. The High Court accordingly revised the rent to Rs.10,000/- per month payable w.e.f. 1.11.2003 onwards leaving it open to the

parties to get the fair rent determined for the demised premises.

21. During the pendency of this appeal, the appellants had filed an application seeking a direction against the respondent for payment of rent @ Rs.50,000/- per month. The application supported by an affidavit, inter-alia, alleges that the market rent of the premises in question was not less than Rs.50,000/- per month as in September 2005 when the application was filed. A Valuation Certificate issued by Shri K. Radhakrishnan Nair, Chartered Engineer & Approved Valuer, is also enclosed with the application, according to which the market value of the plot in question was not less than Rs.7,00,000/- per cent and the current market rent for the building not less than Rs.8/- per square feet. As per the lease deed entered between the deceased owners and the respondents, the premises in question is constructed over an area measuring about 20 cents. The covered area is said to be 5000 sq. ft. or so. In the circumstances while the High Court was justified in tentatively revising the rent for the premises, the revision was not, in our opinion, adequate. Keeping in view the totality of the circumstances, we are of the view that instead of Rs.10,000/- determined by the High Court, the respondents shall pay Rs.15,000/- per month towards rent w.e.f. 1.11.2003. The same shall stand revised to Rs.25,000/- per month w.e.f. 1.1.2009. The differential amount thus payable shall be deposited by the respondents before the Rent Controller within six months from today whereupon the Rent Controller shall take steps to disburse the same to the appellants, the current owners of the premises. Needless to say that the revision ordered by us is also tentative and shall not prevent the parties from seeking determination of the fair rent for the premises by instituting proceedings before the competent Court/authority in accordance with law.

22. With the above modification, this appeal is disposed of leaving the parties to bear their own costs.

B.B.B. Appeal disposed of.

STATE OF WEST BENGAL & ORS.

v.

THE COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS, WEST BENGAL & ORS.

(Civil Appeal Nos. 6249-6250 of 2001)

FEBRUARY 17, 2010

[K.G. BALAKRISHNAN, CJI., R.V. RAVEENDRAN, D.K. JAIN, P. SATHASIVAM AND J.M. PANCHAL, JJ.]

Constitution of India, 1950:

Articles 32 and 226 r/w Article 21 – Fundamental rights – Fair and impartial investigation – Judicial Review – Direction by Supreme Court/High Court to CBI to investigate a cognizable offence committed within territorial jurisdiction of a State without the consent of the State Government – HELD: Will neither impinge upon the federal structure of the Constitution nor will it violate the doctrine of separation of powers, and shall be valid in law – State has a duty to enforce human rights of a citizen providing for fair and impartial investigation – Constitutional courts can exercise its power of judicial review and direct CBI to take up investigation within the jurisdiction of the State – However, this extra ordinary power must be exercised sparingly, cautiously and in exceptional situations only when the Court after considering the material on record comes to a conclusion that such material does disclose a prima facie case calling for an investigation by CBI or any other similar agency – Restriction on Parliament by the Constitution and on the Executive by Parliament under an enactment do not amount to restriction on power of Judiciary under Articles 32 and 226 – The restriction imposed by s.6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the constitutional courts – Delhi Special Police Establishment Act, 1946, ss. 3,5 and 6 - Investigation.

Articles 13,32,142,144 and 226 – Judicial Review – Nature and scope of – HELD: The Constitution expressly confers the power of judicial review on the Supreme Court and High Courts under Articles 32 and 226 respectively – In view of the constitutional scheme and the jurisdiction conferred on the Supreme Court under Article 32 and on High Courts under Article 226, the power of judicial review being an integral part and essential feature of the Constitution constituting its basic structure, no Act of Parliament can exclude or curtail the powers of the constitutional courts with regard to the enforcement of fundamental rights – Besides supremacy of the Constitution, separation of powers between Legislature, Executive and Judiciary constitutes basic feature of the Constitution – Nevertheless, judicial review stands entirely on a different pedestal – Judicial review is essential for resolving the disputes regarding the limits of constitutional power and entering the constitutional limitations as an ultimate interpreter of the Constitution – Judicial review of laws is embedded in the Constitution by virtue of Article 13 read with Articles 32 and 226 of the Constitution – It acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity – Significance of and difference between power of Supreme Court under Articles 32, 142 and 144 and that of High Court under Article 226 – Explained – Doctrines – Separation of powers – Basic structure theory – Principle of constitutionality.

Articles 245 and 246 r/w Seventh Schedule, List I, Entries 2-A and 80 – List II, Entry 2, List III and Articles 32 and 226 – Legislative powers of Parliament and State Legislatures – Judicial review of – HELD: The broad proposition is that under the Constitution there is a clear demarcation of legislative powers between the Union and the States and they have to confine themselves within the field entrusted to them – However, the words "notwithstanding anything contained in

clauses (2) and (3)" in Article 246 (1) and the words "subject to clauses (1) and (2)" in Article 246 (3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III and in case of an overlapping between Lists II and III, the latter shall prevail – But, the principle of federal supremacy laid down in Article 246 cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and the State Lists – If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation – Doctrine of separation of powers.

In the instant appeals and writ petitions, the question referred for consideration of the Constitution Bench was: whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, could direct the Central Bureau of Investigation, established under the Delhi Special Police Establishment Act, 1946, to investigate a cognizable offence, which was alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government.

Answering the question, the Court

HELD: 1.1. Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation

against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State. [Para 44(ii)] [1025-G-H; 1026-A-B]

Kharak Singh vs. State of U.P. **(1964) 1 SCR 332;** *Kehar Singh & Anr. vs. Union of India & Anr*. **1988 (3) Suppl. SCR 1102 = (1989) 1 SCC 204;** *M. Nagaraj & Ors. vs. Union of India & Ors.* **2006 (7) Suppl. SCR 336 = (2006) 8 SCC 212;** *Minerva Mills Ltd. & Ors. vs. Union of India & Ors.* **1981 (1) SCR 206 =(1980) 3 SCC 625;** *Maneka Gandhi v. Union of India* **(1978) 1 SCC 248, referred to.**

A.K. Gopalan v. State of Madras **AIR 1950 SC 27, stood overruled.**

1.2. From a bare reading of Entries 2-A and 80 of List I and Entry 2 of List II of the Seventh Schedule to the Constitution, it is manifest that by virtue of these entries, the legislative power of the Union to provide for the regular police force of one State to exercise power and jurisdiction in any area outside the State can only be exercised with the consent of the Government of that particular State in which such area is situated, except the police force belonging to any State to exercise power and jurisdiction to railway areas outside that State. [Para 18] [1005-F]

1.3. The Delhi Special Police Establishment Act, 1946, which extends to the whole of India, and whereunder the Delhi Special Police Establishment, namely, "the CBI" has been constituted, was enacted with a view to constitute a special force in Delhi for investigation of certain offences in Union Territories and to make provisions for superintendence and administration of the said force and for extension to other areas of the powers and

jurisdiction of the members of the said force in regard to the investigation of the notified offences u/s 3 thereof. The "superintendence" of the Establishment vests in the Central Government. Although s.5(1) of the Act empowers the Central Government to extend the powers and jurisdiction of members of the Delhi Special Police Establishment to any area in a State, but s.6 imposes a restriction on the power of the Central Government to extend the jurisdiction of the said Establishment only with the consent of the State Government concerned. [Para 19 and 22] [1005-G-H; 1006-A-F; 1007-G-H]

Vineet Narain & Ors. vs. Union of India & Anr. **1997 (6) Suppl. SCR 595 = (1998) 1 SCC 226, referred to.**

1.4. Restriction on the Parliament by the Constitution and restriction on the Executive by the Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Articles 32 and 226 of the Constitution. [Para 44 (v)] [1027-C]

1.5. If in terms of Entry 2 of List II of the Seventh Schedule on the one hand and Entry 2-A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the statute. Exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the court fails to grant relief, it would be failing in its constitutional duty. [Para 44(vi)] [1027-D-F]

1.6. When the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise

within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by s.6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the courts, the restriction imposed by s.6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the constitutional courts. Therefore, exercise of power of judicial review by the High Court, would not amount to infringement of either the doctrine of separation of powers or the federal structure. [Para 44(vii)] [1027-G-H; 1028-A-B]

1.7. A direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of powers and shall be valid in law. Being the protectors of civil liberties of the citizens, the Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly. [Para 45] [1028-D-E]

1.8. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely

because a party has levelled some allegations against the local police. An order directing an enquiry by the CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a *prima facie* case calling for an investigation by the CBI or any other similar agency. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise, the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations. [Para 46 and 47] [1028-F-H; 1029-A-C]

Secretary, Minor Irrigation & Rural Engineering Services, U.P. & Ors. vs. Sahngoo Ram Arya & Anr. **(2002) 5 SCC 521, referred to.**

2.1. In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. All organs of the State, including the Supreme Court and the High Courts, derive their authority, jurisdiction and powers from the Constitution and owe allegiance to it. [Para 25] [1008-G]

Raja Ram Pal vs. Hon'ble Speaker, Lok Sabha & Ors. **2007 (1) SCR 317 = (2007) 3 SCC 184, referred to.**

2.2. The Constitution is a living and organic document. It cannot remain static and must grow with the nation. The Constitutional provisions have to be construed broadly and liberally having regard to the

changed circumstances and the needs of time and polity. The Constitution of India expressly confers the power of judicial review on the Supreme Court and the High Courts under Article 32 and 226 respectively. Judicial review of laws is embedded in the Constitution by virtue of Article 13 read with Articles 32 and 226 of the Constitution. [Para 29 and 32] [1012-H; 1013-A-B; 1015-D]

2.3. In view of the constitutional scheme and the jurisdiction conferred on the Supreme Court under Article 32 and on the High Courts under Article 226, the power of judicial review being an integral part and essential feature of the Constitution constituting its basic structure, no Act of Parliament can exclude or curtail the powers of the constitutional courts with regard to the enforcement of fundamental rights. As a matter of fact, such a power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between the Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than the Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, judicial review is justified by combination of "the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review". [para 44(iii)] [1026-C-G]

2.4. It is trite that in the Constitutional Scheme adopted in India, besides supremacy of the Constitution, the separation of powers between the legislature, the executive and the judiciary constitutes the basic features of the Constitution. Nevertheless, apart from the fact that

our Constitution does not envisage a rigid and strict separation of powers between the said three organs of the State, the power of judicial review stands entirely on a different pedestal. Being itself part of the basic structure of the Constitution, it cannot be ousted or abridged by even a constitutional amendment. Even otherwise, judicial review is essential for resolving the disputes regarding the limits of constitutional power and entering the constitutional limitations as an ultimate interpreter of the Constitution. [Para 26] [1009-E-H; 1010-A-B]

Special Reference No.1 of 1964 **[1965] 1 S.C.R. 413;** *Kesavananda Bharati Sripadagalvaru vs. State of Kerala & Anr*. **1973 Suppl. SCR 1 = (1973) 4 SCC 225;** *Smt. Indira Nehru Gandhi vs. Shri Raj Narain & Anr.* **1975 (Supp) SCC 1;** *L. Chandra Kumar vs. Union of India & Ors.* **1997 (2) SCR 1186 = (1997) 3 SCC 261; ;** *State of U.P. & Ors. vs. Jeet S. Bisht & Anr*. **2007 (7) SCR 705 = (2007) 6 SCC 586; and** I.R. *Coelho (D) By LRs. vs. State of Tamil Nadu* **2007 (1) SCR 706 = (2007) 2 SCC 1, referred to.**

Lawson A.W. Hunter & Ors. vs. Southam Inc. **(1984) 2 S.C.R.145 (Can SC), referred to.**

Julius Stone: Social Dimensions of Law and Justice **(1966) p.668, referred to.**

2.5. It is manifest from the language of Article 245 of the Constitution that all legislative powers of the Parliament or the State Legislatures are expressly made subject to other provisions of the Constitution, which obviously would include the rights conferred in Part III of the Constitution. Whether there is a contravention of any of the rights so conferred, is to be decided only by the constitutional courts, which are empowered not only to declare a law as unconstitutional but also to enforce fundamental rights by issuing directions or orders or writs

of or "in the nature of" *mandamus, certiorari, habeas corpus, prohibition* and *quo warranto* for this purpose. It is pertinent to note that Article 32 of the Constitution is also contained in Part III of the Constitution, which enumerates the fundamental rights and not alongside other Articles of the Constitution which define the general jurisdiction of the Supreme Court. Thus, the remedy under Article 32 being a fundamental right itself, it is the duty of the Supreme Court to ensure that no fundamental right is contravened or abridged by any statutory or constitutional provision. [Para 32] [1015-D-H; 1016-A-C]

2.6. Moreover, it is also plain from the expression "in the nature of" employed in clause (2) of Article 32 that the power conferred by the said clause is in the widest terms and is not confined to issuing the high prerogative writs specified in the said clause but includes within its ambit the power to issue any directions or orders or writs which may be appropriate for enforcement of the fundamental rights. Therefore, even when the conditions for issue of any of these writs are not fulfilled, the Supreme Court would not be constrained to help the citizen who has come before it for judicial redress. [Para 32] [1016-D-E]

Bandhua Mukti Morcha vs. Union of India & Ors. **1984 (2) SCR 67 = (1984) 3 SCC 161;** *Nilabati Behera vs. State of Orissa & Ors.* **1993 (2) SCR 581 = (1993) 2 SCC 746;** *Khatri & Ors. (II) vs. State of Bihar & Ors*. **1981 (2) SCR 408 = (1981) 1 SCC 627*;* and** *Khatri & Ors. (IV) vs. State of Bihar & Ors.* **1981 (3) SCR 145 = (1981) 2 SCC 493, referred to.**

2.7. The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any Constitutional or Statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to

be taken into account in determining whether or not it destroys the basic structure. [Para 44(i)] [1025-E-F]

2.8. Further, in so far as the Supreme Court is concerned, apart from Articles 32 and 142 which empower it to issue such directions, as may be necessary for doing complete justice in any cause or matter, Article 144 of the Constitution also mandates all authorities, civil or judicial in the territory of India, to act in aid of the orders passed by it. [Para 34] [1017-F]

2.9. As regards the power of judicial review conferred on the High Court, undoubtedly they are, in a way, wider in scope. The High Courts are authorised under Article 226 of the Constitution to issue directions, orders or writs to any person or authority, including any government to enforce fundamental rights and, "for any other purpose". It is manifest from the difference in the phraseology of Articles 32 and 226 that there is a marked difference in the nature and purpose of the right conferred by these two Articles. Whereas the right guaranteed by Article 32 can be exercised only for the enforcement of fundamental rights conferred by Part III of the Constitution, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but "for any other purpose" as well, i.e. for enforcement of any legal right conferred by a Statute etc. [Para 35] [1017-G-H; 1018-A-B]

Tirupati Balaji Developers (P) Ltd. & Ors. vs. State of Bihar & Ors. **2004 (1) Suppl. SCR 494 = (2004) 5 SCC 1 and** *Dwarkanath, Hindu Undivided Family vs. Income-Tax Officer, Special Circle, Kanpur & Anr.* **[1965] 3 S.C.R. 536, referred to.**

3.1. As regards the legislative powers of Parliament and the State Legislatures, Article 246 of the Constitution of India postulates that Parliament shall have exclusive

power to legislate with respect to any of the matters enumerated in List I notwithstanding anything contained in clauses (2) and (3). The *non obstante* clause in Article 246(1) contemplates the predominance or supremacy of the Union Legislature. This power is not encumbered by anything contained in clauses (2) and (3), for these clauses themselves are expressly limited and made subject to the *non obstante* clause in Article 246(1). [Para 15] [1002-E-H; 1003-A]

Kesavananda Bharati Sripadagalvaru vs. State of Kerala & Anr. **1973 Suppl. SCR 1 = (1973) 4 SCC 225;** *Smt. Indira Nehru Gandhi vs. Shri Raj Narain & Anr.* **1975 (Supp) SCC 1, referred to.**

3.2. The exclusive power of the State Legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an Entry in List I and an Entry in List II, which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List I must supersede *pro tanto* the exercise of power of the State Legislature. [Para 15] [1003-B-D]

3.3. Both – Parliament and the State Legislatures – have concurrent powers of legislation with respect to any of the matters enumerated in List III. The words "notwithstanding anything contained in clauses (2) and (3)" in Article 246 (1) and the words "subject to clauses (1) and (2)" in Article 246 (3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III and in case of an

overlapping between Lists II and III, the latter shall prevail. [Para 15] [1003-D-F]

3.4. Though, undoubtedly, the Constitution exhibits supremacy of Parliament over State Legislatures, yet the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and the State Lists. Thus, the broad proposition is that under the Constitution there is a clear demarcation of legislative powers between the Union and the States and they have to confine themselves within the field entrusted to them. It may also be borne in mind that the function of the Lists is not to confer powers; they merely demarcate the Legislative field. [Para 15] [1003-E-H]

3.5. If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation. In the circumstances, any direction by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure. [Para 44(iv)] [1026-H; 1027-A-B]

The Management of Advance Insurance Co. Ltd. vs. Shri Gurudasmal & Ors. **1970 (1) SCC 633;** *Kazi Lhendup Dorji vs. Central Bureau of Investigation & Ors.* **1994 Supp (2) SCC 116;** *Supreme Court Bar Association vs. Union of India & Anr*. **1998 (2) SCR 795 = (1998) 4 SCC 409;** *State of Rajasthan & Ors. vs. Union of India & Ors.* **1978 (1) SCR 1 = (1977) 3 SCC 592;** *S.R. Bommai & Ors. vs. Union of India & Ors.* **1994 (2) SCR 644 = (1994) 3 SCC 1;** *Kuldip Nayar & Ors. vs. Union of India & Ors*. **2006 (5) Suppl. SCR 1 = (2006) 7 SCC 1; and** *Fertilizer Corporation Kamgar Union (Regd.), Sindri &*

Ors. vs. Union of India & Ors. **1981 (2) SCR 52 = (1981) 1 SCC 568, referred to.**

Case Law Reference:

1970 (1) SCC 633	**referred to**	**para 4**
1994 Supp (2) SCC 116	**referred to**	**para 4**
1998 (2) SCR 795	**referred to**	**para 8**
1978 (1) SCR 1	**referred to**	**para 10**
1994 (2) SCR 644	**referred to**	**para 10**
2006 (5) Suppl. SCR 1	**referred to**	**para 10**
2007 (1) SCR 706	**referred to**	**para 11**
[1965] 1 S.C.R. 413	**referred to**	**para 11**
1981 (1) SCR 206	**referred to**	**para 11**
1981 (2) SCR 52	**referred to**	**para 11**
1993 (2) SCR 581	**referred to**	**para 11**
1997 (2) SCR 1186	**referred to**	**para 11**
[1965] 3 S.C.R. 536	**referred to**	**para 11**
1997 (6) Suppl. SCR 595	**referred to**	**para 13**
2007 (1) SCR 317	**referred to**	**para 25**
1973 Suppl. SCR 1	**referred to**	**para 26**
1975 (Supp) SCC 1	**referred to**	**para 26**
2007 (7) SCR 705	**referred to**	**para 27**
1988 (3) Suppl. SCR 1102	**referred to**	**para 29**
(1984) 2 S.C.R.145 (Can SC)	**referred to**	**para 29**
2006 (7) Suppl. SCR 336	**referred to**	**para 30**

1984 (2) SCR 67	**referred to**	**para 32**
1981 (2) SCR 408	**referred to**	**para 33**
1981 (3) SCR 145	**referred to**	**para 33**
2004 (1) Suppl. SCR 494	**referred to**	**para 36**
(1964) 1 SCR 332	**referred to**	**para 38**
(1978) 1 SCC 248	**referred to**	**Para 41**
AIR 1950 SC 27	**stood overruled**	**Para 41**
(2002) 5 SCC 521	**referred to**	**para 47**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6249-6250 of 2001.

From the Judgment & Order dated 30.03.2001 of the High Court of Calcutta in Civil Rule No. 1601 (W) of 2001 with writ Petition No. 450 (W) of 2001.

WITH

W.P. (Crl.) No. 24 of 2008,

SLP (Crl) No. 4096 of 2007,

W.P. (C) No. 573 of 2006.

G. E. Vahanwati, SG, B. Datta, ASG, K. K. Venugopal, Shyam Diwan, Uday U. Lalit, P.S. Narasimha, K. Radhakrishnan, Pravin Parekh, Tara Chandra Sharma, Neelam Sharma, Ankur Talwar, Kishan Datt, Ejaz Maqbool, Vikash Singh, Taruna Singh, Wasif Gilani, Amit S. Chauhan, K. Raghavavacharyulu, Sridhar Potaraju, Julius Riamei, Roshmani, Ch. Shamsuddin Khan, Chinmoy P. Sharma, Rajni Ohri Lal, B.K. Prasad, P. Parmeswaran, Kalyan Kr. Bandopadhyay, Anip Sachthey, Mohit Paul, Arijit Prasad, Ranjan Mukherjee, Dhiraj Trivedi, Maitrayee Trivedi Dasgupta, Hiren Dasan, Dhirendra Kr. Mishra, Rohit Sohgaura, Amit Sharma, Md. Shakil (for

Sarla Chandra), Sunil Kr. Singh, Jatinder Kumar Bhatia, Prashant Kumar, Triveni Poteker, Amarjit Singh Bedi for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. The issue which has been referred for the opinion of the Constitution Bench is whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, can direct the Central Bureau of Investigation (for short "the CBI"), established under the Delhi Special Police Establishment Act, 1946 (for short "the Special Police Act"), to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government.

2. For the determination of the afore-stated important legal issue, it is unnecessary to dilate on the facts obtaining in individual cases in this bunch of civil appeals/special leave petitions/writ petitions and a brief reference to the facts in Civil Appeal Nos.6249-6250 of 2001, noticed in the referral order dated 8th November, 2006, would suffice. These are:

One Abdul Rahaman Mondal (hereinafter referred to as, "the complainant") along with a large number of workers of a political party had been staying in several camps of that party at Garbeta, District Midnapore, in the State of West Bengal. On 4th January, 2001, the complainant and few others decided to return to their homes from one such camp. When they reached the complainant's house, some miscreants, numbering 50-60, attacked them with firearms and other explosives, which resulted in a number of casualties. The complainant managed to escape from the place of occurrence, hid himself and witnessed the carnage. He lodged a written complaint with the Garbeta Police Station on 4th January, 2001 itself but the First Information Report ("the FIR" for short) for offences under Sections 148/149/448/436/364/302/201 of the Indian Penal Code, 1860 (for short "the IPC") read with Sections

25/27 of the Arms Act, 1959 and Section 9 (B) of the Explosives Act, 1884 was registered only on 5th January, 2001. On 8th January, 2001, Director General of Police, West Bengal directed the C.I.D. to take over the investigations in the case. A writ petition under Article 226 of the Constitution was filed in the High Court of Judicature at Calcutta by the Committee for Protection of Democratic Rights, West Bengal, in public interest, *inter alia,* alleging that although in the said incident 11 persons had died on 4th January, 2001 and more than three months had elapsed since the incident had taken place yet except two persons, no other person named in the FIR, had been arrested; no serious attempt had been made to get the victims identified and so far the police had not been able to come to a definite conclusion whether missing persons were dead or alive. It was alleged that since the police administration in the State was under the influence of the ruling party which was trying to hide the incident to save its image, the investigations in the incident may be handed over to the CBI, an independent agency.

3. Upon consideration of the affidavit filed in opposition by the State Government, the High Court felt that in the background of the case it had strong reservations about the impartiality and fairness in the investigation by the State police because of the political fallout, therefore, no useful purpose would be served in continuing with the investigation by the State Investigating Agency. Moreover, even if the investigation was conducted fairly and truthfully by the State police, it would still be viewed with suspicion because of the allegation that all the assailants were members of the ruling party. Having regard to all these circumstances, the High Court deemed it appropriate to hand over the investigation into the said incident to the CBI.

4. Aggrieved by the order passed by the High Court, the State of West Bengal filed a petition for special leave to appeal before this Court. On 3rd September, 2001 leave was granted. When the matter came up for hearing before a two-Judge

Bench on 8th November, 2006, taking note of the contentions urged by learned counsel for the parties and the orders passed by this Court in *The Management of Advance Insurance Co. Ltd. vs. Shri Gurudasmal & Ors*[1]. and *Kazi Lhendup Dorji vs. Central Bureau of Investigation & Ors.,*[2] the Bench was of the opinion that the question of law involved in the appeals was of great public importance and was coming before the courts frequently and, therefore, it was necessary that the issue be settled by a larger Bench. Accordingly, the Bench directed that the papers of the case be placed before the Hon'ble Chief Justice of India for passing appropriate orders for placing the matter before a larger Bench. When the matter came up before a three-Judge Bench, headed by the Hon'ble Chief Justice of India, on 29th August, 2008, this batch of cases was directed to be listed before a Constitution Bench. This is how these matters have been placed before us.

The Rival Contentions:

5. Shri K.K. Venugopal, learned senior counsel appearing on behalf of the State of West Bengal, referring to Entry 80 of List I of the Seventh Schedule to the Constitution of India; Entry 2 of List II of the said Schedule as also Sections 5 and 6 of the Special Police Act strenuously argued that from the said Constitutional and Statutory provisions it is evident that there is a complete restriction on Parliament's legislative power in enacting any law permitting the police of one State to investigate an offence committed in another State, without the consent of that State. It was urged that the Special Police Act enacted in exercise of the powers conferred under the Government of India Act, 1935, Entry 39 of List I (Federal Legislative List) of the Seventh Schedule, the field now occupied by Entry 80 of List I of the Seventh Schedule of the Constitution, replicates the prohibition of police of one State investigating an offence in another State without the consent

1. 1970 (1) SCC 633.
2. 1994 Supp (2) SCC 116.

of that State. It was submitted that Entry 2 of List II which confers exclusive jurisdiction on the State Legislature in regard to the police, the exclusive jurisdiction of a State Legislature cannot be encroached upon without the consent of the concerned State being obtained.

6. Learned senior counsel submitted that the separation of powers between the three organs of the State, i.e. the Legislature, the Executive and the Judiciary would require each one of these organs to confine itself within the field entrusted to it by the Constitution and not to act in contravention or contrary to the letter and spirit of the Constitution.

7. Thus, the thrust of argument of the learned counsel was that both, the federal structure as well as the principles of separation of powers, being a part of the basic structure of the Constitution, it is neither permissible for the Central Government to encroach upon the legislative powers of a State in respect of the matters specified in List II of the Seventh Schedule nor can the superior courts of the land adjure such a jurisdiction which is otherwise prohibited under the Constitution. It was urged that if the Parliament were to pass a law which authorises the police of one State to investigate in another State without the consent of that State, such a law would be *pro tanto* invalid and, therefore, the rule of law would require the courts, which are subservient to the Constitution, to ensure that the federal structure embodied in the Constitution as a basic principle, is not disturbed by permitting/directing the police force of a State to investigate an offence committed in another State without the consent of that State.

8. Relying heavily on the observations of the Constitution Bench in *Supreme Court Bar Association vs. Union of India & Anr.*[3] to the effect that Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing

3. (1988) 4 SCC 409.

with a subject and thereby to achieve something indirectly which cannot be achieved directly, learned counsel contended that when even Article 142 of the Constitution cannot be used by this Court to act contrary to the express provisions of law, the High Court cannot issue any direction ignoring the Statutory and Constitutional provisions. Learned counsel went to the extent of arguing that even when the State police is not in a position to conduct an impartial investigation because of extraneous influences, the Court still cannot exercise executive power of directing the police force of another State to carry out investigations without the consent of that State. In such a situation, the matter is best left to the wisdom of the Parliament to enact an appropriate legislation to take care of the situation. According to the learned counsel, till that is done, even such an extreme situation would not justify the Court upsetting the federal or quasi-federal system created by the Constitution.

9. As regards the exercise of jurisdiction by a High Court under Article 226 of the Constitution, learned counsel submitted that apart from the fact that there is a significant difference between the power of this Court under Article 142 of the Constitution and the jurisdiction of the High Court under Article 226 of the Constitution because of territorial limitations under Article 226 (1) of the Constitution, a High Court is disentitled from issuing any direction to the authorities situated outside the territories over which it has jurisdiction. According to the learned counsel Clause (2) of Article 226 would have no application in a case, such as the present one, since the cause of action was complete at the time of filing the writ petition and the power under Clause (2) can be exercised only where there is a nexus between the cause of action which arises wholly or partly within the State and the authority which is situated outside the State. It was asserted that the CBI being a rank outsider, unconnected to the incident, which took place within the State of West Bengal, the investigation of which was being conducted by the jurisdictional local police in West Bengal, had no authority to take up the case for investigation.

10. Shri Goolam E. Vahanvati, learned Solicitor General of India, appearing on behalf of the Union of India, submitted that the entire approach of the State being based on an assumption that the alleged restriction on Parliament's legislative power under Entry 80 of List I of the Seventh Schedule to the Constitution and restriction on the power of the Central Government under Section 6 of the Special Police Act to issue a notification binds the constitutional courts i.e. the Supreme Court and the High Courts is fallacious, inasmuch as the restrictions on the Central Government and Parliament cannot be inferentially extended to be restrictions on the Constitutional Courts in exercise of their powers under Articles 32 and 226 of the Constitution as it is the obligation of the Superior Courts to protect the citizens and enforce their fundamental rights. Learned counsel vehemently argued that the stand of the appellants that the exercise of power by the Supreme Court or the High Courts to refer investigation to CBI directly without prior approval of the concerned State Government would violate the federal structure of the Constitution is again misconceived as it overlooks the basic fact that in a federal structure it is the duty of the courts to uphold the Constitutional values and to enforce the Constitutional limitations as an ultimate interpreter of the Constitution. In support of the proposition, learned counsel placed reliance on the decisions of this Court in *State of Rajasthan & Ors. vs. Union of India & Ors.,*[4] *S.R. Bommai & Ors. vs. Union of India & Ors.*[5] *and Kuldip Nayar & Ors. vs. Union of India & Ors*[6]*.*

11. Relying on the recent decision by a Bench of nine Judges of this Court in *I.R. Coelho (D) By LRs. vs. State of Tamil Nadu*,[7] learned counsel submitted that the judicial review

4. (1977) 3 SCC 592.
5. (1994) 3 SCC 1.
6. (2006) 7 SCC 1.
7. (2007) 2 SCC 1.

being itself the basic feature of the Constitution, no restriction can be placed even by inference and by principle of legislative competence on the powers of the Supreme Court and the High Courts with regard to the enforcement of fundamental rights and protection of the citizens of India. Learned counsel asserted that in exercise of powers either under Article 32 or 226 of the Constitution, the courts are merely discharging their duty of judicial review and are neither usurping any jurisdiction, nor overriding the doctrine of separation of powers. In support of the proposition that the jurisdiction conferred on the Supreme Court by Article 32 as also on the High Courts under Article 226 of the Constitution is an important and integral part of the basic structure of the Constitution, learned counsel placed reliance on the decisions of this Court in *Special Reference No.1 of 1964*,[8] *Minerva Mills Ltd. & Ors. vs. Union of India & Ors.*[9]*, Fertilizer Corporation Kamgar Union (Regd.), Sindri & Ors. vs. Union of India & Ors.,*[10] *Nilabati Behera vs. State of Orissa & Ors.*[11] and *L. Chandra Kumar vs. Union of India & Ors.*[12]. Relying on the decision of this Court in *Dwarkanath, Hindu Undivided Family vs. Income-Tax Officer, Special Circle, Kanpur & Anr.,*[13] learned counsel emphasised that the powers of the High Court under Article 226 are also wide and plenary in nature similar to that of the Supreme Court under Article 32 of the Constitution.

The Questions for Consideration:

12. It is manifest that in essence the objection of the appellant to the CBI's role in police investigation in a State without its consent, proceeds on the doctrine of distribution of

8. [1965] 1 S.C.R. 413.
9. (1980) 3 SCC 625.
10. (1981) 1 SCC 568.
11. (1993) 2 SCC 746.
12. (1997) 3 SCC 261.
13. [1965] 3 S.C.R. 536.

legislative powers as between the Union and the State Legislatures particularly with reference to the three Lists in the Seventh Schedule of the Constitution and the distribution of powers between the said three organs of the State.

13. In order to appreciate the controversy, a brief reference to some of the provisions in the Constitution would be necessary. The Constitution of India is divided into several parts, each part dealing in detail with different aspects of the social, economic, political and administrative set up. For the present case, we are mainly concerned with Part III of the Constitution, which enumerates the fundamental rights guaranteed by the State primarily to citizens and in some cases to every resident of India and Part XI thereof, which pertains to the relations between the Union and the States.

14. Bearing in mind the basis on which the correctness of the impugned direction is being questioned by the State of West Bengal, we shall first notice the scope and purport of Part XI of the Constitution. According to Article 1 of the Constitution, India is a 'Union' of States, which means a Federation of States. Every federal system requires division of powers between the Union and State Governments, which in our Constitution is effected by Part XI thereof. While Articles 245 to 255 deal with distribution of legislative powers, the distribution of administrative powers is dealt with in Articles 256 to 261. Under the Constitution, there is a three-fold distribution of legislative powers between the Union and the States, made by the three Lists in the Seventh Schedule of the Constitution. While Article 245 confers the legislative powers upon the Union and the States, Article 246 provides for distribution of legislative powers between the Union and the States. Article 246, relevant for our purpose, reads as follows:

> *"246. Subject-matter of laws made by Parliament and by the Legislatures of States* — (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
>
> (2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
>
> (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').
>
> (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

15. The Article deals with the distribution of legislative powers between the Union and the State Legislatures. List I or the 'Union List' enumerates the subjects over which the Union shall have exclusive powers of legislation in respect of 99 items or subjects, which include Defence etc.; List II or the 'State List' comprises of subjects, which include Public Order, Police etc., over which the State Legislature shall have exclusive power of legislation and List III gives concurrent powers to the Union and the State Legislatures to legislate in respect of items mentioned therein. The Article postulates that Parliament shall have exclusive power to legislate with respect to any of the matters enumerated in List I notwithstanding anything contained in clauses (2) and (3). The *non obstante* clause in Article 246(1) contemplates the predominance or supremacy of the Union Legislature. This power is not encumbered by anything contained in clause (2) and (3) for these clauses themselves are expressly limited and made subject to the *non obstante* clause in Article 246(1). The State Legislature has exclusive

power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III (Concurrent List). The exclusive power of the State Legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an Entry in List I and an Entry in List II, which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List I must supersede *pro tanto* the exercise of power of the State Legislature. Both Parliament and the State Legislature have concurrent powers of legislation with respect to any of the matters enumerated in List III. The words "notwithstanding anything contained in clauses (2) and (3)" in Article 246 (1) and the words "subject to clauses (1) and (2)" in Article 246 (3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III and in case of an overlapping between Lists II and III, the latter shall prevail. Though, undoubtedly, the Constitution exhibits supremacy of Parliament over State Legislatures, yet the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and the State Lists. Thus, there is no quarrel with the broad proposition that under the Constitution there is a clear demarcation of legislative powers between the Union and the States and they have to confine themselves within the field entrusted to them. It may also be borne in mind that the function of the Lists is not to confer powers; they merely demarcate the Legislative field. But the issue we are called upon to determine is that when the scheme of Constitution prohibits encroachment by the Union upon a matter which exclusively falls within the domain of the State Legislature, like public order, police etc.,

can the third organ of the State viz. the Judiciary, direct the CBI, an agency established by the Union to do something in respect of a State subject, without the consent of the concerned State Government?

16. In order to adjudicate upon the issue at hand, it would be necessary to refer to some other relevant Constitutional and Statutory provisions as well.

17. As noted earlier, the Special Police Act was enacted by the Governor General in Council in exercise of the powers conferred by the Government of India Act, 1935 (Entry 39 of List I, Seventh Schedule). The said Entry reads as under:-

> "Extension of the powers and jurisdiction of members of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner's Province, *but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province* or the Chief Commissioner as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit."

It is manifest that the Special Police Act was passed in terms of the said Entry imposing prohibition on the Federal Legislature to enact any law permitting the police of one State from investigating an offence committed in another State, without the consent of the State. The said Entry was replaced by Entry 80 of List I of the Seventh Schedule to the Constitution of India. The said entry reads thus:

> "Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, *but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Govt. of the State in*

which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State."

