MIHEER H. MAFATLAL

v.

MAFATLAL INDUSTRIES LTD.,

SEPTEMBER 11, 1996

[N.P. SINGH AND S.B. MAJMUDAR, JJ.]

Company Law :

Companies Act, 1956 : Sections 391 to 393.

Amalgamation—Scheme of—Sanction—Granting of—Factors to be considered—By Company Court—Jurisdiction of—Broad contours laid down—Creditors or members must arrive at informed decision based on relevant material for approving scheme—Scheme as a whole was to be just, fair and reasonable to creditors or members without coercing minority.

Amalgamation—Scheme of—Approved by majority shareholders—Sanction of—By Company Court—Alleged bona fide action of majority shareholders or supression by the minority shareholders—Consideration for—Held : Bona fides of majority shareholders acting as group to be examined—Not bona fides of person whose personal interest might be different from that of voters as a class—Further, grievance of bona fides of majority voiced before General Body meeting itself—In the circumstances of the case, Scheme of Amalgamation could not be said to be unfair to minority shareholders.

Amalgamation—Scheme of—Minority equity shareholders—Convening of separate meeting of—Held : No separate meeting of the sub-class of minority shareholders to be convened unless different type of scheme of compromise offered to them—If same scheme offered to entire class of equity shareholders no separate meeting of minority shareholders required to be convened.

The respondent transferee-company was a large multi- Division, multi-locational company carrying on diversified activities including manufacturing and sale of textiles. The appellant was a director in the transferor-company which had been carrying on the business of manufacture and sale of textile piece goods and chemicals.

A The transferee-company moved an application before the High Court for sanctioning of a scheme of Amalgamation of the transferor-company with the transferee-company. It was at this stage that the appellant who was one of the shareholders of the transferee-company filed his objections under Section 391 of the Companies Act, Earlier the High Court directed convening of a meeting of equity shareholders of the respondent trans-
B feree-company. In the meeting an overwhelming majority of equity shareholders approved the scheme of Amalgamation. Thereafter the respondent transferee-company filed Company Petition before the High Court under Section 391(2) of the Act. The Single Judge sanctioned the said scheme of Amalgamation which was confirmed in appeal by the
C Division Bench of the High Court. Being aggrieved the appellant preferred the present appeal.

On behalf of the appellant it was contended that the respondent transferee-company was guilty of hiding the special interest of its director
D from the shareholders thereby the voting by the equity shareholders got vitiated; that the scheme of Amalgamation was unfair, unreasonable and amounted to supression of minority shareholders represented by the appellant and hence liable to be rejected; that a separate meeting of minority shareholders represented by the appellant was required to be convened on the basis that the appellant's group represented a special class of equity
E shareholders; and that the exchange ratio of equity shares of the transferor and transferee companies was *ex facie* unfair and unreasonable to the shareholders of the transferee-company.

On behalf of the respondent transferee-company it was contended
F that the personal disputes between the directors of the transferee and transferor companies were out of consideration of the equity shareholders and in any case non-disclosure of such disputes had no adverse effect on the decision of the majority shareholders who had approved the Scheme with a thumping majority of a about 95% and the appellant who was objecting to the Scheme was in microscopic minority of 5% of the total voting strength;
G that the appellant never cared even to be present at the meeting of the equity shareholders to put forward his objection and he only sent proxies who had no right to speak at the meeting; that the exchange ratio was suggested by experts and approved by an overwhelming majority of the equity shareholders; and that the appellant himself who was the director of the
H transferor-company had approved the scheme of Amalgamation.

Dismissing the appeal, this Court A

HELD : 1.1. The provisions of Sections 391 and 393 of the Companies Act, 1956 show that compromise or arrangement can be proposed between a company and its creditors or any class of them or between a company and its members or any class of them. Such a compromise would also take in its sweep any scheme of amalgamation/merger of one company with another. When such a scheme is put forward by a company for the sanction of the Court in the first instance the Court has to direct holding of meeting of creditors of class of creditors or members or class of members who are concerned with such a scheme to accord their approval. The Company Court which is called upon to sanction such a scheme has not merely to go by the *ipse dixit* of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme. A Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the concerned company, cannot act merely as a rubber stamp and automatically put its seal of approval on such a scheme. [24-A-G; 25-B] B C D

1.2. The following broad contours of the jurisdiction of the Company Court in granting sanction to the scheme have emerged : E

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held. [31-H; 32-A]

F

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391(2). [32-B]

3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class. [32-C] G

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplates by H

A Section 391(1). [32-C-D]

5. That all the requisite material contemplated by the proviso to Section 391(2) of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same. [32-D]

B

6. That the proposed Scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the C veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same. [32-E]

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting *bona fide* and in good faith and were not coercing the minority D in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent. [32-F]

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of vies of prudent men of business taking a E commercial decision beneficial to the class represented by them for whom the scheme is meant. [32-G]

9. Once the aforesaid board parameters about the requirements of the scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the F commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to G the Court exercising appellant jurisdiction over the scheme rather than its supervisory jurisdiction. [32-H; 33-A-B]

1.3. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept H in view by the Court. The Court certainly would not act as a court of appeal

and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umprie. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392 of the Act. Of course this Section deals with post- sanction supervision. But the said provisions itself clearly earmarks the field in which the sanction of the Court operates. The supervisor cannot ever treated as the author or a policy maker. Consequently the propriety and the merits of the Compromise or arrangement have to be judged by the parties who as *sui juris* their open eyes and fully informed about the pros and cons of the Scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction.

[25-H; 26-A-C; 27-A-B]

Alabama New Orleans Texas and Pacific Junction Railway Company, Re, **(1891) 1 Chancery Division 213 and** *Anglo- Continental Supply Co. Ltd., Re,* **(1992) 2 Ch. 723, referred to.**

Mankam Investments Ltd. and Others, Re., **(1995) 4 Comp. LJ 330 (cal.), approved.**

Hindustan Lever Employees' Union **v.** *Hindustan Lever Ltd. and Other,* **[1995] Supp. 1 SCC 499, relied on.**

Hoare & Co. Ltd., Re, **(1933) All ER Rep. 105, Ch. D and** *Bugle Press Ltd., Re,* **(1961) Ch. 270, cited.**

Bucklay on the Companies Act, **14th Edition, referred to.**

2.1. Section 393(1)(a) of the Act shows that the special interest of

A **director which is required to be brought home to the voters must satisfy the following requirements of the Section before it can be treated to be a relevant special interest of the director which is required to be communicated to the voters : [34-E-F]**

1. The director's interest must be a special interest different from the
B **interest of other members who are the voters at the meeting. [34-E-F-G]**

2. The compromise or arrangement which is put to vote must have an effect on such special interest of the director. [34-G]