Entry 2 of List II of the Constitution of India, which corresponds to Entry 2 List II of the Government of India Act, conferring exclusive jurisdiction to the States in matter relating to police reads as under:

Entry 2 List II:

"Police (including railway and village police) subject to the provisions of entry 2A of List I."

Entry 2A of List I:

"Development of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment."

18. From a bare reading of the afore-noted Constitutional provisions, it is manifest that by virtue of these entries, the legislative power of the Union to provide for the regular police force of one State to exercise power and jurisdiction in any area outside the State can only be exercised with the consent of the Government of that particular State in which such area is situated, except the police force belonging to any State to exercise power and jurisdiction to railway areas outside that State.

19. As the preamble of the Special Police Act states, it was enacted with a view to constitute a special force in Delhi for the investigation of certain offences in the Union Territories and to make provisions for the superintendence and administration of the said force and for the extension to other areas of the powers and jurisdiction of the members of the said force in regard to the investigation of the said offences. Sub-

section (1) of Section 1 specifies the title of the Special Police Act and sub-section (2) speaks that the Special Police Act extends to the whole of India. Section 2 contains 3 sub-sections. Sub-section (1) empowers the Central Government to constitute a special police force to be called the Delhi Special Police Establishment for the investigation of offences notified under Section 3 in any Union Territory; sub-section (2) confers upon the members of the said police establishment in relation to the investigation of such offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which police officers of that Union Territory have in connection with the investigation of offences committed therein and sub-section (3) provides that any member of the said police establishment of or above the rank of Sub-Inspector be deemed to be an officer in charge of a police station. Under Section 3 of the Special Police Act, the Central Government is required to specify and notify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment, constituted under the Special Police Act, named "the CBI". Section 4 deals with the administrative control of the establishment and according to sub-section (2), the "superintendence" of the Establishment vests in the Central Government and the administration of the said establishment vests in an officer appointed in this behalf by the Central Government. Explaining the meaning of the word "Superintendence" in Section 4(1) and the scope of the authority of the Central Government in this context, in *Vineet Narain & Ors. vs. Union of India & Anr.,*[14] a Bench of three Judges of this Court said:

"40.…The word "superintendence" in Section 4(1) cannot be construed in a wider sense to permit supervision of the actual investigation of an offence by the CBI contrary to the manner provided by the statutory provisions. The broad proposition urged on behalf of the Union of India that it can issue any directive to the CBI to curtail or inhibit its

14. (1998) 1 SCC 226.

jurisdiction to investigate an offence specified in the notification issued under Section 3 by a directive under Section 4(1) of the Act cannot be accepted. The jurisdiction of the CBI to investigate an offence is to be determined with reference to the notification issued under Section 3 and not by any separate order not having that character."

20. Section 5 of the Special Police Act empowers the Central Government to extend the powers and jurisdiction of the Special Police Establishment to any area, in a State, not being a Union Territory for the investigation of any offences or classes of offences specified in a notification under Section 3 and on such extension of jurisdiction, a member of the Establishment shall discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of the police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police force.

21. Section 6, the pivotal provision, reads as follows:-

"6. Consent of State Government to exercise of powers and jurisdiction. - Nothing contained in Section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union Territory or railway area, *without the consent of the Government of that State."*

22. Thus, although Section 5(1) empowers the Central Government to extend the powers and jurisdiction of members of the Delhi Special Police Establishment to any area in a State, but Section 6 imposes a restriction on the power of the Central Government to extend the jurisdiction of the said Establishment only with the consent of the State Government concerned.

23. Having noticed the scope and amplitude of Sections

5 and 6 of the Special Police Act, the question for consideration is whether the restriction imposed on the powers of the Central Government would apply mutatis mutandis to the Constitutional Courts as well. As stated above, the main thrust of the argument of Shri K.K. Venugopal, learned senior counsel, is that the course adopted by the High Court in directing the CBI to undertake investigation in the State of West Bengal without the consent of the State is incompatible with the federal structure as also the doctrine of separation of powers between the three organs of the State, embodied in the Constitution even when the High Court, on the material before it, was convinced that the State Police was dragging its feet in so far as investigation into the 4th January, 2001 carnage was concerned.

24. In so far as the first limb of the argument is concerned, it needs little emphasis that, except in the circumstances indicated above, in a federal structure, the Union is not permitted to encroach upon the legislative powers of a State in respect of the matters specified in List II of the Seventh Schedule. However, the second limb of the argument of the learned counsel in regard to the applicability of the doctrine of separation of powers to the issue at hand, in our view, is clearly untenable. Apart from the fact that the question of Centre – State relationship is not an issue in the present case, a Constitutional Court being itself the custodian of the federal structure, the invocation of the federal structure doctrine is also misplaced.

25. In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. As observed in Raja Ram Pal vs. Hon'ble Speaker, Lok Sabha & Ors.,[15] the Constitution is the *suprema lex* in this country. All organs of the State, including this Court and the High Courts, derive their authority, jurisdiction and powers from the Constitution and owe allegiance to it. Highlighting the fundamental features of a federal Constitution, in *Special*

15. (2007) 3 SCC 184.

Reference No.1 (supra), the Constitution Bench (7-Judges) observed as follows:

> "...the essential characteristic of federalism is 'the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other'. The supremacy of the Constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the Constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers."

26. It is trite that in the Constitutional Scheme adopted in India, besides supremacy of the Constitution, the separation of powers between the legislature, the executive and the judiciary constitutes the basic features of the Constitution. In fact, the importance of separation of powers in our system of governance was recognised in *Special Reference No.1* (supra), even before the basic structure doctrine came to be propounded in the celebrated case of *His Holiness Kesavananda Bharati Sripadagalvaru vs. State of Kerala & Anr.,*[16] wherein while finding certain basic features of the Constitution, it was opined that separation of powers is part of the basic structure of the Constitution. Later, similar view was echoed in *Smt. Indira Nehru Gandhi vs. Shri Raj Narain & Anr.*[17] and in a series of other cases on the point. Nevertheless, apart from the fact that our Constitution does not envisage a rigid and strict separation of powers between the said three organs of the State, the power of judicial review stands entirely on a different pedestal. Being itself part of the basic structure

16. (1973) 4 SCC 225.

17. 1975 (Supp) SCC 1.

of the Constitution, it cannot be ousted or abridged by even a Constitutional amendment. [See: *L. Chandra Kumar vs. Union of India & Ors.* (supra)]. Besides, judicial review is otherwise essential for resolving the disputes regarding the limits of Constitutional power and entering the Constitutional limitations as an ultimate interpreter of the Constitution. In *Special Reference No.1 of 1964* (supra), it was observed that whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. In *Smt. Indira Nehru Gandhi* (supra), Y.V. Chandrachud, J. (as His Lordship then was), drawing distinction between the American and Australian Constitution on the one hand and the Indian Constitution on the other, observed that the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions. The learned judge also observed that in a federal system, which distributes powers between three coordinate branches of government, though not rigidly, disputes regarding the limits of Constitutional power have to be resolved by courts. Quoting George Whitecross Paton, an Australian Legal Scholar, that "the distinction between judicial and other powers may be vital to the maintenance of the Constitution itself", the learned judge said that the principle of separation of powers is a principle of restraint which "has in it the percept, innate in the prudence of self-preservation (even if history has not repeatedly brought in home), that discretion is the better part of valour".[18]

27. Recently in *State of U.P. & Ors. vs. Jeet S. Bisht & Anr.,*[19] S.B. Sinha, J. dealt with the topic of separation of powers in the following terms:

"77. Separation of powers is a favourite topic for some of

18. Julius Stone: Social Dimensions of Law and Justice, (1960) p. 668.

19. (2007) 6 SCC 586.

us. Each organ of the State in terms of the constitutional scheme performs one or the other functions which have been assigned to the other organ. Although drafting of legislation and its implementation by and large are functions of the legislature and the executive respectively, it is too late in the day to say that the constitutional court's role in that behalf is non-existent. The judge-made law is now well recognised throughout the world. If one is to put the doctrine of separation of power to such a rigidity, it would not have been possible for any superior court of any country, whether developed or developing, to create new rights through interpretative process.

78. Separation of powers in one sense is a limit on *active jurisdiction* of each organ. But it has another deeper and more relevant purpose: to act as *check and balance* over the activities of other organs. Thereby the *active jurisdiction* of the organ is not challenged; nevertheless there are *methods of prodding* to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times.

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80. The modern view, which is today gathering momentum in constitutional courts the world over, is not only to demarcate the *realm of functioning* in a negative sense, but also to define the *minimum* content of the demarcated *realm of functioning*. Objective definition of function and role entails executing the same, which however may be subject to the plea of *financial constraint* but only in exceptional cases. In event of any such shortcoming, it is the essential duty of the other organ to advise and recommend the *needful* to substitute inaction. To this

extent we must be prepared to frame answers to these difficult questions.

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83. If we notice the evolution of separation of powers doctrine, traditionally the *checks and balances* dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable *social and economic* entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of *checks and balances* to include governmental inaction. Otherwise we envisage the country getting transformed into a *state of repose*. Social engineering as well as institutional engineering therefore forms part of this obligation."

28. Having discussed the scope and width of the doctrine of separation of powers, the moot question for consideration in the present case is that when the fundamental rights, as enshrined in Part III of the Constitution, which include the right to equality (Article 14); the freedom of speech [Article 19(1)(a)] and the right not to be deprived of life and liberty except by procedure established by law (Article 21), as alleged in the instant case, are violated, can their violation be immunised from judicial scrutiny on the touchstone of doctrine of separation of powers between the Legislature, Executive and the Judiciary. To put it differently, can the doctrine of separation of powers curtail the power of judicial review, conferred on the Constitutional Courts even in situations where the fundamental rights are sought to be abrogated or abridged on the ground that exercise of such power would impinge upon the said doctrine?

29. The Constitution is a living and organic document. It cannot remain static and must grow with the nation. The Constitutional provisions have to be construed broadly and

liberally having regard to the changed circumstances and the needs of time and polity. In *Kehar Singh & Anr. vs. Union of India & Anr.,*[20] speaking for the Constitution Bench, R.S. Pathak, C.J. held that in keeping with modern Constitutional practice, the Constitution of India is a constitutive document, fundamental to the governance of the country, whereby the people of India have provided a Constitutional polity consisting of certain primary organs, institutions and functionaries with the intention of working out, maintaining and operating a Constitutional order. On the aspect of interpretation of a Constitution, the following observations of Justice Dickson of the Supreme Court of Canada in *Lawson A.W. Hunter & Ors. vs. Southam Inc.*[21] are quite apposite:

> "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."

30. In *M. Nagaraj & Ors. vs. Union of India & Ors.*,[22] speaking for the Constitution Bench, S.H. Kapadia, J. observed as under:

20. (1989) 1 SCC 204.

21. (1984) 2 S.C.R. 145 (Can SC).

22. (2006) 8 SCC 212.

> "The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. *A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges."*
>
> [Emphasis supplied]

31. Recently, in *I.R. Coelho* (supra), noticing the principles relevant for the interpretation of Constitutional provisions, Y.K. Sabharwal, C.J., speaking for the Bench of nine Judges of this Court, observed as follows:

> "The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centres of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes."

Observing further that the protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism, the Court went on to say:

> "Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, Courts may be forced to modify the principle of parliamentary sovereignty, for example, in cases where judicial review is sought to be abolished. By this the judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the Government is maintained."

32. The Constitution of India expressly confers the power of judicial review on this Court and the High Courts under Article 32 and 226 respectively. Dr. B.R. Ambedkar described Article 32 as the very soul of the Constitution – the very heart of it – the most important Article. By now, it is well settled that the power of judicial review, vested in the Supreme Court and the High Courts under the said Articles of the Constitution, is an integral part and essential feature of the Constitution, constituting part of its basic structure. Therefore, ordinarily, the power of the High Court and this Court to test the Constitutional validity of legislations can never be ousted or even abridged. Moreover, Article 13 of the Constitution not only declares the pre-constitution laws as void to the extent to which they are inconsistent with the fundamental rights, it also prohibits the State from making a law which either takes away totally or abrogates in part a fundamental right. Therefore, judicial review of laws is embedded in the Constitution by virtue of Article 13 read with Articles 32 and 226 of our Constitution. It is manifest from the language of Article 245 of the Constitution that all legislative powers of the Parliament or the State Legislatures are expressly made subject to other provisions of the Constitution, which obviously would include the rights conferred in Part III of the Constitution. Whether there is a contravention

of any of the rights so conferred, is to be decided only by the Constitutional Courts, which are empowered not only to declare a law as unconstitutional but also to enforce fundamental rights by issuing directions or orders or writs of or "in the nature of" *mandamus, certiorari, habeas corpus, prohibition* and *quo warranto* for this purpose. It is pertinent to note that Article 32 of the Constitution is also contained in Part III of the Constitution, which enumerates the fundamental rights and not alongside other Articles of the Constitution which define the general jurisdiction of the Supreme Court. Thus, being a fundamental right itself, it is the duty of this Court to ensure that no fundamental right is contravened or abridged by any statutory or constitutional provision. Moreover, it is also plain from the expression "in the nature of" employed in clause (2) of Article 32 that the power conferred by the said clause is in the widest terms and is not confined to issuing the high prerogative writs specified in the said clause but includes within its ambit the power to issue any directions or orders or writs which may be appropriate for enforcement of the fundamental rights. Therefore, even when the conditions for issue of any of these writs are not fulfilled, this Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress. (per P.N. Bhagwati, J. in *Bandhua Mukti Morcha vs. Union of India & Ors.*[23]).

33.In this context, it would be profitable to make a reference to the decision of this Court in *Nilabati Behera* (supra). The Court concurred with the view expressed by this Court in *Khatri & Ors. (II) vs. State of Bihar & Ors.*[24] and *Khatri & Ors. (IV) vs. State of Bihar & Ors.,*[25] wherein it was said that the Court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared "to forge new tools and devise new remedies" for the purpose

23. (1984) 3 SCC 161.

24. (1981) 1 SCC 627.

25. (1981) 2 SCC 493.

of vindicating these precious fundamental rights. It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the enquiry, needed to ascertain the necessary facts, for granting the relief, as may be available mode of redress, for enforcement of the guaranteed fundamental rights. In his concurring judgment, Dr. A.S. Anand, J. (as His Lordship then was), observed as under:

> *"35.* This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law – through appropriate proceedings."

34. It may not be out of place to mention that in so far as this Court is concerned, apart from Articles 32 and 142 which empower this Court to issue such directions, as may be necessary for doing complete justice in any cause or matter, Article 144 of the Constitution also mandates all authorities, civil or judicial in the territory of India, to act in aid of the orders passed by this Court.

35. As regards the power of judicial review conferred on the High Court, undoubtedly they are, in a way, wider in scope. The High Courts are authorised under Article 226 of the Constitution, to issue directions, orders or writs to any person or authority, including any government to enforce fundamental rights and, "for any other purpose". It is manifest from the difference in the phraseology of Articles 32 and 226 of the

Constitution that there is a marked difference in the nature and purpose of the right conferred by these two Articles. Whereas the right guaranteed by Article 32 can be exercised only for the enforcement of fundamental rights conferred by Part III of the Constitution, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but "for any other purpose" as well, i.e. for enforcement of any legal right conferred by a Statute etc.

36. In *Tirupati Balaji Developers (P) Ltd. & Ors. vs. State of Bihar & Ors.,*[26] this Court had observed thus:

> *"8.* Under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts both are courts of record. The High Court is not a court "subordinate" to the Supreme Court. In a way the canvas of judicial powers vesting in the High Court is wider inasmuch as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by Part III of the Constitution and *for any other purpose* while the original jurisdiction of Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some such matters, such as Presidential elections or inter-State disputes which the Constitution does not envisage being heard and determined by High Courts."

37. In *Dwarkanath's* case (supra), this Court had said that Article 226 of the Constitution is couched in comprehensive phraseology and it *ex facie* confers a wide power on the High Court to reach injustice wherever it is found. This Article enables the High Courts to mould the reliefs to meet the peculiar and extra-ordinary circumstances of the case. Therefore, what we have said above in regard to the exercise of jurisdiction by this Court under Article 32, must apply equally in relation to the

26. (2004) 5 SCC 1.

exercise of jurisdiction by the High Courts under Article 226 of the Constitution.

38. Article 21, one of the fundamental rights enshrined in Part III of the Constitution declares that no person shall be deprived of his "life" or "personal liberty" except according to the procedure established by law. It is trite that the words "life" and "personal liberty" are used in the Article as compendious terms to include within themselves all the varieties of life which go to make up the personal liberties of a man and not merely the right to the continuance of person's animal existence. (See: *Kharak Singh vs. State of U.P.*[27])

39. The paramountcy of the right to "life" and "personal liberty" was highlighted by the Constitution Bench in *Kehar Singh* (supra). It was observed thus:

> "To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ."

40. In *Minerva Mills* (supra), Y.V. Chandrachud, C.J., speaking for the majority observed that Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of democracy. They are universally regarded by the Universal

27. (1964) 1 SCR 332.

Declaration of Human Rights. If Articles 14 and 19 are put out of operation, Article 32 will be drained of its life blood. Emphasising the significance of Articles 14, 19 and 21, the learned Chief Justice remarked:

> *"74.* Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31-C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual."

41. The approach in the interpretation of fundamental rights has again been highlighted in *M. Nagaraj* (supra), wherein this Court observed as under:

> "This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part-III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the

principles, one has also to see the structure of the Article in which the fundamental value is incorporated. *Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction.* In *Sakal Papers (P) Ltd. v. Union of India*[28], this Court has held that *while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure.* An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in *A.K. Gopalan v. State of Madras*[29]. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in *A.K. Gopalan* and held in its landmark judgment in *Maneka Gandhi v. Union of India*[30] that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive

28. AIR 1962 SC 305.

29. AIR 1950 SC 27.

30. (1978) 1 SCC 248.

interpretation of a fundamental right. *The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity.* This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated guarantees."

42. Thus, the opinion of this Court in *A.K. Gopalan* (supra) to the effect that a person could be deprived of his liberty by 'any' procedure established by law and it was not for the Court to go into the fairness of that procedure was perceived in *Maneka Gandhi* (supra) as a serious curtailment of liberty of an individual and it was held that the law which restricted an individual's freedom must also be right, just and fair and not arbitrary, fanciful or oppressive. This judgment was a significant step towards the development of law with respect to Article 21 of the Constitution, followed in a series of subsequent decisions. This Court went on to explore the true meaning of the word "Life" in Article 21 and finally opined that all those aspects of life, which make a person live with human dignity are included within the meaning of the word "Life".

43. Commenting on the scope of judicial review vis-à-vis constitutional sovereignty particularly with reference to Articles 14, 19 and 21 of the Constitution, in *I.R. Coelho* (supra), this Court said:

"There is a difference between Parliamentary and constitutional sovereignty. Our Constitution is framed by a Constituent Assembly which was not Parliament. It is in the exercise of law making power by the Constituent Assembly that we have a controlled Constitution. Articles 14, 19, 21 represent the foundational values which form the basis of the rule of law. These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers. If in future, judicial review

was to be abolished by a constitutional amendment, as Lord Steyn says, the principle of parliamentary sovereignty even in England would require a relook. This is how law has developed in England over the years. It is in such cases that doctrine of basic structure as propounded in *Kesavananda Bharati* case *(supra)* has to apply."

While observing that the abrogation or abridgement of the fundamental rights under Chapter III of the Constitution have to be examined on broad interpretation so as to enable the citizens to enjoy the rights guaranteed by Part III in the fullest measure, the Court explained the doctrine of separation of powers as follows: (SCC p.86-87, paras 64-66)

"…[i]t was settled centuries ago that for preservation of liberty and prevention of tyranny it is absolutely essential to vest separate powers in three different organs. In *The Federalist* Nos. 47, 48, and 51, James Madison details how a separation of powers preserves liberty and prevents tyranny. In *The Federalist* No. 47, Madison discusses Montesquieu's treatment of the separation of powers in *Spirit of Laws,* (Book XI, Chapter 6). There Montesquieu writes,

"When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty ... Again, there is no liberty, if the judicial power be not separated from the legislative and executive."

Madison points out that Montesquieu did not feel that different branches could not have overlapping functions, but rather that the power of one department of Government should not be entirely in the hands of another department of Government.

Alexander Hamilton in *The Federalist* No.78, remarks on the importance of the independence of the

judiciary to preserve the separation of powers and the rights of the people:

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." (434)

Montesquieu finds that tyranny pervades when there is no separation of powers:

"There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

The Court further observed: (SCC pg.105, paras 129-130)

"Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

Realising that it is necessary to secure the enforcement

of the Fundamental Rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. Judicial Review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality which is a part of the basic structure can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure - rule of law, separation of power - the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure."

Conclusions:

44. Thus, having examined the rival contentions in the context of the Constitutional Scheme, we conclude as follows:

(i) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any Constitutional or Statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce

the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State.

(iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Courts under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights. As a matter of fact, sucha power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between the Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than the Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of "the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review".

(iv) If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that Courts act as

guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation. In the circumstances, any direction by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure.

(v) Restriction on the Parliament by the Constitution and restriction on the Executive by the Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Article 32 and 226 of the Constitution.

(vi) If in terms of Entry 2 of List II of The Seventh Schedule on the one hand and Entry 2A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the Statute. In our opinion, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the court fails to grant relief, it would be failing in its constitutional duty.

(vii) When the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away,

curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the Constitutional Courts. Therefore, exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure.

45. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.

46. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has

levelled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.

47. In *Secretary, Minor Irrigation & Rural Engineering Services, U.P. & Ors. vs. Sahngoo Ram Arya & Anr.,*[31] this Court had said that an order directing an enquiry by the CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a *prima facie* case calling for an investigation by the CBI or any other similar agency. We respectfully concur with these observations.

48. All the cases shall now be placed before the respective Benches for disposal in terms of this opinion.

R.P. Question answered.

31. (2002) 5 SCC 521.

ABDUL MANNAN

v.

STATE OF ASSAM

(Criminal Appeal No. 946 of 2002)

FEBRUARY 18, 2010

[DALVEER BHANDARI AND K.S. RADHAKRISHNAN, JJ.]

Penal Code, 1860: ss.302/323/34 – Appellant charged for committing murder – Acquittal by trial court – Reversed by High Court – On appeal, held: Trial Court was not justified in acquitting appellant when there was overwhelming evidence against him – Medical evidence corroborated evidence of eye-witnesses – Eye-witnesses categorically named appellant and attributed specific role to him – There was mis-reading of evidence and non-appreciation of law in proper perspective by trial court.

Prosecution case was that on the fateful day, when brother of informant was on way, accused persons attacked and assaulted him. On hearing his screams, the informant, deceased and another brother rushed to the spot and intervened whereupon they were also assaulted. The injured persons were taken to the hospital. Deceased succumbed to injuries after 14 days. Accused persons were charged of committing offence under ss.302/323/34 IPC.

Trial Court acquitted the accused persons. On appeal, High Court observed that the view taken by the trial Court was not a possible or plausible view and the judgment of trial Court was perverse and wholly untenable. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1. The medical evidence corroborated the evidence of five eye witnesses including the statements of the injured eye witnesses. The Trial Court gravely erred in ignoring the most important and material aspect of the prosecution version. In the impugned judgment, the High Court carefully marshalled the entire prosecution evidence. [Paras 13 and 14] [1036-F-H]

1.2. It is well settled that in a case where the Trial Court has recorded acquittal, the Appellate Court should be slow in interfering with the judgment of acquittal. On evaluation of the evidence, if the two views are possible, the Appellate Court should not substitute its own view and discard the judgment of the Trial Court. But, in the instant case, the High Court clearly came to the conclusion that the entire approach of the Trial Court cannot be sustained both on the law and the facts. According to the High Court, there was non-reading and mis-reading of the evidence and the law, as it stands, was also not appreciated in proper perspective. According to the High Court, the conclusion arrived at by the Trial Court can only be termed as perverse because no Court acting reasonably and judiciously can ever take such a view. The High Court was fully justified in setting aside the acquittal so far as the appellant and the other accused persons were concerned. The High Court also examined that this was a clear case of common intention in committing the crime. The Court observed that common intention can develop during the course of an occurrence. [Paras 15 and 16] [1037-B-F]

Sheoram Singh v. State of U.P. **AIR 1972 SC 2555;** *Joginder Singh v. State of Haryana* **AIR 1994 SC 461, referred to.**

1.3. The appellant was named in the F.I.R. All the eye witnesses including the injured eye witnesses

categorically named appellant and attributed specific role to him. In this view of the matter, the Trial Court was not justified in acquitting the accused when there was overwhelming evidence against the appellant and other accused. It was not a case that the view taken by the Trial Court was a plausible or a possible view. The judgment of the Trial Court was wholly unsustainable. The close scrutiny and examination of the impugned judgment show that the High Court took into consideration all relevant factors in dealing with the appeal from the order of acquittal. The impugned order of the High Court is unexceptionable. [Paras 19 and 20] [1038-E-H]

1.4. The High Court in the impugned judgment convicted the appellant under Section 304 Part II I.P.C. and awarded imprisonment for a period of four years and to pay a fine of Rupees one thousand each; in default, to undergo further imprisonment for a period of one month each. The sentence awarded by the High Court is just appropriate in the facts and circumstances of the case. [Para 21] [1039-A-B]

Case Law Reference:

AIR 1972 SC 2555	**referred to**	**Para 17**
AIR 1994 SC 461	**referred to**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 946 of 2002.

From the Judgment & Order dated 22.6.2001 of the High Court of Gauhati in Govt. Criminal Appeal No. 248 of 1998.

Azim H. Laskar, Sachin Das, Rajneesh Singh Abhijit Sengupta for the Appellant.

Momota Oinam (for Corporate Law Group) for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. This appeal is directed against the judgment of the Gauhati High Court in Criminal Appeal No. 248 of 1998 dated 22nd June, 2001.

2. Abdul Mannan, Abdul Salam and Abdul Subhan have preferred an appeal against the impugned judgment. The appeal of Abdul Salam and Abdul Subhan was dismissed by this Court vide order dated 13th September, 2002, as they did not surrender. The present surviving appeal is only on behalf of the accused appellant – Abdul Mannan.

3. The brief facts, which are necessary to dispose of the appeal are recapitulated as under:

On 17th February, 1994, one Abdul Kuddus Khan lodged a written First Information Report [for short, 'F.I.R.'] before the Chaudhury Bazar Police Out Post stating inter alia that on that date at about 2.00 p.m. while his elder brother Abdul Hakim was returning home from Masjid, six accused persons named in the F.I.R., namely, Subhan, Abdul Mannan, Abdul Hanan, Abdul Sukur, Abdul Kurdish and Abdul Salam attacked and assaulted him. On hearing the screams and loud cries for the help of Abdul Hakim, another elder brother, the informant, namely, Abdul Karim and one of his neighbours, Abdul Kalam, rushed to the spot and intervened, whereupon those two persons were also assaulted and they sustained injuries. The injured persons were taken to the hospital and Abdul Karim succumbed to injuries after fourteen days.

4. The police after usual investigation submitted a charge sheet against all the six accused persons. The learned Additional Sessions Judge, Nagaon framed charges under Section 302/323/34 IPC. The Trial Court examined eight witnesses and on conclusion of the trial, the accused were acquitted by the Trial Court. Against acquittal, the State of Assam preferred an appeal before the High Court.

5. In the impugned judgment, the High Court carefully examined the entire evidence and relevant legal position, as settled by this Court in a number of cases. In the impugned judgment, the High Court has clearly observed that the view taken by the Trial Court was not a possible or a plausible view. The High Court termed the judgment of the Trial Court as perverse and wholly untenable.

6. In view of the conflicting judgments, we ourselves looked into the entire evidence and the relevant documents of the case. There are five eye witnesses. Ajijur Rahman, P.W.1 had known the accused persons, who lived in the same neighbourhood. He categorically stated that he saw the appellant and the other accused beating the deceased with lathis. Fearing that the accused might beat him, his sister took him away. He also stated that the deceased was taken to Nagaon because the injuries sustained by him were critical in nature.

7. Abdul Kalam, P.W.2 stated that the accused were known to him because they live in his neighbourhood. He also stated that the appellant and the other accused gave lathi blows to the deceased.

8. Abdul Malik was examined as P.W.3. He clearly stated that Abdul Mannan gave lathi blows to Abdul Karim along with the other accused. He asked them not to beat Abdul Karim, but they did not listen to him. The appellant and the other accused ran away after causing injuries.

9. Abdul Hakim P.W.4 also clearly stated that the appellant and other accused gave beating to Hafez Kalam and him as well with lathis. They gave lathis blows to Abdul Karim. Abdul Hakim stated that he also received injuries on his head and below the left eye.

10. Abdul Kuddus Khan, P.W.5 also corroborated the prosecution version and stated that the appellant and others had given beating to his brothers Abdul Hakim and Abdul Kalam.

He also stated that his other brother Abdul Karim came on the spot from the western direction and shouted 'don't beat, don't beat' but that had no impact on them. The deceased Abdul Karim fell down on the ground because of the injuries.

11. The learned Additional Sessions Judge, Nagaon, Assam, did not carefully marshall the prosecution evidence on record and was swayed away by the fact that the injuries were caused by 'sharp edged weapon' and ultimately, those injuries caused by sharp edged weapon were not found by the doctor in his evidence. The entire prosecution evidence was discarded solely on this ground. According to the High Court, the words 'sharp edged' were added subsequently between the two lines in the report. We have checked the original record and we tend to concur with the findings of the High Court. The Court must examine the entire case comprehensively. Even if some inconsistency or discrepancy is discovered, then its impact on the total prosecution version must be carefully examined. In the instant case, how any court can legitimately ignore the testimony of five eye witnesses, including two injured eye witnesses, particularly when their version is wholly consistent and gets full corroboration from the medical evidence? The statements of all eye witnesses including the injured eye witnesses are wholly consistent and are fully corroborated with the medical evidence.

12. Dr. Pradip Kumar Talukdar, P.W.7 who was posted at the Gauhati Medical College Hospital in the Forensic Medicine Department, performed the post-mortem examination on Abdul Karim and found the following injuries.

"(i) On larynx and trachea, tracheotomy was done. Old abrasion on the back of the chest - 10 cm away from the root of neck and 5 cms away from the midline left side of the size 5 cm. x 3 cm.

(ii) Abrasions over left buttock.

(iii) Old abrasion over right leg.

(iv) Lacerated wound over medical aspect of right wrist joint above the elbow joint. The wound is stitched.

(v) Lacerated wound over the scalp in the parieto-occipital region on both sides. Left side wound of size 6 cm x 2 cm x bone deep. Right side wound is of size 5 cm x 1.5 cm x bone deep. Both the wounds are stitched. Injury over the skull.

Depressed communated fracture over both right and left parieto-occipital region is present.

Membranes of the brain. – Membranes lacerated at place and sizes vary from 2 x 1.5 cm to 2 cm x 2cm.

Brain. (i) Lacerated injury over right parietal region of size 4 cm x 4 cm x 2 cm.

(ii) Lacerated injury over left parietal region of size 4 cm x 2 cm x 1.5 cm.

(iii) Frontal lobe contusion of size 6 cm x 3 cm of size."

13. In the opinion of Dr. Talukdar, the death was a result of head injury sustained by the deceased. According to him, all the injuries were ante-mortem in nature caused by blunt force impact, homicidal in nature. The medical evidence corroborates the evidence of five eye witnesses including the statements of the injured eye witnesses. The Trial Court gravely erred in ignoring the most important and material aspect of the prosecution version.

14. In our considered view, in the impugned judgment, the High Court carefully marshalled the entire prosecution evidence and also considered the relevant judgments of this Court, both on the aspect of interference by the High Court in cases where

there is acquittal by the Trial Court and on the aspect of common intention.

15. It is well settled that in a case where the Trial Court has recorded acquittal, the Appellate Court should be slow in interfering with the judgment of acquittal. On evaluation of the evidence, if the two views are possible, the Appellate Court should not substitute its own view and discard the judgment of the Trial Court. But, in the instant case, the High Court clearly came to the conclusion that the entire approach of the Trial Court cannot be sustained both on the law and the facts. According to the High Court, there is non-reading and mis-reading of the evidence and the law, as it stands, is also not appreciated in proper perspective. According to the High Court, the conclusion arrived at by the Trial Court can only be termed as perverse because no Court acting reasonably and judiciously can ever take such a view. In the impugned judgment, the High Court observed that this was not a case where two views were possible and the court below has taken the one view. According to the High Court, on careful scrutiny of the evidence, no other view point is possible. The High Court was left with no option but to set aside the judgment of the Trial Court. In our view, the High Court was fully justified in setting aside the acquittal so far as the appellant herein and Abdul Salam and Abdul Subhan are concerned.

16. The High Court has also examined that this was a clear case of common intention in committing the crime. The Court observed that common intention can develop during the course of an occurrence.

17. The High Court placed reliance on *Sheoram Singh v. State of U.P.* AIR 1972 SC 2555, in which this Court observed as under:

> "It is undeniable that common intention can develop during the course of an occurrence but there has to be cogent material on the basis of which the court can arrive at that finding and hold an accused vicariously liable for the act of the other accused by invoking Section 34 of the Indian Penal Code."

18. Reliance was also placed on *Joginder Singh v. State of Haryana* AIR 1994 SC 461, in which this Court has observed:

> "It is one of the settled principles of law that the common intention must be anterior in time to the commission of the crime. It is also equally settled law that the intention of the individual has to be inferred from the overt act or conduct or from other relevant circumstances. Therefore, the totality of the circumstances must be taken into consideration in order to arrive at a conclusion whether the accused had a common intention to commit the offence under which they could be convicted. The pre-arranged plan may develop on the spot. In other words, during the course of commission of the offence, all that is necessary in law is the said plan must proceed to act constituting the offence."

19. The appellant has been named in the F.I.R. All the eye witnesses including the injured eye witnesses have categorically named the appellant and attributed specific role to him. In this view of the matter, the Trial Court was not justified in acquitting the accused when there was overwhelming evidence against the appellant and other accused. It was not a case that the view taken by the Trial Court was a plausible or a possible view. The judgment of the Trial Court was wholly unsustainable. The High Court in the impugned judgment was justified in setting aside the judgment of the Trial Court.

20. On close scrutiny and examination of the impugned judgment, we are clearly of the view that, in the impugned judgment, the High Court has taken into consideration all relevant factors in dealing with the appeal from the order of acquittal. The impugned order of the High Court is unexceptionable.

21. The High Court in the impugned judgment convicted the appellant as also the accused Abdul Subhan and Abdul Salam under Section 304 Part II I.P.C. and awarded imprisonment for a period of four years and to pay a fine of Rupees one thousand each; in default, to undergo further imprisonment for a period of one month each. The sentence awarded by the High Court is just appropriate in the facts and circumstances of the case.

22. The appeal, being devoid of any merit, is accordingly dismissed. The bail bonds of the appellant, who is on bail, are cancelled and he shall surrender to the court. In case the appellant does not surrender within four weeks, the respondent-State would take all necessary steps to arrest the appellant and lodge him in jail to serve out the remaining period of sentence.

D.G. Appeal dismissed.

P.K. SINGH
v.
M/S. S.N. KANUNGO AND OTHERS
(Civil Appeal No. 6551 of 2002)

FEBRUARY 18, 2010

[J.M. PANCHAL AND DR. B.S. CHAUHAN, JJ.]

Contempt of Courts Act, 1971:

s.14 – Contempt petition alleging wilful and deliberate violation of judgment of High Court – In an appeal arising out of a contract, High Court directing the Department to pay decretal amount to the contractor, along with interest – Officer concerned writing to contractor for settlement as regards interest component – High Court holding the officer concerned guilty of contempt of court and while accepting unconditional apology, imposing cost on him – HELD: Order 21, r. 2 CPC relates to the payment of amount to a decree-holder out of court – An agreement, which extinguishes the decree as such in whole or in part and results in the satisfaction of the decree in respect of the particular relief or relieves granted by the decree, is an 'adjustment' within the meaning of r.2 – It is open to the parties to enter into a contract or compromise with reference to their rights under the decree – Adjustment is not the same as satisfaction of the decree but is some method of settling decree which is not provided for in the decree itself – The right of the judgment-debtor to make an attempt to adjust the decree is independent and cannot be treated as contempt of court – Having regard to the interest of the department, the officer concerned had addressed letters to the contractor to adjust the award – The letters for adjustment of award could not have been treated as contempt of court within the meaning of the provisions of the Act – The tenor of letters do not indicate that there was any willful disobedience on the part of the officer in not complying with the judgment of the

High Court – The error of law committed by High Court is that without answering the question whether violation of the judgment amounts to contempt of court, it presumed that violation of the judgment amounts to contempt of court, and proceeded to examine the question whether violation of the judgment was willful or deliberate – After reaching the conclusion that the violation is neither willful nor deliberate, the High Court should have at once dropped the contempt proceedings and could not have accepted the unconditional apology tendered by the officer nor could have imposed cost on him – Further, the High Court itself came to the conclusion that a letter being written by the officer would not amount to willful and deliberate disobedience of the decree of the court – In any view of the matter, the High Court, after accepting the unconditional apology tendered by the officer, should not have imposed cost on him – On the facts and in the circumstances of the case, the judgment impugned cannot be sustained and is set aside – Code of Civil Procedure, 1908 – Or. 21, r.2. [Para 7 and 10]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6551 of 2002.

From the Judgment & Order dated 9.4.2001 of the High Court of Calcutta, Circuit Bench at Port Blair in contempt Application No. 10 of 2001.

Jayasree Singh, Swati Sinha, Fox Mandal & Co., for the Appellant.

Jena Kalyan Das for the Respondents.

The Order of the Court was delivered

O R D E R

The instant appeal is directed against the judgment dated April 9, 2001 rendered by the High Court at Calcutta in Contempt Application No. 010 of 2001 by which the appellant is held guilty of contempt of court and is directed to pay the cost of the application to the respondent which is assessed at 200 GMs.

2. From the record of the case it is evident that a contract was entered into between the respondent-contractor and the Andaman and Nicobar Administration through Union of India for execution of the work of extension of runway by 1542 meters (5000 ft.) at Port Blair Airport on 29.12.1995. During the course of the execution of the said contract, dispute arose between the parties regarding payments of bills. The dispute was referred to sole arbitration of Mr. O.P. Goel. The arbitrator made his Award on March 22, 1999 and directed the Andaman and Nicobar Administration to pay to the respondent a sum of Rs.2,81,83,305/- (Rupees two crores eighty one lacs, eighty three thousand, three hundred and five only) with 12% interest per annum from the date of withholding of the amount of Rs.41,42,000/- (Rupees forty one lacs forty two thousand only) till the date of payment.

3. Feeling aggrieved, the Union of India, through the Executive Engineer, Andaman and Nicobar Public Works Department, filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 on 17th June, 1999 for setting aside the Award. By judgment dated 29.9.2000 the learned District Judge, Andaman and Nicobar Island, Port Blair, dismissed the application with cost of Rs.500/-. Thereupon, Union of India, through the Executive Engineer, preferred an appeal, i.e., FAT No. 4220 of 2001, before the High Court at Calcutta. The Division Bench of the High Court dismissed the appeal by judgment dated 26.2.2001. However, the High Court clarified that the claim No. 4 of the Award dated 22.3.1999 would stand modified and the respondent-contractor would be entitled to interest @ 12% per annum from the date of reference of the dispute to arbitration till the date of payment of the said amount.

4. Thereafter, the appellant, who is Executive Engineer, Construction Division II, APWD, South Andaman, addressed a letter to the Superintending Engineer, Construction Circle No. 1, Andaman Public Works Department, on 5.3.2001 giving

details of the financial implication of the Award dated 22.3.1999. The appellant received a letter dated March 30, 2001 from the Executive Engineer (PLG), CE's Office, APWD, Port Blair stating that the principal component of the Award might be released to the agency, i.e., the respondent herein, immediately. The appellant thereupon wrote a letter dated 30.3.2001 to the Chief Engineer, APWD requesting that the acceptance of the Award should be communicated with details regarding amount/principal component to be paid. It was also mentioned in the said letter that for delay, if any, in payment of the amount, he would not be responsible. The appellant thereafter addressed another letter on the same day to the respondent requesting it to intimate its acceptance of the Award amount to Rs.2,81,83,305/- in full and final settlement of its claim. The respondent thereupon replied by a letter dated 30.3.2001 to the appellant that it was not willing to accept the amount stated in the aforesaid letter. The appellant, therefore, wrote another letter on 30.3.2001 to the respondent informing that the principal component of the Award of Rs.2,81,83,305/- would be released on the same day and requested the respondent to reconcile with the appellant for mutual understanding about payment of interest. The respondent wrote a letter to the appellant on March 31, 2001 mentioning that it was willing to accept the principal amount of the Award "at present" but the remaining amount of the interest etc. should be released within a fortnight. Thereupon, the appellant addressed a letter dated 2.4.2001 to the Chief Engineer, APWD, Port Blair, forwarding a copy of the letter received by him from the respondent and pointed out that the respondent was unwilling to accept the amount of the Award without interest. The appellant addressed another letter dated 2.4.2001 to the Chief Engineer informing him about the changed stand of the respondent regarding its willingness to accept the principal component of the Award and requested him to communicate the decision regarding payment of interest without further delay.

5. The respondent filed Contempt Application No. 010 of

2001 in the month of April, 2001 under Section 14 of the Contempt of Courts Act, 1971 complaining about willful and deliberate violation of the judgment and decree dated February 26, 2001 passed in First Appeal T. No. 4220 of 2001. The High Court issued notice to the respondent. On notice being served, the appellant filed a reply denying that there was willful and deliberate breach of the decree passed by the court. By impugned judgment the Division Bench of the High Court at Calcutta, Circuit Bench at Port Blair, found the respondent guilty of contempt of court and while accepting the unconditional apology of the appellant, imposed cost of 200 GMs upon him to be paid within a week. This judgment has given rise to the instant appeal.

6. This Court has heard the learned counsel for the appellant and considered the documents forming part of the instant appeal.

7. From the facts mentioned above, it is evident that, after Award of the arbitrator was confirmed by Division Bench of the Calcutta High Court, the appellant had made an attempt to adjust the decree in terms of Order XXI Rule 2 of Code of Civil Procedure by requesting the respondent to accept the principal amount and waive the interest awarded thereon. The contents of the two letters written by the appellant to the respondent do not show that any attempt was made by the appellant to sit in appeal over the judgment of the High Court. Those two letters do not indicate that the appellant had criticized the High Court for awarding interest in favour of the respondent. The record would indicate that within the framework of law, the appellant had made an attempt to persuade the respondent to forego claim relating to interest. Order XXI Rule 2 of Code of Civil Procedure relates to the payment of amount to a decree holder out of court and inter alia provides that when any wrong payment under a decree of any other kind is paid out of court to the decree holder, the decree holder has to certify payment made as required by the said Rule. An agreement, which extinguishes the decree as such in whole or in part and results

in the satisfaction of the decree in respect of the particular relief or reliefs granted by the decree, is an 'adjustment' within the meaning of this Rule. It is open to the parties to enter into a contract or compromise with reference to their rights under the decree. If the contract or the compromise amounts to an 'adjustment' of the decree, it must be recorded under this Rule and unless so recorded cannot be recognized by the executing court. Adjustment is not the same as satisfaction of the decree but is some method of settling decree which is not provided for in the decree itself. The right of the judgment debtor to make an attempt to adjust the decree is independent and cannot be treated as contempt of court. Having regard to the interest of the department concerned, the appellant had addressed letters to the respondent to adjust the Award. The letters for adjustment of Award could not have been treated as contempt of court within the meaning of the provisions of the Contempt of Courts Act, 1971. The tenor letters do not indicate that there was any willful disobedience on the part of the appellant in not complying with the judgment of the High Court.

8. Even if it is assumed for the sake of argument that writing of the letter dated 30.3.2001 amounts to contempt, this Court finds that the two letters dated 30.3.2001 and 2.4.2001 addressed by the appellant to the Chief Engineer, APWD, Port Blair, indicate that the appellant had taken all possible steps to comply with the Award confirmed by the High Court. According to the High Court, asking the respondent to accept only the principal amount vide letter dated 30.3.2001 amounts to violation of the judgment of the High Court. Having held so, the High Court proceeded to examine the question whether the violation of judgment of the High Court would amount to the contempt of court. The High Court also considered the question whether violation of judgment by the appellant was willful and deliberate. The High Court noticed that after addressing letter dated 30.3.2001, another letter on the same day was addressed by the appellant inviting the respondent for negotiation with reference to the rate of interest payable to the

respondent and concluded that even if previous letter amounted to violation of the judgment of the court, the appellant did not do so willfully and deliberately. Though the High Court ostensibly proceeded to examine the question whether violation of the judgment of the High Court would amount to contempt of court, the said question is neither determined nor answered one way or the other. The error of law committed by the High Court is that without answering the question whether the violation of the judgment amounts to the contempt of court, the High Court presumed that the violation of the judgment amounts to contempt of court and proceeded to examine the question whether the violation of judgment was willful or deliberate. After reaching the conclusion that the violation is neither willful nor deliberate, the High Court should have at once dropped the contempt proceedings and could not have accepted the unconditional apology tendered by the appellant nor could have imposed cost on the appellant. In any view of the matter, the High Court, after accepting the unconditional apology tendered by the appellant, should not have imposed cost on the appellant for negligence and reckless manner in which it had allegedly acted in the instant case.

9. Further, the High Court itself came to the conclusion that a letter being written by the Executive Engineer would not amount to willful and deliberate disobedience of the decree of the court.

10. On the facts and in the circumstances of the case, this Court is of the opinion that the judgment impugned cannot be sustained and is liable to be set aside.

11. For the foregoing reasons, the appeal succeeds. The impugned judgment is set aside. The cost, if any, recovered from the appellant be refunded to him. The appeal stands, accordingly, disposed of.

12. There shall be no order as to costs.

R.P. Appeal disposed of.

ANGAD DAS

v.

UNION OF INDIA & ORS.

(Civil Appeal Nos. 1429-1430 OF 2008)

FEBRUARY 18, 2010

[DALVEER BHANDARI AND A. K. PATNAIK, JJ.]

Service law:

Central Reserve Police Force Rules, 1955 – r. 28 – Delinquent official punished with 'compulsory retirement' on the charge of suppression of real date of birth at the time of joining service – Letter by the delinquent official to higher authority requesting to consider his re-employment – Treating the letter as appeal, punishment enhanced to 'removal from service' – Review dismissed by the authority concerned – Dismissal of writ petition – On appeal, held: Letter requesting re-employment cannot be treated as appeal u/r. 28 – Imposition of enhanced punishment was unjustified – Direction to pay pensionary benefits with interest.

The appellant, recruited as a constable in Central Reserve Police Force, was issued show-cause notice, after about 25 years of service alleging that his date of birth given at the time of joining the service, was found false. After the enquiry, he was given the punishment of compulsory retirement. The appellant, thereafter, wrote a letter to DIG Police, CRPF, praying for his re-employment in view of the fact that he had enormous family responsibility. This letter was treated as an appeal, and DIG Police, CRPF, enhanced his punishment to 'removal from service'. The revision petition there against was dismissed by the competent authority. The writ petition challenging the orders was dismissed. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1. The letter requesting for re-employment could not have been treated as an appeal under Rule 28 of Central Reserve Police Force Rules, 1955. The D.I.G. Police, CRPF, was unjustified in enhancing the punishment from 'compulsory retirement' to 'removal from service'. The order was legally untenable. The reviewing authority has also seriously erred in upholding the order passed by the D.I.G. Police, CRPF. The appellant and his family have suffered tremendous mental agony, and harassment was caused to them on account of arbitrary orders. The appellant be paid all the pensionary benefits which have become due and payable to him, with interest at the rate of 9% per annum, within two moths from the date of communication of this order. [Paras 8, 10 and 11] [1051-C-E, G-H; 1052-A]

2. People in power and authority should not easily lose equanimity, composure and appreciation for the problems of the lesser mortals. They are always expected to remember that power and authority must be judiciously exercised according to the laws and human compassion. Arrogance and vanity have no place in discharge of their official functions and duties. The Court hopes and trusts that senior officials in future would not be totally oblivious of the problems of the humble and modest employees and pass similar orders. [Paras 1 and 13] [1049-B-C; 1052-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1429-1430 of 2010.

From the Judgment & Order dated 12.5.2008 & 4.8.208 of the High Court of Delhi at New Delhi in Civil Writ Petition No. 5006 of 1998.

Dalip Kumar Malhotra, Rajesh Malhotra for the Appellant.

Vivek Tankha, ASG, Satya Siiddique, A. Deb Kumar, Shreekant N. Terdal for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. People in power and authority should not easily lose equanimity, composure and appreciation for the problems of the lesser mortals. They are always expected to remember that power and authority must be judiciously exercised according to the laws and human compassion. Arrogance and vanity have no place in discharge of their official functions and duties.

2. Delay condoned. Leave granted.

3. Heard the learned Additional Solicitor General and the learned counsel for the appellant at length. Brief facts necessary to dispose of these appeals are recapitulated as under:-

4. The appellant was recruited as a Constable in the Central Reserve Police Force, Balia Police Line in the State of U.P. in the year 1969. He was promoted to the post of Lance Naik, then as Naik and thereafter to the post of Head Constable. When the appellant was posted as a Head Constable at Jammu and Kashmir, he was served a show cause notice dated 11.4.1995 by the Commandant 51 BN, C.R.P.F. (respondent no.4) alleging that the date of birth as given by him at the time of joining the service was found false. An enquiry was conducted and thereafter the appellant was compulsorily retired from the service by way of punishment by an order dated 14th June, 1996 by respondent no.4. The said order reads as under:-

> "After careful thought and keeping in view of his long service career, a family to support and considering natural justice, I hereby impose the punishment of 'COMPULSORY RETIREMENT FROM SERVICE WITH FULL PENSIONARY BENEFITS AND GRATUITY' on No.690298321 HC Angad Dass w.e.f. 31/5/96 AN, in pursuance of the authority vested in me under Section 11(1) of CRPF Act, 1949 read with table below Rule 27 of CRPF Rule 1955."

5. The appellant had sent a very polite letter of request to the Additional District Inspector General, Police (for short, DIG) praying that his request for re-employment be kindly considered because he has enormous responsibility of educating and marrying five daughters. The prayer was made with folded hands and touching his feet. The letter reflected pinnacle of humility. The relevant portion of request letter reads as under:-

> "I am burdened with the education and marriages of five daughters and I am the only earning hand and according to the hereditary record of Gram Panchayat my date of birth is 8.7.47. I had received that record under the order of BDO. I am also having certificate from the Gram Pradhan. I, therefore, with folded hands and touching the feet praying that I may be allowed to complete the service and I may be awarded any other punishment otherwise, seven people will be uprooted and will resort to beggary and will fall on the wrong path for earning their bread."

6. Respondent No.4 would have been fully justified in either accepting or declining the appellant's request for re-employment, but astonishingly, on 8th October, 1996 the request letter of the appellant for re-employment was treated as an appeal by the DIG Police, CRPF, Avadi, Madras and the punishment of "compulsory retirement" as awarded by the Commandant, 51 BN, CRPF, was enhanced to that of "removal from service" w.e.f. 31.5.1996. No provision of law permits him to treat a letter of request for re-employment as an appeal. The DIG (Police) has no power or authority to enhance the sentence of the appellant. We fail to comprehend how such an innocuous and polite letter of request seeking re-employment on compassionate ground can ever receive such an unwarranted and arrogant reaction. The order is wholly arbitrary and illegal.

7. The appellant aggrieved by the said order filed a revision petition before the Special Director General, C.R.P.F., Hyderabad who unfortunately passed the following order on 2nd August, 1997. The relevant part of the order reads as under:-

> "HC Angad Das of 51 BN CRPF is hereby removed from service with effect from the date of issue of this order. The intervening period between 31-5-96 (AN) to the date of this order will be treated as 'Dies Non' for all purposes."

8. We are astonished as to how a simple letter of request for re-employment has been treated as an appeal by the D.I.G. Police, CRPF, and in exercise of his power under Rule 28 of the CRPF Rules, 1955, the punishment of "compulsory retirement" from service has been enhanced to "removal from service" w.e.f. 31.5.1996. The mere letter for re-employment could not have been treated as an appeal under Rule 28 of the CRPF Rules, 1955. The D.I.G. Police, CRPF, was totally unjustified in enhancing the punishment from "compulsory retirement" to "removal from service". The order was legally untenable. The Special Director General has also seriously erred in upholding the order dated 8th October, 1996 passed by the D.I.G. Police, CRPF.

9. In the peculiar facts and circumstances of this case, we are constrained to set aside the orders dated 8th October, 1996 and 2nd August, 1997. Consequently, the order dated 21.5.1996 passed by the Commandant, 51 BN, CRPF as amended by order dated 14.6.1996 of compulsory retirement is restored. The appellant would be entitled to all the benefits which flow from the said order.

10. The appellant and his family have suffered tremendous mental agony and harassment caused to them on account of totally arbitrary orders mentioned above.

11. We also direct that the appellant be paid all the pensionary benefits which have become due and payable to

A him, with interest at the rate of 9% per annum, within two months from the date of communication of this order.

12. Consequently, these appeals are allowed. Respondent No.1, Union of India is directed to pay costs of Rs.50,000/- to the appellant within two months.

13. We hope and trust that senior officials in future would not be totally oblivious of the problems of the humble and modest employees and pass similar orders.

K.K.T. Appeals allowed.

M/S. HINDUSTAN PETROLEUM CORPN. LTD. & ORS.
v.
M/S. SUPER HIGHWAY SERVICES & ANR.
(Special Leave Petition (C) No.104 of 2009)

FEBRUARY 19, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Contract – Dealership Agreement for retail sale/supply of petrol and diesel – Termination of, by Petitioner Corporation – On basis of findings of a sample laboratory test – Validity – Held: Not valid – Petitioner did not adhere to the relevant Guidelines inasmuch as respondent-dealer was not served upon with proper notice regarding such test – Test was conducted behind the back of respondent – This caused severe prejudice to it – Termination of the dealership agreement was thus arbitrary, illegal and in violation of the principles of natural justice – Natural justice.

Constitution of India, 1950 – Art. 136 – New Plea – Termination of dealership agreement – Writ petition by dealer – Allowed by High Court – Order challenged by Petitioner-Corporation – Plea raised by it that in view of a specific clause in the dealership agreement, the dealer was barred from seeking remedy before the writ court (High Court) – Maintainability of – Held: Not maintainable – Petitioner ought to have raised the plea before High Court – In any event, by challenging the order of High Court, the Petitioner also submitted to the jurisdiction of the writ Court, without objecting to the same.

The Petitioner Corporation entered into an Agreement with Respondent No.1 for the retail sale/ supply of petrol, diesel etc.. Both parties were at liberty to terminate the Agreement by giving three months' notice in writing. The agreement also granted rights to

the Petitioner Corporation to terminate the Agreement earlier, on the happening of any of the events mentioned in Clause 58 of the Agreement.

A check was conducted at the outlet of the Respondent No.1 Company, where a sample of High Speed Diesel (HSD) failed the Marker Test, which indicated that the same had been contaminated. Subsequently a Nozzle Test of HSD was conducted. Further to the result of the test, Respondent No.1 was served with a notice, asking it to show cause as to why its dealership should not be cancelled on account of the failed Marker Test.

Respondent No.1 filed Writ Petition in the High Court praying for issuance of appropriate writs to quash the entire proceedings arising out of the Marker Test. Meanwhile, the petitioner Corporation, upon consideration of the reply sent by Respondent No.1 to the show cause notice, terminated the Dealership Agreement of Respondent No.1 under Clause 58(1) thereof.

A Single Judge of the High Court allowed the writ petition holding, that the retesting had been done without proper notice to the Respondent No.1, hence, as per the Marketing Discipline Guidelines, the same had caused severe prejudice to the Respondent No.1 and the order of termination of the Dealership Agreement, could not, therefore, be sustained. Hence the present Special Leave Petition.

Dismissing the Special Leave Petition, the Court

HELD: 1.1. The facts and circumstances of the present case did not give rise to a presumption that service had been effected on Respondent No.1, in the absence of any proof in that regard. Except for the endorsement on the hand-written notice said to have

been given by one 'D', there is nothing else on record to even suggest that notice had been sent to the Respondent No.1 and that the same had been refused. Nothing has been shown by the petitioner to disprove the allegation made on behalf of the Respondent No.1 that the notice alleged to have been tendered to the representative of the Respondent No.1 was not in the manner and the form in which such notice is required to be given to a dealer. It is obvious that the same had been made out in haste to indicate that service had been attempted on the Respondent No.1. [Para 16] [1067-A-F]

1.2. The cancellation of dealership agreement of a party is a serious business and cannot be taken lightly. In order to justify the action taken to terminate such an agreement, the concerned authority has to act fairly and in complete adherence to the rules/guidelines framed for the said purpose. The non-service of notice to the aggrieved person before termination of his dealership agreement also offends the well-established principle that no person should be condemned unheard. It was the duty of the petitioner to ensure that the Respondent No.1 was given a hearing or at least serious attempts were made to serve him with notice of the proceedings before terminating his agreement. [Para 17] [1067-G-H; 1068-A]

1.3. In the instant case, the High Court did not commit any error in allowing the writ petition filed by Respondent No.1, upon holding that notice of the Laboratory Test to be conducted had not been served upon the Respondent No.1, which caused severe prejudice to the said respondent since its dealership agreement was terminated on the basis of the findings of such Test. Admittedly the dealership agreement was terminated on the ground that the product supplied by the petitioner corporation was contaminated by the respondent. Such

contamination was sought to be proved by testing the T.T. retention sample in the laboratory. The Guidelines being followed by the Corporation require that the dealer should be given prior notice regarding the test so that he or his representative also can be present when the test is conducted. The said requirement is in accordance with the principles of natural justice and the need for fairness in the matter of terminating the dealership agreement and it cannot be made an empty formality. Notice should be served on the dealer sufficiently early so as to give him adequate time and opportunity to arrange for his presence during the test and there should be admissible evidence for such service of notice on the dealer. Strict adherence to the above requirement is essential, in view of the possibility of manipulation in the conduct of the test, if it is conducted behind the back of the dealer. [Para 18] [1068-B-F]

1.4. In the present case, there is no admissible evidence to prove service of notice on the respondent or refusal of notice by the respondent. Further, the notice dated 28.05.2008 which was allegedly refused by respondent, did not give him adequate time to arrange for the presence of himself or his representative during the test to be conducted at 3.00 PM on 29.05.2008. It is also to be noted that the endorsement regarding the alleged refusal is dated 29.05.2008 itself. Thus, the termination of the dealership agreement of the respondent was arbitrary, illegal and in violation of the principles of natural justice. [Para 18] [1168-G-H; 1169-A]

Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors. **(1991) 1 SCC 533;** *Mrs. Sanjana M. Wig v. Hindustan Petro Corporation Ltd.* **AIR 2005 SC 3454 and** *State of Himachal Pradesh & Ors. v. Gujarat Ambuja Cement Ltd. & Anr.* **(2005) 6 SCC 499, referred to.**

2. Although, Clause 68 of the Dealership Agreement refers to arbitration, the said question was not raised before the High Court. It is now too late in the day for the petitioner Corporation to contend that in view of Clause 68 of the Dealership Agreement, the Respondent No.1 was not entitled to seek its remedy before the writ Court. In any event, by filing appeal against the order of the Single Judge, the Petitioner also submitted to the jurisdiction of the writ Court, without objecting to the same. [Para 19] [1069-B-C]

Case Law Reference:

(1991) 1 SCC 533	**referred to**	**Para 8**
AIR 2005 SC 3454	**referred to**	**Para 9**
(2005) 6 SCC 499	**referred to**	**Para 10**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 14 of 2009.

From the Judgment & Order dated 2.12.2008 of the High Court of Judicature at Patna in LPA No. 890 of 2008.

U.U. Lalit, Sanjay Kapur, Rajiv Kapur, Shubhra Kapur, Arti Singh for the Petitioners.

Ramesh P. Bhatt, Ravi Bhushan, Mohit Kumar Shah for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. This Special Leave Petition involves the question as to whether the dealership of the Respondent No.1 had been validly terminated in accordance with Clause 58 of the Dealership Agreement executed between the parties on 30th August, 2003. In addition, it would also have to be considered as to whether the termination of the Agreement was in keeping with the procedure/ guidelines in

conducting Marker Test in retail outlets.

2. By virtue of the aforesaid Agreement, the petitioner Corporation entered into an Agreement with the Respondent No.1 for the retail sale or supply of petrol, diesel, motor oils, grease and such other products as might be specified by the Corporation from time to time, at the premises in question. The Agreement was to remain in force for 15 years with effect from 30th August, 2003. However, both the parties would be at liberty to determine the Agreement without assigning any reason by giving three months' notice in writing to the other of its intention to terminate the Agreement and upon expiration of such notice, the Agreement would stand cancelled and revoked, without prejudice to the rights of either party against the other in respect of any matter or thing antecedent to such termination. It was also indicated that such liberty would not prejudice the rights of the Corporation to terminate the Agreement earlier on the happening of any of the events mentioned in Clause 58 of the Agreement. Clause 4 of the Agreement provided that the licence and permission granted for the use of the outfit would terminate immediately on the termination of the Agreement or on any breach of any of the terms thereof. The relevant portion of Clause 58 of the Agreement is reproduced hereinbelow :-

> "58. Notwithstanding anything to the contrary herein contained, the Corporation shall also be at liberty to terminate this agreement forthwith upon or at any time after the happening of any of the following events, namely:-
>
> (a) If the dealer shall commit a breach of any of the covenants and stipulation contained in the agreement, and fail to remedy such breach within four days of the receipt of a written notice from the corporation in that regard.
>
> (b) ……
>
> (c) ……

(d) ……

(e) ……

(f) ……

(g) ……

(h) ……

(i) If the dealer shall contaminate or tamper with the quality of any of the products supplied by the Corporation.

(j) ……

(k) ……

(l) ……

(m) If the dealer shall either himself or by his servants or agents commit or suffer to be committed by any act which in the opinion of the Chief Senior Regional Manager of the Corporation of the time being at Patna whose decision shall be final, is prejudicial to the interest or good name of the Corporation or its products the Chief Senior Regional Manager shall not be bound to give reason for such decision."

3. On 26th May, 2008, a check was conducted at the outlet of the Respondent No.1 Company, where a sample of High Speed Diesel (HSD) failed the Marker Test, which indicated that the same had been contaminated. On the same day, the petitioner Corporation's authorized representative, SGS India Pvt. Ltd. submitted its report on the Marker Test indicating such contamination. Accordingly, in terms of the Marketing Disciplinary Guidelines, referred to hereinabove, on 27th May, 2008, sales and supplies of all the products from its outlet were suspended by the petitioner Corporation to the Respondent

No.1 because of the sample failure. According to the petitioner Corporation, on the very next day on 28th May, 2008, the Respondent No.1 was given notice that a Nozzle Test of HSD was to be conducted at the Barauni Terminal on 29th May, 2008. According to the petitioner Corporation, the Respondent No.1's representative refused to acknowledge the notice. However, the Area Sales Manager of the petitioner Corporation is alleged to have informed the Respondent No.1 telephonically of the Nozzle Test to be conducted on 29th May, 2008, at its Barauni Terminal. Despite having been given notice, no one appeared on behalf of the said respondent when the comparison test was conducted in Barauni and the same was held at the Barauni Terminal on 29th May, 2008, in the presence of the representative of SGS India Pvt. Ltd. (the agent of the petitioner), the Manager, Barauni Terminal, Transporter's representative and the petitioner's Area Sales Manager. Further to the result of the test, the Respondent No.1 was served with a notice dated 14th July, 2008, asking it to show cause as to why its dealership should not be cancelled on account of the failed Marker Test. According to the petitioner Corporation, the reply sent by the Respondent No.1 on 21st July, 2008, was entirely vague. Immediately thereafter, the respondent No.1 filed a Writ Petition, being CWJC No.11172 of 2008, in the Patna High Court praying for issuance of appropriate writs to quash the entire proceedings arising out of the Marker Test. On 9th September, 2008, the petitioner Corporation, upon consideration of the reply sent by the Respondent No.1 to the Show Cause Notice, terminated the Dealership Agreement of the Respondent No.1 under Clause 58(1) thereof.

4. On 25th September, 2008, a counter affidavit was filed on behalf of the petitioner Corporation in the Writ Petition mentioning the refusal on the part of the Respondent No.1 to acknowledge the notice dated 28th May, 2008, informing it of the Nozzle Sample and T/T Retention Sample Test which was to be conducted at the Barauni Terminal on 29th May, 2008.

5. On 15th October, 2008, the learned Single Judge allowed the Respondent No.1's writ petition, upon holding, inter alia, that mere statement on affidavit that an unsuccessful attempt had been made to serve the Respondent No.1, was insufficient for taking such a drastic step such as termination of the Dealership Agreement. The learned Single Judge held that even if the Respondent No.1 had refused to acknowledge the letter, the same could have been sent to it by registered post and the testing could have been delayed, as there was no urgency involved, as, in any event, the pump of the Respondent No.1 had been sealed. Apart from the above, the learned Single Judge took note of the fact that as per the version of the Respondent No.1, no information had been given to it about the testing to be conducted at the Barauni Terminal on 29th May, 2008. What also weighed with the learned Single Judge was that on behalf of the Respondent No.1 it was asserted that the person who is supposed to have served the letter on the Respondent No.1, was not in Barauni on 29th May, 2008, when the same is supposed to have been refused by the representative of the Respondent No.1. The learned Single Judge was of the view that since the retesting had been done without proper notice to the Respondent No.1, as per the Marketing Discipline Guidelines, the same had caused severe prejudice to the Respondent No.1 and the order of termination of the Dealership Agreement dated 9th September, 2008, could not, therefore, be sustained.

6. Appearing for the petitioner Corporation, Mr. U.U. Lalit, learned Senior Advocate, submitted that the Nozzle Test had been conducted at site in the presence of the representative of the Respondent No.1 and also the transporter and samples had been drawn for testing at site and also for future testing, in the presence of the parties. Since the Respondent No.1 failed the Marker Test during the Nozzle Test, the samples taken earlier were sent to the Forensic Laboratory at Barauni for cross-checking. Mr. Lalit submitted that notice had been duly given to both the Respondent No.1 and the transporter, but that

while the representative of the transporter was present, the Respondent No.1 chose to be absent during the Marker Test in the laboratory. Mr. Lalit submitted that the Show Cause Notice issued to the Respondent No.1 on 14th July, 2008, categorically indicated that the representative of the Respondent No.1 had refused to acknowledge the receipt of the notice dated 28th May, 2008, and that the petitioner Corporation had no alternative but to proceed with the Marker Test at Barauni in the presence of the representative of the transporter. Mr. Lalit submitted that when the Respondent No.1 failed the Marker Test even in the laboratory, the petitioner Corporation had no option but to terminate the agreement with the Respondent No.1. Mr. Lalit also emphasized the fact that all the samples had been drawn/collected not by the employees of the petitioner Corporation themselves, but by its authorized agent, M/s SGS India Pvt. Ltd.

7. Mr. Lalit then contended that the proceedings before the High Court in its writ jurisdiction stood vitiated in view of Clause 68 of the Agreement between the petitioner Corporation and the Respondent No.1 which provided for arbitration in respect of disputes or difference of any nature whatsoever or relating to any right, liability, act or omission between any of the parties arising out of or in relation to the agreement and the same were to be referred to the sole arbitration of the Managing Director of the Corporation or of some officer of the Corporation who might be nominated by the Managing Director. Mr. Lalit submitted that without taking recourse to the arbitration clause, the Respondent No.1 was not entitled in law to move the writ Court against the order terminating its agreement with regard to operation of the retail outlet.

8. In support of his submissions, Mr. Lalit firstly referred to and relied upon the decision of this Court in *Indian Oil Corporation Ltd. vs. Amritsar Gas Service & Ors.* [(1991) 1 SCC 533], wherein an Award made under the Arbitration Act, 1940, was under challenge and it was held that even if the

clause providing for termination of the agreement for sale of LPG by Indian Oil Corporation was not available, the agreement was terminable by either party under Clause 8 and hence, the only relief which could be granted was award of compensation for loss of earning for the period of notice and not restoration of the distributorship.

9. Reference was also made to the decision of this Court in *Mrs. Sanjana M. Wig vs. Hindustan Petro Corporation Ltd.* [AIR 2005 SC 3454], in which this Court was dealing with the termination of a petrol pump dealership. In the said case, one of the objections taken to the writ petition was that the said jurisdiction had been wrongly invoked since an alternative remedy was available and questions relating to the termination gave rise to serious questions of fact arising out of the contract between the parties, which, ordinarily the writ Court would not be entitled to go into. The Supreme Court went on further to hold that in such circumstances the writ petition was not the proper remedy and the refusal of the High Court to entertain the writ petition on the ground of existence of an alternative remedy should not be interfered with. Several decisions on the same lines, including that of *Amritsar Gas Service's* case, were taken into consideration while arriving at the said decision on being fully conscious of the fact that only if a question of public law character was involved, could a writ petition be entertained in the existing circumstances.

10. Mr. Lalit, however, pointed out that a differing view had been taken by this Court in *State of Himachal Pradesh & Ors. vs. Gujarat Ambuja Cement Ltd. & Anr.* [(2005) 6 SCC 499] in which the question as to whether the High Court should interfere under Article 226 of the Constitution, when an alternative remedy was available, fell for consideration and it was held that the power relating to alternative remedy is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. It was also held that despite the existence of an alternative remedy it is

within the discretion of the High Court to grant relief under Article 226 of the Constitution, though, it should not interfere if an adequate efficacious alternative remedy was available. Mr. Lalit also pointed out that since the *Gujarat Ambuja Cement's* case was rendered by a three Judge Bench, in the case of *M/s. Ankur Filling Station vs. Hindustan Petroleum Corp. Ltd. & Anr.* being SLP(C)No.11193/2009, a Bench consisting of two Judges of this Court was of the opinion that the question regarding the jurisdiction of the High Court to entertain a writ petition in a similar situation and to direct restoration of supply by itself, may not be a ground to entertain a writ application, particularly when the remedy of the petition in such an event may also lie by filing a civil suit. Accordingly, while issuing notice on the basis of the earlier view taken by this Court, it was felt that the matter should be considered by a larger Bench. The Special Leave Petition was, therefore, directed to be placed before the Hon'ble the Chief Justice of India for appropriate orders. We are informed by Mr. Lalit that the same is still pending.

11. Mr. Lalit submitted that in view of the failure of the Respondent No.1 to avail of the alternative remedy available to it, the writ petition should have been dismissed at the initial stage.

12. Mr. Lalit's submissions were vehemently opposed by Mr. Ramesh P. Bhatt, learned Senior counsel, who pointed out that the entire procedure adopted by the petitioner had been vitiated on account of the fact that the notice dated 25th December, 2008, which was alleged to have been sent by the petitioner to the Respondent No.1 regarding the test conducted at the Barauni Terminal had not been served on the Respondent No.1 and it was, therefore, completely unaware of the fact that such a test was to be conducted. Mr. Bhatt also submitted that it was the stand of the Respondent No.1 that no Marker Test had, in fact, been held on 26th May, 2008, at the retail outlet itself. The learned counsel pointed out that by letter dated 30th

May, 2008, the Respondent No.1 informed the Senior Regional Manager of the petitioner that although the representative of S.G.S. India Pvt. Ltd. had come to the retail outlet on 26th May, 2008 in order to conduct a marker test of the nozzle sample of MS and HSD from the dispensing unit, such a test could not be conducted since the retail outlet was dry in respect of both MS and HSD, which made it impossible for samples to be drawn from the nozzles of the dispensing units of the said products. Similarly, the underground tanks were also dry and there was hardly any MS or HSD available in tank Nos.1 and 2 from which samples could be extracted through the nozzle. Mr. Bhatt also pointed out several other letters of protest written on behalf of the Respondent No.1 against the termination of supply of petroleum products to the said Respondent and requesting that the same may be restored immediately.