3. Such effect must be different from the effect of compromise and
C **arrangement on similar interest of other persons who are called upon to vote at the meeting. [34-F-H]**

2.2. When a scheme of Compromise and Arrangement which involves two companies, namely, the transferor-company and the transferee-com-
D **pany and their shareholders and creditors is on the anvil of scrutiny before the sanctioning Court, the Court has to see that the interest of the class of creditors or shareholders to whom the Scheme is offered for approval is any way likely to be affected by the suppression of special interest of the director in connection with such a scheme which is on the anvil. Two independent bodies which are represented by their shareholders or**
E **creditors as a class, as the case may be, have to take commercial decisions strictly with a view to seeing that the concerned Scheme of Compromise or Arrangement is beneficial to the shareholders or creditors as a class vis-a-vis the company which is a corporate entity in so far as company's relations with these class of creditors and shareholders are concerned. If**
F **the special interest which the director has is in any way likely to be affected by the Scheme and if non-disclosure of such an interest is likely to affect the voting pattern of the class of creditors or shareholders who are called upon to vote on the scheme, then only such special interest of the director is required to be communicated to the voters as per Section 393(1)(a) of**
G **the Act. [36-E-G]**

2.3. The personal family dispute between the appellant on the one hand and his uncle, director or the transferee-company on the other regarding the right to hold shares in the company cannot have any linkage or nexus with the Scheme of Amalgamation of these two companies which
H **was put to vote before the equity shareholders. The equity shareholders of**

the transferee-company had to decide in their commercial wisdom whether it is worthwhile to have a larger body of shareholders on account of the merger so that apart from the share-holding of the transferee-company its objects would also get diversified and its field of operation would be enlarged with the prospect of hike in the dividend available to these shareholders after the economic and Industrial activities of both the companies so amalgamated would get elongated and whether the value of their shares in such consolidated companies were likely to get a boost in the stock market. While deciding whether transferor-company should be merged with the transferee-company and the transferee company's economic and industrial activity should be permitted to be enlarged as a result of such merger the equity shareholders least concerned whether the appellant would purchase in future the share of his uncle, the present director or vice versa. That was entirely their personal dispute which was still not adjudicated upon and its decision one way or the other had no impact on the pattern of voting of the equity shareholders of the respondent- company as a class of prudent businessmen and investors so far as the Scheme was concerned. Consequently, it must be held that mention about the personal interest was outside the statutory requirements of Section 393(1)(a) of the Act. [36-H; 37-A; C; H; 38-A-B; C]

3.1. While considering the question of *bona fides* of the majority voters and whether they were unfair to the appellant it has to be kept in view that *bona fides* of the majority acting as a group has to be examined vis-a-vis the Scheme in question and not the *bona fides* of the person whose personal interest might be different from the interests of the voters as a class. *Bona fide* of person can only be relevant if it can be established with reasonable certainty that he represents majority or is controller of majority. The director of the transferee-company cannot be visited with such a charge. The question of *bona fide* of the majority shareholders or the alleged suppression by them of the minority shareholders or their attempt to suffocate their interest has to be judged from the point of view of the class as a whole. Question is whether the majority equity shareholders while acting on behalf of the class as a whole had exhibited any adverse interest against the appellant's minority shareholders also having similar interest as members of the same class, while approving the Scheme or had acted with any oblique motive to whittle down such a class interest of the minority. [41-E-F]

A *Hellenic and General Trust Limited, Re,* (1976) 1 WLR 123, referred to.

3.2. In the instant case it cannot be said that the voting pattern was dominated by the share-holding of the director of the transferee-company and his group. Nor could it be said that the Scheme as put to vote was in B any way unfair to appellant or that the majority shareholders acting as a class had not behaved in a *bona fide* manner for protecting the interest of the class as a whole and were in any way inimical to the appellant. It was not the contention of the appellant that while voting by majority in favour of the Scheme the majority had acted with any oblique motive to fructify C any adverse commercial interest qua him and his group when it consisted of outsiders like financial institutions or that there was any possibility of their surrendering their economic interest in the scheme at the dictates of shareholder-director of the transferee-company and his group. The Board of Directors of the respective companies, namely, the transferor-company as well as the transferee-company had approved that Scheme of Amal- D gamation before it was put to vote. The appellant was himself one of the directors of the transferee-company who had no objection to the Scheme of Amalgamation from the point of view of the transferor-company. So far as the transferee-company is concerned though appellant was not a director he was 5% shareholder who did not think it fit to personally remain present E at the time of voting and simply relied upon proxy. If the appellant was feeling that the Scheme was unfair to him or was not going to protect his interest as shareholder in the respondent-company nothing prevented him from remaining present and voicing his grievance before the General Body of the equity shareholders and to apprise them of the alleged pernicious effect of the Scheme. It is, therefore, too late in the day for him to contend F that the Scheme was unfair to him and that the family of the director of transferee-company had tried to dominate and engineer any adverse pattern of voting at the meeting of the equity shareholders. Apart from the pattern of voting at the meeting of the equity shareholders, even the share-holding pattern of the respondent-company belies the submission put for- G ward on behalf of the appellant that the group of the transferee-company's director dominated the constitution of the company and could control the decisions of the shareholders. The scheme of the Amalgamation cannot be said to be unfair and amounting to suppression of minority shareholders represented by the appellant. [41-D; 42-C-F; 43-G]

H 4. Even though the Companies Act or the Article of Association do

not provided for such a class within the class of equity shareholders, in a given contingency it may be contended by a group of shareholders that because of their separate and conflicting interests vis-a-vis other equity shareholders with whom they formed a wider class, a separate meeting of such separately interested shareholders should have been convened. On the express language of Section 391(1) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly presupposes that if the Scheme of Arrangement or Compromise is offered to the members as a class and no separate Scheme is offered to any sub- clause of members which has a separate Scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive. In the instant case when one the same Scheme is offered to the entire class of equity shareholders for their consideration and when commercial interest of the appellant so far as the Scheme is concerned is common with other equity shareholders he would have a common cause with them either to accept or to reject the Scheme from commercial point of view. Consequently there was no occasion for convening a separate class meeting of the minority equity shareholders represented by the appellant and his group. [46-G-H; 47-E; G-H]

Palmer on Company Law 24th Edition, referred to.

5. Valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the filed of accountancy. Many imponderables enter the exercise of valuation of shares. Which exchange ratio is better is in the realm of commercial decision of well informed equity shareholders. It is not for the Court to sit in appeal over this value judgment of equity shareholders who are supposed to be men of the world and reasonable persons who know their own benefit and interest underlying any proposed scheme and who with open eyes have okayed this ratio and the entire Scheme. [49-D; 50-A; 51-B]

Kamala Sugar Mills Ltd. 55 Company Cases, 308 (Guj), approved.

CWT. v. *Mahadeo Jalan,* [1973] 3 SCC 157, relied on.

Penington : *Principles of Company Law,* referred to.

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11879 of 1996.

From the Judgment and Order dated 12.7.96 of the Gujarat High Court in O.J.A. No. 16 of 1994.

B Shanti Bhusan, Miheer Thakur, Darshan Parekh, Jay Salve, and J.K. Das for the Appellant.

Soli J. Sorabjee, S.B. Vakil, S. Ganesh, P.N. Kapadia, U.A. Rana and Rajiv Tyagi for Gagrat & Co. for the Respondent.

C The Judgment of the Court was delivered by

S.B. MAJMUDAR, J. Leave granted.

By consent of learned advocate of parties this appeal was taken up for final hearing. We have heard the learned advocates of parties. The D appeal is being disposed of by this judgment.

This appeal by special leave arises out of the judgment and order of a Division Bench of High Court of Gujarat in Original Jurisdiction Appeal No. 16 of 1994 decided on 12 July 1996. The Division Bench by the said E impugned judgment dismissed the appeal of the appellant and confirmed the order of the learned Single Judge in Company Petition No. 22 of 1994 and sanctioned a Scheme of Amalgamation of two Public Limited companies, namely Mafatlal Industries Limited ('MIL' for short) being the transferee-company with which Mafatlal Fine Spinning and Manufacturing Company Limited ('MFL' for short) being the transferor-company was to F be amalgamated. The learned Single Judge granted requisite sanction to the applicant transferee-company MIL to amalgamate in it the transferor-company MFL under Section 391(2) of the Companies Act, 1956 (hereinafter referred to as 'the Act'). In order to appreciate the grievance of the appellant who objected to the Scheme moved by the respondent-G company MIL, as ventilated before us by its learned senior counsel Shri Shanti Bhusan, assisted by learned counsel Shri M.J. Thakore, it will be necessary to glance through a few relevant background facts.

Background Facts

H The respondent-company MIL which was the petitioner before the

learned Single Judge has its registered office at Ahmedabad in Gujarat State. It was incorporated on 20th January 1913 under the name 'The New Shorrock Spinning & Manufacturing Co. Limited' and its name was subsequently changed to 'Mafatlal Industries Limited' as per the fresh Certificate of Incorporation dated 24 January 1974 consequent upon change of name, as sanctioned by the Registrar of Companies, Gujarat, Ahmedabad. The objects of the transferee-company MIL as per its Memorandum of Association, *inter alia*, included activity of carrying on all or any of the businesses such as cotton spinners and doublers, wool, silk, flax, jute and hemp spinners and doublers, linen manufactures, to work spinning and weaving mills, cotton mills, jute mills and mills of any other description. The Authorised Share Capital of the respondent-company was Rs. 100,00,00,000 (Rupees one hundred crores only) divided into 30,05,500 equity shares of Rs. 100 each and 69,94,500 unclassified shares of Rs. 100 each. The subscribed Share Capital of the respondent-company as on 31st March 1993 was Rs. 26.30 crores (Rupees twenty six crores thirty lacs only) divided into 26,90,000 equity shares of Rs. 100 each.

The respondent-company commenced the business of textiles and had been carrying on the same since incorporation. The respondent-company is a large multi-Division, Multi-locational company carryiny on diversified activities including manufacturing and sale textiles, dyes intermediates and chemicals, professional grade connectors, plastic processing machineries and promoting various companies through Project Promotion Division.

The MFL being transferor-company was incorporated on 20th April 1931 under the Baroda State Companies Act and had been carrying on the business of manufacture and sale of textile piece goods and chemicals. Its registered office was situated at Mafatlal Centre, Nariman Point, Bombay. It was engaged in the manufacture and sale of textiles and fluorines based chemicals. There were three units of the Textiles Division situated at (1) Vejalpur Road, Navsari, (2) Mazagon, Bombay and (3) Lower Parel, Bombay and the unit of the Chemicals Division was situated at Bhestan, District Surat.

The Authorised Share Capital of the transferor-company as on 31st March 1993 was Rs. 30 crores (Rupees thirty crores only) divided into 30,00,000 ordinary shares of Rs. 100 each. The Subscribed Share Capital

A of the transferor-company as on 31st March 1993 was Rs. 26,25,77,100 (Rupees twenty six crores twenty five lacs seventy seven thousand and one hundred only) divided into 26,25,771 ordinary shares of Rs. 100 each. Subsequent to 31st March 1993 the the transferor-company had allotted 382 ordinary shares of Rs. 100 each. The transferor-company had also issued and allotted further 1,00,000 ordinary shares of Rs. 100 each at a B premium of Rs. 200 per share on conversion of 1,00,000 Partly Convertible Debentures of the face value of Rs. 2,000 each issued to Financial Institutions with effect from 1st February 1994 by the transferor-company.

The transferor-company MFL is proposed to be amalgamated with C the respondent-company MIL under the following circumstances and for the following reasons :

(1) The proposed amalgamation will pave the way for batter, more efficient and economical control in the running of operation.

D

(2) Economies in administrative and management costs will improve in combined profitability.

(3) The amalgamated company will have the benefit of the combined reserves, manufacturing assets, manpower and E cashflows of the two companies. The combined technological, managerial and financial resources are expected to enhance the capability of the amalgamated company to invest in larger and sophisticated projects to ensure rapid growth.

F (4) The amalgamated company will have a strong and large re source base. With a strong resource base, the risk bearing capacity of the amalgamated company will be substantial. Hitherto, with limited resources and capacity, either company had to forego business opportunities which would otherwise have been profitable to the group.

G

(5) "Exports" have been identified a 'thrust' area for both the companies and response in time to customers needs is considered to be critical in this area of operations. An amalgamated company will be strategically better placed to reduce H the response time. Customers' confidence in dealing with such

a mega company ensures timely delivery of large orders. A

(6) The amalgamated company will be able to source and absorb new technology and spend on Research and Development, Market Surveys etc. More comprehensively.