13. Mr. Bhatt then referred to the reply given on behalf of the Respondent No.1 on 25th June, 2008, to the show cause notice wherein again the above facts were reiterated and it was also asserted in no uncertain terms that the notice regarding the conducting of laboratory test at the Barauni Refinery of the petitioner had not been served upon the respondent. Referring in particular to the alleged notice dated 28th May, 2008, informing the Respondent No.1 that the Marker Test was to be held at the Barauni Terminal on 29th May, 2008, Mr. Bhatt pointed out that the alleged refusal to acknowledge receipt by an employee of the Respondent No.1 was dated 29th May, 2008 itself and it was highly doubtful as to whether such notice was at all meant to be served on the Respondent No.1 to enable its representative to be present at the Marker Test at Barauni on the same day. It was also pointed out that upon information which had been taken by the Respondent No.1, Mr. Dilip Kumar Dash, the Area Sales Manager of the petitioner Corporation, who was said to have tendered notice to the representative of the Respondent No.1, was not even present in Barauni on 29th May, 2008.

14. Mr. Bhatt submitted that in failing to serve notice on the Respondent No.1 regarding the conducting of the laboratory test at the Barauni Terminal, the entire process of decision making culminating in the termination of the petitioner's agreement, stood completely vitiated and the said decision had been correctly set aside by the learned Single Judge whose decision was not interfered with by the Division Bench in appeal.

15. Mr. Bhatt submitted that even if the case sought to be made out on behalf of the petitioner Corporation regarding refusal of acceptance of notice by the representative of the Respondent No.1 is accepted, the same could have been sent by registered post with acknowledgement due and the Marker Test could have been postponed for some time for the said purpose as there was no immediate threat to the T/T Samples or the samples at site becoming contaminated in any way. It was pointed out that even the ordinary norms relating to service of notice were not followed in the instant case and in that regard reference was made to a similar notice issued to another retail dealer, made Annexure A-4 to the additional affidavit on behalf of the Respondent No.1. It was pointed out that the said letter dated 23rd December, 2008, not only had a reference number, but was printed and sent to the dealer concerned, whereas in the instant case the notice alleged to have been given to the Respondent No.1 by Shri D.K. Dash was in hand written script. In addition, the same did not have any reference number and though dated 28th May, 2008, was alleged to have been tendered on 29th May, 2008, the very date on which the Marker Test was to be held in the Barauni Terminal at 3.00 p.m. Mr. Bhatt urged that the said notice was obviously manufactured for the purpose of termination of the dealership of the Respondent No.1.

16. Having carefully considered the submissions made on behalf of the respective parties and also having considered the various decisions referred to by learned counsel, we are of the

view that the case made out on behalf of the Respondent No.1 is more probable. Although, the transporter's representative was present at the terminal at the stipulated time on 29th May, 2008, that by itself cannot give rise to a presumption that service had been effected also on the Respondent No.1, in the absence of any proof in that regard. Except for the endorsement on the hand-written notice said to have been given by Mr. Dash, there is nothing else on record to even suggest that notice had been sent to the Respondent No.1 and that the same had been refused. It is also rather difficult to accept that in respect of a test to be conducted on 29th May, 2008, at 3.00 p.m., an attempt was made to serve the said notice on the representative of the Respondent No.1 on the date of the proposed test itself. Although, the notice is dated 28th May, 2008, the endorsement alleged to have been made by the representative of the Respondent No.1 is dated 29th May, 2008, and we would be justified in assuming that the Respondent No.1 could not have arranged for being represented at the laboratory in the Barauni Terminal of the petitioner Corporation on such short notice. Nothing has been shown by the petitioner to disprove the allegation made on behalf of the Respondent No.1 that the notice alleged to have been tendered to the representative of the Respondent No.1 was not in the manner and the form in which such notice is required to be given to a dealer. It is obvious that the same had been made out in haste to indicate that service had been attempted on the Respondent No.1.

17. The cancellation of dealership agreement of a party is a serious business and cannot be taken lightly. In order to justify the action taken to terminate such an agreement, the concerned authority has to act fairly and in complete adherence to the rules/guidelines framed for the said purpose. The non-service of notice to the aggrieved person before termination of his dealership agreement also offends the well-established principle that no person should be condemned unheard. It was the duty of the petitioner to ensure that the Respondent No.1

was given a hearing or at least serious attempts were made to serve him with notice of the proceedings before terminating his agreement.

18. In the instant case, we are inclined to agree with Mr. Bhatt's submissions that the High Court did not commit any error in allowing the writ petition filed by the Respondent No.1 herein, upon holding that notice of the Laboratory Test to be conducted at the Barauni Terminal had not been served upon the Respondent No.1, which has caused severe prejudice to the said respondent since its dealership agreement was terminated on the basis of the findings of such Test. Admittedly the dealership agreement was terminated on the ground that the product supplied by the petitioner corporation was contaminated by the respondent. Such contamination was sought to be proved by testing the T.T. retention sample in the laboratory at Barauni Terminal. The Guidelines being followed by the Corporation require that the dealer should be given prior notice regarding the test so that he or his representative also can be present when the test is conducted. The said requirement is in accordance with the principles of natural justice and the need for fairness in the matter of terminating the dealership agreement and it cannot be made an empty formality. Notice should be served on the dealer sufficiently early so as to give him adequate time and opportunity to arrange for his presence during the test and there should be admissible evidence for such service of notice on the dealer. Strict adherence to the above requirement is essential, in view of the possibility of manipulation in the conduct of the test, if it is conducted behind the back of the dealer. In the present case, there is no admissible evidence to prove service of notice on the respondent or refusal of notice by the respondent. Further, the notice dated 28.05.2008 which was allegedly refused by respondent, did not give him adequate time to arrange for the presence of himself or his representative during the test to be conducted at 3.00 PM on 29.05.2008. It is also to be noted that the endorsement regarding the alleged refusal is dated

29.05.2008 itself. Thus, the termination of the dealership agreement of the respondent was arbitrary, illegal and in violation of the principles of natural justice.

19. Although, Clause 68 of the Dealership Agreement refers to arbitration, it is unfortunate that the said question was not raised before the High Court. It is now too late in the day for the petitioner Corporation to contend that in view of Clause 68 of the Dealership Agreement, the Respondent No.1 was not entitled to seek its remedy before the writ Court. In any event, by filing appeal against the order of the learned Single Judge, the Petitioner herein also submitted to the jurisdiction of the writ Court, without objecting to the same.

20. In the aforesaid circumstances, we are not inclined to admit the Special Leave Petition, which is, accordingly, dismissed, without, however, any order as to costs.

B.B.B. Special Leave Petition dismissed.

SADASHIV SHYAM SAWANT (D) THROUGH LRS. AND ORS.

v.

ANITA ANANT SAWANT

(Civil Appeal No. 1930 of 2010)

FEBRUARY 22, 2010

[P. SATHASIVAM AND R.M. LODHA, JJ.]

Specific Relief Act, 1963: s.6 – Suit filed by landlord under s.6 against trespasser when tenant in exclusive possession of suit property is dispossessed forcibly by a trespasser/third party – Maintainability of – Held: Maintainable – Non-impleadment of tenant is not fatal to the maintainability of such suit as tenant is not necessary party in such suit.

Words and phrases: Word 'dispossessed' – Meaning of – In the context of s.6(1) of Specific Relief Act, 1963.

The questions which arose for consideration in the present appeal were whether landlord can maintain suit under Section 6 of Specific Relief Act, 1963 against a trespasser for immediate possession where a tenant in exclusive possession was dispossessed forcibly by the trespasser and whether tenant is a necessary party in such suit.

Dismissing the appeal, the Court

HELD: 1.1. The key words in Section 6(1) of Specific Relief Act, 1963 are "dispossessed" and "he or any person claiming through him". A person is said to have been dispossessed when he has been deprived of his possession; such deprivation may be of actual possession or legal possession. Possession in law follows right to possession. The right to possession, though distinct from possession, is treated as equivalent

to possession itself for certain purposes. A landlord by letting out the property to a tenant does not lose possession as he continues to retain the legal possession although actual possession, user and control of that property is with the tenant. By retaining legal possession or in any case constructive possession, the landlord also retains all his legal remedies. As a matter of law, the dispossession of tenant by a third party is dispossession of the landlord. The word "dispossessed" in Section 6(1) must be read in this context and not in light of the actual possession alone. If a tenant is thrown out forcibly from the tenanted premises by a trespasser, the landlord has implied right of entry in order to recover possession (for himself and his tenant). Similarly, the expression "any person claiming through him" would bring within its fold the landlord as he continues in legal possession over the tenanted property through his tenant. As a matter of fact, on plain reading of Section 6(1), it is clear that besides the person who has been dispossessed, any person claiming through him can also file a suit seeking recovery of possession. Obviously, a landlord who holds the possession through his tenant is competent to maintain suit under Section 6 and recover possession from a trespasser who has forcibly dispossessed his tenant. A landlord when he lets out his property to the tenant is not deprived of his possession in the property in law. What is altered is mode in which the landlord held his possession in the property inasmuch as the tenant comes into physical possession while the landlord retains possession through his tenant. [Paras 16 and 19] [1082-F-H; 1084-C-D]

Veeraswami Mudali v. P.R. Venkatachala Mudali and others **AIR 1926 Madras 18;** *Ramchandra v. Sambashiv* **AIR 1928 Nagpur 313;** *(Kanneganti) Ramamanemma v. (Kanneganti) Basavayya* **AIR 1934 Madras 558, overruled.**

Nobin Das v. Kailash Chandra Dey **(1910) Vol. VII Indian Cases 924;** *Ramanadhan Chetti v. Pulikutti Servai and Mohideen avuther v. Jayarama Aiyar* **(1898) 21 Madras 288;** *Sailesh Kumar and Anr. v. Rama Devi* **AIR (1952) Patna 339;** *Gobind Ram Jamna Dass v. Mst. Mewa w/o Parbhati* **AIR (1953) Pepsu 188, approved.**

Ramanadhan Chetti v. Pulikutti Servai **(1898) 21 Madras 288;** *Mohideen Ravuther v. Jayarama Aiyar* **(1921) 44 Madras 937, referred to.**

Halsbury's Laws of England **(Fourth Edition, page 617), referred to.**

1.2. Section 6 of the Act provides that suit to recover possession under the said provision could be filed by the person who is dispossessed or any person claiming through him. The tenant having lost the possession though without his consent to a third party, may not be interested in recovery of possession. He may not be available. He may not like to involve himself in litigation. In such circumstances, if a landlord brings the suit to recover possession against trespasser under Section 6, it cannot be laid down as an absolute proposition that tenant must necessarily be impleaded as party to such suit. It may be desirable that a landlord in a suit under Section 6 of the Act against a trespasser for immediate possession when, at the date of dispossession, the house was in occupation of a tenant, impleads the tenant, but his non-impleadment is not fatal to the maintainability of such suit. [Para 20] [1085-C-G]

Case Law Reference:

AIR 1926 Madras 18	**overruled**	**Para 7**
(1898) 21 Madrass 288	**referred to**	**Para 7**
(1921) 44 Madras 937	**referred to**	**Para 7**
AIR 1928 Nagpur 313	**overruled**	**Para 8**

AIR 1934 Madras 558	**overruled**	**Para 9**
(1910) Vol. VII Indian Cases 924	**approved**	**Para 11**
(1898) 21 Madras 288	**approved**	**Para 12**
AIR (1952) Patna 339	**approved**	**Para 13**
AIR (1953) Pepsu 188	**approved**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1930 of 2010.

From the Judgment & Order dated 28.3.2008 of the High Court of Judicature at Bombay in Civil Revision Application No. 1235 of 2001.

Amol Chitale, Abhijat P. Medh for the Appellants.

Sushil Karanjka, Vishal A. Patil, K.N. Rai for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. Leave granted.

2. The main question for consideration in this appeal by special leave is: where a tenant in exclusive possession is dispossessed forcibly by a person other than landlord, can landlord maintain suit under Section 6 of Specific Relief Act, 1963 against such person for immediate possession. The incidental question is, whether tenant is a necessary party in such suit.

3. Smt. Anita Anant Sawant – the sole respondent filed a suit for possession under Section 6 of the Specific Relief Act, 1963 (for short 'the Act') in respect of portion of property being Gram Panchayat House No. 97 situated on land bearing Gat No. 1, Hissa No. 61, Village Ambet, Taluka Mahasala, District Raigad, against the appellants and their predecessors-in-title

(hereinafter referred to as 'the contesting defendants') and one Smt. Nanibai Shankar Sawant, since deceased, (hereinafter referred to as 'defendant no. 4'). The plaintiff averred in the plaint that she purchased the entire house No. 97 from defendant no. 4 by registered sale deed on October 1, 1981. At the time of purchase, part of house No. 97 was in possession of Pandurang Vichare who vacated that portion and she came into possession of entire house. Later on, she let out southern side one room along with hall adjacent to Padavi and northern side room of hall (for short 'suit property') to one P.V. Warik. On October 1, 1988, the contesting defendants forcibly dispossessed the tenant – P.V. Warik, threw away his articles and took possession of the suit property. The plaintiff, thus, prayed for recovery of possession of the suit property of which her tenant was forcibly dispossessed. The contesting defendants filed written statement and traversed plaintiff's claim by stating that suit property was joint family property and defendant no. 4 had no authority to sell the said house to the plaintiff. The contesting defendants, thus, claimed that they were co-owners and in possession of the entire house No. 97. Defendant No. 4 set up the plea that no consideration was paid to her for the sale of house No. 97 and that sale deed was obtained by fraud. It transpires, on the basis of the pleadings of the parties, the trial court framed as many as six issues, including that of title to property although such issue was unnecessary. The trial court, after recording the evidence and hearing the parties, held that plaintiff was able to prove her dispossession on October 1, 1988 by the contesting defendants from the suit property and that she could maintain the suit under Section 6 of the Act against the contesting defendants as she was in possession through a tenant over the suit property. The trial court, accordingly, vide its judgment and decree dated July 31, 2001, directed the contesting defendants to handover the possession of the suit property to the plaintiff.

4. The contesting defendants challenged the judgment and decree of the trial court by filing revision application before the

High Court of Judicature at Bombay. It may be noticed here that defendant no. 4 had already died during the pendency of suit and her legal representatives were brought on record, but later on they were deleted from array of parties in the revision application. Inter alia, the contention raised before the High Court was that if the tenant of the plaintiff was forcibly dispossessed, the suit under Section 6 of the Act could be filed by the tenant and not by the landlady. The High Court did not accept the contention of the contesting defendants and held that in view of the language of Section 6 of the Act, either the tenant who was actually dispossessed or the plaintiff being landlady could file the suit. The High Court, thus, by its judgment dated March 28, 2008 dismissed the revision application. It is from this judgment that the present appeal by special leave arises.

5. Section 6 of the Act reads as under:-

"6.- *Suit by person dispossessed of immovable property.-* (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought –

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof."

6. Section 6 corresponds to Section 9 of the repealed Specific Relief Act, 1877 (for short, '1877 Act'). The question whether a landlord can sue a trespasser for immediate possession where his tenant has been dispossessed has come up for consideration before various High Courts with reference to Section 9 of the 1877 Act. Section 9 of the 1877 Act is in these terms:-

"9. If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Central Government or any State Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed. "

7. In *Veeraswami Mudali v. P.R. Venkatachala Mudali and others*[1], it was held by the Madras High Court that the trespasser could not interfere with landlord's right to receive rent and a decree to be put into possession of the rents, but so long as landlord did not himself possess the right to enjoy physical possession, he could not eject the trespasser under Section 9. While holding so, the Single Judge of Madras High Court relied upon previous decisions of that Court in *Ramanadhan Chetti v. Pulikutti Servai*[2] and *Mohideen Ravuther v. Jayarama Aiyar*[3].

1. Air 1926 Madras 18.
2. (1898) 21 Madras 288.
3. (1921) 44 Madras 937.

8. The Division Bench of *Additional Judicial Commissioners, Nagpur, in Ramchandra v. Sambashiv*[4], on a question referred to it under Section 113 of Code of Civil Procedure, held that a landlord cannot sue under Section 9 to recover possession of the land because he was not in possession of it and was not dispossessed of it.

9. In *(Kanneganti) Ramamanemma v. (Kanneganti) Basavayya*[5], a Single Judge of the Madras High Court held that a suit by landlord for possession under Section 9 in which the tenant in possession had not joined, is not maintainable.

10. Contrary to the aforesaid view of the Madras High Court and Nagpur Judicial Commissioner, the High Courts of Calcutta, Bombay, Patna, Pepsu and Rajasthan have taken the view that a landlord can maintain a suit under Section 9 of the 1877 Act to recover possession where his tenant in exclusive possession has been dispossessed forcibly by the act of a third party.

11. In *Nobin Das v. Kailash Chandra Dey*[6], the Division Bench of Calcutta High Court held:

> "….In the case before us, the plaintiff was originally in actual possession of the land. He was at that stage entitled to use the property in any way he chose. He settled the land with tenants. The result was, not that he was deprived of his possession, but that the mode in which he held possession of the property was altered. His tenants came into physical possession of the land and he held possession thereafter by receipt of rent from them. When, therefore, his tenants were forcibly ejected from the land by the defendants, it may reasonably be held that he also was dispossessed. The case before us is further strengthened by the additional fact that the tenants, after they had been evicted, relinquished the land in favour of the plaintiff so that the plaintiff thereafter became entitled to have physical possession of the land. Under these circumstances, we hold that the plaintiff was dispossessed within the meaning of section 9 of the Specific Relief Act when his tenants were evicted from the land by the defendant…..".

4. AIR 1928 Nagpur 313.

5. Air 1934 Madras 558.

6. (1910) Vol. VII Indian Cases 924.

12. The Division Bench of Bombay High Court in *Ratanlal Ghelabhai v. Amarsing Rupsing and others*[7] stated the legal position with reference to Section 9 of 1877 Act thus:

> "There is nothing in this section to show that possession is confined to actual physical possession. In the case of a landlord and tenant the landlord is in possession through his tenant and, as pointed out in *Nirjivandas Madhavdas v. Mahomed Ali Khan Ibrahim Khan* [1880] 5 Bom. 208], the proper remedy where exclusive occupation of immovable property is given to a tenant is for the tenant to file a suit for possession but the landlord, if he desires to sue immediately on the possessory right, can sue in the name of the tenant and further, for an injury to the reversion, the landlord can sue in his own name. The injury in the present instance consists in a denial of the plaintiff's title to the land for defendant 1 has taken possession of it claiming it to be his. I think, therefore, that there is an injury to the reversion in respect of which the plaintiff can sue in his own name….".

13. In *Sailesh Kumar and another v. Rama Devi*[8], the Division Bench of Patna High Court answered the question, whether a landlord can maintain a suit under Section 9 of the 1877 Act against trespasser for immediate possession when, at the date of dispossession, the house was in occupation of a tenant entitled to its exclusive use, in affirmative. The Division Bench considered the matter thus:-

7. AIR 1929 Bombay 467.

8. AIR 1952 Patna 339.

"(6). Mr. P.B. Ganguly, appearing in support of this application, contended that the plaintiff's suit under S.9 of the Specific Relief Act was not maintainable, as she could not sue for possession, the actual possession having been with defendants 5 and 6 who were the tenants of the house. In support of his contention, he placed reliance on the cases of `*SITA RAM v. RAM LAL',* 18 All 440 and `*VEERASWAMI v. VENKATACHALA',* AIR 1926 Mad 18. It is sufficient to state that the Allahabad case was not one under Section 9 of the Specific Relief Act, and it is beside the point in issue before us. The Madras case, however, supports the contention. That case is a single Judge case, and it appears that in the Madras High Court there are conflicting decisions on the point.

(7). Section 9 of the Specific Relief Act is as follows:-

> "If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit"

(8). The contrary view was taken in the cases of '*JADU NATH SINGH v. BISHUNATH SINGH',* 1950 All LJ 288 & 'RATANLAL GHELABHAI v. AMARSINGH RUPSANG', 53 Bom 773. I respectfully agree with the view expressed in these cases. I am of opinion that there is nothing to bar a landlord from suing a trespasser under S. 9, Specific Relief Act, for possession even when at the date of dispossession the property is in occupation of a tenant entitled to possession".

14. In the case of Gobind *Ram Jamna Dass v. Mst. Mewa w/o Parbhati*[9], the Division Bench of Pepsu High Court relied

9. AIR 1953 Pepsu 188.

upon the decision of Patna High Court in Sailesh Kumar[8] and did not follow decision of Madras High Court in Veeraswami Mudali[1]. The Division Bench of Pepsu High Court held that possession of the tenant can be considered to be the possession of the landlord for the purposes of Section 9. The Division Bench expressed its opinion in the following words:

> "….The word used in S. 9 is `dispossessed'. There is nothing in this section to show that the possession is confined only to actual physical possession. I am, therefore, of the opinion that a suit is competent by the landlord, even if he is not in actual physical possession of the land but in its possession through a tenant at the time of illegal dispossession. This conclusion is further strengthened by the words "he or any person claiming through him may, by suit, recover possession thereof" used in the section. The language of this section, therefore, clearly indicates that besides the person dispossessed, any person claiming through him can seek his remedy provided in this section for the recovery of possession. It necessarily follows that the person seeking relief under S. 9 need not himself be in actual physical possession of the property. A contrary view to this will defeat the aims and objects of this enactment. Supposing a landlord is incompetent to sue and his tenant who is dispossessed refuses to institute a suit under S. 9 of the Act, the landlord would be put in a very awkward situation and would be forced to file a regular suit. In such a case a wrong-doer will naturally be placed in an advantageous position. To accept this position it would be putting a premium on a wrong act of trespasser. This position, in my opinion, is not contemplated by the relevant legislation. On the other hand S.9 provides for a speedy and summary remedy to recover possession taken away by unlawful means. The object of the legislation, besides this, is to place the parties in their original position. Trespasser, if he so likes, can bring a regular suit to prove his title. A contrary construction, in my

opinion, would result in protracted litigation for persons ousted from lawful possession by unlawful means on the part of a trespasser".

15. The Single Judge of Rajasthan High Court in *Raghuvar Dayal v. Hargovind and another*[10] was concerned with the question, whether suit for possession under Section 9 of the 1877 Act can be brought by a landlord even when the property is in possession of the tenant. The Single Judge followed the afore-referred decisions of Bombay, Pepsu and Patna High Courts and reiterated the legal position as follows:-

"(18). On a careful consideration of the wordings of S. 9 of the Act, I am of opinion that the ruling in which it has been held that the suit for possession u/s 9 of the Act can be brought by a landlord also even when the property is in possession of the tenant have taken a correct view of the provisions of S. 9. The words used are "dispossessed" and "recover possession thereof". Section 9 is not confined only to those cases where the plaintiff is in actual possession of the property in suit. Whatever possession the plaintiff has at the date of dispossession, he is entitled to claim in case of dispossession. If a tenant is in possession of the property and being dispossessed therefrom does not care to bring a suit for possession of the property, the landlord cannot be shut off from bringing a suit against the trespasser.

If the tenant has a mind to remain in possession of the property on behalf of the landlord, the landlord will put him in actual possession of the property. If, however, the tenant has no mind to stick to the land, the landlord is entitled to get actual possession of the property from the trespasser. Of course it would be proper to make the tenant also a party to the suit. He may either join as a co-plaintiff or in case he refuses to join as a co-plaintiff he may be made a defendant so that he might have his say in the

10. AIR 1958 Rajasthan 287.

matter. In this case the tenant has also been made a defendant.

I may say here that in this particular case according to the finding of the learned Civil Judge with which I have no reason to disagree, the tenant had put Raghuvar Dayal defendant in possession of the property in collusion with him. This Reghuvardayal filed a suit for ejectment and the tenant entered into a compromise and suffered a compromise decree for ejectment being passed against him. In execution of that decree Shivchand tenant was dispossessed. Under these circumstances to my mind the plaintiff was entitled to actual possession of the property in dispute and the defendant Reghuvardayal who came into possession of that property certainly interfered with the possession of the plaintiff.

Shivchand tenant had no interest in the possession of the property in dispute under the circumstances of the case and the only persons interested in possession thereof was the plaintiff. I cannot therefore find any fault with the decree of the lower Court awarding possession to the plaintiff".

16. As noticed above, the views of the High Courts differ about maintainability of suit for possession by the landlord under Section 9 of 1877 Act in respect of property let out to the tenant who has been dispossessed forcibly by a third party. That language of Section 6(1) of the Act and first paragraph of Section 9 of 1877 Act is exactly identical admits of no doubt. The key words in Section 6(1) are "dispossessed" and "he or any person claiming through him". A person is said to have been dispossessed when he has been deprived of his possession; such deprivation may be of actual possession or legal possession. Possession in law follows right to possession. The right to possession, though distinct from possession, is treated as equivalent to possession itself for certain purposes.

17. In Halsbury's Laws of England (Fourth Edition, page 617 - para 1111), 'physical and legal possession' is distinguished as under:

> " `Possession' is a word of ambiguous meaning, and its legal senses do not coincide with the popular sense. In English law it may be treated not merely as a physical condition protected by ownership, but as a right in itself. The word "possession" may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called de facto possession or detention as distinct from a legal right to possession……
>
> 'Possession' may mean legal possession: that possession which is recognized and protected as such by law. The elements normally characteristic of legal possession are an intention of possessing together with that amount of occupation or control of the entire subject matter of which it is practically capable and which is sufficient for practical purposes to exclude strangers from interfering. Thus, legal possession is ordinarily associated with de facto possession; but legal possession may exist without de facto possession, and de facto possession is not always regarded as possession in law. A person who, although having no de facto possession, is deemed to have possession in law is sometimes said to have constructive possession."

18. Pollock and Wright in their classic work, 'An Essay on Possession in the Common Law' (1888 Edition, page 27) explained the nature of possession, inter alia, as follows:

> "Right to possess or to have legal possession. This includes the right to physical possession. It can exist apart from both physical and legal possession; it is, for example, that which remains to a rightful possessor immediately after he has been wrongfully dispossessed. It is a normal incident of ownership or property, and the name of

> `property' is often given to it….
>
> Right to possess, when separated from possession, is often called 'constructive possession.' The correct use of the term would seem to be coextensive with and limited to those cases where a person entitled to possess is (or was) allowed the same remedies as if he had really been in possession….".

19. A landlord by letting out the property to a tenant does not lose possession as he continues to retain the legal possession although actual possession, user and control of that property is with the tenant. By retaining legal possession or in any case constructive possession, the landlord also retains all his legal remedies. As a matter of law, the dispossession of tenant by a third party is dispossession of the landlord. The word "dispossessed" in Section 6(1) must be read in this context and not in light of the actual possession alone. If a tenant is thrown out forcibly from the tenanted premises by a trespasser, the landlord has implied right of entry in order to recover possession (for himself and his tenant). Similarly, the expression "any person claiming through him" would bring within its fold the landlord as he continues in legal possession over the tenanted property through his tenant. As a matter of fact, on plain reading of Section 6(1), it is clear that besides the person who has been dispossessed, any person claiming through him can also file a suit seeking recovery of possession. Obviously, a landlord who holds the possession through his tenant is competent to maintain suit under Section 6 and recover possession from a trespasser who has forcibly dispossessed his tenant. A landlord when he lets out his property to the tenant is not deprived of his possession in the property in law. What is altered is mode in which the landlord held his possession in the property inasmuch as the tenant comes into physical possession while the landlord retains possession through his tenant. The view of Calcutta High Court that where the tenant was forcibly ejected from the land by the third party, it may reasonably be held that landlord has also

been dispossessed is the correct view. We find ourselves in agreement with the view of Bombay, Patna, Pepsu and Rajasthan High Courts and hold, as it must be, that there is nothing in Section 6 of the Act to bar a landlord from suing a trespasser in possession even when, at the date of dispossession, the property is in actual occupation of a tenant entitled to possession. The views expressed by Madras High Court in Veeraswami Mudali[1] and (Kanneganti) Ramamanemma[5] and by Nagpur Judicial Commissioner in the case of Ramchandra[4] do not lay down the correct law.

20. Now we advert to the incidental question whether in such a suit, tenant is a necessary party. Section 6 of the Act provides that suit to recover possession under the said provision could be filed by the person who is dispossessed or any person claiming through him. The tenant having lost the possession though without his consent to a third party, may not be interested in recovery of possession. He may not be available. He may not like to involve himself in litigation. In such circumstances, if a landlord brings the suit to recover possession against trespasser under Section 6, it cannot be laid down as an absolute proposition that tenant must necessarily be impleaded as party to such suit. The view of Bombay High Court in Ratanlal Ghelabhai[7] that landlord can sue in his own name where there is an injury to the reversion exposits the correct position of law. It may be desirable that a landlord in a suit under Section 6 of the Act against a trespasser for immediate possession when, at the date of dispossession, the house was in occupation of a tenant, impleads the tenant, but his non-impleadment is not fatal to the maintainability of such suit. The view of Madras High Court in (Kanneganti) Ramamanemma5 and of other High Courts following that view do not appear to us as laying down correct law.

21. In the result, appeal fails and is dismissed with no order as to costs.

D.G. Appeal dismissed.

SAHDEO @ SAHDEO SINGH
v.
STATE OF U.P. AND ORS.
(Criminal Appeal No. 527 of 2002)

FEBRUARY 23, 2010

[J.M. PANCHAL AND DR. B.S. CHAUHAN, JJ.]

Contempt of Court:

Alleged illegal abduction and detention by police personnel – Suo motu contempt proceedings initiated by Division Bench of Allahabad High Court – Conviction of appellants – Justification of – Held: On facts, not justified – Contempt proceedings were concluded without ensuring compliance of the mandatory provisions of the statutory Rules framed for the purpose (i.e. the 1952 Rules) – The appellants were never informed as what were the charges against them – Relevant documents on the basis of which the High Court had taken a prima facie view while initiating suo motu contempt proceedings, were not made available to them – Notice itself was not only defective, but inaccurate and totally mis-leading – Principles of natural justice were not observed – Contempt of Courts Act, 1971 – s.23 – Allahabad High Court Rules, 1952 – rr. 5 and 6 of Chapter XXXV-E – Natural justice.

Contempt proceedings – Nature of – Safeguards provided to alleged contemnor – Held: Contempt proceedings are quasi-criminal in nature – The alleged contemnor is entitled to protection of all safeguards/rights provided in criminal jurisprudence, including the benefit of doubt – Court not to punish an alleged contemnor merely on conjectures and surmises.

Contempt proceedings – Requirement of expeditious

conclusion – Inapplicability of CrPC and Evidence Act – Held: Inspite of the contempt proceedings being quasi-criminal in nature, provisions of CrPC and Evidence Act are not attracted thereto, since such proceedings have to be concluded expeditiously.

Evidence Act, 1872 – s.108 – Presumption under, of a person being dead – Held: On facts, such presumption was erroneously drawn by High Court since only 4½ years had elapsed since the first informant's son went missing.

FIR was lodged alleging illegal abduction and detention of the first informant's son by police personnel and thereafter *Habeas Corpus* petition was filed in the Allahabad High Court. The High Court directed the District Judge concerned to hold inquiry as regards the allegations made in the *Habeas Corpus* petition and, upon receipt of the report from the District Judge, *suo motu* initiated contempt proceedings against the alleged contemnors under the Contempt of Courts Act, 1971.

As the whereabouts of the first informant's son could not be traced, the High Court presumed that he had died and disposed of the *Habeas Corpus* petition by transferring the investigation to the CBI. In the contempt case, the High Court held that in taking the first informant' son into custody, the appellants did not comply with the directions issued by this Court to police authorities in *D.K. Basu's case,* and accordingly sentenced them to six months imprisonment and further directed the State Government to terminate the services of the appellants after holding disciplinary proceedings.