(7) More particularly in the Textiles Division, with 5 operating units at the company's disposal, the flexibility in operations will be very much pronounced. The Managers will not be inhibited by capacity constraints and will have the freedom of choosing from various options. B

(8) Both the companies have been subject to the pressures of raw material price fluctuations and of adverse market conditions in their respective product mix. Hence, the amalgamation will neutralise the adverse effects of contrary business cycles. The operations of one unit will be complementary to the other and a stable profitability will be achieved. C D

The director of the respondent-company MIL and transferor- company MFL approved the proposal for amalgamation of the MFL with MIL and pursuant to the respective Resolutions passed by them the detailed Scheme of Amalgamation was finalised. The directors of both the companies of the opinion that such amalgamation was in the interest do both the companies. E

It is pertinent to note at this stage that the appellant who has objected to the amalgamation before the High Court in the present proceedings so far as the amalgamation of the transferee-company is concerned, is himself one of the directors of the transferor- company being MFL. So far as the transferor-company MFL is concerned as its registered office is located at Bombay the corresponding application on behalf of the transferor-company for sanctioning this very Scheme of Amalgamation was moved in the Bombay High Court. The appellant at this stage did not object to this very Scheme for amalgamation on behalf of the transferor-company of which he was one of the directors and party to the Resolution approving the said amalgamation. Learned Single Judge of the Bombay High Court sanctioned the said Scheme on behalf of transferor-company. It is not in dispute between the parties that Bombay High Court had already sanctioned this very Scheme on behalf of the transferor-company. F G H

A As the registered office of the transferee-company is located at Ahmedabad the respondent transferee-company had approached the High Court of Gujarat for sanctioning this very Scheme of Amalgamation on behalf of the transferee-company and that application was moved on 8th February 1994. It is at this stage that the appellant who was one of the shareholders of the transferee-company filed his objection to the Scheme B of Amalgamation moved under Section 391 of the Act. Earlier the learned Single Judge directed convening of meeting of equity shareholders of the respondent-company. In the meeting of equity shareholders convened pursuant to the order of the High Court, overwhelming majority of the equity shareholders approved the Scheme in the meeting of 22nd January 1994 C convened at Premabhai Hall, Bhadra, Ahmedabad. The said meeting was attended by 5522 members present in person or by proxy, holding 20, 48, 513 fully paid equity shares of Rs. 100 each aggregating to Rs. 20,48,51,300. At the said meeting, resolution was passed without modification by the requisite majority as 5298 members holding 19, 36, 964 fully paid equity shares voted in favour of the Scheme and 143 members holding 86, 061 D fully paid equity shares voted against the Scheme. In short, the said meeting by requisite majority approved the proposed Scheme of Amalgamation and report of the Chairman was submitted to the High Court. Thereafter the respondent-company MIL filed Company Petition No. 22 of 1994 under Section 391(2) of the Act. That application was ordered to be published in local newspapers as well as in the Bombay edition of the said newspaper. E Notice was also issued to Regional Director, Company Law Board, Western Region, Bombay.

In response to the notice issued to the Central Government under Section 394A of the Act the learned Additional Central Government F Standing Counsel appeared before the High Court and submitted to the orders of the Court making it clear that the Central Government is not to make any representation in favour or against the proposed Scheme.

Pursuant to the public advertisement only the present appellant, the G shareholder of transferee-company holding 40, 567 share in MIL filed affidavit opposing the Scheme of Amalgamation and Arrangement between the respondent transferee-company MIL and transferor-company MFL of which, as noted earlier, he himself was one of the directors and the High Court of Bombay which sanctioned this very Scheme on behalf of the transferor-company had sanctioned the Scheme without any objection H being taken by the appellant at that stage.

Nine objections were raised by the appellant against the proposed Scheme of Amalgamation as shareholder of the transferee-company. At this stage we may not mention all these nine objections as ultimately only four objections have survived for our consideration in the present proceedings and to which we will make a detailed reference hereinafter. Suffice it to state at this stage that after a prolonged hearing the learned Single Judge S.D. Shah, J., over-ruled these objections and by a detailed as exhaustive judgment running over 254 pages covering various aspects of the matters canvassed before him sanctioned the said Scheme moved on behalf of the respondent transferee-company.

The Division Bench of the High Court to which the appellant carried the matter in appeal confirmed the aforesaid decision of the learned Single Judge by well considered Judgment which also ran into 136 pages and that is how the appellant, original objector, is before us in this appeal.

Family History

In order to properly appreciate the grievance of the appellant against the proposed Scheme and his role as an objector it will be necessary to note the family history of the appellant and two of the directors of the respondent transferee-company who have a common ancestor Mafatlal Gagalbhai. The Family Tree of Mafatlal Gagalbhai projects the following picture :

Family Tree of Mafatlal Gagalbhai

Seth Mafatlal Gagalbhai
(Died on 19.07.1944)

<table>
<tr><td colspan="4">Navinchandra
(Died 31.08.1955)</td><td>Bhagubhai
(Died
30.09.1944)</td><td>Pransukhlal
(Deceased)
(No issues)</td></tr>
<tr><td colspan="2">Arvind</td><td>Yogindra</td><td>Rasesh</td><td rowspan="2">Hemant
(Died on
16.08.1971)</td><td></td></tr>
<tr><td>Padmanabh
(Died on
29.07.1990)</td><td>Hrishikesh</td><td>Atulya</td><td>Pradeep</td><td></td></tr>
<tr><td></td><td></td><td></td><td></td><td>Miheer
(Born on
27.05.1958)</td><td></td></tr>
</table>

A As the aforesaid Family Tree shows, the appellant Miheer is the son of cousin brother of Arvind Navinchandra who is said to be at the helm of affairs of the transferee-company along with his son Hrishikesh. As seen from the Family Tree the common ancestor Mafatlal Gagalbhai who was himself a very astute businessman and entrepreneur had three sons Pran-
B sukhlal. Navinchandra and Bhagubhai. The eldest son Pransukhlal got out of the family prior to the death of Mafatlal Gagalbhai and he died without leaving any issue. Mafatlal Gagalbhai expired on 19th July 1944 and was survived by his two sons Navinchandra and Bhagubhai. On 30th September 1944, the said Bhagubhai died leaving him surviving Hemant, then aged 9 as his only male issue. On 31st August 1955, Navinchandra Mafatlal died
C leaving him surviving the three sons. Arvind Mafatlal. Yogindra Mafatlal and Rasesh mafatlal as his male issues. On 16th August 1971, said Hemant expired leaving behind him only male issue, present objector Miheer, them aged 13.

D The said Mafatlal Gagalbhai started different business undertakings and with passage of time, the family of said Mafatlal consisting to Navinchandra and Bhagubhai expanded their business undertakings. The said family held controlling interest in different business concerns run through public limited or private limited companies and the members of the family were also partners in partnership firms. The pattern which was
E maintained throughout was that the two sons Navinchandra and Bhagubhai and their families would respectively have an equal interest in companies or in partnership firms. At the time of the death of the said Bhagubhai the said Hemant was just 9 years of age. The business of Mafatlal Group was therefore for all practical purposes managed by the said Navinchandra. At
F the time to the death of Navinchandra the shareholding of the branch of Hemant Mafatlal in Mafatlal Group of Industries was equal to aggregate shareholding of Arvind Mafatlal, Yogindra Mafatlal and Rasesh Mafatlal. On the death of Navinchandra, the Mafatlal Group was managed by Arvind Mafatlal, Yogindra Mafatlal, Rasesh Mafatlal and late Hemant Mafatlal. Arvind Mafatlal was, however the eldest male member in the family who
G was always looked upon by Yogindra, Rasesh and late Hemant as an elder in the family and respected.