In appeals to this Court, it was contended on behalf of the appellants that the High Court committed an error in observing that the first informant's son had died and that therefore, no purpose would be served in continuing with the Habeas Corpus petition; that there was not even

***prima facie* evidence against the appellants in contempt proceedings; that the court did not adopt the fair procedure; that even charges had not been framed; that the enquiry conducted by the District Judge, at the most, could be treated to be a preliminary enquiry; that the High Court erred in placing reliance on a preliminary enquiry report and convicting the appellants without furnishing the copy thereof to them and also that contempt proceedings are quasi-criminal in nature and the Court while deciding the criminal case does not have competence to issue any direction affecting the civil rights of the parties.**

Allowing the appeals, the Court

HELD: 1. Section 108 of Indian Evidence Act, 1872 provides for presumption of a person being dead in case he has not been heard of for seven years. In the instant case, only a period of 4½ years had elapsed. Therefore, such a presumption could not have been drawn by the High Court. [Para 8] [1098-G-H; 1099-A]

2.1. The proceedings of contempt are quasi-criminal in nature. In a case where the order passed by the court is not complied with by mistake, inadvertence or by mis-understanding of the meaning and purport of the order, unless it is intentional, no charge of contempt can be brought home. There may possibly be a case where disobedience is accidental. If that is so, there would be no contempt. The Court should not punish an alleged contemnor without any foundation merely on conjectures and surmises in criminal contempt. [Paras 9 and 16] [1099-A; 1102-B]

2.2. The High Court has a power to initiate the contempt proceedings *suo motu* for ensuring the compliance of the orders passed by the Court. However,

contempt proceedings being quasi-criminal in nature, the same standard of proof is required in the same manner as in other criminal cases. The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the Criminal Jurisprudence, including the benefit of doubt. There must be a clear-cut case of obstruction of administration of justice by a party intentionally to bring the matter within the ambit of the said provision. The alleged contemnor is to be informed as what is the charge, he has to meet. Thus, specific charge has to be framed in precision. The alleged contemnor may ask the Court to permit him to cross-examine the witnesses i.e. deponents of affidavits, who have deposed against him. Inspite of the fact that contempt proceedings are quasi-criminal in nature, provisions of Code of Criminal Procedure, 1973 (CrPC) and Evidence Act are not attracted for the reason that proceedings have to be concluded expeditiously. Thus, the trial has to be concluded as early as possible. The case should not rest only on surmises and conjectures. There must be clear and reliable evidence to substantiate the allegations against the alleged contemnor. The proceedings must be concluded giving strict adherence to the statutory Rules framed for the purpose. [Para 20] [1103-F-H; 1104-A-C]

B.K. Kar v. Hon'ble the Chief Justice and his companion Justices of the Orissa High Court & Anr. **AIR 1961 SC 136;** *Debabrata Bandopadhyay & Ors. v. The State of West Bengal & Anr.* **AIR 1969 SC 189;** *Aligarh Municipal Board & Ors. v. Ekka Tonga Mazdoor Union & Ors.* **AIR 1970 SC 1767;** *Dushyant Somal (Capt.) v. Smt Sushma Somal & Ors.* **AIR 1981 SC 1026;** *M/s. Bharat Coking Coal Ltd. v. State of Bihar & Ors.* **AIR 1988 SC 127;** *Niaz Mohammed & Ors. v. State of Haryana & Ors.* **(1994) 6 SCC 332;** *Manish Gupta & Ors. v. Gurudas Roy* **(1995) 3 SCC 559;** *Sukhdev Singh v.*

Hon'ble C.J.S. Teja Singh & the Hon'ble Judges of the Pepsu High Court at Patiala **AIR 1954 SC 186;** *S.Abdul Karim v. M.K. Prakash & Ors.* **AIR 1976 SC 859;** *Chhotu Ram v. Urvashi Gulati & Anr.* **(2001) 7 SCC 530;** *Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors.* **AIR 2002 SC 1405;** *Daroga Singh & Ors. v. B.K. Pandey* **(2004) 5 SCC 26;** *All India Anna Dravida Munnetra Kazhagam v. L.K. Tripathi & Ors.* **AIR 2009 SC 1314;** *Mrityunjoy Das & Anr. v. Sayed Hasibur Rahaman & Ors.,* **AIR 2001 SC 1293;** *V.G. Nigam & Ors. v. Kedar Nath Gupta & Anr.* **AIR 1992 SC 215;** *Murray & Co. v. Ashok Kumar Newatia & Ors.* **AIR 2000 SC 833;** *Dr. L.P. Misra v. State of U.P.* **AIR 1998 SC 3337;** *Three Cheers Entertainment Pvt. Ltd. v. C.E.S.C. Ltd.* **AIR 2009 SC 735;** *T.R. Dhananjaya v. J. Vasudevan* **AIR 1996 SC 302;** *Afzal & Anr. v. State of Haryana & Ors,* **AIR 1996 SC 2326;** *Contemnor: In re, Arundhati Roy,* **AIR 2002 SC 1375;** *Prem Surana v. Additional Munsif & Judicial Magistrate,* **AIR 2002 SC 2956;** *Radha Mohan Lal v. Rajasthan High Court* **AIR 2003 SC 1467;** *S.R. Ramaraj v. Special Court, Bombay,* **AIR 2003 SC 3039;** *R.K. Anand v. Registrar, Delhi High Court* **(2009) 8 SCC 106;** *Re: Vinay Chandra Mishra (the alleged contemnor)* **(1995) 2 SCC 584, relied on.**

D.K. Basu v. State of West Bengal **AIR 1997 SC 610;** *The State of Bihar v. Rani Sonabati Kumari* **AIR 1961 SC 221 and** *Andre Paul Terence Ambard v. The Attorney-General of Trinidad and Tabago* **AIR 1936 PC 141, referred to.**

3.1. In the instant case, the contempt proceedings had been initiated under the Contempt of Courts Act, 1971. Section 23 of the 1971 Act enables the High Court to frame rules providing for a procedure in contempt cases. In view thereof, the Allahabad High Court framed the rules by adding chapter XXXV-E in the Allahabad High Court Rules, 1952. As per the said rules, a criminal contempt is to be dealt with by the Division Bench and a detailed procedure to file the application etc. has been

laid down therein. Once the Court is *prima facie* satisfied that there is a case to proceed with the contempt against a person concerned, the Division Bench in such case has to proceed giving strict adherence to the procedure prescribed under the 1952 Rules. Rule 5 of the Chapter XXXV-E provides for issuance of notice while Rule 6 provides mandatorily that the show cause notice issued under Rule 5 must be accompanied with material documents. Thus it is evident that while initiating contempt proceedings the Court has to frame the charge (s) and serve the same alongwith other relevant material upon the alleged contemnor. This is a mandatory requirement under the 1952 Rules. [Para 21] [1104-D-F; 1105-F]

3.2. The notices had been served upon the appellants and other alleged contemnor. There was no case filed by the State of U.P. before the High Court in respect of abduction of the informant's son nor any application for initiating contempt proceedings was ever filed by any person yet show cause notices for suo motu contempt had been issued in a case titled as *"State of U.P. vs. Ramesh Chandra & Ors.***" Admittedly, the proceedings were initiated by the High Court suo motu. The notice itself remains incomplete, inaccurate and mis-leading. The appellants ought to have been told clearly as for what offence they were being tried. The Registry of the High Court issued the "dotted lines notice" without any sense of responsibility. The notice did not mention as what was the allegation/ accusation against either of them. [Paras 22, 23] [1107-B-D; 1106-A-B]**

3.3. The notice did not make any reference to the judgment of this Court in *D.K. Basu***. Neither the report of the District Judge nor any evidence collected by him during that inquiry, nor any other document relevant to the case was annexed with the said notice. Rather, considering the reply of appellant no.1 and one other person, the impugned judgment and order has been passed. The aforesaid 1952 Rules provide for a specific procedure to hold the trial in contempt cases. The Rules mandatorily require the framing of charge(s) and furnishing the copy of the documents to the alleged contemnor on the basis of which, the charges have been framed. In the instant cases, there has been no compliance of these mandatory provisions contained in the Rules. In absence of the charge(s), a delinquent/ accused/alleged contemnor may not be able to furnish any defence as he is not aware as to what charge(s) he is required to meet. Every statutory provision requires strict adherence, for the reason that the Statute creates rights in favour of persons concerned. The impugned judgment suffered from non-observance of the principles of natural justice and not ensuring the compliance of Statutory Rules, 1952. Thus, the trial itself suffered from material procedural defect and stood vitiated. Also, it is apparent from the order sheets itself that the matter remained pending before the Court, so far as the contempt proceedings are concerned, for more than three years which itself is in contravention of the true spirit of the purpose of initiation of the contempt proceedings. [Paras 24, 26] [1107-G-H; 1108-A-C; 1109-B-C]**

3.4. The contempt proceedings herein had been concluded without ensuring the compliance of the mandatory provisions of the 1952 Rules. The appellants had never been informed as what were the charges against them. The relevant documents on the basis of which the High Court had taken a prima facie view while initiating the contempt proceedings suo motu, had not been made available to them. The notice itself was not only defective, but inaccurate and totally mis-leading. [Para 27] [1109-D-E]

Case Law Reference:

AIR 1997 SC 610	**referred to**	**Para 1**
AIR 1961 SC 136	**relied on**	**Para 9**
AIR 1969 SC 189	**relied on**	**Para 10**
AIR 1970 SC 1767	**relied on**	**Para 10**
AIR 1981 SC 1026	**relied on**	**Para 10**
AIR 1988 SC 127	**relied on**	**Para 10**
(1994) 6 SCC 332	**relied on**	**Para 10**
(1995) 3 SCC 559	**relied on**	**Para 10**
AIR 1961 SC 221	**referred to**	**Para 11**
AIR 1954 SC 186	**relied on**	**Para 12**
AIR 1936 PC 141	**referred to**	**Para 12**
AIR 1976 SC 859	**relied on**	**Para 13**
(2001) 7 SCC 530	**relied on**	**Para 13**
AIR 2002 SC 1405	**relied on**	**Para 13**
(2004) 5 SCC 26	**relied on**	**Para 13**
AIR 2009 SC 1314	**relied on**	**Para 13**
AIR 2001 SC 1293	**relied on**	**Para 13**
AIR 1992 SC 215	**relied on**	**Para 13**
AIR 2000 SC 833	**relied on**	**Para 13**
AIR 1998 SC 3337	**relied on**	**Para 14**
AIR 2009 SC 735	**relied on**	**Para 15**
AIR 1996 SC 302	**relied on**	**Para 16**
AIR 1996 SC 2326	**relied on**	**Para 16**
AIR 2002 SC 1375	**relied on**	**Para 16**
AIR 2002 SC 2956	**relied on**	**Para 16**
AIR 2003 SC 1467	**relied on**	**Para 16**
AIR 2003 SC 3039	**relied on**	**Para 16**
(2009) 8 SCC 106	**relied on**	**Para 17**
(1995) 2 SCC 584	**relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 527 of 2002.

From the Judgment & Order dated 20.12.2001 of the High Court of Judicature at Allahabad in Criminal Contempt No. 69 of 1997.

WITH

Crl. A. No. 531 of 2002.

Jitendra Mohan Sharma, Sandeep Singh, Sanpreet Singh, Seema Singh for the Appellant.

R.K. Gupta, S.K. Dwivedi, Rajeev K. Dubey, Vandana Mishra, Kamlendra Mishra, K.C. Lamba, M.P. Shorawala, Praveen Swarup for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. The present appeals have been filed against the judgment and order of the Allahabad High Court dated 20.12.2001 passed in Criminal Contempt No. 69 of 1997, convicting the appellants for not complying with the directions issued by this Court in *D.K. Basu vs. State of West Bengal* AIR 1997 SC 610, and sentencing them for six months' imprisonment and also imposing a fine to the tune of Rs.2000/

- each. Further, direction has been issued to the State Government to terminate the services of the appellants after holding disciplinary proceedings.

2. The facts and circumstances giving rise to the present appeals are that one Ramwati lodged an FIR dated 01.06.1997 in the Police Station Kotwali Ghaziabad with an allegation that her son Tej Veer Singh @ Pappu, a man of absolutely clear antecedents, never involved in any criminal case, who was running a sweet mart shop, was going to Allahabad by Prayagraj Express on 29.05.1997. He was apprehended by Deep Chand, Sub-Inspector of Police, posted at Police Station, Sector 24, Noida and Constable Ramesh Chandra, posted in the office of Superintendent of Police (R.A.) Ghaziabad along with some other policemen, from Shyamal Chauk, Sibbanpura, Ghaziabad. Tej Veer Singh was carrying a briefcase containing clothes and Rs. 40000/- in cash apart from the ticket. At the time of apprehending, neither the reason for his arrest nor the destination, where he was being taken to, was disclosed to him. His family members ran from pillar to post to know his whereabouts but in vain. On 30.05.1997, telegraphic information regarding abduction of Tej Veer Singh @ Pappu by police was sent to the Senior Superintendent of Police, Ghaziabad and Inspector General of Police, Meerut Zone.

3. No action was taken on the aforesaid FIR, thus Smt. Ramwati, mother of Tej Veer Singh made complaint to the Senior Suptd. of Police, Ghaziabad, Hon'ble the Chief Justice of India and the Chairman, National Human Rights Commission, New Delhi. The case was registered only on 04.06.1997 under Section 364 of Indian Penal Code, 1860 (hereinafter called IPC). However, no progress was made in the investigation. Being aggrieved, a Habeas Corpus petition, being numbered as Crl. Misc. (Habeas Corpus) Writ Petition No. 20040 of 1997, was filed in June, 1997 by one M. C. Verma, being next friend of the detenu Tej Veer Singh before

the Allahabad High Court. In the said petition, allegations had been made that the respondent therein, Deep Chand, Sub-Inspector of Police and Constable Ramesh Chandra had detained Tej Veer Singh illegally since 29.5.1997 and his whereabouts were not known.

4. As the High Court could not get any information from the State regarding the whereabouts of Tej Veer Singh, the Court, vide order dated 30.07.1997, directed the District Judge, Ghaziabad to hold an inquiry regarding the allegations made in the Habeas Corpus petition. The purpose of holding an inquiry was to find out as to whether the police was responsible for his arrest and thereafter, his disappearance.

5. The District Judge submitted his report dated 03.12.1997 wherein it was mentioned that Yashpal, the elder brother of Tej Veer Singh, was a hardened criminal, and was wanted in large number of criminal cases. The police had taken away Tej Veer Singh alongwith one Jagdish Kumar to know the whereabouts of Yashpal to Murad Nagar Police Station, where they were beaten up. However, no information could be gathered from either of them about Yashpal. It was found that Jagdish Kumar was released by the police from its custody at 4.00 AM on 30.05.1997 but Tej Veer Singh remained under detention and still remained untraceable. Sub-Inspector Deep Chand was the mastermind in abducting Tej Veer Singh and Constable Ramesh Chandra had participated in illegal detention. Sub-Inspectors R. P. Singh and Satya Veer Singh, who were allegedly participated in abduction, were exonerated. However, Sahdeo Singh, Lila Dhar (appellants) and one Sujan Singh, Constable, were found to have participated in abduction. Sub-Inspector Deep Chand, had died in a car accident on 20.08.1997. After receiving the report from the District Judge, the High Court on 4.12.1997 issued notices to the four indicted persons initiating proceedings for criminal contempt suo motu. Sujan Singh submitted an application before the High Court that during the inquiry by the District Judge, no notice/opportunity

of hearing was given to him. The High Court asked the District Judge, Ghaziabad to provide an opportunity of hearing to the said applicant-Sujan Singh and submit a supplementary report. The said report was submitted on 10.07.1998 exonerating Sujan Singh from any criminal liability. Sahdeo Singh and Ramesh Chandra submitted their replies to the said Show Cause Notices dated 4.12.1997. Lila Dhar did not submit any reply.

As the whereabouts of Tej Veer Singh could not be known, the High Court disposed of the Habeas Corpus petition vide judgment and order dated 20.12.2001 transferring the investigation to the Central Bureau of Investigation (hereinafter called, "CBI"). In contempt case, the Court came to the conclusion that taking the said Tej Veer Singh into custody, was in violation of the directions issued by this Court in *D. K. Basu* (supra) and held all the three alleged contemnors guilty. Constable Ramesh Chandra was sentenced for six months' imprisonment and a fine of rupees one lakh was imposed. In addition, Rs. 5000/- was imposed as costs. The appellants were imposed the punishment of six months' imprisonment and a fine of Rs. 2000/- each. Further direction was issued to the State to terminate their services after holding disciplinary proceedings. Hence, these appeals.

6. Sh. Jitendra Mohan Sharma and Sh. P.K. Jain, learned counsel appearing for the appellants, have submitted that the High Court had committed an error as while disposing of the Habeas Corpus petition it observed that Tej Veer Singh had died and, therefore, no purpose would be served in continuing with the Habeas Corpus petition. There was not even prima facie evidence against the appellants in contempt proceedings. The court did not adopt the fair procedure. Even charges had not been framed. The enquiry conducted by the District Judge, at the most, could be treated to be a preliminary enquiry. The High Court erred in placing reliance on a preliminary enquiry report and convicting the appellants without furnishing the copy

thereof to them. More so, the contempt proceedings are quasi-criminal in nature. The Court while deciding the criminal case does not have competence to issue any direction affecting the civil rights of the parties. Therefore, the judgment and order impugned is liable to be set aside.

On the contrary, Sh. R.K. Gupta, learned counsel appearing for the State of U.P. and Sh. K.C. Lamba, learned counsel appearing for Smt. Ramwati, the mother of Tej Veer Singh, defended the impugned judgment and order contending that a fair trial had been conducted. The appellant Lila Dhar did not even submit the reply to the Show Cause Notice issued by the High Court. Therefore, no fault could be found with the impugned judgment and order. The appeals are liable to be dismissed.

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

7. The impugned judgment and the record of the case reveal that as no progress was likely to be made in the Habeas Corpus petition, the District Judge, Ghaziabad, was directed to conduct an inquiry in the allegations made in the petition and also taking note of the contents of the FIR dated 4.6.1997 lodged by Smt. Ramwati, the mother of Tej Veer Singh. The District Judge submitted his report after recording evidence of the witnesses, particularly, the family members and friends of Tej Veer Singh, and also hearing the appellants and other police officials. On the basis of the report submitted by the District Judge, the Habeas Corpus petition was disposed of vide Order dated 20.12.2001 presuming that Tej Veer Singh was dead.

8. Section 108 of Indian Evidence Act, 1872 (hereinafter called 'Evidence Act') provides for presumption of a person being dead in case he has not been heard of for seven years. In the instant case, only a period of 4½ years had elapsed. Therefore, we are not able to understand as under what

circumstances, such a presumption could be drawn by the High Court.

9. The proceedings of contempt are quasi-criminal in nature. In a case where the order passed by the court is not complied with by mistake, inadvertence or by mis-understanding of the meaning and purport of the order, unless it is intentional, no charge of contempt can be brought home. There may possibly be a case where *disobedience is accidental*. If that is so, there would be no contempt. (Vide *B.K. Kar vs. Hon'ble the Chief Justice and his companion Justices of the Orissa High Court & Anr.,* AIR 1961 SC 1367).

10. Similarly, in *Debabrata Bandopadhyay & Ors. vs. The State of West Bengal & Anr.,* AIR 1969 SC 189, this Court has observed as under:-

> "A question whether there is contempt of court or not is a *serious one.* The court is both the accuser as well as the judge of the accusation. It behoves *the court to act with as great circumspection* as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished……. Punishment under the law of Contempt is called for *when the lapse is deliberate* and in disregard of one's duty and in defiance of authority. *To take action in an unclear case is to make* the law of contempt do duty for other measures and is not to be encouraged."

The same view has been re-iterated by this Court in *Aligarh Municipal Board & Ors. vs. Ekka Tonga Mazdoor Union & Ors.,* AIR 1970 SC 1767; *Dushyant Somal (Capt.) vs. Smt Sushma Somal & Ors.,* AIR 1981 SC 1026; *M/s. Bharat Coking Coal Ltd. vs. State of Bihar & Ors.,* AIR 1988 SC 127; *Niaz Mohammed & Ors. vs. State of Haryana & Ors,* (1994) 6 SCC 332; and *Manish Gupta & Ors. vs. Gurudas Roy,* (1995) 3 SCC 559.

11. The Constitution Bench of this Court, in *The State of Bihar vs. Rani Sonabati Kumari,* AIR 1961 SC 221, held that the provisions of Contempt of Courts Act, 1971 (for short 'the Act, 1971') deal with the wilful defiance of the order passed by the Court. Order of punishment be not passed if the Court is satisfied that the party was, in fact, under a misapprehension as to the scope of the order or there was an unintentional wrong for the reason that the order was ambiguous and reasonably capable of more than one interpretation or the party never intended to disobey the order but conducted himself in accordance with the interpretation of the order.

12. In *Sukhdev Singh vs. Hon'ble C.J.S. Teja Singh & the Hon'ble Judges of the Pepsu High Court at Patiala,* AIR 1954 SC 186, this Court placing reliance upon the judgment of the Privy Council in *Andre Paul Terence Ambard vs. The Attorney - General of Trinidad and Tabago,* AIR 1936 PC 141, held that the proceedings under the Contempt of Courts Act are quasi-criminal in nature and orders passed in those proceedings are to be treated as orders passed in criminal cases.

13. In *S. Abdul Karim vs. M.K. Prakash & Ors.,* AIR 1976 SC 859, *Chhotu Ram vs. Urvashi Gulati & Anr.,* (2001) 7 SCC 530; *Anil Ratan Sarkar & Ors. vs. Hirak Ghosh & Ors.* AIR 2002 SC 1405; *Daroga Singh & Ors. vs. B.K. Pandey,* (2004) 5 SCC 26; and *All India Anna Dravida Munnetra Kazhagam vs. L.K. Tripathi & Ors.* AIR 2009 SC 1314, this Court held that burden and standard of proof in contempt proceedings, being quasi-criminal in nature, is the standard of proof required in criminal proceedings, for the reason that contempt proceedings are quasi-criminal in nature.

Similarly, in *Mrityunjoy Das & Anr. vs. Sayed Hasibur Rahaman & Ors.,* AIR 2001 SC 1293, this Court placing reliance upon a large number of its earlier judgments, including, *V.G. Nigam & Ors. vs. Kedar Nath Gupta & Anr.,* AIR 1992

SC 215; and *Murray & Co. vs. Ashok Kumar Newatia & Ors.,* AIR 2000 SC 833, held that jurisdiction of the contempt has been conferred on the Court to punish an offender for his contemptuous conduct or obstruction to the majesty of law, but in the case of quasi-criminal in nature, charges have to be proved beyond reasonable doubt and alleged contemnor becomes entitled to the benefit of doubt. It would be very hazardous to impose sentence in contempt proceedings on some probabilities.

14. In *Dr. L.P. Misra vs. State of U.P.* AIR 1998 SC 3337, this Court dealt with an untoward incident i.e. ex-facie contempt in Allahabad High Court wherein, the High Court passed certain orders without following the procedure prescribed in the Rules applicable in such proceedings. This Court held that power of the High Court even under Article 215 of the Constitution has to be exercised in accordance with the procedure prescribed by law. The Court observed as under :

> "12. ……. we are of the opinion that the Court while passing the impugned order *had not followed the procedure prescribed by law.* It is true that the High Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India *but such a jurisdiction has to be exercised in accordance with the procedure prescribed by law.* It is in these circumstances the impugned order cannot be sustained." (Emphasis supplied)

15. In *Three Cheers Entertainment Pvt. Ltd. vs. C.E.S.C. Ltd.* AIR 2009 SC 735, this Court held that in contempt proceedings the court must conclude the trial and complete the proceedings "in accordance with the procedure prescribed by law". However, for enforcing the order passed by the Court "a roving enquiry is not permissible". The proceedings had to be completed most expeditiously and the court has to permit the parties to cross-examine the witnesses to enable the court to

reach a particular finding.

16. The Court should not punish an alleged contemnor without any foundation merely on conjectures and surmises in criminal contempt. (Vide *T.R. Dhananjaya vs. J. Vasudevan,* AIR 1996 SC 302; *Afzal & Anr. vs. State of Haryana & Ors,* AIR 1996 SC 2326; *Contemnor: In re, Arundhati Roy,* AIR 2002 SC 1375; *Prem Surana vs. Additional Munsif & Judicial Magistrate,* AIR 2002 SC 2956; *Radha Mohan Lal vs. Rajasthan High Court* AIR 2003 SC 1467; and *S.R. Ramaraj vs. Special Court, Bombay,* AIR 2003 SC 3039).

17. In *R.K. Anand vs. Registrar, Delhi High Court* (2009) 8 SCC 106, this Court while dealing with the same issue held as under:

> "140. …….Now, it is one thing to say that the standard of proof in a contempt proceeding is *no less rigorous than a criminal trial but it is something entirely different to insist that the manner of proof for the two proceedings must also be the same.*
>
> *141. It is now well settled and so also the High Court has held that the proceeding of contempt of court is sui generis. In other words, it is not strictly controlled by the provisions of CrPC and the Evidence Act. What, however, applies to a proceeding of contempt of court are the principles of natural justice and those principles apply to the contempt proceeding with greater rigour than any other proceeding. This means that the court must follow a procedure that is fair and objective; that should cause no prejudice to the person facing the charge of contempt of court and that should allow him/her the fullest opportunity to defend himself/herself." (Emphasis added)*

18. This Court In *Re: Vinay Chandra Mishra (the alleged contemnor)* (1995) 2 SCC 584, has observed that a contempt amounts to an offence but it is an offence sui generis and hence

for such an offence, the procedure adopted both under the common law and the statute law has always been summary. The Court held that in spite of the fact that it is a summary procedure, there must be an opportunity to the alleged contemnor of meeting the charge. The degree of precision with which the charge may be stated depends upon the circumstances. So long as the gist of the specific allegation is made clear or otherwise the contemnor is aware of the specific allegation, it is not always necessary to formulate the charge. So long as the contemnor's interest is adequately safeguarded by giving him an opportunity of being heard in his defence, even summary procedure in the case of contempt cannot be found fault with.

19. In *Daroga Singh* (supra), this Court observed that in case, the alleged contemnor feels that there is a necessity to cross-examine the witnesses i.e. deponents of affidavits filed against him, the alleged contemnor must be given an opportunity to cross-examine the said witnesses provided it is so asked by him. This Court observed that in Contempt proceedings, a summary procedure is to be adopted for the reason that matter is to be disposed of most expeditiously and it is for this reason that in spite of the fact that proceedings are quasi-criminal in nature, the procedure under Cr.P.C. or Evidence Act is not made applicable.

20. In view of the above, the law can be summarised that the High Court has a power to initiate the contempt proceedings suo motu for ensuring the compliance of the orders passed by the Court. However, contempt proceedings being quasi-criminal in nature, the same standard of proof is required in the same manner as in other criminal cases. The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the Criminal Jurisprudence, including the benefit of doubt. There must be a clear-cut case of obstruction of administration of justice by a party intentionally to bring the matter within the ambit of the said provision. The alleged

contemnor is to be informed as what is the charge, he has to meet. Thus, specific charge has to be framed in precision. The alleged contemnor may ask the Court to permit him to cross-examine the witnesses i.e. deponents of affidavits, who have deposed against him. In spite of the fact that contempt proceedings are quasi-criminal in nature, provisions of Code of Criminal Procedure, 1973 (hereinafter called, "Cr.P.C.") and Evidence Act are not attracted for the reason that proceedings have to be concluded expeditiously. Thus, the trial has to be concluded as early as possible. The case should not rest only on surmises and conjectures. There must be clear and reliable evidence to substantiate the allegations against the alleged contemnor. The proceedings must be concluded giving strict adherence to the statutory Rules framed for the purpose.

21. The instant cases are required to be examined in view of the aforesaid settled legal proposition. The contempt proceedings had been initiated under the Act, 1971. Section 23 of the Act 1971 enables the High Court to frame rules providing for a procedure in contempt cases. In view thereof, the Allahabad High Court framed the rules by adding chapter XXXV-E in the Allahabad High Court Rules, 1952 (hereinafter called the 'Rules 1952') vide amendment published in Uttar Pradesh Gazette, Part II dated 12.2.1977. As per the said rules, a criminal contempt is to be dealt with by the Division Bench and a detailed procedure to file the application etc. has been laid down therein. Once the Court is prima facie satisfied that there is a case to proceed with the contempt against a person concerned, the Division Bench in such case has to proceed giving strict adherence to the procedure prescribed under the Rules 1952. Rule 5 of the Chapter XXXV-E reads as under:-

> *"5. Issuance of notice.* – Such allegations contained in the petition as appears to the Court to make out a prima facie case of contempt of Court against the person concerned, *shall be reduced into charge or charges by the Court against such person, and notice shall be issued only with*

respect to those charges. (Emphasis added).

Rule 6 thereof provides mandatorily that the show cause notice issued under Rule 5 must be accompanied with material documents. The Rule reads as under:-

"6. Documents accompanied notice. – Where an order has been made directing that notice be issued to any person to show cause why he should not be punished for contempt of Court, a date shall be fixed for the hearing and a notice thereof in the prescribed form given to the person concerned. The notice of a criminal contempt shall also be served on the Government Advocate. *The notice shall be accompanied by copies of the application,* motion and the affidavit or a copy of the reference by a subordinate court as the case may be, and a copy of the *charge or charges as framed by the Court,* and shall require the person concerned to appear, unless otherwise ordered, in person before the Court at the time and on the date specified therein to show cause why he should not be punished for Contempt of Court. Notice of every proceeding under Section 15 of the Act shall be served personally on the person charged, unless the Court for reasons to be recorded directs otherwise." (Emphasis added)

Thus, it is evident that while initiating contempt proceedings the Court has to frame the charge (s) and serve the same alongwith other relevant material upon the alleged contemnor. This is a mandatory requirement under the Rules 1952.

22. The question does arise as to whether the contempt proceedings had been concluded in conformity with the aforesaid Rules? The enquiry entrusted to the District Judge was to find out as what was the truth in the allegations made in the Habeas Corpus Petition about kidnapping of Tej Veer Singh. After submission of both the reports by the District Judge, Ghaziabad, the Court suo motu initiated the contempt

proceedings. The appellants ought to have been told clearing as for what offence they were being tried. We have examined the original record of the case and to our utter surprise, we find that show cause notices for suo motu contempt dated 20.2.1998 had been issued in a case, titled as *"State of UP vs. Ramesh Chandra & Ors.".* The notice reads as under:

"IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

QUASI CRIMINAL SIDE

NO.48- NOTICE

In the matter of Crl. Miscellaneous Contempt Case No.69/97

Between

State of U.P. ....Applicant

And

Ramesh Chandra & Ors. ....Opposite Party

Sri Lilidhar Constable Police Station Muradnagar, District Ghaziabad.

To,

WHEREAS the above named applicant has represented to this Court that you have committed contempt of court.

AND WHEREAS the 31st day of March, 1998 has been fixed for the hearing of the said case:

NOTICE is hereby given to you calling upon you to appear in person in this Court on the above mentioned date at 10 O' clock in the forenoon to show cause why you should not be punished for contempt of court.

Given under my hand and the seal of the Court,

This 20th day of February, 1998.

Deputy Registrar
Allahabad"

23. The notices had been served upon the appellants and other alleged contemnor. There was no case filed by the State of U.P. before the High Court in respect of abduction of Tej Veer Singh nor any application for initiating contempt proceedings was ever filed by any person. Admittedly, the proceedings were initiated by the High Court suo motu. The notice itself remains incomplete, inaccurate and mis-leading. The Registry of the High Court issued the "dotted lines notice" without any sense of responsibility. The notice did not mention as what was the allegation/accusation against either of them. It did not contain any charge(s) against either of them. In *D.K. Basu* (supra) this Court has issued as many as eleven directions to the police authorities inter-alia, furnishing the information of the person arrested to his relatives; the person should be arrested only by the police officials with clear identification marks; a memo of arrest is to be prepared at the time of arrest, which should be attested at least by some person from the locality; the time, place of arrest and venue of custody must be disclosed etc. etc. This Court further observed that non-observance of any of the directions issued therein would make the Police personnel liable for departmental action and render them liable to be punished for Contempt of Court and proceedings for Contempt of Court would be initiated in the High Court having territorial jurisdiction over the matter.

24. The notice did not make any reference to the judgment of this Court in *D.K.Basu* (supra). Neither the report of the District Judge nor any evidence collected by him during that inquiry, nor any other document relevant to the case was annexed with the said notice. Rather, considering the reply of Constable Ramesh Chandra and Sahdeo Singh, the impugned judgment and order has been passed. The aforesaid Rules 1952 provide for a specific procedure to hold the trial in

contempt cases. The Rules 1952 mandatorily require the framing of charge(s) and furnishing the copy of the documents to the alleged contemnor on the basis of which, the charges have been framed. In the instant cases, there has been no compliance of these mandatory provisions contained in the Rules. In absence of the charge(s), a delinquent/accused/ alleged contemnor may not be able to furnish any defence as he is not aware as to what charge(s) he is required to meet. Every statutory provision requires strict adherence, for the reason that the Statute creates rights in favour of persons concerned. The impugned judgment suffered from non-observance of the principles of natural justice and not ensuring the compliance of Statutory Rules, 1952. Thus, the trial itself suffered from material procedural defect and stood vitiated.

The impugned judgment and order, so far as the conviction of the appellants in Contempt proceedings are concerned, is liable to be set aside.

25. By the impugned judgment and order, Constable Ramesh Chandra was convicted and punished with imprisonment for six months. Further, a fine of Rs. 1 lakh and costs of Rs. 5000/- were also imposed on him. We are told that during the pendency of his appeals, i.e. Criminal Appeal Nos. 530 & 532 of 2002, Constable Ramesh Chandra has died and those appeals have been disposed of accordingly. Appellants were, however, convicted and imposed punishment as referred to hereinabove.

26. In the instant cases, the record reveals that the Habeas Corpus petition was taken by the High Court on 30.07.1997 and directed the District Judge, Ghaziabad to hold the inquiry on the allegations made in the Habeas Corpus petition. The District Judge submitted the report on 03.12.1997. The Court considered the case on 4.12.1997 and initiated contempt proceedings against appellants and others suo motu. Matter was remanded to the District Judge for further inquiry in view of the fact that Sujan Singh was not heard in the earlier inquiry.

The District Judge, Ghaziabad, submitted the supplementary inquiry report on 12.07.1998. After hearing the parties the judgment was reserved on 12.03.1999. Thereafter, it was listed on 14.12.2001 i.e. after 2 years and 9 months for fresh arguments. However, the counsel for the parties stated that nothing more was required to be submitted except what had been argued earlier. The judgment was pronounced on 20.12.2001. It is apparent from the order sheets itself that the matter remained pending before the Court, so far as the contempt proceedings are concerned, for more than three years which itself is in contravention of the true spirit of the purpose of initiation of the contempt proceedings.

27. In view of the above, we reach the inescapable conclusion that contempt proceedings had been concluded without ensuring the compliance of the mandatory provisions of the Rules 1952. The appellants had never been informed as what were the charges against them. The relevant documents on the basis of which the High Court had taken a prima facie view while initiating the contempt proceedings suo motu, had not been made available to them. The notice itself was not only defective, but inaccurate and totally mis-leading. The facts and circumstances of the case warrant reversal of the aforesaid judgment and order.

This Court, while entertaining these appeals, granted interim relief to the appellants. Thus, State could not initiate disciplinary proceedings against either of them.

The appeals stand allowed. The judgment and order dated 20.12.2001 passed by the Allahabad High Court in Criminal Contempt No.69 of 1997 is hereby set aside.

B.B.B. Appeals allowed.

STATE OF U.P.
v.
GURU CHARAN & OTHERS
(Criminal Appeal No. 297-298 of 2002)

FEBRUARY 23, 2010

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

Constitution of India, 1950 – Article 136 – Appeal against acquittal – Scope of interference – Allegation of murder of two and murderous assault on one – Conviction of two accused u/s. 302/34 and sentenced to death, and other u/s. 307 and sentenced to life imprisonment – Acquittal by High Court – Interference with – Held: Scope of interference under Article 136 in an appeal against acquittal is rather limited – View taken by High Court was plausible and possible one – On basis of the evidence, High Court concluded that the prosecution failed to prove the guilt of assailants – Thus, the findings recorded by High Court does not warrant any interference –-Penal Code, 1860 – ss. 302/34 and s. 307.

According to the prosecution case, RN, his son-in-law J, VK-PW 1 and N-PW 2 were traveling in a private bus. RN was carrying his licensed double barrel gun and bandolier of cartridges. When the bus stopped on the way, S, P, GC and BP armed with weapons boarded the bus. They fired several shots at RN, resulting in his death. J tried to run out of the bus but he was caught and killed by the assailants. When PW2 tried to save J, BP inflicted knife injuries on him. The driver of the bus was also attacked with a knife. Motive for the offence was the enmity between the two parties. The trial court convicted S, P and GC u/s. 302/34 and sentenced to death whereas BP was convicted u/s. 307 and sentenced to life imprisonment. The High Court acquitted all the accused

of all the charges and rejected the Reference made by the Sessions Judge for confirmation of death sentence awarded to S, P and GC. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1. On examining the evidence as well as the findings recorded by the courts below, the view taken by the High Court is both plausible and possible. The scope of interference in Article 136 of the Constitution of India, 1950 in an appeal against acquittal is rather limited. Applying the principles with regard to the scope of interference by this Court under Article 136, to the facts and circumstances of the instant case, the findings recorded by the High Court does not warrant any interference. [Paras 26 and 30] [1129-F-G; 1132-F]

State of Uttar Pradesh vs. Banne alias Baijnath and Ors. 2009 **(4) SCC 271;** *State of U.P. vs. Harihar Bux Singh and Anr.* **1975 (3) SCC 167;** *State of U.P. vs. Gopi and Ors*. **1980 Supp. SCC 160;** *State of Uttar Pradesh vs. Ashok Kumar and Anr*. **1979 (3) SCC 1, relied on.**

2.1. In its well reasoned and detailed judgment, the High Court re-examined the entire evidence. While considering the evidence of PW 1-VK, it is noticed that GC who is said to be the main assailant did not have any motive to commit the murder of the deceased. He was simply a witness in the murder case against deceased RN. PW1 in the evidence had stated that GC armed with a licensed .315 bore rifle had entered the bus and fired 7-8 rounds on his uncle i.e. deceased RN; that due to the injuries his uncle died there and then, in the bus itself; that his brother-in-law J immediately got down from the bus and started running in order to save himself but the respondent fired upon him and he too was killed outside the bus; and that when PW 2 came forward to save G,

BP stabbed him with his knife. He emphatically stated that no other person received any injuries. But then it is stated that when the driver of the bus tried to move the bus he too was stabbed. It is noticed that according to the witness PW 1, he was sitting at the back of the bus. When his uncle was being shot at, he hid behind the seat. Every other person tried to get off the bus. Even people in the nearby fields ran away for fear of the assailants. The assault was so ferocious that two persons were killed, two were injured. The two injured had no enmity with the respondents. On the other hand, PW1 was a co-accused in the murder of V, yet he suffered no injury. He made no effort to save his uncle RN. His account of the incident is so graphical that he could only do this if he was visible to the respondents. In that case, he would not have been spared. Therefore, the High Court doubts his presence at the scene of the crime. On an analysis of his evidence, the High Court concluded that the evidence of this witness was unbelievable for a number of reasons. [Paras 16 and 17] [1125-C-H; 1126-A-C]

2.2. High Court noticed that even the inquest report was specially prepared to show the presence of PW1 at the place of occurrence, when the investigating officer visited the spot. But PW1, in his cross-examination stated that after handing over written report to the Head Constable at the police station, he went to sleep and did not know what happened after that. However, he admitted his signature on the inquest report of the deceased RN. He also stated that his signature was obtained at the police station. Thus, according to PW 1, he never went to the spot during the night after reporting the crime. On the other hand, the investigating officer states that he was present at the spot between 9-10 p.m. Thus, according to the High Court, the investigating officer has been over enthusiastic to ensure the presence of PW 1 which was,

to say the least, doubtful. The High Court also found the evidence of PW 1 about injuries on VR, bus driver, was contrary to the medical evidence. PW 5-doctor stated that VR had suffered a lacerated wound caused with a blunt weapon, whereas PW 1 stated that he was stabbed with the knife. [Para 18] [1126-D-H; 1127-A]

2.3. PW 1 stated that GC caught hold of J and made him fall down. Then P and S fired at him from a distance of about two feet. There is no mention of any knife injury but the post mortem report shows that J had sustained one incised wound 3.5 x 12.5 cm on right side of the chest. Thus, the version is contradicted by medical evidence. Then PW 1 stated that GC had fired a number of shots at his uncle RN deceased from his licensed .315 bore rifle. The empty cartridges had fallen in the bus. These were collected by the Investigating Officer. The licensed rifle of GC was taken into possession. The empty cartridges recovered from the spot and the rifle of GC was sent to forensic Science laboratory for comparison. The test report shows that the cartridges were not fired from the licensed gun of GC. [Paras 19 and 20] [1127-B-D]

2.4. High Court noticed that PW 2 who had been seriously injured and was in need of urgent medical attention was not taken in the jeep when VR and VK PW 1 proceeded to the police station. This casts a doubt on the version given by PW 1. PW 2 claims to be in the bus. He stated that RN was shot dead by all the accused, who fired at him from their respective weapons; that J was pulled down to the ground and being shot; and that when he tried to intervene, BP caused injuries on him with a knife. He still carries the marks of the injuries. His version of when he got the injuries is not supported by the medical examination. High Court noticed the evidence

given by P.W.6-doctor who had examined the injuries of PW 2 at place A at 3.50 a.m. PW 6 in his evidence stated that it was a fresh case of stab injuries and injuries were fresh in duration and by fresh injuries he meant the injuries caused within 6 to 10 hours. He also found that injuries 1 and 3 were bleeding and caused by one weapon. Fresh injuries are the injuries which are caused within 6 hours. No doubt there may be variation of two hours on either side. Thus the fresh injuries could be termed injuries within 4 to 8 hours and not more than 8 hours. On the basis thereof, the High Court was of the opinion that since PW 2 was examined about 12 hours after the injuries were caused, they could not be described as fresh injuries. [Paras 21, 22 and 23] [1127-E-H; 1128-A-C]

2.5. High Court noticed the claim of P.W.2 that after the occurrence he was brought to the police station. He was medically examined at place S and thereafter shifted to place E. From place E he was further shifted to place A. But P.W.6-doctor who had examined PW 2 at place A stated that no reference slip was shown to him. The prosecution also did not file any injury report on the reference slip prepared at place S or place E. Although PW 2 claims to have been brought to the police station by the police personnel he did not identify any particular police officer who helped him. In fact, the investigating officer-BS in his evidence stated that PW 2 did not meet him on the date of the occurrence. High Court also noticed that although PW 2 had stated that appellant GC had fired at RN from his licensed .315 bore rifle, the empty cartridges recovered from the bus had not been fired from the licensed rifle of GC. High Court noticed that PW 2 failed to explain the circumstances in which J sustained knife injuries, as according to PW 2, the respondents P,S and GC had fired at J. [Para 24] [1128-E-H; 1129-A]

2.6. Upon the thorough examination of the entire witness, the High Court concluded that the evidence of PW 2 is falsified by the evidence of PW 6-doctor. Consequently, PW 2 was held to be unreliable witness. After examination of the eye witnesses who testified for the prosecution, the High Court noticed another relevant omission in the case of the prosecution. According to the prosecution witnesses, the driver sustained injuries in the same incident and by the same assailants. He was also an eye witness. He was alleged to have taken P.W.1 to the police station. Yet he was not examined by the prosecution. The witnesses stated that there were numerous other passengers in the bus. These passengers were said to have quickly got off the bus. Although there was sustained firing by the assailants in the bus, none of the other passengers were injured. The prosecution also did not care to examine any other passenger who would have been the eye witness to the whole transaction. In this state of the evidence, the High Court concluded that the prosecution miserably failed to prove the guilt of the respondents for the murder of RN and J and the murderous assault of PW 2. [Para 25] [1129-A-E]

Case Law Reference:

2009 (4) SCC 271	**Relied on.**	**Para 26**
1975 (3) SCC 167	**Relied on.**	**Para 27**
1980 Supp. SCC 160	**Relied on.**	**Para 28**
1979 (3) SCC 1	**Relied on.**	**Para 29**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 297-298 of 2002.