On 16th August 1971, Hemant Mafatlal died at the young age of 36 years leaving behind him his widowed mother, his wife, his son Miheer
H (then aged 13) and his two daughters (then aged 11 and 6). At that time,

the Mafatlal family, i.e., the families of Navinchandra and Bhagubhai were running 3 apex companies (1) Mafatlal Gagalbhai & Company Private Limited, (2) Surat Cotton Spinning and Weaving Mills Private Limited and (3) Pransukhlal & Company Private Limited.

It is the case of Miheer that when his father expired, the New Shorrock Spinning and Manufacturing Co. Limited was being controlled and managed by Mafatlal Gagalbhai & Co. Limited in which his father and his family had 46.47% shares vis-a-vis 43.66% shares held by the family of Navinchandra Mafatlal. After the death of his father, when Miheer was minor, it was decided to amalgamate Mafatlal Gagalbhai & Co. Pvt. Limited with the New Shorrock Spinning & Manufacturing Co. Limited on 24th January 1974 January 1974 and the name of the company was changed to present name i.e. MIL.

According to the appellant Miheer in or around 1979, there were certain disputes and difference amongst Arvind Mafatlal, Yogindra Mafatlal and Rasesh Mafatlal and it was felt that some arrangement should be worked put, whereby there would be a separation and division of the family business concerns amongst the four branches viz. Miheer Branch known as MHM Group, family of Arvind Mafatlal known as ANM Group, family of Yogindra Mafatlal known as YNM Group and family of Rasesh Mafatlal known as RNM Group. It is his further case that Shri C.C. Chokshi, a reputed chartered accountant was requested to prepare a Scheme for division of family business concerns. According to the appellant. Shri C.C. Chokshi prepared Note dated 23rd February 1979 making six suggestions for the division of Mafatlal Group of Industries into four groups as there were four family groups. The appellant contends that as per the aforesaid family arrangement the transferee-company, i.e., MIL was agreed to be put to his share and the other groups which were holding shares in the said transferee-company were to transfer their share-holdings in favour of the appellant. The appellant contends that however because of some family disputes the appellant fell from the grace of Shri Arvind Mafatlal who was the eldest male member monitoring all these industries belonging to all the groups of the same family, and consequently the family arrangement was not give effect to and that the transferee-company was not handed over in management to the appellant.

On the other hand the case of the other group headed by Shri Arvind

A Mafatlal was to the effect that the said family arrangement of 1979 was given a go-by and the appellant himself agreed to sell his share-holding in the transferee-company MIL in favour of Arvind Mafatlal's Group. Number of litigations took place between the parties in the second half of 1980s. That on 6th April 1987 Arvind Mafatlal filed Suit No. 10 of 1987 in the
B High Court of Judicature at Bombay for a declaration that there was a valid, subsisting and binding contract to sell shares held by Rasesh Mafatlal, Yogindra Mafatlal and Miheer Mafatlal, the appellant herein, groups to Shri Arvind Mafatlal's group and for a direction that they should sell that shares at a price to be determined by the arbitrator. In the said suit the appellant Miheer filed a counter-claim praying that the family arran-
C gement of 1979 should should be enforced and the share-holding of Shri Arvind Mafatlal's group and other groups in the transferee- company MIL should be sold by way of specific performance to the appellant. The aforesaid suit by Arvind Mafatlal and the counter- claim by the appellant are pending for adjudication in the High Court of Judicature at Bombay.
D It is in the background of the aforesaid history of family feud between these warring groups descended from the common ancestor Shri Mafatlal Gagalbhai that the grievance voiced by the appellant in these proceedings has to be appreciated.

Rival Contentions

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As noted earlier though a battle royal was fought between the contesting parties before the learned Single Judge wherein nine objections were raised for adjudication by the appellant, at this stage, the dispute centered round a limited number of contentions which were canvassed for
F our consideration by learned senior counsel for the appellant. Four-fold submissions for opposing the Scheme were canvassed on behalf of the appellant before us by Shri Shanti Bhushan, learned senior counsel. In the first place he contended that the respondent-company while putting the Scheme for approval of the equity shareholders in their meeting did not disclose the interest of the directors, namely, Shri Arvind Mafatlal and Shri
G Hrishikesh Mafatlal belonging to the camp of Arvind Mafatlal in the explanatory statement supporting the Scheme and consequently the shareholders were misled and could not come to an informed decision regarding the approval of the said Scheme with the result that the approval by the majority of equity shareholders to the said Scheme has got vitiated;
H (2) The Scheme as proposed was unfair to the minority shareholders

represented by the appellant and consequently it ought not to have been sanctioned by the Court; (3) The Scheme was otherwise unfair to the equity shareholders as the exchange ratio of equity shares of the transferor and transferee companies was *ex facie* unreasonable and unfair to the shareholders of the transferee-company MIL in so far as it provides under the Scheme that two equity shares of the transferee company will be allotted against five equity shares of the transferor-company at their respective face value of Rs. 100 per share; and (4) That the appellant represented a distinct class of equity shareholders so far as the respondent transferee-company is concerned and consequently separate meeting so far as his group is concerned should have been convened by the Company Court and as that has not been done the Scheme is liable to be rejected.

As a corollary to the aforesaid contention Shri M.J. Thakore, learned counsel appearing for the appellant in addition submitted that the voting pattern as adopted in the meeting of equity shareholders which had approved the Scheme by majority, resulted in coercing the minority represented by the appellant and that has rendered the Scheme unfair and unreasonable and consequently it is required to be rejected.

On the other hand learned senior counsel Shri Sorabjee appearing for th respondent transferee-company contended that there was to illegality either procedural or substantive vitiating the Scheme and that there was no suppression of relevant material from the shareholders when the Scheme was put to vote. That the personal disputes between the worring groups of the family, namely, Arvind Mafatlal on the one hand and the appellant on the other and which were subject-matter of the pending litigation in Bombay High Court had nothing to do with the question of sanctioning the Scheme for its better economic viability with which the shareholders were concerned and that as the transferor-company and the transferee-company were juristic persons and corporate bodies, while considering the question of approving the said Scheme such personal disputes between the directors of the transferee-company and the director of transferor-company were completely irrelevant and were out of consideration of the equity shareholders who were not at all concerned with this type of internal feuds and in any case non-disclosure of such disputes had no adverse effect on the decision of the majority shareholders who had approved the Scheme with a thumping majority of about 95% and the appellant who was objecting to the Scheme was in microscopic minority of

A 5% of the total voting strength. It was also contended by learned senior counsel for the respondent that it is wrong to assume that the transferee-company was family concerned and was managed by families. That Shri Arvind Mafatlal and Hrishikesh Mafatlal were only two directors out of thirteen directors of respondent-company. These eleven directors did not belong to his family. That even shareholding of Arvind Mafatlal's group in the respondent-company was not substantial and on the contrary about 40% shares were held by outside financial institutions. Even otherwise there was no question of any unfairness underlying the proposed Scheme or that in any way it was unfair to the appellant who never cared even to remain present personally at time of the meeting of the equity shareholders to put forward his objections and he only sent proxies who had no right to speak at the meeting. That therefore all these objections which he ultimately raised before the High Court were an afterthought. It was also contended that there was nothing wrong with the exchange ration as C.C. Chokshi & Co., a firm of reputed chartered accountants, had considered all the pros and cons underlying the Scheme and had suggested the exchange ratio and such an expert opinion was endorsed by another financial institution ICICI. That the appellant had not chosen to controvert this expert opinion by leading any evidence in rebuttal by any other expert in the field who could have suggested the exchange ratio differently. That the appellant's contention that the exchange ratio should have been one share of transferee company against six shares of the transferor company was in the realm of mere conjecture and *ipse dixit*. It was not supported by any expert opinion. Consequently the High Court was justified in taking the view both at the stage of learned Single Judge as well as in appeal by the Division Bench that the exchange ratio could not be said to be unfair or unreasonable especially when by as overwhelming majority the equity shareholders approved the said Scheme along with said exchange ratio and had no objection to the allotment of two equity shares of the transferee-company in exchange for five equity shares of transferor-company. It was also contended that the appellant himself who was the director of the transferor-company had approved the same exchange ratio while he acted on behalf of the transferor-company. He was, therefore, playing hide and seek when it came to the enforcement of the very same exchange ratio at the end of the transferee-company wherein he was not a director but only shareholder of merely 5% shares.

H It was next contended that the appellant was also an equity

shareholder and so far as the other equity shareholders were concerned they constituted the same class as the appellant. That there was no *inter se* conflict between the rest of the equity shareholders representing 95% of the voting strength which approved the Scheme and the appellant who represented dissenting 5% votes and consequently there was no question of holding as separate meeting so far as the appellant was concerned. Even otherwise such a separate meeting would not have made any impact on the voting pattern projected by the equity shareholders approving the said Scheme by overwhelming majority. Repelling the additional contention canvassed by learned counsel for the appellant it was submitted by Shri Sorabjee learned senior counsel for the respondent that there was no question of coercing any minority by the majority as in the meeting of the equity shareholders the appellant had not thought fit even to remain present personally and had only got represented through proxy for submitting his objection by voting against the Scheme without having any right to address the meeting. Thus the contention regarding alleged suppression by the majority was purely an afterthought especially when in the meeting the group of Arvind Mafatlal had not represented an absolute majority and 40% of the voting was by financial institutions who had no axe to grind against the appellant and who had voted by keeping in view purely commercial and economic interests of equity shareholders and had approved the Scheme in that light. It was, therefore, submitted that the contention raised on behalf of the appellant deserve to be rejected and the appeal consequently also deserve to be dismissed.

In view of the aforesaid rival contentions the following points arise for our determination :

1. Whether the respondent-company was guilty of hiding the special interest of its director Shri Arvind Mafatlal from the shareholders while circulating the explanatory statement supporting the Scheme and whether thereby the voting by the equity shareholders got vitiated.

2. Whether the Scheme is unfair and unreasonable to the minority shareholders represented by the appellant.

3. Whether the proposed Scheme of Amalgamation was unfair and amounted to suppression of minority shareholders represented by the appellant and hence liable to be rejected.

A 4. Whether separate meeting of minority shareholders represented by the appellant was required to be convened on the basis that the appellant's group represented a special class of equity shareholders.

5. Whether the exchange ratio of two equity shares of MIL for five equity shares of MFL was *ex facie* unfair and unreasonable to the equity B shareholders of MIL and consequently the Scheme of Amalgamation on that account was liable to be rejected.

However before we deal with the aforesaid points for determination seriatim, it will be necessary to keep in view the limited scope of the C jurisdiction of the Company Court which is called upon to sanction the Scheme of Amalgamation as per the provisions of Section 391 read with Section 393 of the Act.

Scope of interference by the Company Court in sanction proceedings

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The relevant provisions of the Companies Act, 1956 are found in Chapter V of Part VI dealing with 'Arbitration, Compromises, Arrangements and Reconstructions'. In the present proceedings we will be concerned with Sections 391 and 393 of the Act. The relevant provisions thereof read as under :

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"391. (1) Where a compromise or arrangement is proposed -

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

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the Court may, on the application of the company, or, of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of G members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, H where proxies are allowed under the rules made under section 643,

by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company :

Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like.

393. (1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called under section 391,-

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect : and in particular, stating any material interests of the directors, managing director, managing agent, secretaries and treasurers or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement, if, and in so far as, it is different from the effect on the like interests of other persons; and

(b) in every notice calling the meeting which is given by advertisement, there shall be included either such a statement as aforesaid on a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid."

The aforesaid provisions of the Act show that compromise or arrangement

A can be proposed between a company and its creditors or any class of them or between a company and its members or any class of them. Such a compromise would also take in its sweep any scheme of amalgamation/merger of one company with another. When such a scheme is put forward by a company for the sanction of the Court in the first instance
B the Court has to direct holding of meetings of creditors or class of creditors or members or class of members who are concerned with such a scheme and once the majority in number representing three-fourths in value of creditors or class of creditors or members or class of members, as the case may be, present or voting either in person or by proxy at such a meeting
C accord their approval to any compromise or arrangement thus put to vote, and once such compromise is sanctioned by the Court, it would be binding to all creditors or class of creditors or members or class of members, as the case may be, which would also necessarily mean that even to dissenting creditors or class of creditors or dissenting members or class of members
D such sanctioned scheme would remain binding. Before sanctioning such a scheme even though approved by a majority of the concerned creditors or members the Court has to be satisfied that the company or any other person moving such an application for sanction under sub-section (2) of Section 391 has disclosed all the relevant matters mentioned in the proviso
E to sub-section (2) of that Section. So far as the meetings of the creditors or members, or their respective classes for whom the Scheme is proposed are concerned, it is enjoined by Section 391(1)(a) that the requisite information as contemplated by the said provision is also required to be placed for consideration of the concerned voters so that the parties concerned before whom the scheme is placed for voting can take an informed and
F objective decision whether to vote for the scheme or against it. On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to by go by the *ipse dixit* of the majority of the shareholders or creditors or their respective classes who
G might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which
H is required to receive the imprimature of a court of law. No court of law

would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholder or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the concerned company has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the concerned scheme placed for its sanction. It is, of course, true that so far as the Company Court is concerned as per the statutory provisions of Sections 391 and 393 of the Act the question of voidability of the scheme will have to be judged subject to the rider that a scheme sanctioned by majority will remain binding to a dissenting minority of creditors or members, as the case may be, even though they have not consented to such a scheme and to that extent absence of their consent will have no effect on the scheme. It can be postulated that even in case of such a Scheme of Compromise and Arrangement put up for sanction of a Company Court it will have to be seen whether the proposed scheme is lawful and just and fair to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with required majority vote.