From the Judgment & Order dated 3.7.2000 of the High Court of Judicature at Allahabad in Criminal Appeal No. 1795 and 2018 of 1999.

Pramod Swarup, Prashant Chaudhary, Alka Sinha, Anuvrat Sharma for the Appellant.

H.C. Kharbanda, Jyoti Saxena, M.P. Shorawala, J.P. Dhanda, Vineet Dhanda, Raj Rani Dhanda, Amrendra Kumar Singh, N.A. Usdmani for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. These two appeals have been filed by the State of U.P. challenging the common Judgment of the High Court of Judicature at Allahabad in the Judgment in Criminal Appeal 1795/99 and Criminal Appeal No.2018/99 and Reference No.8 of 1999. By the aforesaid judgment, the two appeals by the convicts Guru Charan, Sunil and Pramod and Brahma Pal have been allowed and they have been acquitted of all the charges. At the same time the reference made by the Sessions Judge for confirmation of death sentence awarded to Guru Charan, Sunil and Pramod has been rejected.

2. We may notice here the relevant facts, culled out from the judgments of the Trial Court and the High Court and the evidence on record. On 20.7.1997 Ramesh Narain, deceased along with his son-in-law Jitendra alias Guddu deceased and Vijay Kumar (PW1) were returning to village Yakoot Ganj, Police Station Sahawar, district Etaah in a private bus No.PB-12-0148. Ramesh Narain, deceased was having his licensed double barrel gun and bandolier of cartridges. Nathu (PW2) was also traveling in the same bus. Ramesh Narain was sitting in the third row in the front side of the bus. Vijay Kumar (PW1) was sitting towards the rear end of the bus. Jitendra alias Guddu deceased was sitting beside Ramesh Narain, deceased. Nathu (PW 2) was sitting on the seat beside the bonnet. At about 4.15 pm when the bus reached near Tali Village and made a temporary stop, Sunil, Pramod, Guru Charan and Brahma Pal boarded the bus. Sunil and Pramod were having

country-made pistols. Guru Charan was having licensed rifle of 0.315 bore and Brahma Pal was having a knife. On entering the bus they fired several shots at Ramesh Narain. As a result of gun fire, he died on the spot. Other passengers in the bus started running helter-skelter due to fear. It is stated that even the people working in the fields nearby ran away from there due to fear of the assailants. Jitendra alias Guddu tried to run out of the bus. He was however caught, thrown on the ground and killed by the assailants by shooting at him from their unlicensed arms. It is further the case of the prosecution that when PW2 tried to save Jitendra alias Guddu, Brahma Pal inflicted knife injuries on him. Similarly, when the driver of the bus namely Virendra tried to take the bus away he was attacked with a knife. It is further stated that while leaving the scene of the crime the assailants took away the double barrel gun and bandolier of cartridges of Ramesh Narain deceased.

3. The motive for the assault on the deceased is stated to be old enmity between the deceased and the assailants (hereinafter referred to as the respondents). According to the prosecution about two years prior to the date of the occurrence one Vinod Kumar brother of respondent No.1, Sunil, was murdered. Ramesh Narain, Vijay Kumar (PW1) and Vishwanath were accused of murdering Vinod. They were, however, acquitted in the murder trial. Therefore the respondents were having a grudge against the deceased as well as Vijay Kumar (PW1).

4. Some time after the incident, Vijay Kumar (PW1) along with the driver of the bus went to PS Sahawar in a jeep and lodged a written report Ex.Ka1 at 5.20 pm. On the basis of this, FIR (Ex.Ka16) was prepared by constable Brijesh Kumar, who made an endorsement of the same at GD Report (Ex.Ka17) and registered the case against the respondents u/s. 302, 307, 324, 404 IPC. The investigation was conducted by S.I. Bhagwan Sahai. The Investigation Officer prepared the inquest of deceased Ramesh Narain Upadhyay, Ex. Ka 3 and deceased

Jitendra alias Guddu Ex. Ka. 3a at the site. He also prepared photo of the dead body Ex.Ka. 4, and photo of the dead body of deceased Jitendra alias Guddu Ex. Ka.9, wrote letter to C.M.O. Ex. Ka.7 and Ka.5 regarding deceased Ramesh Narain and deceased Jitendra, prepared challan of deceased Ramesh Narain Ex. Ka.6, challan of deceased Jitendra alias Guddu Ex. Ka. 8, recorded statements of the witnesses, prepared site plan Ex. Ka. 10. The Investigation Officer collected blood stained and ordinary soil and prepared memos. Ex. Ka. 11. He prepared Ex. Ka. 12 for taking empty cartridge shells and tickles, Ex. Ka. 13 for taking a blood stained piece of the bus seat and a stove which deceased Ramesh Narain was carrying with him from Sahawar after getting it repaired and left it in the custody vide memo Ex. Ka. 14. The Investigation Officer sent injured Nathu Singh (PW 2) and Virendra for medical examination and their injury reports are Ex. Ka 18 and Ka.19 respectively. The Investigation Officer sent dead bodies of deceased Ramesh Narain and Jitendra alias Guddu duly sealed for postmortem and their postmortem reports are Ext. Ka.2 and Ka.3 respectively.

5. The Special Judge (Dacoits Infested Area) Etah, framed charges u/s. 302 read with 34, 307 read with 34, and 392 I.P.C. against the respondents Sunil, Pramod, Brahma Pal and Guru Charan on 10.2.1998. All the accused pleaded not guilty and they were sent up for trial.

6. The prosecution examined PW1, Vijay Kumar, PW2 Nathu, both injured eye-witnesses, PW3, Dr. Narendra Babu Katiyar, Radiologist, who conducted the post mortem on the deceased persons, PW4, sub-Inspector Bhagwan Sahai, Investigation Officer. PW.5 Dr. Girish Chandra, Medical Officer, CH.C. Sahawar, who examined the injured persons, PW.6 Dr. Ram Babu, Medical Officer, casualty department, Sarojini Naidu Medical College, Agra.

7. We may now notice the medical evidence. It appears that, Virendra Singh driver of the bus, had been sent to the

Community Health Centre, Sahawar where he was medically examined on 20.7.1997 at 5.40 pm by Dr. Girish Chandra PW5. The doctor (PW5) found the following injuries on the driver, Virendra:

Lacerated wound 2.5 cm x 5 cm on the top of skull 11 cm above from the ear and 18 cm from bridge of nose. Deep bone uncoverage.

General condition of the patient was poor advised X-ray and referred to District Hospital, Etaah for treatment. The injury was kept under observation, caused by blunt and hard object and was fresh in duration.

Autopsy on the dead body of Ramesh Narain deceased was conducted on 21-7-1997 at 11.30 A.M. by Dr. Narendra Babu Katiyar (PW.3) who found following ante mortem injuries on his person:-

1. Gun shot wound through and through lacerated on front of head and middle of head 17 cm x 3 cm x brain cavity deep (brain matter coming out) 4 cm above left ear, 12 cm above right ear from base of nose and including both eye brows. Bleeding present.

2. Gun shot wound of entry 1 cm x 1 cm x left lateral abdomen cavity (through) lacerated, margins inverted with blackening and tattooing in area of 5 cm x 4 cm, on left iliac crest, 19 cm from umbilicus.

3. Gun shot wound of exit 1 cm x 1 cm x communicating to injury No.2 on right lateral abdomen 18 cm from umbilicus at 10 'O' clock. Lacerated. Direction left to right.

4. Gun shot wound of entry 1.5 cm x 1 cm left chest cavity deep. Margins lacerated and inverted 10 cm from nipple at 7 'O' clock position. Tattooing

present, direction downward to right.

5. Gun shot wound of entry 1 cm x 1 cm x right back (Abdomen) 4 cm from mid line, 8 cm above right iliac crest. Lacerated inverted. Blackening present.

6. Gun shot wound of entry 1 cm x ½ cm x through on outer aspects of left knee lacerated, inverted.

7. Gun shot wound of entry 1 cm x 1 cm x communicating to injury No.6 on front and upper part of left knee. Lacerated, inverted.

On internal examination brain matter was found coming out. Peritoneum was lacerated. Cavity contained 2 liters clotted blood. Stomach contained about 15 ounce pasty food in process of digestion. Small intestine and large intestine, gall bladder and right kidney were lacerated.

Two yellow colored bullets were recovered from abdomen.

According to the opinion of Doctor, cause of death was due to coma and shock as a result of injuries noted above. The Doctor prepared post mortem report. (Ext. Ka2)

Autopsy on the dead body of Jitendra alias Guddu was conducted on same day at 12.00 noon by Dr. Narendra Babu Katiyar (PW.3), who found following ante mortem injuries on his person:-

1. Gun shot wound of entry 1.5 cm x 1.5 cm x left chest cavity deep on left chest, 3 cm from left nipple at 2 'O' clock position. Lacerated, inverted. Blackening present. Direction left to right.

2. Gun shot wound of entry 2.5 cm x 2.5 x left chest cavitydeep on left upper chest below mid end of left clavicle. Lacerated inverted. Blackening present. Direction left to right.

3. Gun shot wound of exit (pellets) four in no. 0.5 cm x 0.5 cm x communicating to injury No.2 on right lateral chest, 4 cm below axilla in an area of 5 cm x 3 cm. Lacerated inverted, two wad pieces and one Gatta (wad) recovered from right lateral wall of chest below axilla with pellets 15 in number.

4. Incised wound 3.5 cm x 3.5 cm x right chest cavity deep on right chest 13 cm above right iliac crest lateral. Margins clean cut.

On internal examination 4th, 5th, and 7th ribs on left side and 5th, 6th and 10th ribs on right side were fractured. Pleura was lacerated. Both lungs were lacerated. Thoracic cavity contained about 1 liters fresh and clotted blood. Peritoneum was lacerated. Cavity contained about 1 liters of clotted blood. Stomach contained about 1.15 ml of semi digested food. Large intestine contained gasses and faecal matters. Gall bladder was lacerated.

One yellow colour pellet recovered from right back of chest. One Gatta (wad) and two wad pieces and 15 pellets were recovered from right lateral chest wall.

In the opinion of Doctor, cause of death was shock and haemorrage as a result of injuries noted above. The doctor prepared postmortem report (Ext. Ka3).

Nathu Singh (PW.2) was shifted to S.R.N. Medical College, Agra and his injuries were examined on 21-7-1997 at 3.50 A.M. by Dr. Ram Babu (PW.6) who found the following injuries on his person:-

1. One stab wound elliptical in shape 1-1/2" x ½" x abdominal cavity deep 1-1/2" away from left umbilicus at 11 'O' clock position. Loop of intestine coming out, bleeding present.

2. One horizontal elliptical wound 1" x ½"x depth not probed. 3" away left to umbilicus at 3 'O' clock position.

3. One elliptical wound present 6" away at 10 'O' clock position in right A.S.I. spine. Placed vertically.

4. One stab wound on scalp over occipital are ½" x ¼" x not proven size ½" x ¼" x not proven. Bleeding present.

Margins of all wounds were clear. The doctor opined that it was fresh case of stabbed injuries. All injuries were kept under observation and fresh in duration. Patient admitted and police informed for dying declaration.

8. On 22.7.1997 Guru Charan, respondent was arrested at 12.10 pm in village Jamalpur near Temple. At that time he was carrying .315 bore rifle and six cartridges which were taken into possession. Thereafter Bhagwan Sahai was transferred and remaining investigation was conducted by SO Rajpal Singh who on completion of investigation submitted chargesheet (Ex.Ka15) against the respondents. Fired cartridges recovered from the spot and licensed gun of Guru Charan, respondent was sent to Joint Director Forensic Science Laboratory, Lucknow, Uttar Pradesh for comparison and report. Report dated 23.12.1997 (Ex. Ka.20) was submitted by the Asst. Director of the laboratories.

9. The Trial Court on examination of the evidence came to the conclusion that the evidence given by the Vijay Kumar (PW1) cannot be brushed aside only on ground of the enmity against the respondent. He was present in the bus at the time of the incident. He filed the report against the accused at the Police Station immediately after the incident. He was cross-examined at length but nothing favourable to the accused could be elicited from him. Trial Court also came to the conclusion that Vijay Kumar (PW1) has given consistent evidence without any material contradiction. He had no motive to depose falsely

against the respondents as he along with his uncle Ramesh Narain, deceased were in fact acquitted of the murder charge in the earlier case. The Trial Court further holds that the evidence of Nathu (PW2) fully supported the prosecution version. He was an injured eye-witness. He was neither a friend of the prosecution nor an enemy of the accused. He was an independent and impartial witness and there was no reason to disbelieve his evidence. The Trial Court did not accept the suggestions of the defence that Vijay Kumar (PW1) and Nathu (PW2) were procured witnesses. The injuries suffered by the witnesses were self-inflicted. Numerous contradictions in the evidence of PW1 Vijay Kumar and PW 2 Nathu were held to be not material. The Trial Court also found that the version of injuries given by PW1 and PW2 is corroborated by the medical evidence as well as the ocular evidence given by PW3, PW5 and PW6. PW3 Dr. Narendra Babu Katiyar had conducted the post mortem on the deceased Ramesh Narain He had found 6 fire arm injuries on his body. He had also conducted post mortem on Jitendra who had three fire arm injuries on his body. PW5, Dr. Girish Chandra had examined the injuries on Virendra and found an incise wound on his body. Similarly PW6, Dr. Ram Babu examined Nathu (PW 2) and found the knife injuries on his stomach. The cross examinations of these doctors proved totally ineffective for the respondents.

10. Upon consideration of the entire evidence, the Trial Court held that the prosecution has successfully proved that the respondents Sunil, Pramod and Guru Charan in furtherance of their common intention committed murder of Ramesh Narain and Jitendra alias Guddu. It was further held that respondent Brahma Pal committed murderous assault on Nathu Singh (PW2). Accordingly respondents Sunil, Pramod and Guru Charan were convicted u/s. 302 read with Section 34 IPC whereas Brahma Pal was convicted under Section 307 IPC. Upon conviction Sunil, Pramod and Guru Charan were sentenced to death whereas Brahma Pal was sentenced to life imprisonment.

11. The respondents-convicts, aggrieved by the judgment of the Additional Sessions Judge, challenged the same in separate appeals before the High Court.

12. The High Court re-examined the entire evidence and came to the conclusion that the prosecution story is unbelievable. Consequently, Criminal Appeal 1795/99 and Criminal Appeal No.2018/99 by the convicts Guru Charan, Sunil and Pramod and Brahma Pal have been allowed and they have been acquitted of all the charges and Reference No.8 of 1999 made by the Sessions Judge for confirmation of death sentence awarded to Guru Charan, Sunil and Pramod has been rejected.

13. Mr. Pramod Swarup, learned senior counsel for the appellant submitted that the High Court has erred in accepting the appeals filed by the respondents. He has taken us through the evidence, as well as the judgments of both the courts below. He submits that the evidence given by P.W.1 Vijay Kumar and P.W.2 Nathu Singh, could not be discarded, as they are injured witnesses. Nathu Singh, P.W.2, had no reason to falsely implicate the respondents, being an independent witness. The medical evidence is consistent with the oral testimony. Therefore, few minor discrepancies would not be material to discredit the testimony of the eye witnesses. According to the learned counsel, this is a case of pre- planned assault, by one group on the other. It is a clear case of revenge killing. Therefore, the trial court verdict as well as sentence were legal and ought to be restored.

14. On the other hand, Mr. H.C. Kharbanda, learned counsel for the respondents submits that this is a clear case where an incident of dacoity has been twisted to falsely involve the respondents in a crime they did not commit. He emphasized that the presence of Vijay Kumar (P.W.1) is very doubtful. Nathu Singh (P.W.2) also can not be believed, in view of the medical evidence, as well as the statement of Dr. Ram Babu (P.W.6). Enmity existed between the two parties. He further emphasized

that Vijay Kumar (P.W.1) has given a fabricated version. Driver of the bus Virendra, though injured, has been deliberately withheld by the prosecution. He submitted that such firing in a bus was bound to injure some other passengers. He submits that the High Court has correctly disbelieved the prosecution version. According to the learned counsel, the State has failed to make out any exceptional case to warrant interference with the judgment of the High Court.

15. We have considered the submissions of the learned counsel.

16. In its well reasoned and detailed judgment, the High Court has re-examined the entire evidence. While considering the evidence of Vijay Kumar (P.W.1), it is noticed that Guru Charan who is said to be the main assailant did not have any motive to commit the murder of the deceased. He was simply a witness in the murder case against deceased Ramesh Narain. Vijay Kumar (PW1) in the evidence had stated that Guru Charan armed with a licensed .315 bore rifle had entered the bus and fired 7-8 rounds on his uncle i.e. deceased Ramesh Narain. He further stated that due to the injuries his uncle died there and then, in the bus itself. He further stated that his brother-in-law Jitendra alias Guddu immediately got down from the bus and started running in order to save himself but the respondent fired upon him and he too was killed outside the bus. This witness further stated when Nathu (PW 2) came forward to save Guddu, Brahma Pal stabbed him with his knife. Vijay Kumar (PW1) emphatically stated that no other person received any injuries. But then it is stated that when the driver of the bus tried to move the bus he too was stabbed. On an analysis of his evidence, the High Court concluded that the evidence of this witness was unbelievable for a number of reasons. We may notice here only the prominent reasons given by the High Court.

17. It is noticed that according to the witness Vijay Kumar (PW 1), he was sitting at the back of the bus. When his uncle

was being shot at, he hid behind the seat. Every other person tried to get off the bus. Even people in the nearby fields ran away for fear of the assailants. The assault was so ferocious that two persons were killed, two were injured. The two injured had no enmity with the respondents. On the other hand, Vijay Kumar (PW1) was a co-accused in the murder of Vinod. Yet he suffered no injury. He made no effort to save his uncle Ramesh Narain deceased. His account of the incident is so graphical that he could only do this if he was visible to the respondents. In that case, he would not have been spared. The High Court, therefore, doubts his presence at the scene of the crime.

18. It is then noticed by the High Court that even the inquest report has been specially prepared to show the presence of Vijay Kumar (PW1) at the place of occurrence, when the investigating officer visited the spot. But Vijay Kumar (PW1), in his cross-examination states that after handing over written report to the Head Constable at the police station, he went to sleep and did not know what happened after that. This report was handed over to the Head Constable at 5.20 p.m. He woke up only at about 9-10 p.m. By that time, the investigating officer had returned to the police station. He did not know whether the investigating officer had gone to the spot on the night of the occurrence. He did not know when or where documents were prepared regarding the dead body. However, he admitted his signature on the inquest report of the deceased Ramesh Narain. He also stated that his signature was obtained at the police station. Thus, according to Vijay Kumar (PW 1), he never went to the spot during the night after reporting the crime. On the other hand, the investigating officer states that he was present at the spot between 9-10 p.m. Thus, according to the High Court, the investigating officer has been over enthusiastic to ensure the presence of Vijay Kumar (PW 1) which was, to say the least, doubtful. The High Court also found the evidence of Vijay Kumar (PW 1) about injuries on Virendra, bus driver, was contrary to the medical evidence. Dr. Girish Chandra

(P.W.5) says that Virendra had suffered a lacerated wound caused with a blunt weapon, whereas Vijay Kumar (PW 1) says he was stabbed with the knife.

19. Again Vijay Kumar (PW 1) states that Guru Charan caught hold of Jitendra alias Guddu and made him fall down. Then Pramod and Sunil fired at him from a distance of about two feet. There is no mention of any knife injury but the post mortem report shows that Jitendra alias Guddu had sustained one incised wound 3.5 x 12.5 cm on right side of the chest. Thus the version is contradicted by medical evidence.

20. Then Vijay Kumar (PW 1) says that Guru Charan had fired a number of shots at his uncle Ramesh Narain (deceased) from his licensed .315 bore rifle. The empty cartridges had fallen in the bus. These were collected by the Investigating Officer. The licensed rifle of Guru Charan was taken into possession. The empty cartridges recovered from the spot and the rifle of Guru Charan was sent to forensic Science laboratory for comparision. The test report shows that the cartridges were not fired from the licensed gun of Guru Charan.

21. The High Court then noticed that Nathu (PW 2), who had been seriously injured and was in need of urgent medical attention was not taken in the jeep when Virendra and Vijay Kumar (PW 1) proceeded to the police station. This again casts a doubt on the version given by Vijay Kumar (PW 1).

22. Having virtually destroyed the credibility of Vijay Kumar (PW 1), the High Court then proceeds to examine the eye witness account of Nathu Singh(PW 2) (injured witness). Nathu (PW 2) also claims to be in the bus. He also talks of Ramesh Narain being shot dead by all the accused, who fired at him from their respective weapons. He also talks of Jitendra alias Guddu being pulled down to the ground and being shot. Then he says, when he tried to intervene, Brahma Pal caused injuries on him with a knife. He still carries the marks of the injuries. His version of when he got the injuries is not supported by the

medical examination.

23. The High Court noticed the evidence given by Dr. Ram Babu (P.W.6) who had examined the injuries of Nathu Singh (P.W.2) on 21.7.1997 in S.N. Medical College, Agra at 3.50 a.m. Dr. Ram Babu (P.W.6) in his evidence stated that it was a fresh case of stab injuries and injuries were fresh in duration. He further stated that by fresh injuries he meant the injuries caused within 6 to 10 hours. He also found that injuries 1 and 3 were bleeding and caused by one weapon. Fresh injuries are the injuries which are caused within 6 hours. No doubt there may be variation of two hours on either side. Thus the fresh injuries could be termed injuries within 4 to 8 hours and not more than 8 hours. On the basis of the aforesaid, the High Court was of the opinion that since Nathu (PW 2) was examined about 12 hours after the injuries were caused, they could not be described as fresh injuries.

24. The High Court further noticed the claim of Nathu (P.W.2) that after the occurrence he was brought to the police station. He was medically examined in Sahawar and thereafter shifted to Etaah. From Etaah he was further shifted to Agra. But Dr. Ram Babu (P.W.6) who had examined Nathu (P.W.2) at S.N. Medical College, Agra stated that no reference slip was shown to him. The prosecution also did not file any injury report on the reference slip prepared at Sahawar or Etaah. Although Nathu Singh (PW 2) claims to have been brought to the police station by the police personnel he did not identify any particular police officer who helped him. In fact, the investigating officer Bhagwan Sahai (Sub Inspector) in his evidence stated that Nathu Singh (P.W.2) did not meet him on the date of the occurrence. The High Court also noticed that although Nathu Singh (PW 2) had stated that appellant Guru Charan had fired at Ramesh Narain from his licensed .315 bore rifle, the empty cartridges recovered from the bus had not been fired from the licensed rifle of Guru Charan. It is also noticed by the High Court that Nathu (PW 2) had failed to explain the circumstances in which Jitendra alias Guddu (deceased) sustained knife injuries,

as according to Nathu (PW 2), the respondents Pramod, Sunil and Guru Charan had fired at Jitendra alias Guddu.

25. Upon this thorough examination of the entire witness, the High Court has concluded that the evidence of Nathu Singh (P.W.2) is falsified by the evidence of Dr. Ram Babu (P.W.6). Consequently, Nathu Singh (PW 2) has also been held to be unreliable witness. After examination of the eye witnesses who testified for the prosecution, the High Court noticed another relevant omission in the case of the prosecution. According to the prosecution witnesses, the driver, Virendra, sustained injuries in the same incident and by the same assailants. He was also an eye witness. He was alleged to have taken Vijay Kumar (P.W.1) to the police station. Yet he has not been examined by the prosecution. It has also come in the evidence of the witnesses that there were numerous other passengers in the bus. These passengers were said to have quickly got off the bus. Although there was sustained firing by the assailants in the bus, none of the other passengers were injured. The prosecution also did not care to examine any other passenger who would have been the eye witness to the whole transaction. In this state of the evidence, the High Court has concluded that the prosecution has miserably failed to prove the guilt of the respondents for the murder of Ramesh Narain, and Jitendra alias Guddu and the murderous assault of Nathu Singh (PW.2).

26. With the able assistance of the learned counsel for the parties, we have carefully examined the evidence as well as the findings recorded by the courts below. We are of the considered opinion that the view taken by the High Court is both plausible and possible. The scope of interference in Article 136 in an appeal against acquittal is rather limited. The position with regard to circumstances in which the appellate court would interfere with an acquittal has been recently restated by this court in the case of *State of Uttar Pradesh vs. Banne alias Baijnath & Ors.* [2009 (4) SCC 271]. In this case, the settled legal position which has been crystallized in a number of

judgments has been reconsidered and reiterated. The principles emerging are restated in the following words:

> "27. The following principles emerge from the aforementioned cases:
>
> *1*. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.
>
> *2*. The accused is presumed to be innocent until proved guilty. The accused possessed this presumption when he was before the trial court. The High Court's acquittal bolsters the presumption that he is innocent.
>
> *3*. There must also be substantial and compelling reasons for reversing an order of acquittal.
>
> This Court would be justified in interfering with the judgment of acquittal of the High Court only when there are very substantial and compelling reasons to discard the High Court's decision.
>
> 28**.** Following are some of the circumstances in which perhaps this Court would be justified in interfering with the judgment of the High Court, but these are illustrative not exhaustive:
>
> (*i*) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;
>
> (*ii*) The High Court's conclusions are contrary to evidence and documents on record;
>
> (*iii*) The entire approach of the High Court in dealing with

the evidence was patently illegal leading to grave miscarriage of justice;

(*iv*) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(*v*) This Court must always give proper weight and consideration to the findings of the High Court;

(*vi*) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal."

27. We may also notice here the observations made by this Court in the case of *State of U.P. vs. Harihar Bux Singh & Anr.* [975 3 SCC 167] with regard to the scope of interference by this Court under Article 136 of the Constitution. It is observed as follows:-

"In an appeal under Article 136 of the Constitution, this Court does not interfere with the finding of acquittal recorded by the High Court unless that finding is vitiated by some glaring infirmity in the appraisement of evidence. The fact that another view could also have been taken on the evidence on record would not justify interference with the judgment of acquittal. The judgment of the High Court in the present case has not been shown to suffer from any such weakness as might induce us to interfere. The appeal consequently fails and is dismissed."

28. The same view has been reiterated by this Court in the case of *State of U.P. vs. Gopi & Ors.* [1980 Supp. SCC 160] wherein it is observed as follows:

"There may be something to be said for this view of the High Court and, if we were sitting as a court of appeal, we may have taken a different view and may have accepted the statements of PWs 4 and 6. But that is no

reason to set aside the judgment of the High Court for after consideration of the various aspects of the case it cannot be said that the view taken by the High Court was not reasonably possible."

29. In the case of *State of Uttar Pradesh vs. Ashok Kumar & Anr.* [1979 (3) SCC 1], the same view has been again reiterated as follows:-

"The facts of the case have been set out in the judgment of the High Court and it is not necessary for us to repeat them again. It is well-settled that this Court would not normally interfere with an order of acquittal in special leave unless there are cogent reasons for doing so or unless there is a gross violation of any procedure of law which results in serious miscarriage of justice. We have heard Counsel for the parties and have gone through the judgment of the Sessions Judge and of the High Court. It is true that High Court has not made an attempt to discuss the intrinsic merits of the evidence of the eyewitnesses but having regard to the glaring defects appearing in the prosecution case we are in agreement with the ultimate view taken by the High Court."

30. Applying the aforesaid principles to the facts and circumstances of this case, we are of the considered opinion that the findings recorded by the High Court do not warrant any interference by this Court. In view of the above, the appeals are dismissed.

N.J. Appeals dismissed.

KIRPAL SINGH

v.

STATE OF U.P.

(Criminal Appeal No. 235 of 2006)

FEBRUARY 23, 2010

[B. SUDERSHAN REDDY AND J.M. PANCHAL, JJ.]

Penal Code, 1860 – s. 302 – Murder – Dispute between the parties – Appellant firing gun shot to deceased resulting in his death – Conviction and sentence of all the accused for the commission of offence – Conviction of appellant u/s. 302 and imposition of sentence of life imprisonment by courts below – Interference with – Held: Not called for – Appreciation of evidence by courts below neither perverse nor unreasonable – Homicidal death of deceased proved by testimony of the doctor – Testimony of eye witnesses reliable – No major discrepancy therein – FIR filed promptly – Evidence.

The question which arose for consideration in this appeal is whether the courts below were justified in convicting the appellant u/s. 302 IPC and imposing sentence of life imprisonment.

Dismissing the appeal, the Court

HELD: 1. On the facts and in the circumstances of the case, the conviction of the appellant under section 302 IPC as well as imposition of sentence of life imprisonment is well-founded and no case is made out to interfere with the same. [Para 10] [1144-F]

2.1 The fact that deceased died a homicidal death amply stands proved by the testimony of doctor-PW 7. The injuries, which were noticed by the Medical Officer while performing autopsy on the dead body of the

deceased, have been mentioned by him in his substantive evidence before the court. The injuries are also mentioned by him in the post mortem notes prepared by him. It is nobody's case that the deceased died an accidental death or natural death or had committed suicide. Therefore, the finding recorded by the Sessions Court and the High Court that the deceased had died a homicidal death, deserves to be upheld and is upheld. [Para 7] [1141-E, F]

2.2 J-first informant was examined as PW-1. She asserted in her sworn testimony that on the date of incident at about 2.00 pm a quarrel had ensued between children of the two families and, therefore, RS had gone to the house of KS with a view to get the matter reconciled amicably but the deceased was abused. It is further asserted by her that at about 7.00 pm on May 30, 1983, when she along with her deceased husband and son RK was returning from jungle, they were accosted near the house of KS, who with his sons, was standing on the road in front of his house and that the appellant, who was having a gun, had fired a shot at the deceased as a result of which the deceased had fallen down on the road. Though PW-1 was cross-examined searchingly, nothing could be elicited to establish that the appellant and others were falsely implicated in the case because of enmity. Her testimony gets complete corroboration from the contents of FIR lodged by her. The courts below, on appreciation of evidence held that the FIR was neither ante-timed nor delayed and that the same was filed promptly. When soon after the occurrence the FIR is lodged at the police station, false story being cooked up and/or false implication of accused stands ruled out. [Para 8] [1141-H; A-D]

2.3. The testimony of wife of the deceased also gets complete corroboration from the testimony of witness

RK-son of the deceased and examined as PW-2. Witness RK stated that the appellant had fired a shot from his gun at the deceased as a result of which the deceased had died. Though this witness was cross-examined at length, no dent could be made in the assertion made by him that the deceased had died because of the gun shot fired by the appellant. PW-1 is the wife of the deceased whereas RK, examined as PW-2, is the son of the deceased. They, being the close relatives of the deceased, would not allow the real culprits to go scot free and implicate the appellant falsely in the case. KS was brother-in-law, i.e., husband of the sister of J. Therefore, she would never make an attempt to implicate the appellant falsely in the case, as the appellant is closely related to her. It was easy for her to mention in her FIR and before the court that the shot was fired either by KS i.e., her brother-in-law or by VP or by DK. But she has not made any such attempt and attributed the firing of the shot only to the appellant. The trial court, which had advantage of observing demeanour of the witnesses, rightly placed reliance on the testimony of J and RK for the purpose of coming to the conclusion that the appellant had fired a shot at the deceased due to which the deceased lost his life. The appreciation of evidence by the trial court and the High Court is neither perverse nor unreasonable. It could not be pointed out that any material piece of evidence on record was ignored either by the trial court or by the High Court before coming to the conclusion that the appellant was guilty under section 302 IPC. Therefore, the finding that the appellant caused death of the deceased deserves to be upheld. [Para 8] [1142-E-H; A-C]

2.4. The submission that after drawing adverse inference against the prosecution for not examining injured witness-SD, the prosecution story should have been disbelieved as improbable has no substance. The

prosecution has satisfactorily established that a quarrel between the children of the two families-family of the deceased and the family of KS, had ensued on the day of the incident at about 2.00 pm and, therefore, in order to see that the disputes were settled amicably, the deceased had gone to the house of KS, but he was humiliated by KS and his sons and invectives were hurled at him and, therefore, he had to come back. The evidence shows that the accused had decided to liquidate RS and were, therefore, standing in front of their house with weapons and the appellant had killed the deceased by firing shot from the gun at him. The eye witnesses, J and RK narrated the whole incident before the court on oath in a simple manner without any material improvement. The testimony tendered by the eye witnesses was subjected to great care, caution and circumspection by the High Court as well as by the trial court because the eye witnesses were found to be closely related to the deceased as well as the accused. No major discrepancy could be brought to the notice of the court, which would make the testimony of the eye witnesses unreliable. The finding recorded by the trial court as well as by the High Court on the question of motive could not be successfully assailed. Though the defence had examined three witnesses, the evidence of none of them was of any assistance for establishing the innocence of the appellant. The evidence tendered by DW-3 that the deceased was also having a gun licence has no consequence whatsoever because it is nobody's case that the appellant had fired a shot from the gun belonging to the deceased. Thus, the examination of defence witnesses was futile and could not probablize the defence of the accused that they were innocent and were falsely implicated. [Para 9] [1143-E-H; A-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 235 of 2006.