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However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinies the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 sub-Section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken and informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept

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A in view by the Court. The Court certainly would not act as a court of appeal nd sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umprie in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392 of the Act which reads as under :

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> "392. (1) Where a High Court makes an order under Section 391 sanctioning a compromise or an arrangement in respect of a company, it -
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> (a) shall have power to supervise the carrying out of the compromise or arrangement; and
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> (b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.
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> (2) If the Court aforesaid is satisfied that a compromise or arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under section 433 of this Act.
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> (3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act under section 153 of the Indian Companies Act, 1913 (7 of 1913), sanctioning a compromise or an

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arrangement." A

Of course this Section deals with post-sanction supervision. But the said provision itself clearly earmarks the filed in which the sanction of the Court operates. It is obvious that the supervisor cannot ever be treated as the author or a policy maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as *sui juris* with their open eye and fully informed about the pros and cons of the Scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinising the scheme place for its sanction which a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in the their best commercial and economic interest by majority agree to give green single to such a compromise or arrangement. The aforesaid statutory scheme which is clearly discernible from the relevant provisions of the Act, as seen above, has been subjected to a series of decisions of different High Courts and this Court as well as by the courts in England which had also occasion to consider schemes under *pari materia* English Company Law. We will briefly refer to the relevant decisions on the point. But before we do so we may also usefully refer to the observations found in the *oft-quoted* passage in Bucklay on the Companies Act, 14th Edition. They are as under :

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> "In exercising its power of sanction the Court will see, *first* that the provisions of the statute have been complied with, *second*, that the class was fairly represented by those who attended the meeting and that statutory majority are acting *bona fide* and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent, and *thirdly*, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. F G
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> The court does not sit merely to see that the majority are acting *bona fide* and thereupon to register the decision of the meeting, but at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, H

A or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the Scheme."

In the case of Re. *Alabama, New Orleans Texas and Pacific junction Railway Company* reported in 1891 (1) Chancery Division 213 the relevant B observations regarding the power and jurisdiction of the Company Court which is called upon to sanction a scheme of arrangement or compromise between the company and its creditor or shareholders were made by Lindley, L.J. as under :

C "What the court has to do is to see, *first of all*, that the provisions of that statute have been complied with; and, *secondly*, that the minority has been acting *bonafide*. The court also has to see that the minority is not being overriden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the court has to look at the scheme and D see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can reasonable be taken by businessmen. The court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bonafide*, and whether they are coercing the minority in order to E promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve it."

F To the similar effect were the observations of Fry, L.J., which read as under:

"The next enquiry is-Under what circumstances is the court to sanction a resolution which has been passed approving of a com- G promise or arrangement? I shall not attempt to define what elements may enter into the consideration of the court beyond this, that I do not doubt for a moment that the Court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the H proposal was at least so far fair and reasonable, as that an intel-

> ligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it. What other circumstances the court may take into consideration I will not attempt to forecast."

In *Anglo-Continental Supply Co. Ltd.*, Re. (1992) 2 Ch. 723 Ashtury, J., a century later reiterated the very same propositions as under :

> "Before giving its sanction to a scheme of arrangement the court will see firstly that the provisions of the statute have been complied with; secondly that the class was fairly represented by those who attended the meeting and that the statutory majority are acting *bona fide* and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and, thirdly, that the arrangement is such as a man of business would reasonably approve."

Learned Single Judge of the Calcutta High Court in the case of Re. *Mankam Investments Ltd. and Others* (1995) 4 Comp LJ 330 (Cal.) relying on a catena of decisions of the English Courts and Indian High Courts observed as under on the power and jurisdiction of the Company Court which is called upon to sanction a scheme of merger and amalgamation of companies :

> "It is a matter for the shareholders to consider commercially whether amalgamation or merger is beneficial or not. The court is really not concerned with the commercial decision of the shareholders until and unless the court feels that the proposed merger is manifestly unfair or is being proposed unfairly and/or to defraud the other shareholders. Whether the merged companies will be ultimately benefited or will be able to economise in the matter of expenses is a matter for the shareholders to consider. If three companies are amalgamated, certainly, there will be some economies in the matter of maintaining accounts, filing of returns and various other matters. However, the court is really not concerned with the exact details of the matter and if the shareholders approved the scheme by the requisite majority, then the court only looks into the scheme as to find out that it is not manifestly unfair and/or is not intended to defraud or do injustice to the other shareholders."

A We may also in this connection profitably refer to the judgment of this Court in the case of *Hindustan Lever Employee's Union* v. *Hindustan Lever Ltd. and Others,* [1995] Supp. 1 SCC 499 wherein a Bench of three learned judges speaking through Sen, J. on behalf of himself and Venkatachaliah, CJ., and with which decision Sahai, J., concurred. Sahai, J., in his concurring judgment in the aforesaid case has made the following pertinent observations in this connection in paras 3 and 6 of the Report :

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> "But what was lost sight of was that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction.
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> Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered between parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, the courts have evolved, the principle "prudent business management test" or that the scheme should not be a device to evade law. But when the court is concerned with a scheme of merger with a subsidiary of a foreign company then test is not only whether the scheme shall result in maximizing profits of the shareholders or whether the interest of employees was protected but it has to ensure that merger shall not result in impeding promotion of industry or shall obstruct growth of national economy. Liberalised economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective. Reliance on English decisions *Hoare & Co. Ltd.*, Re 1933 All ER Rep 105, Ch D and *Bugle Press Ltd.*. Re. 1961 Ch 270 that the power of the court is to be satisfied only whether the provisions of the Act have been complied with or that the class or classes were fully represented and the arrangement was such as a man of business would reasonably approve between two private companies may be correct and may normally be adhered to but when the merger is with a subsidiary of a foreign company then economic interest of the country may have to be given precedence. The

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jurisdiction of the court in this regard is comprehensive." A

Sen, J., speaking for himself and Venkatachaliah, CJ., also towed the line indicated by Sahai, J., about the jurisdiction of the Company Court while sanctioning the scheme and made the following pertinent observations in paragraph 84 at page 528 of the Report : B