From the Judgment & Order dated 11.7.2005 of the High Court of Judicature at Allahabad in Criminal Appeal No. 2402 of 1985.

T.S. Doabia, Sudarshan Singh Rawat and Sunita Sharma for the Appellant.

Ratnakar Dash, Shail K. Dwivedi, AAG, Rajiv K. Dubey, Kamlendra Mishra and Irshad Ahmad for the Respondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. This appeal, by special leave, is directed against judgment dated July 11, 2005, rendered by the High Court of Judicature at Allahabad in Criminal Appeal No. 2402 of 1985 by which the conviction of the appellant recorded under Section 302 IPC and imposition of sentence of life imprisonment on him by learned V Additional Sessions Judge, Moradabad in ST No. 622 of 1983, is confirmed

2. The facts emerging from the record of the case are as under: -

Deceased Ram Kumar Singh was resident of village Dudaila, District Muradabad. Some six months prior to the incident in question, some dispute had taken place between Ram Kumar Singh who lost his life in the incident and Kallu Singh, i.e. original accused No.3 over the question of digging and lifting of the earth from the land of accused No.3 for the purpose of raising of level of a village pathway which was decided to be constructed by village people at a Shramdan Yojna held in the village. Ever since the said dispute, the parties were not on the talking terms with each other. On May 30, 1983 at about 2.00 pm, some quarrel had taken place between the grandsons of original accused No. 3, i.e., Kallu Singh and children of Ram Kumar Singh. The appellant, i.e., Kirpal Singh who was original accused No.1, Vijay Pal Singh, who was original accused No. 2 and Devender Kumar, who was original

accused No. 4, are sons of original accused No. 3, i.e., Kallu Singh. Ram Kumar Singh went to the house of original accused No. 3, i.e., Kallu Singh for getting the quarrel settled but Kallu Singh and his sons not only abused him but were found to be ready to assault him. At that point of time Ram Swarup and others, who were present there, intervened. At about 7.00 pm on the same day, Ram Kumar Singh, his wife Mrs. Jishna and his son Rupender Kumar were returning home from the jungle. Ram Kumar Singh was slightly ahead of his wife and son. Whey they reached near the house of the accused, who were standing in front of their house, Kallu Singh is said to have exhorted his sons to kill Ram Kumar Singh and finish the dispute for ever, whereupon the appellant fired a shot from his gun at Ram Kumar Singh which hit his chest. On sustaining the gunshot injury, Ram Kumar Singh tumbled down on the road. On hearing the cries of Mrs. Jishna, wife of Ram Kumar Singh and noise of the gun shot, Hari Raj Singh, Rattu Singh and others reached the place of incident. Another shot at Ram Kumar Singh was fired by original accused No. 2, i.e., Vijay Pal Singh from his country made pistol, which hit Mrs. Shanti Devi, wife of Nathu Singh. As the people gathered at the place of incident, Kallu Singh and his sons made their escape good. Ram Kumar Singh, who had sustained fire arm injuries, was removed to Government Hospital, Kanth in a tractor, which was arranged by his wife Mrs. Jishna. Injured Ram Kumar Singh succumbed to his injuries at the hospital and was declared dead by the Medical Officer at about 10.15 pm. Mrs. Jishna thereafter got a report scribed through one Anand Kumar in the hospital premises and lodged the same at the police outpost Kanth, at 10.50 pm. On the basis of the First Information Report, offences punishable under Sections 302 and 307 read with Section 34 of the Indian Penal Code were registered against the four accused. After necessary investigation, charge-sheet was submitted in the court of learned Chief Judicial Magistrate, Moradabad. As the offences punishable under Sections 302 and 307 are exclusively triable by a court of Sessions, the case was committed to the Court of learned V

Additional Sessions Judge, Moradabad for trial.

3. The learned Judge framed charge against the appellant under Section 302 of Indian Penal Code whereas other accused were charged under Section 302 read with Section 34 of Indian Penal Code. All the four accused, including the appellant, were also charged under Section 307 read with Section 34 of the Indian Penal Code. The Charge was read over and explained to the accused, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined witnesses and also produced documentary evidence in support of its case against the appellant and others. After recording of evidence of prosecution witness was over, the learned Judge explained to the accused the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure. In the further statement the case of the appellant and others was that they were implicated falsely in the case due to enmity. On behalf of the accused witness Pooran Singh was examined as DW-1, whereas Mr. Harish Chander, a fire arm dealer, was examined as DW-2 and Mr. Nihal Chand, arms clerk, was examined as DW-3.

4. On appreciation of evidence adduced by the parties the learned Judge held that it was proved satisfactorily by the prosecution that deceased Ram Kumar Singh died a homicidal death and Mrs. Shanti Devi was injured in the incident. The learned Judge noticed that both, i.e., Kallu Singh, original accused No. 3 and Ram Kumar Singh, the deceased, were brothers-in-law and wives of both of them were cousins. The learned Judge found that accused Devendra Kumar had not committed any offence and was entitled to be acquitted. On scrutiny of evidence the learned Judge found that the evidence tendered by Mrs. Jishna, widow of Ram Kumar Singh, was trustworthy as well as reliable and the same was corroborated by her complaint, which was neither ante-dated nor delayed and

was filed promptly. Similarly, the learned Judge found that the testimony of Rupender Kumar, son of the deceased, was trustworthy and reliable. After placing reliance on the evidence of these two witnesses, the learned Judge held that it was established that the appellant had fired a shot at the deceased because of which the deceased had fallen down and ultimately died. After analysis of evidence of PW-3 Mishri Singh, the learned Judge held that the motive, which prompted the appellant to kill the deceased was dispute between the deceased and original accused No.3 relating to the digging and lifting of the earth from the field of original accused No.3 for the purpose of raising level of the road to be constructed for people of the village and quarrel which took place between the grandsons of the deceased and accused No.3 on the date of the incident. On assessment of evidence of DW-1, DW-2 and DW-3, the learned Judge found that the defence that the accused were falsely implicated in the case due to enmity, was not probablized at all. By judgment dated September 9, 1985 the learned Judge convicted the appellant under Section 302 of Indian Penal Code whereas accused Kallu Singh and accused Vijay Pal Singh were convicted under Section 302 with the aid of Section 34 of Indian Penal Code and accused Vijay Pal Singh was also convicted under Section 323 of the Indian Penal Code for causing injuries to Mrs. Shanti Devi. Thereafter, learned counsel on behalf of the accused and the learned Additional Public Prosecutor were heard by the learned Judge with reference to the sentence to be imposed on the accused and by order dated September 9, 1985 the appellant was sentenced to R.I. for life for commission of offence punishable under Section 302 of Indian Penal Code whereas accused Kallu Singh and Vijay Pal Singh were sentenced to life imprisonment for commission of offence punishable under Section 302 read with Section 34 of Indian Penal Code. Further, accused Vijay Pal Singh was sentenced to R.I. for six months for commission of offence punishable under Section 323 of Indian Penal Code.

5. Feeling aggrieved, the accused preferred Criminal Appeal No. 2402 of 1985 in the High Court of Judicature at Allahabad. The High Court noticed that Kallu Singh, who was rightly convicted under Section 302 read with Section 34 of the Indian Penal Code, had expired during the pendency of the appeal and, therefore, the appeal by him had abated whereas there was no evidence to establish that accused Vijay Pal Singh had committed offence punishable under Section 302 read with Section 34 of Indian Penal Code, but his conviction under Section 323 of the Indian Penal Code was eminently just. The High Court, therefore, by judgment dated July 11, 1985, dismissed the appeal filed by the appellant and partly allowed the appeal filed by Vijay Pal Singh, which has given rise to the instant appeal.

6. This Court has heard the learned counsel for the parties at length and considered the documents forming part of the appeal.

7. The fact, that deceased Ram Kumar Singh died a homicidal death, is not disputed before this Court by the learned counsel for the appellant. The said fact amply stands proved by the testimony of Dr. D.N. Sharma, who was examined by the prosecution as Prosecution Witness No. 7. The injuries, which were noticed by the Medical Officer while performing autopsy on the dead body of the deceased, have been mentioned by him in his substantive evidence before the court. The injuries are also mentioned by him in the post mortem notes prepared by him. It is nobody's case that the deceased died an accidental death or natural death or had committed suicide. Therefore, the finding recorded by the Sessions Court and the High Court that the deceased had died a homicidal death deserves to be upheld and is hereby upheld.

8. Mrs. Jishna, who is the first informant, was examined as PW-1. She asserted in her sworn testimony that on the date of incident at about 2.00 pm a quarrel had ensued between children of the two families and, therefore, Ram Kumar Singh

had gone to the house of Kallu Singh with a view to get the matter reconciled amicably but the deceased was abused. It is further asserted by her that at about 7.00 pm on May 30, 1983, when she along with her deceased husband and son Rupender Kumar was returning from jungle, they were accosted near the house of Kallu Singh, who with his sons, was standing on the road in front of his house and that the appellant, who was having a gun, had fired a shot at the deceased as a result of which the deceased had fallen down on the road. Though this witness was cross-examined searchingly, nothing could be elicited to establish that the appellant and others were falsely implicated in the case because of enmity. Her testimony gets complete corroboration from the contents of FIR lodged by her. The courts below, on appreciation of evidence, have held that the FIR was neither ante-timed nor delayed and that the same was filed promptly. It is well settled that when soon after the occurrence the FIR is lodged at the police station, false story being cooked up and/or false implication of accused stands ruled out. The testimony of wife of the deceased also gets complete corroboration from the testimony of witness Rupender Kumar, who is son of the deceased and examined as PW-2. Witness Rupender Kumar has also stated that the appellant had fired a shot from his gun at the deceased as a result of which the deceased had died. Though this witness was cross-examined at length, no dent could be made in the assertion made by him that the deceased had died because of the gun shot fired by the appellant. It is well to remember that Mrs. Jishna PW-1 is the wife of the deceased whereas Rupender Kumar, examined as PW-2, is the son of the deceased. They, being the close relatives of the deceased, would not allow the real culprits to go scot free and implicate the appellant falsely in the case. As noticed by the High Court, Kallu Singh was brother-in-law, i.e., husband of the sister of Mrs. Jishna. Therefore, she would never make an attempt to implicate the appellant falsely in the case, as the appellant is closely related to her. It was easy for her to mention in her FIR and before the court that the shot was fired either by Kallu Singh, i.e., her

brother-in-law or by Vijay Pal Singh or by Devender Kumar. But she has not made any such attempt and attributed the firing of the shot only to the appellant. The trial court, which had advantage of observing demeanour of the witnesses, has rightly placed reliance on the testimony of Mrs. Jishna and Rupender Kumar for the purpose of coming to the conclusion that the appellant had fired a shot at the deceased due to which the deceased lost his life. The appreciation of evidence by the trial court and the High Court is neither perverse nor unreasonable. It could not be pointed out by the learned counsel for the appellant that any material piece of evidence on record was ignored either by the trial court or by the High Court before coming to the conclusion that the appellant was guilty under Section 302 of the Indian Penal Code. Therefore, the finding that the appellant caused death of the deceased deserves to be upheld.

9. The contention, that after drawing adverse inference against the prosecution for not examining injured witness Mrs. Shanti Devi, the prosecution story should have been disbelieved as improbable has no substance. As observed earlier, the prosecution has satisfactorily established that a quarrel between the children of the two families, i.e., family of the deceased and the family of Kallu Singh, had ensued on the day of the incident at about 2.00 pm and, therefore, in order to see that the disputes were settled amicably, the deceased had gone to the house of Kallu Singh, but he was humiliated by Kallu Singh and his sons and invectives were hurled at him and, therefore, he had to come back. The evidence further shows that the accused had decided to liquidate Ram Kumar Singh and were, therefore, standing in the front of their house with weapons and the appellant had killed the deceased by firing shot from the gun at him. The eye witnesses, i.e., Mrs. Jishna and Rupender Kumar, have narrated the whole incident before the court on oath in a simple manner without any material improvement. The testimony tendered by the eye witnesses was subjected to great care, caution and circumspection by the

High Court as well as by the trial court because the eye witnesses were found to be closely related to the deceased as well as the accused. No major discrepancy could be brought to the notice of the court by the learned counsel for the appellant, which would make the testimony of the eye witnesses unreliable. The finding recorded by the trial court as well as by the High Court on the question of motive could not be successfully assailed by the learned counsel for the appellant. Though the defence had examined three witnesses, the evidence of none of them was of any assistance for establishing the innocence of the appellant. DW-1 Pooran Singh had tried to suggest that there was no way for coming to the house of the deceased from his chak, but to a court question he had to admit that the deceased Ram Kumar Singh was going to his field from his open land, which was situated in the front of house of the appellant. Similarly, the evidence of DW-2 Harish Chander was of little assistance to the defence. The evidence tendered by DW-3 Nihal Chand that the deceased was also having a gun licence has no consequence whatsoever because it is nobody's case that the appellant had fired a shot from the gun belonging to the deceased. Thus, the examination of defence witnesses was futile and could not probablize the defence of the accused that they were innocent and were falsely implicated.

10. On the facts and in the circumstances of the case, this Court finds that the conviction of the appellant under Section 302 of Indian Penal Code as well as imposition of sentence of life imprisonment is well-founded and no case is made out by the learned counsel for the appellant to interfere with the same. The appeal, which lacks merit, deserves to be dismissed.

11. For the foregoing reasons the appeal fails and is dismissed.

N.J. Appeal dismissed.

BHAGWAN DAS & ORS. ETC.

v.

STATE OF UP & ORS.

(Civil Appeal Nos. 2069-2070 of 2010)

FEBRUARY 26, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Land Acquisition Act, 1894:

ss. 18(2) and 54 – Reference to Court – Acquisition of land – Award passed by Land Acquisition Collector – Application seeking reference u/s. 18 to civil court for determination of compensation – Rejection of, by Collector since it was made beyond a period of six months from the date of award – Writ petition dismissed on the ground that appeal was maintainable u/s. 54 – Review petition also dismissed since land owners should have filed application for condonation of delay before Collector – On appeal, held: Award was not made in the presence of the land owners – Notice of award was issued but was not sent by post nor served on land owners – No evidence placed by Collector to show knowledge on the part of land owners – Thus, claim of land owners that they became aware that award was made only when notice was received by them calling upon them to receive the compensation, is correct and application was filed in time – Orders of High Court set aside – Collector directed to make reference u/s. 18.

ss. 54 and 18 – Appeals in proceedings before court – Order of Land Acquisition Collector refusing to make a reference to civil court for determination of compensation – Appeal thereagainst u/s 54 – Maintainability of – Held: Not maintainable since s. 54 does not provide for appeals against the awards or orders of Land Acquisition Collector.

s. 18 – Application seeking reference under – Delay in filing of – Condonation of delay by Land Acquisition Collector – Held: Collector is not a civil court, provisions of s. 5 of the 1963 Act are not applicable to proceedings before the Collector under the Act and there is no provision enabling the Collector to extend the time for making application for reference – Thus, Collector cannot entertain any application for extension, nor extend the time for seeking reference, even if there are genuine and bonafide grounds for condoning delay – Limitation Act, 1963 – s. 5.

s. 18 (2) proviso (b) – Reference to court – Period of six months under clause (b) of proviso to s. 18 – Reckoning of, from the date of knowledge of the award of Collector or from the date of award itself – Held: Words 'date of the collector's award' in proviso (b) to s. 18 is to be read as referring to the date of knowledge of the essential contents of the award, and not the actual date of the Collector's award.

s. 18 (2) proviso (b) – Interpretation of –Explained.

The appellants' lands were acquired under the notifications for public purpose. The Land Acquisition Collector passed an award but served notice to the appellant after seven months to receive the compensation from the Collector's office. The appellants filed an application seeking a reference u/s. 18 of the Land Acquisition Act, 1894 for determination of compensation. The Collector rejected the application since it was made beyond a period of six months from the date of the award. The appellants filed writ petition but the same was dismissed on the ground that the appeal u/s. 54 was available against the order of the Collector. The review petition was also dismissed on the ground that the appellant should have filed application for condonation of delay along with the application for reference. Hence the present appeal.

The questions which arose for consideration in these appeals are (a) whether an appeal would lie u/s. 54 of the Act against the order of the Collector refusing to make a reference; (b) whether the Collector can condone the delay in filing an application seeking reference, if sufficient cause is shown; (c) whether the period of six months under clause (b) of proviso to s. 18 should be reckoned from the date of knowledge of the award of the Collector or from the date of award itself; and (d) whether the appellants were entitled to relief?

Allowing the appeals, the Court

HELD:

On Question (a)

1. Section 54 of the Land Acquisition Act, 1894 provides for an appeal from the award of the court in any proceedings under the Act to the High Court, and from the decree of the High Court to the Supreme Court. The decision of the Collector made after an enquiry under section 11 with the previous approval of the appropriate Government or its authorized officer is termed as the 'award of the Collector'. The determination by a court u/s. 26 of the Act in a reference by the Collector is termed as an 'award of the court' which shall be deemed to be a decree. Thus, there is a difference between an 'award of the Collector' which is an offer of compensation by the Collector as the agent of the Government, and 'an award of the court' which is a determination of the compensation by a civil court on a reference by the Collector. Further, the Collector can either make a reference or refuse to make a reference to the court under section 18 of the Act or under section 30 of the Act, and such orders of the Collector are merely acts of a Statutory Authority in exercise of statutory functions and

are not adjudicatory in nature. Such orders are not awards. The Land Acquisition Collector is not a Court, nor his award or order, an award of the Court. While the proceedings of a court resulting in an award of the court are judicial proceedings, neither the proceedings of the Collector u/s. 11 of the Act resulting in an award of the Collector, nor the proceedings relating to an application seeking reference, are judicial proceedings. Section 54 does not provide for appeals against the awards or orders of Land Acquisition Collector. Hence the assumption of the High Court that an order of the Collector refusing to refer a claim for increase in compensation to the civil court u/s. 18(1) of the Act, is an 'award of the court' appealable u/s. 54 of the Act, is wholly erroneous. [Para 5] [1157-A-H; 1158-A-B]

On Question (b) :

2.1. The proviso to section 18 requires that an application by a person interested, to the Collector, seeking reference of his claim for higher compensation for determination by the Court, shall be made within six weeks from the date of the Collector's award, if such person was present or represented before the Collector, at the time when the award was made. If not, the application for reference shall have to be made within six weeks of the receipt of the notice of the Collector u/s. 12(2) or within six months from the date of the Collector's award, whichever period shall first expire. [Para 6] [1158-C-D]

2.2. As the Collector is not a civil court and as the provisions of Section 5 of the Limitation Act, 1963 have not been made applicable to proceedings before the Collector under the Act, and as there is no provision in the Act enabling the Land Acquisition Collector to extend the time for making an application for reference, the Collector cannot entertain any application for extension,

nor extend the time for seeking reference, even if there are genuine and bonafide grounds for condoning delay. Therefore, the observation of the High Court that an application for condonation of delay could have been made by the person interested, is incorrect. [Para 7] [1158-G-H; 1159-A-B]

Steel Authority of India Ltd. vs. S.U.T.N.I. Sangam and Ors. **2009 (16) SCC 1, distinguished.**

Officer on Special Duty (Land Acquisition) and Anr. v. Shah Manilal Chandulal and Ors. **1996 (9) SCC 414, relied on.**

On Question (c) :

3.1. Clause (b) of the proviso to section 18 requires a person interested who has not accepted the award, to make an application to the Collector requiring him to refer the matter for determination of the court, within six weeks of the receipt of the notice from the Collector u/s. 12(2) or within six months from the date of the Collector's award whichever period first expires, if he or his representative was not present before the Collector at the time of making of the award. [Para 8] [1159-F]

3.2. The reason for providing six months from the date of the award for making an application seeking reference, where the applicant did not receive a notice u/s 12(2) of the Act, while providing only six weeks from the date of receipt of notice u/s. 12(2) of the Act for making an application for reference where the applicant has received a notice u/s. 12(2) of the Act is obvious. When a notice u/s. 12(2) of the Act is received, the land owner or person interested is made aware of all relevant particulars of the award which enables him to decide whether he should seek reference or not. On the other hand, if he only comes to know that an award has been

made, he would require further time to make enquiries or secure copies so that he can ascertain the relevant particulars of the award. [Para 9] [1159-G-H; 1160-A-B]

Raja Harish Chandra Raj Singh v. Dy. Land Acquisition Officer **AIR 1961 SC 1500;** *State of Punjab v. Mst. Qaisar Jehan Begum and Anr.* **AIR 1963 SC 1604;** *Parsottambhai Maganbhai Patel and Ors. vs. State of Gujarat through Dy. Collector Modasa and Anr.* **2005 (7) SCC 431;** *Steel Authority of India Ltd. vs. S.U.T.N.I Sangam* **2009 (16) SCC 1, referred to.**

3.3. When a land is acquired and an award is made u/s. 11 of the Act, the Collector becomes entitled to take possession of the acquired land. The award being only an offer on behalf of the Government, there is always a tendency on the part of the Collector to be conservative in making the award, which results in less than the market value being offered. Invariably the land loser is required to make an application u/s. 18 of the Act to get the market value as compensation. The land loser does not get a right to seek reference to the civil court unless the award is made. This means that he can make an application seeking reference only when he knows that an award has been made. If the words six months from the 'date of the Collector's award' should be literally interpreted as referring to the date of the award and not the date of knowledge of the award, it will lead to unjust and absurd results. If the words 'date of the Collector's award' are literally interpreted, the effect would be that on the expiry of six months from the date of award, even though the claimant had no notice of the award, he would lose the right to seek a reference. That will lead to arbitrary and unreasonable discrimination between those who are notified of the award and those who are not notified of the award. Unless the procedure under the Act is fair, reasonable and non-discriminatory, it will run the risk of being branded as being violative of Article 14 as

also Article 300A of the Constitution of India. To avoid such consequences, the words 'date of the collector's award' occurring in proviso (b) to s. 18 requires to be read as referring to the date of knowledge of the essential contents of the award, and not the actual date of the Collector's award. [Para 11] [1162-F-H; 1163-A-E]

3.4. When a person interested makes an application for reference seeking the benefit of six months period from the date of knowledge, the initial onus is on him to prove that he (or his representative) was not present when the award was made, that he did not receive any notice u/s. 12(2) of the Act, and that he did not have the knowledge of the contents of the award during a period of six months prior to the filing the application for reference. This onus is discharged by asserting these facts on oath. He is not expected to prove the negative. Once the initial onus is discharged by the claimant/ person interested, it is for the Land Acquisition Collector to establish that the person interested was present either in person or through his representative when the award was made, or that he had received a notice u/s. 12(2) of the Act, or that he had knowledge of the contents of the award. Actual or constructive knowledge of the contents of the award can be established by the Collector by proving that the person interested had received or drawn the compensation amount for the acquired land, or had attested the Mahazar/ Panchnama/proceedings delivering possession of the acquired land in pursuance of the acquisition, or had filed a case challenging the award or had acknowledged the making of the award in any document or in statement on oath or evidence. The person interested, not being in possession of the acquired land and the name of the state or its transferee being entered in the revenue municipal records coupled with delay, can also lead to an inference of constructive

knowledge. In the absence of any such evidence by the Collector, the claim of the person interested that he did not have knowledge earlier will be accepted, unless there are compelling circumstances to not to do so. [Para 13] [1164-F-H; 1165-A-D]

On Question (d):

4. In the instant case, the award was not made in the presence of the claimant-land owner. The claimant asserted that the award was not made in the presence of either himself or his representative, and no notice of the award u/s. 12(2) of the Act was tendered to him. He also asserted that he became aware of the award only when he received the notice dated 25.10.2007 calling upon him to receive the payment of the award. The respondents contend that a notice dated 30.3.2007 was issued u/s. 12(2) of the Act, to all the interested land-owners including the appellants. But it is admitted that the said notice was not sent by post nor served on the land-owners. There is also no evidence that the said notice was tendered personally to them or that they refused to accept it. The respondent has produced a copy of a notice dated 30.3.2007 with an endorsement of the person who was sent to serve the notice. A vague endorsement that the person who had to serve the notice went to village and informed the farmers, is not the same as notice being specifically tendered to the person concerned. The endorsement-cum-report does not mention or identify the farmers to whom he spoke or which of them refused to put their signatures. In the absence of any evidence placed by the Collector to show knowledge on the part of the appellants, the claim of the appellants that they became aware that an award was made only when the notice dated 25.10.2007 was tendered to them and they became aware of the contents

of the award only on 16.11.2007 has to be accepted. In the circumstances, the date of the award should be taken as 16.11.2007. The application filed on 16.11.2007 was therefore in time. The Land Acquisition Collector ought to have entertained the application seeking reference. The High Court, instead of directing the Collector to make a reference, wrongly rejected the writ petition on the ground that an appeal is maintainable u/s. 54 of the Act and also wrongly rejected the review petition on the ground that they could have made an application for condonation of delay before the Land Acquisition Collector. The orders of the High Court are set aside. The writ petition is allowed and the Collector is directed to make a reference to the civil court u/s. 18 of the Land Acquisition Act, 1894, without any delay, not later than two months. [Paras 14 and 15] [1165-E-H; 1166-A-F]

Case Law Reference:

1996 (9) SCC 414	**Relied on.**	**Para 7**
2009 (16) SCC 1	**Distinguished.**	**Para 7**
AIR 1961 SC 1500	**Referred to**	**Para 10.1**
AIR 1963 SC 1604	**Referred to**	**Para 10.2**
2005 (7) SCC 431	**Referred to**	**Para 10.3**
2009 (16) SCC 1	**Referred to.**	**Para 10.3**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2069-2070 of 2010.

From the Judgment & Order dated 17.1.2008 of the High Court of Judicature at Allahabad, U.P. in Writ petition No. 3022 of 2008 and dated 5.5.2008 in Civil Misc. Review Application No. 47803 of 2008 in Writ Petition No. 3022 of 2008.

WITH

C.A. No. 2071-2072 of 2010.

K.K. Rai, Anant K. Vatsya, Awanish Kumar, Garima Prashad for the Appellants.

Pramod Swarup, Shobha Dikshit, Vandana Mishra, C.P. Pandey, Daleep Kumar Dhyani, Pradeep Misra for the Respondents.

The Judgment of the Court was delivered by

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

2. The lands of appellants within the municipal limits of Bisanda were acquired for establishing a Upmandi by Krishi Utpadan Mandi Samiti under preliminary notification dated 31.01.2004 and final notification dated 20.03.2006. An award was made by the Land Acquisition Collector on 14.03.2007. The appellants were served a notice on 25.10.2007 by the office of the Collector to appear and receive the compensation. The respondents made enquiries and on 16.11.2007 learnt that an award had been made on 14.3.2007. Immediately they made an application seeking a reference under section 18 of the Land Acquisition Act, 1894 ('Act' for short) to the civil court for determination of compensation. The Collector, Banda vide his order dated 19.12.2007 rejected the application seeking reference, on the ground that it was made beyond a period of six months from the date of the award, prescribed under Section 18(2) of the Act. The appellants filed a writ petition for quashing the said order dated 19.12.2007 and seeking a direction to the Land Acquisition Collector to refer their claim for increase in compensation to the civil court. The writ petition was dismissed on 17.01.2008 as not maintainable, on the ground that an alternative remedy, by way of an appeal under section 54 of the Act, was available against the order dated 19.12.2007 passed by the Land Acquisition Officer. The

appellants filed a review petition pointing out that Section 54 of the Act was inapplicable as it only provides for appeals against awards of courts. The review petition was dismissed by order dated 5.5.2008, on the ground that the appellants ought to have filed an application for condonation of delay along with the application for reference, before the Land Acquisition Collector. The appellants have challenged the said orders dated 17.01.2008 and 05.05.2008 in these appeals by special leave.

3. The following questions arise for consideration, on the contentions urged :

(a) Whether an appeal would lie under Section 54 of the Act against the order of the Collector refusing to make a reference?

(b) Whether the Collector can condone the delay in filing an application seeking reference, if sufficient cause is shown?

(c) Whether the period of six months under clause (b) of the proviso to section 18 of the Act should be reckoned from the date of knowledge of the award of the Collector or from the date of award itself?

(d) Whether the appellants were entitled to relief?

4. We may, to begin with, refer to the provisions of the Act which are relevant for considering these questions. Section 11 of the Act provides for an enquiry into objections and making of an award by the Collector. Sub-Section (2) of Section 12 requires the Collector shall give immediate notice of his award to such of the persons interested as were not present personally or by their representatives when the award was made. Section 18 providing for Reference to Court is extracted below:-

"18. *Reference to Court* –

(1) Any person interested who has not accepted the award

may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made,—-

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under Section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire".

(emphasis supplied)

Section 54 of the Act providing for appeals. The said section reads:

"54. *Appeals in proceedings before court* –

Subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court and from any decree of the High Court passed on such appeal as aforesaid an appeal shall lie to the Supreme Court subject to the provisions contained in Section 110 of the Code of Civil Procedure, 1908 and in Order XLIV thereof".

Re : Question (a)

5. Section 54 of the Act provides for an appeal from the award *of the court* in any proceedings under the Act to the High Court, and from the decree of the High Court to the Supreme Court. Section 3(d) of the Act defines the expression "court" to mean a principal civil court of original jurisdiction, unless the appropriate Government has appointed a special officer within any specified local limits to perform functions of the court under the Act. On the other hand, the expression "Collector" is defined in section 2(c) of the Act as the Collector of a district, and includes a Deputy Commissioner and any officer specially appointed by the appropriate Government to perform the functions of a Collector under the Act. The decision of the Collector made after an enquiry under section 11 with the previous approval of the appropriate Government or its authorized officer is termed as the 'award of the Collector'. The determination by a court under section 26 of the Act in a reference by the Collector is termed as an 'award of the court' which shall be deemed to be a decree. Thus there is a difference between an 'award of the Collector' which is an offer of compensation by the Collector as the agent of the Government, and 'an award of the court' which is a determination of the compensation by a civil court on a reference by the Collector. Further, the Collector can either make a reference or refuse to make a reference to the court under section 18 of the Act or under section 30 of the Act, and such orders of the Collector are merely acts of a Statutory Authority in exercise of statutory functions and are not adjudicatory in nature. Such orders are not awards. The Land Acquisition Collector is not a Court, nor his award or order, an award of the Court. While the proceedings of a court resulting in an award of the court are judicial proceedings, neither the proceedings of the Collector under section 11 of the Act resulting in an award of the Collector, nor the proceedings relating to an application seeking reference, are judicial proceedings. Section 54 does not provide for appeals against

the awards or orders of Land Acquisition Collector. Hence the assumption of the High Court that an order of the Collector refusing to refer a claim for increase in compensation to the civil court under section 18(1) of the Act, is an 'award of the court' appealable under section 54 of the Act, is wholly erroneous.

Re : Question (b)

6. The proviso to section 18 requires that an application by a person interested, to the Collector, seeking reference of his claim for higher compensation for determination by the Court, shall be made within six weeks from the date of the Collector's award, if such person was present or represented before the Collector, at the time when the award was made. If not, the application for reference shall have to be made within six weeks of the receipt of the notice of the Collector under Section 12(2) or within six months from the date of the Collector's award, whichever period shall first expire.

7. In *Officer on Special Duty (Land Acquisition) & Anr. v. Shah Manilal Chandulal & Ors*. [1996 (9) SCC 414], this Court held that in view of the special limitation provided under the proviso to section 18 of the Act, section 29(2) of the Limitation Act, cannot be applied to the proviso to section 18 of the Act; and therefore, the benefit of sections 4 to 24 of Limitation Act 1963, will not be available in regard to applications under section 18(1) of the Act. It was also held that as the Collector is not a court when he discharges his functions as a statutory authority under section 18(1) of the Act, section 5 of the Limitation Act 1963 cannot be invoked for extension of the period of limitation prescribed under the proviso to section 18(2) of the Act. As the Collector is not a civil court and as the provisions of Section 5 of the Limitation Act, 1963 have not been made applicable to proceedings before the Collector under the Act, and as there is no provision in the Act enabling the Land Acquisition Collector to extend the time for making

an application for reference, the Collector cannot entertain any application for extension, nor extend the time for seeking reference, even if there are genuine and bonafide grounds for condoning delay. This view was reiterated in *Steel Authority of India Ltd. vs. S.U.T.N.I. Sangam and others* [2009 (16) SCC 1]. Therefore, the observation of the High Court that an application for condonation of delay could have been made by the person interested, is incorrect.

We should however notice that there is an apparent inconsistency in two observations of this Court in *S.U.T.N.I. Sangam* (supra). In the earlier part of the decision, this Court observed : "T*he proceedings under the Land Acquisition Collector is of an administrative nature and not of a judicial or quasi judicial character*." However, in a latter part of the said decision (at para 75 of the report), this Court observed : "*Land Acquisition Collector is a statutory authority. The proceeding before the Land Acquisition Collector is a quasi-judicial proceeding*." As the said inconsistency has no bearing upon the issue on hand, we do not propose to consider it in this case, but leave the clarification to be done in an appropriate decision.

Re : Question (c)

8. Clause (b) of the proviso to section 18 requires a person interested who has not accepted the award, to make an application to the Collector requiring him to refer the matter for determination of the court, within six weeks of the receipt of the notice from the Collector under section 12(2) or within six months from the date of the Collector's award whichever period first expires, if he or his representative was not present before the Collector at the time of making of the award.

9. The reason for providing six months from the date of the award for making an application seeking reference, where the applicant did not receive a notice under section 12(2) of the Act, while providing only six weeks from the date of receipt of notice under section 12(2) of the Act for making an application

for reference where the applicant has received a notice under section 12(2) of the Act is obvious. When a notice under section 12(2) of the Act is received, the land owner or person interested is made aware of all relevant particulars of the award which enables him to decide whether he should seek reference or not. On the other hand, if he only comes to know that an award has been made, he would require further time to make enquiries or secure copies so that he can ascertain the relevant particulars of the award.

10. The term 'date of the Collector's award' occurring in clause (b) of the proviso, has been interpreted by this Court in several cases. We may refer to a few of them.

(10.1.) In *Raja Harish Chandra Raj Singh v. Dy. Land Acquisition Officer* [AIR 1961 SC 1500], this Court held :

> "Therefore, if the award made by the Collector is in law no more than an offer made on behalf of the Government to the owner of the property then the making of the award as properly understood must involve the communication of the offer to the party concerned. That is the normal requirement under the contract law and its applicability to cases of award made under the Act cannot be reasonably excluded. *Thus considered the date of the award cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office; it must involve the consideration of the question as to when it was known to the party concerned either actually or constructively*. If that be the true position then the literal and mechanical construction of the words 'the date of the award' occurring in the relevant section would not be appropriate.
>
> There is yet another point which leads to the same conclusion. If the award is treated as an administrative decision taken by the Collector in the matter of the valuation of the property sought to be acquired it is clear that the

said decision ultimately affects the rights of the owner of the property and in that sense, like all decisions which affect persons, it is essentially fair and just that the said decision should be communicated to the said party. The knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. *Thus considered the making of the award cannot consist merely in the physical act of writing the award or signing it or even filing it in the office of the Collector; it must involve the communication of the said award to the party concerned either actually or constructively*. If the award is pronounced in the presence of the party whose rights are affected by it it can be said to be made when pronounced. If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly if without notice of the date of its pronouncement an award is pronounced and a party is not present, the award can be said to be made when it is communicated to the party later. *The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice the expression 'the date of the award' used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively*. In our opinion, therefore, it would be unreasonable to construe the words 'from the date of the Collector's award' used in the proviso to Section 18 in a literal or mechanical way."

(emphasis supplied)

(10.2.) In *State of Punjab v. Mst. Qaisar Jehan Begum & Anr*. [AIR 1963 SC 1604], this Court reiterated the principles

stated in *Raja Harish Chandra Raj Singh* (supra) and further held as follows :

"It seems clear to us that the ratio of the decision in *Harish Chandra*'s case (supra) is that the party affected by the award must know it, actually or constructively, and the period of six months will run from the date of that knowledge. *Now, knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award*. These contents may be known either actually or constructively. If the award is communicated to a party under S. 12(2) of the Act, the party must be obviously fixed with knowledge of the contents of the award whether he reads it or not. Similarly when a party is present in court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award. Having regard to the scheme of the Act we think that knowledge of the award must mean knowledge of the essential contents of the award."

(emphasis supplied)

(10.3.) In *Parsottambhai Maganbhai Patel & Ors. vs. State of Gujarat through Dy. Collector Modasa & Anr*. [2005 (7) SCC 431] and in *Steel Authority of India Ltd. vs. S.U.T.N.I Sangam* [2009 (16) SCC 1], the aforesaid principles were followed and reiterated by this Court.

11. When a land is acquired and an award is made under section 11 of the Act, the Collector becomes entitled to take possession of the acquired land. The award being only an offer on behalf of the Government, there is always a tendency on the part of the Collector to be conservative in making the award, which results in less than the market value being offered. Invariably the land loser is required to make an application under section 18 of the Act to get the market value as compensation. The land loser does not get a right to seek reference to the civil court unless the award is made. This

means that he can make an application seeking reference only when he *knows* that an award has been made. If the words six months from the 'date of the Collector's award' should be literally interpreted as referring to the date of the award and not the date of knowledge of the award, it will lead to unjust and absurd results. For example, the Collector may choose to make an award but not to issue any notice under section 12(2) of the Act, either due to negligence or oversight or due to any ulterior reasons. Or he may send a notice but may not bother to ensure that it is served on the land owner as required under section 45 of the Act. If the words 'date of the Collector's award' are literally interpreted, the effect would be that on the expiry of six months from the date of award, even though the claimant had no notice of the award, he would lose the right to seek a reference. That will lead to arbitrary and unreasonable discrimination between those who are notified of the award and those who are not notified of the award. Unless the procedure under the Act is fair, reasonable and non-discriminatory, it will run the risk of being branded as being violative of Article 14 as also Article 300A of the Constitution of India. To avoid such consequences, the words 'date of the collector's award' occurring in proviso (b) to section 18 requires to be read as referring to the date of knowledge of the essential contents of the award, and not the actual date of the Collector's award.

12. The following position therefore emerges from the interpretation of the proviso to section 18 of the Act :

(i) If the award is made in the presence of the person interested (or his authorised representative), he has to make the application within six weeks from the date of the Collector's award itself.

(ii) If the award is not made in the presence of the person interested (or his authorised representative), he has to make the application seeking reference within six weeks of the receipt of the notice from the Collector under section

12(2).

(iii) If the person interested (or his representative) was not present when the award is made, and if he does not receive the notice under Section 12(2) from the Collector, he has to make the application within six months of the date on which he actually or constructively came to know about the contents of the award.

(iv) If a person interested receives a notice under section 12(2) of the Act, after the expiry of six weeks from the date of receipt of such notice, he cannot claim the benefit of the provision for six months for making the application on the ground that the date of receipt of notice under section 12(2) of the Act was the date of knowledge of the contents of the award.

A person who fails to make an application for reference within the time prescribed is not without remedy. It is open to him to make an application under section 28A of the Act, on the basis of an award of the court in respect of the other lands covered by the same acquisition notification, if there is an increase. Be that as it may.

13. When a person interested makes an application for reference seeking the benefit of six months period from the date of knowledge, the initial onus is on him to prove that he (or his representative) was not present when the award was made, that he did not receive any notice under Section 12(2) of the Act, and that he did not have the knowledge of the contents of the award during a period of six months prior to the filing the application for reference. This onus is discharged by asserting these facts on oath. He is not expected to prove the negative. Once the initial onus is discharged by the claimant/person interested, it is for the Land Acquisition Collector to establish that the person interested was present either in person or through his representative when the award was made, or that he had received a notice under Section 12(2) of the Act, or that

he had knowledge of the contents of the award. Actual or constructive knowledge of the contents of the award can be established by the Collector by proving that the person interested had received or drawn the compensation amount for the acquired land, or had attested the Mahazar/ Panchnama/ proceedings delivering possession of the acquired land in pursuance of the acquisition, or had filed a case challenging the award or had acknowledged the making of the award in any document or in statement on oath or evidence. The person interested, not being in possession of the acquired land and the name of the state or its transferee being entered in the revenue municipal records coupled with delay, can also lead to an inference of constructive knowledge. In the absence of any such evidence by the Collector, the claim of the person interested that he did not have knowledge earlier will be accepted, unless there are compelling circumstances to not to do so.

Re : Question (d)

14. In this case, it is not in dispute that the award was not made in the presence of the claimant-land owner. The claimant has asserted that the award was not made in the presence of either himself or his representative, and no notice of the award under section 12(2) of the Act was tendered to him. He has also asserted that he became aware of the award only when he received the notice dated 25.10.2007 calling upon him to receive the payment of the award. The respondents contend that a notice dated 30.3.2007 was issued under section 12(2) of the Act, to all the interested land-owners including the appellants. But it is admitted that the said notice was not sent by post nor served on the land-owners. There is also no evidence that the said notice was tendered personally to them or that they refused to accept it. The respondent has produced a copy of a notice dated 30.3.2007 with an endorsement of the person who was sent to serve the notice which reads as under : "As per your order I went to village Bishanda and informed

the farmers but they refused to put their signatures. Report is submitted." A vague endorsement that the person who had to serve the notice went to village and informed the farmers, is not the same as notice being specifically tendered to the person concerned. The endorsement-cum-report does not mention or identify the farmers to whom he spoke or which of them refused to put their signatures. In the absence of any evidence placed by the Collector to show knowledge on the part of the appellants, the claim of the appellants that they became aware that an award was made only when the notice dated 25.10.2007 was tendered to them and they became aware of the contents of the award only on 16.11.2007 has to be accepted. In the circumstances, the date of the award should be taken as 16.11.2007. The application filed on 16.11.2007 was therefore in time. The Land Acquisition Collector ought to have entertained the application seeking reference. The High Court, instead of directing the Collector to make a reference, wrongly rejected the writ petition on the ground that an appeal is maintainable under section 54 of the Act and also wrongly rejected the review petition on the ground that they could have made an application for condonation of delay before the Land Acquisition Collector.

15. In view of the above, the appeals are allowed, the orders of the High Court dated 17.1.2008 and 5.5.2008 are set aside, the writ petition is allowed and the Collector is directed to make a reference to the civil court under section 18 of the Act, without any delay, not later than two months.

N.J. Appeals allowed.

A.P. PUBLIC SERVICE COMMISSION
v.
PRASADA RAO AND ORS.
(Civil Appeal No. 2043-2046 of 2010)

FEBRUARY 25, 2010

[V.S. SIRPURKAR AND DR. MUKUNDAKAM SHARMA, JJ.]

Service Law – Selection – Select list prepared by Andhra Pradesh Public Service Commission – Directions issued by Tribunal, affirmed by High Court – On appeal, said directions suitably modified by Supreme Court.

Dispute arose with regard to the select list prepared by the Andhra Pradesh Public Service Commission, and certain directions were issued by the Tribunal, which were affirmed by the High Court. Hence the present appeals.

Disposing of the appeals, the Court

HELD:1. There is force in the argument that the directions issued by the Tribunal which are also affirmed by the High Court would create complications and therefore in modification of the orders passed by the Tribunal and affirmed by the High Court, it is directed:

(i) That the select list which was prepared by the Andhra Pradesh Public Service Commission pursuant to the judgment and order of this Court dated 14.09.2006 in Civil Appeal No. 4129 of 2006 and which is contained in the official records of the Public Service Commission is restored and that appointment shall be given effect to by the competent

authority in terms of the seniority position ascribed in the said select list as contained in the official records of the Public Service Commission but subject to the condition that all those candidates who are shown to have been selected for the post mentioned in the select list as prepared by the Andhra Pradesh Public Service Commission and amongst them, who have pursuant to the same joined their posts be given an option either to retain their existing position and post to which they were selected pursuant to the notification No. 5/1998 for Group-I services or to opt for a new post now being offered pursuant to this order;

(ii) That such a candidate shall be ordered to exercise his option within a time frame as stipulated by the Public Service Commission. The Commission would thereafter act in accordance with the rules and in accordance with the law in terms of the aforesaid option so exercised and give effect to the same. It is also made clear that no option is required to be called for or obtained from the candidates who are being given offer of appointment for the first time pursuant to the selection and in accordance with the merit position in the select list which has already been prepared; and

(iii) That after giving effect to the selection in terms of clauses (i) and (ii) above, the vacancies, if any, would then be filled up by the candidates from the select list/merit list in accordance with their merit and rules of reservation as per the options given earlier or by giving similar

option to the candidates selected and working in some other post. [Para 3] [1169-H; 1170-A-H; 1171-A-B]

1.2. The selected candidates who are being appointed for the first time would only be entitled to give fresh option and the candidates who had already exercised their option would not be entitled to give any fresh option. [Para 4] [1171-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2043-2046 of 2010.

From the Judgment & Order dated 8.10. 2007 of the High Court of Andhra Pradesh in Wirt Nos. 17397, 17398, 17399 and 17400 of 2007.

WITH

C.A. No. 2047 of 2010.

Altaf Ahmad, R. Sundervardhan, Shyam Divan, H.S. Gururaja Rao, Guntur Prabhakar, Y. Rajagopala Rao, Y. Ramesh, Y. Ismai Rao, R. Santhan Krishnan, Praveen K. Pandey (for D. Mahesh Babu), D. Bharathi Reddy, Anuradha Rustogi, G.V.R. Choudhary K. Shivraj Choudhuri, Y. Ramesh, Y. Vismai Rao, C.S.N. Mohan Rao, Satish Galla, N. Rajaraman for the appearin parties.

The Judgment of the Court was delivered by

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

2. Having heard all the learned counsel appearing for the parties, we are of the considered opinion that these appeals could be disposed of by a common judgment and order as the facts of these appeals are similar.

3. We find force in the arguments of some of the counsel appearing for the parties that the directions issued by the

Tribunal which are also affirmed by the High Court would create complications and therefore in modification of the orders passed by the Tribunal and affirmed by the High Court, we pass the following orders:-

(i) We direct that the select list which was prepared by the Andhra Pradesh Public Service Commission pursuant to the judgment and order of this Court dated 14.09.2006 in Civil Appeal No. 4129 of 2006 and which is contained in the official records of the Public Service Commission is restored and that appointment shall be given effect to by the competent authority in terms of the seniority position ascribed in the said select list as contained in the official records of the Public Service Commission but subject to the condition that all those candidates who are shown to have been selected for the post mentioned in the select list as prepared by the Andhra Pradesh Public Service Commission and amongst them, who have pursuant to the same joined their posts be given an option either to retain their existing position and post to which they were selected pursuant to the notification No. 5/1998 for Group-I services or to opt for a new post now being offered pursuant to the order passed today.

(ii) Such a candidate shall be ordered to exercise his option within a time frame as stipulated by the Public Service Commission. The Commission would thereafter act in accordance with the rules and in accordance with the law in terms of the aforesaid option so exercised and give effect to the same. It is also made clear that no option is required to be called for or obtained from the candidates who are being given offer of appointment for the first time pursuant to the selection and in accordance with the merit position

in the select list which has already been prepared.

(iii) That after giving effect to the selection in terms of clauses (i) and (ii) above, the vacancies, if any, would then be filled up by the candidates from the select list/merit list in accordance with their merit and rules of reservation as per the options given earlier or by giving similar option to the candidates selected and working in some other post.

4. The selected candidates who are being appointed for the first time would only be entitled to give fresh option and the candidates who had already exercised their option would not be entitled to give any fresh option.

5. In terms of the aforesaid order and directions, the appeals stand disposed of.

B.B.B. Appeals disposed of.

ORIENTAL AROMA CHEMICAL INDUSTRIES LTD.

v.

GUJARAT INDUSTRIAL DEVELOPMENT CORPORATION AND ANOTHER

(Civil Appeal No. 2075 of 2010)

FEBRUARY 26, 2010

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

Limitation Act, 1963 – s.5 – Condonation of delay – Appeal by Government Corporation against judgment and decree in civil suit – Also application under for condonation of delay of 4 years – Allowed by Division Bench – Justification of – Held: Not justified – Law Department of the Government Corporation did not approach High Court with clean hands – High Court committed grave error by condoning more than four years' delay in filing of appeal ignoring the judicially accepted parameters for exercise of discretion u/s. 5 – Thus, order of High Court set aside – Application for condonation of delay dismissed – Civil Procedure Code, 1908 – O 41 r. 3A.

The question which arose for consideration was whether the Division Bench of High Court was justified in condoning more than four years' delay in filing of appeal by the respondents against judgment and decree passed by the Civil Judge in the Special Civil Suit.

Allowing the appeal, the Court

HELD: 1.1. The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature.

To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time. The expression "sufficient cause" employed in section 5 of the Limitation Act, 1963 and similar other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which sub serves the ends of justice. Although, no hard and fast rule can be laid down in dealing with the applications for condonation of delay, this Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate. [Para 8] [1184-C-E]

Collector, Land Acquisition, Anantnag v. Mst. Katiji **(1987) 2 SCC 107;** *N. Balakrishnan v. M. Krishnamurthy* **(1998) 7 SCC 123;** *Vedabai v. Shantaram Baburao Patil* **(2001) 9 SCC 106, relied on.**

1.2. In dealing with the applications for condonation of delay filed on behalf of the State and its agencies/ instrumentalities this Court has, while emphasizing that same yardstick should be applied for deciding the applications for condonation of delay filed by private individuals and the State, observed that certain amount of latitude is not impermissible in the latter case because the State represents collective cause of the community and the decisions are taken by the officers/agencies at a slow pace and encumbered process of pushing the files from table to table consumes considerable time causing delay. [Para 8] [1184-F-H; 1185-A]

G. Ramegowda v. Spl. Land Acquisition Officer **(1988) 2 SCC 142;** *State of Haryana v. Chandra Mani* **(1996) 3 SCC 132;** *State of U.P. v. Harish Chandra* **(1996) 9 SCC 309;** *State of Bihar v. Ratan Lal Sahu* **(1996) 10 SCC 635;** *State of Nagaland v. Lipok Ao* **(2005) 3 SCC 752;** *State (NCT of Delhi) v. Ahmed Jaan* **(2008) 14 SCC 582, relied on.**

2.1. A reading of the impugned order makes it clear that the High Court did make a bald reference to the application for condonation of delay filed by the respondents but allowed the same without adverting to the averments contained therein and the reply filed on behalf of the appellant. The High Court erroneously assumed that the delay was of 1067 days, though, as a matter of fact, the appeal was filed after more than four years. Another erroneous assumption made by the High Court was that the appellant had not filed reply to controvert the averments contained in the application for condonation of delay. It may have been possible for this Court to ignore the first error in the impugned order because by deleting the figures and words "4 years and 28" in paragraphs 2 and 3 of the application and substituting the same with the figure 1067, the respondents misled the High Court in believing that the delay was of 1067 days only but it is not possible to fathom any reason why the Division Bench of the High Court omitted to consider the detailed reply which had been filed on behalf of the appellant to contest the prayer for condonation of delay. Notwithstanding this, the impugned order may have been set aside and remitted the case to the High Court for fresh disposal of the application filed by the respondents under section 5 of the Limitation Act but, it is not proper to adopt that course because the respondents did not approach the High Court with clean hands. [Para 10] [1185-A-H; 1186-A]

2.2. It is clear that the Law Department of respondent No.1 was very much aware of the proceedings of the first as well as the second suit. In the first case, RM was

appointed as an advocate and in the second case BR was instructed to appear on behalf of the respondents, but none of the officers is shown to have personally contacted either of the advocates for the purpose of filing written statement and preparation of the case and none bothered to appear before the trial Court on any of the dates of hearing. It is a matter of surprise that even though an officer of the rank of General Manager (Law) had issued instructions to RM to appear and file vakalat as early as in May 2001 and Manager (Law) had given vakalat to BR Advocate in the month of May 2005, in the application filed for condonation of delay, the respondents boldly stated that the Law Department came to know about the ex parte decree only in the month of January/February 2008. The respondents went to the extent of suggesting that the parties may have arranged or joined hands with some employee of the corporation and that may be the reason why after engaging advocates, nobody contacted them for the purpose of giving instructions for filing written statement and giving appropriate instructions which resulted in passing of the ex parte decrees. The above statement is not only incorrect but is ex facie false and the High Court committed grave error by condoning more than four years' delay in filing of appeal ignoring the judicially accepted parameters for exercise of discretion under section 5 of the Limitation Act. [Para 13] [1187-G-H; 1188-A]

2.3. The impugned order of the High Court is set aside and the application for condonation of delay filed by the respondents is dismissed. As a corollary, the appeal filed by the respondents against judgment and decree dated 30.10.2004 shall stand dismissed as barred by time. However, it is made clear that the disposal of the instant appeal shall not absolve the higher functionaries of respondent No.1 from the responsibility of conducting

a thorough probe into the matter so that accountability of the defaulting officers/officials may be fixed and the loss, if any, suffered by respondent No.1 recovered from them after complying with the rules of natural justice. [Para 14] [1188-B-C]

State of Bihar and others v. Kamleshwar Prasad Singh and another **2000 AIR SC 2388;** *Spl. Tehsildars, Land Acquisition, Kerala v. K.V. Ayisumma* **AIR 1996 SC 2750;** *Punjab Small Industries and Export Corporation Ltd. and others v. Union of India and others* **1995 Suppl. (4) SCC 681;** *P.K. Ramachandran v. State of Kerala and another* **(1997) 7 SCC 566, referred to.**

Case Law Reference:

2000 AIR SC 2388	Referred to	Para 5
AIR 1996 SC 2750	Referred to	Para 5
1995 Suppl. (4) SCC 681	Referred to	Para 5
(1997) 7 SCC 566	Referred to	Para 5
(1987) 2 SCC 107	Relied on	Para 8
(1998) 7 SCC 123	Relied on	Para 8
(2001) 9 SCC 106	Relied on.	Para 8
(1988) 2 SCC 142	Relied on	Para 8
(1996) 3 SCC 132	Relied on	Para 8
(1996) 9 SCC 309	Relied on	Para 8
(1996) 10 SCC 635	Relied on	Para 8
(2005) 3 SCC 752	Relied on	Para 8
(2008) 14 SCC 582	Relied on.	Para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2075 of 2010.

From the Judgment & Order dated 25.3.2009 of the High Court of Gujarat at Ahmedabad in Civil Application No. 14201 of 2008 in First Appeal No. 4180 of 2008.

L.N. Rao, Nikhil Goel, Naveen Goel, Marsoak Bafaki, Sheela Goel for the Appellant.

Anip Sachthey, Mohit Paul, Shagun Matta, Sherin Daniel for the Respondents.

The Judgment of the Court was delivered by

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

2. Whether the Division Bench of Gujarat High Court was justified in condoning more than four years' delay in filing of appeal by the respondents against judgment and decree dated 30.10.2004 passed by Civil Judge (Sr. Division) Gandhinagar (hereinafter referred to as "the trial Court") in Special Civil Suit No.32 of 2001 is the question which arises for consideration in this appeal.

3. The appellant was allotted a piece of land for setting up an industrial unit at Ankleshwar subject to the terms and conditions embodied in agreement of licence dated 2.4.1976 which, among other things, provided for consumption of specified quantity of water by the appellant. The agreement also provided for payment of 70% of the cost of agreed quantity of water irrespective of consumption. In 1982, respondent No.1 demanded non utilization charges amounting to Rs.4068/-, which were deposited by the appellant. After some time, respondent No.1 demanded Rs.2,69,895/- towards water charges. For next 10 years, the parties entered into long correspondence on the issue of levy of water charges, etc. Finally, respondent No.1 issued bill dated 13.1.1996 requiring

the appellant to pay Rs.22,96,207/- towards water charges. The appellant challenged the same in Special Civil Suit No.32 of 2001. The summons issued by the trial Court were duly served upon the respondents but no written statement was filed on their behalf to controvert the averments contained in the plaint and none appeared on the dates of hearing despite the fact that the case was adjourned on more than one occasion. The suit was finally decreed on 30.10.2004 and it was declared that the appellant is not liable to pay Rs.22,96,207/- by way of minimum charges for water for the period between 1978 and 16.4.2001 and, thereafter, till the water was supplied by respondent No.1. After few months, the appellant filed another suit which was registered as Civil Suit No.222 of 2005 and prayed that respondent No.1 be directed to issue no objection certificate in its favour. The summons of the second suit were also served upon the respondents, but neither the written statement was filed nor any one appeared on their behalf. The second suit was also decreed on 12.12.2007 and respondent No.1 was directed to issue no objection certificate to the appellant. In compliance of the decree passed in the second suit, the concerned authority of the Corporation issued no dues certificate dated 9.7.2008.

4. After four months and fifteen days of taking action in furtherance of the decree passed in the second suit, the respondents filed an appeal against judgment and decree dated 30.10.2004 passed in Special Civil Suit No.32 of 2001. They also filed an application under Order 41 Rule 3A of the Code of Civil Procedure read with Section 5 of the Limitation Act for condonation of delay by making the following assertions:

> "1. That this appeal is preferred against the judgment and decree of the learned Civil Judge (SD), Gandhinagar passed on 30.10.2004. That the suit was filed for permanent injunction and declaration and on the ground that the advocate of the GIDC has appeared but no written statement was filed and, therefore, the learned Judge resorted to Order 8 Rule 11 of the Civil Procedure Code

and granted the declaration as prayed for in the plaint. That after the decree being passed, the present plaintiff filed another suit being Civil Suit No.222 of 2005 and in which the decree was passed on 12.12.2007. That particular decree is to be challenged before this Honourable Court and, therefore, in 2008, after the second decree was passed, it was brought to the notice of the Legal Department as well as to the Executive Engineer at GIDC, Ankleshwar as to how this has happened and it seems that because of numerous transfers as well as it is also possible that the party might have arranged or joined hands with some employee of the Corporation and thereby after engaging advocate, no body has gone to the advocate for the purpose of giving instruction or filing the written statement and as a result thereof, decree is passed and only in the month of January/February, the law department came to know and therefore, an inquiry was made into the matter but the GIDC could not trace out as to at whose hands the mistake or mischief was done, however, when after inquiry everything was noticed and, therefore, the application for certified copy was made on 17.11.2008 and on 18.11.2008, the copy was ready and the same was sent to the advocate and thereafter the present appeal is preferred.

2. That a long span from 30.10.2004 to 18.11.2008, practically four years time is passed and this has happened only because of some mistake or mischief on the part of the staff and, therefore, the appeal could not be preferred, otherwise it is a matter of substantial right of the GIDC where the water charges are leveled in spite of water being used or not and when the bills were already drawn, there was not intention on the part of the GIDC not to contest the suit. But it is difficult to trace out how this has happened and, therefore, when the inquiry was conducted in detail, the facts were brought to the notice and on that basis the cause has arisen to file this appeal and the delay

of 1067 days cause in filing the appeal is required to be condoned in the interest of justice."

On notice, a detailed reply was filed on behalf of the appellant in the form of an affidavit of its Director, Shri Sanjay Kantilal Shah, paragraphs 4.16, 5 and 6 whereof read as under:

"4.16. That the First Appeal preferred by the appellant has been preferred with Civil Application No.14201 of 2008 and the said application for condonation of delay under Order 41 Rule (3A) read with Section 5 of the Limitation Act. As a matter of fact, the petitioner company being a Government Corporation is bound to follow the rules and regulations as it is and cannot deviate itself from the provisions of law. As a matter of fact in filing the present First Appeal there is a delay of more than 4 years. Moreover, in the second suit, the decree and judgment is already passed and thereafter now the petitioner has no right to challenge the order of the Civil Suit No.32/2001. But for the reasons best known to the appellant the correct number of days has not been mentioned in the condonation of delay application. As a matter of fact, the petitioner being a Government Corporation has to follow the rules and regulations strictly and is required to give proper explanation as to why the Appeal has not been preferred within the time frame and if they were so, being aggrieved by the order passed by the Ld. Civil Judge (SD) Gandhinagar. If the condonation of delay is taken into consideration the said page is only a 4 pages wherein no proper explanation as to what the petitioner was doing for the past year has been given in the said and thereby also the said application is required to be dismissed in limine.

5. With regard to para -1 of the Civil Application, I most humbly and respectfully submit that it is true that the decree passed by the Ld. Civil Judge (S.D) Gandhinagar on 13.10.2004. It is also true that in the said Suit, the advocate for the GIDC had appeared but had not filed

written statement and therefore, the Ld. Judge has passed the order under the provisions of the Code of Civil Procedure and granted declaration as prayed for in the plaint. It is also true that after decree was passed, the present respondent filed another suit being Civil Suit No.222/2005 and the said decree was passed on 12.12.2007. It is not true that in the year 2008 after the second decree was passed it was brought to the knowledge of the Legal Department that the earlier decree was required to be challenged. Lack of legal knowledge cannot be said to be ground to condone the delay. If the facts had not been brought well in time then for the said it cannot be said that the respondent company is required to be punished. As a matter of fact nothing has been mentioned on Affidavit as to who did not give proper instructions or as to who had possibly played the mischief and as to who had joined the hand with the respondent company. It is only the blame game which is being played and allegations are being leveled in order to save its own skin but there is no truth behind the facts mentioned therein and thereby there is no way as to how the present application can ever be allowed. Moreover the respondent is not knowing any persons of the G.I.D.C. (as on today or at any time).

6. With regard to para-2 of the Civil Application, I most humbly and respectfully say and submit that it is true that more than 4 years time has been passed from the date of the decree but as to who has played the mischief or mistake or had it been intentionally filed within the time frame that is for the reasons best known to the appellant corporation and that is something on which the petitioner company would not like to comment at this juncture. No proper justification or explanation has been brought on record as to what was happening for the past 4 years, has also not given anything in detail and neither true and correct facts have been mentioned nor the calculation in respect

of the days have been made properly and thereby also on all the said counts, the present application is required to be dismissed with exemplary cost."

5. The Division Bench of the High Court referred to the judgments of this Court in *State of Bihar and others v. Kamleshwar Prasad Singh and another,* 2000 AIR SC 2388**,** *N. Balakrishnan v. M. Krishnamurthy,* JT 1998 (6) SC 242, *State of Haryana v. Chandra Mani and others* AIR 1996 SC 1623, *Spl. Tehsildars, Land Acquisition, Kerala v. K.V. Ayisumma* AIR 1996 SC 2750, *Punjab Small Industries and Export Corporation Ltd. and others v. Union of India and others* 1995 Suppl. (4) SCC 681, *P.K. Ramachandran v. State of Kerala and another* (1997) 7 SCC 566 and *Collector, Land Acquisition, Anantnag v. Mst. Katiji* AIR 1987 SC 1353 and condoned the delay by making a cryptic observation that the cause shown by the respondents is sufficient. The relevant portion of the High Court's order is reproduced below:

"Applying the principles laid down by the Supreme Court to the facts of the present case, we are satisfied that sufficient cause is made out by the applicant for condonation of delay. *Over and above, in view of the fact that reasons mentioned in this application have not been controverted by the other side* and also in view of the principles governing the discretionary exercise of power under Section 5 of the Limitation Act, 1963, we are of the view that sufficient cause has been stated for not filing the appeal in time and hence, delay caused in filing appeal is to be condoned and the application is required to be allowed."

(Emphasis supplied)

6. Shri L.N. Rao, learned senior counsel appearing for the appellant argued that the impugned order is liable to be set aside because the High Court allowed the application for condonation of delay by erroneously assuming that the delay

was of 1067 days only. Learned senior counsel pointed out that appeal against judgment and decree dated 30.10.2004 was filed on 24.11.2008 i.e., after more than four years, but by scoring out the figures and words "4 years and 28" in paragraphs 2 and 3 of the application and substituting the same with figure "1067", the respondents misled the High Court in believing that delay was of 1067 days. He then referred to affidavit dated 16.2.2009 of Shri Sanjay Kantilal Shah to show that substantial grounds had been put forward on behalf of the appellant for opposing the respondents' prayer for condonation of delay of more than four years and submitted that the Division Bench of the High Court committed serious error in condoning the delay by assuming that no reply had been filed by the appellant. Learned senior counsel also invited the Court's attention to affidavits dated 25.11.2009 and 4.2.2010 of Shri Pravin Keshav Lal Modi and Shri Harishbhai Patel respectively filed in this Court on behalf of the respondents as also the list of events attached with the second affidavit to show that the functionaries of respondent No.1 were very much aware of the proceedings of Special Civil Suit No.32 of 2001 and Civil Suit No.222 of 2005 and submitted that the High Court should not have accepted patently incorrect assertions contained in the application for condonation of delay, which was supported by an affidavit of none else than the General Manager of respondent No.1, Shri R.B. Jadeja, that the Law Department came to know about the judgment of Special Civil Suit No.32/2001 only in January/February, 2008.

7. Shri Anip Sachthey, learned counsel for the respondents fairly admitted that the appeal was filed after lapse of more than four years of judgment dated 30.10.2004 but submitted that this Court should not interfere with the discretion exercised by the High Court to condone the delay and the respondents should not be penalized simply because the advocates appointed by the Corporation did not bother to file written statement and appear before the trial Court on the dates of hearing. Learned counsel emphasized that this Court has

repeatedly taken cognizance of the lethargy and callousness with which litigation is conducted on behalf of the State and its agencies/instrumentalities at various levels and condoned the delay so as to enable them to contest the matters on merit and submitted that similar approach may be adopted in the present case and the appellant may be compensated by award of adequate cost.

8. We have considered the respective submissions. The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time. The expression "sufficient cause" employed in Section 5 of the Indian Limitation Act, 1963 and similar other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which sub serves the ends of justice. Although, no hard and fast rule can be laid down in dealing with the applications for condonation of delay, this Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate - *Collector, Land Acquisition, Anantnag v. Mst. Katiji* (1987) 2 SCC 107, *N. Balakrishnan v. M. Krishnamurthy* (1998) 7 SCC 123 and *Vedabai v. Shantaram Baburao Patil* (2001) 9 SCC 106. In dealing with the applications for condonation of delay filed on behalf of the State and its agencies/instrumentalities this Court has, while emphasizing that same yardstick should be applied for deciding the applications for condonation of delay filed by private individuals and the State, observed that certain amount of latitude is not impermissible in the latter case because the State represents collective cause

of the community and the decisions are taken by the officers/ agencies at a slow pace and encumbered process of pushing the files from table to table consumes considerable time causing delay – *G. Ramegowda v. Spl. Land Acquisition Officer* (1988) 2 SCC 142, *State of Haryana v. Chandra Mani* (1996) 3 SCC 132, *State of U.P. v. Harish Chandra* (1996) 9 SCC 309, *State of Bihar v. Ratan Lal Sahu* (1996) 10 SCC 635, *State of Nagaland v. Lipok Ao* (2005) 3 SCC 752, and *State (NCT of Delhi) v. Ahmed Jaan* (2008) 14 SCC 582.

9. In the light of the above, it is to be seen whether the respondents had offered any plausible/tangible explanation for the long delay of more than four years in filing of appeal and the High Court was justified in condoning the delay.

10. A reading of the impugned order makes it clear that the High Court did make a bald reference to the application for condonation of delay filed by the respondents but allowed the same without adverting to the averments contained therein and the reply filed on behalf of the appellant. Not only this, the High Court erroneously assumed that the delay was of 1067 days, though, as a matter of fact, the appeal was filed after more than four years. Another erroneous assumption made by the High Court was that the appellant had not filed reply to controvert the averments contained in the application for condonation of delay. It may have been possible for this Court to ignore the first error in the impugned order because by deleting the figures and words "4 years and 28" in paragraphs 2 and 3 of the application and substituting the same with the figure 1067, the respondents misled the High Court in believing that the delay was of 1067 days only but it is not possible to fathom any reason why the Division Bench of the High Court omitted to consider the detailed reply which had been filed on behalf of the appellant to contest the prayer for condonation of delay. Notwithstanding this, we may have set aside the impugned order and remitted the case to the High Court for fresh disposal of the application filed by the respondents under Section 5 of the Limitation Act

but, do not consider it proper to adopt that course, because as will be seen hereinafter, the respondents did not approach the High Court with clean hands.

11. The statement containing the list of events annexed with the affidavit of Shri Harishbhai Patel shows that before filing suit, the appellant had issued notice dated 5.2.2001 to which respondent No.1 sent reply dated 13.3.2001. The summons of Special Civil Suit No. 32/2001 instituted by the appellant were served upon the respondents sometime in the month of April/ May 2001. On 16.5.2001, General Manager (Law) instructed Ms. Rekhaben M. Patel to appear on behalf of the respondents. Executive Engineer, Ankleshwar was also directed to contact the advocate for preparing the reply affidavit. On 23.5.2001, Deputy Executive Engineer, Ankleshwar forwarded the comments to Ms. Rekhaben M. Patel. On 18.4.2002, the appellant filed an application for ex parte proceedings against the respondents. On 30.11.2002, the trial Court directed the respondents to appear on 12.12.2002 with indication that if they fail to do so, ex parte proceedings will be held. Thereupon, General Manager (Law) wrote letter dated 10.12.2002 to Ms. Rekhaben to remain present on the next date of hearing i.e., 12.12.2002. On 30th December, 2002, Deputy Executive Engineer, Ankleshwar wrote to the advocate in the matter of submission of para-wise comments. On 2.1.2003, the Executive Engineer is said to have sent a letter to the advocate informing her about the next date of hearing i.e., 10.1.2003 and asked her to remain present. After almost one year and ten months, the trial Court pronounced the ex parte judgment and decreed the suit. The summons of the second suit were received sometime in May, 2005. On 20.6.2005, Shri B.R. Sharma, Advocate was instructed to appear on behalf of the respondents. On 10.1.2006, Deputy Executive Engineer, Ankleshwar informed the new advocate about the next date of hearing which was 23.1.2006. The second suit was decreed on 12.12.2007.

12. During the course of hearing, learned counsel for the respondents fairly conceded that in the second suit filed by the appellant there was a specific mention of decree dated 30.10.2004 passed in Special Civil Suit No. 32/2001. He also conceded that even though the first suit remained pending before the trial Court for three years and five months and the second suit remained pending for more than two years, none of the officers of the Law Department or the Engineering Department of respondent No.1 appeared before the Court.

13. From what we have noted above, it is clear that the Law Department of respondent No.1 was very much aware of the proceedings of the first as well as the second suit. In the first case, Ms. Rekhaben M. Patel was appointed as an advocate and in the second case Shri B.R. Sharma was instructed to appear on behalf of the respondents, but none of the officers is shown to have personally contacted either of the advocates for the purpose of filing written statement and preparation of the case and none bothered to appear before the trial Court on any of the dates of hearing. It is a matter of surprise that even though an officer of the rank of General Manager (Law) had issued instructions to Ms. Rekhaben M. Patel to appear and file vakalat as early as in May 2001 and Manager (Law) had given vakalat to Shri B.R. Sharma, Advocate in the month of May 2005, in the application filed for condonation of delay, the respondents boldly stated that the Law Department came to know about the ex parte decree only in the month of January/February 2008. The respondents went to the extent of suggesting that the parties may have arranged or joined hands with some employee of the corporation and that may be the reason why after engaging advocates, nobody contacted them for the purpose of giving instructions for filing written statement and giving appropriate instructions which resulted in passing of the ex parte decrees. In our view, the above statement contained in para 1 of the application is not only incorrect but is ex facie false and the High Court committed grave error by condoning more than four years' delay in filing

of appeal ignoring the judicially accepted parameters for exercise of discretion under Section 5 of the Limitation Act.

14. In the result, the appeal is allowed. The impugned order of the High Court is set aside and the application for condonation of delay filed by the respondents is dismissed. As a corollary, the appeal filed by the respondents against judgment and decree dated 30.10.2004 shall stand dismissed as barred by time. However, it is made clear that the disposal of this appeal shall not absolve the higher functionaries of respondent No.1 from the responsibility of conducting a thorough probe into the matter so that accountability of the defaulting officers/officials may be fixed and the loss, if any, suffered by respondent No.1 recovered from them after complying with the rules of natural justice.

N.J. Appeal allowed.