> "An argument was also made that as a result of the amalgamation, a large share of the market will be captured by HLL. But there is nothing unlawful or illegal about this. The Court will decline to sanction a scheme of merger, if any tax fraud or any other illegality is involved. But that is not the case here. A company C may, on its own, grow up to capture a large share of the market. But unless it is shown that there is some illegality or fraud involved in the scheme, the Court cannot decline to sanction a scheme of amalgamation. It has to be borne in mind that this proposal of amalgamation arose out of a sharp decline in the business of TOMCO. Dr. Dhavan has argued that TOMCO is not yet a sick D Company. That may be right, but TOMCO at this rate will become a sick Company, unless something can be done to improve its performance. In the last two years, it has sold its investments and other properties. If this proposal of amalgamation is not sanctioned, the consequence for TOMCO may be very serious. The E shareholders, the employees, the creditors will all suffer. The argument that the Company has large assets is really meaningless. Very many cotton mills and jute mills in India have become sick and are on the verge of liquidation, even though they have large assets. The Scheme has been sanctioned almost unanimously by the shareholders, debenture-holders, secured creditors, unsecured F creditors and preference shareholders of both the Companies. There must exist very strong reasons for withholding sanction to such a scheme. Withholding of sanction may turn out to be disastrous for 60,000 shareholders of TOMCO and also a large number of its employees." G

In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged :

1. The sanctioning court has to see to it that all the requisite statutory H

A procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub- Section (2).

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3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

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4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391 sub-Section (1).

D 5. That all the requisite material contemplated by the proviso of sub-Section (2) of Section 391 of the Act is placed before the Court by the concerned appllicant seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not E found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

F 7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting *bona fide* and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.

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8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

H 9. Once the aforesaid broad parameters about the requirements of a

scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the courts jurisdiction.

In the light of the aforesaid settled legal position we will now proceed to deal with the main points for determination indicated hereinabove.

Point No. 1

So for as this point is concerned it was vehemently contended by learned senior counsel Shri Shanti Bhushan that the explanatory statement placed for consideration of the meeting of equity shareholders was not a complete statement and relevant material indicating the interest of the director of MIL Shri Arvind Mafatlal was not placed before the voters with the result that the majority vote supporting the scheme got vitiated. The explanatory statement which came to be circulated to the voters, namely, the equity shareholders of the transferee-company MIL alleged as under :

> "It is proposed to amalgamate MF with MIL so as to enable the carrying on of the combined business more economically and advantageously. Amalgamation of both the companies would lead to substantial benefits in view of synergy of operations. The amalgamation of both the companies would give improved capital structure which would lend better flexibility in capital gearing which would enable the amalgamated company to raise required finance at better terms. A larger company would generate more confidence in the investors and with the persons dealing with the company and will afford access to resources easily and at lower costs. The amalgamation of M.F. with MIL will pave the way for

A better, more efficient and economic control in the running operations and would lead to economy in the administrative and management cost, resulting in improving profitability. The amalgamated company will have a strong and large resource funds. The combined Technological Managerial and financial resources would enhance the capability of the amalgamated company to invest in larger and sophisticated projects to ensure rapid growth. The amalgamated company's Textiles Division with five operative units at its disposal will have flexibility in its operation."

So far as the aforesaid explanatory statement is concerned it gives sufficient indication regarding the pliability and usefulness of the proposed Scheme of Amalgamation of transferor-company MFL with the transferee-company MIL. However the special grievance of the appellant voiced by his learned counsel is to the effect that the real interest underlying the scheme of merger was that of the director Shri Arvind Mafatlal and his group who were at the helm of affairs of the transferee-company. Learned senior counsel Shri Shanti Bhushan in this connection submitted that under Section 393(1)(a) of the Act the company is enjoined to mention in the statement material interest of the director Shri Arvind Mafatlal in the Scheme which is of a special nature as compared to the interest of other shareholders and it was also necessary to mention the effect of the compromise and arrangement on such special interest of Shri Arvind Mafatlal and as that was not mentioned in the explanatory statement along with which the copy of the Scheme was circulated to the members the majority vote became vitiated. Now a mere look at Section 393(1)(a) shows that the special interest of the director which is required to be brought home to the voters must satisfy the following requirements of the Section before it can be treated to be a relevant special interest of the director which is required to be communicated to the voters :

1. The director's interest must be a special interest different from the interest of other members who are the voters at the meeting.

2. The compromise or arrangement which is put to vote must have an effect on such special interest of the director.

3. Such effect must be different from the effect of compromise and arrangement on similar interest of other persons who are called upon to vote at the meeting.

When we enquired of Shri Shanti Bhushan, learned senior counsel for the appellant as to which special interest, according to him, of director Arvind Mafatlal was required to be communicated to the voters as per Section 393(1)(a), he stated that there was a pending litigation between the appellant on the one hand Shri Arvind Mafatlal on the other in Bombay High Court. That Shri Arvind Mafatlal had sought a declaration in a pending suit against the appellant that the latter was required to sell off his share-holding in the transferee-company MIL to the plaintiff Arvind Mafatlal who was director of MIL. In this very suit the appellant had filed a counter-claim to the effect that Shri Arvind Mafatlal and his group was required to transfer their share-holding in the transferee-company in favour of the appellant as per the Family Arrangement of 1979. Shri Shanti Bhushan in this connection submitted that though the learned Single Judge had taken the view that this type of special interest of director Arvind mafatlal was not relevant and germane to the requirement of Section 393(1)(a), the Division Bench in appeal had taken a contrary view and held that such a special interest was required to be communicated to the equity shareholders in their meeting as per the said provision. In this connection our attention was invited by Shri Shanti Bhushan to the observation of the Division Bench of the High Court at page 325 of the paper book wherein the Division Bench observed as under :

> "Mihir H. Mafatlal was to get exclusive control to MIL to the exclusion of Arvind N. Mafatlal and his two brothers. Under the proposed family arrangement M. Fine was to be hived off from MIL and the control and management of the M. Fine was to be held by Arvind N. Mafatlal and that of MIL was to be handed over to objector Mihir H. Mafatlal. This family arrangement has suffered rough weather. Suit No. 1010 of 1987 was filed by Arvind N. Mafatlal against Mihir H. Mafatlal and others before the Bombay High Court alleging that another agreement subsequent to the said family arrangement has come into existence under which Mihir H. Mafatlal and other brothers of Arvind had agreed to transfer all their holdings in MIL to A.N. Mafatlal, drawing a curtain on the family arrangement of 1979. Mihir H. Mafatlal has filed counter claim in that suit claiming enforcement of family arrangement of 1979. The said dispute and the outcome thereof will have direct effect on the respective interest of the shares held by A.N. Mafatlal, Mihir H. Mafatlal and other members of the Mafatlal family, and

A trusts under them."

He also invited our attention to the observations of the Division Bench at page 328 of the paper book to the effect that having considered the rival contentions and closely examined the scheme of Section 393, they were unable to sustain the conclusion that the facts about the interests under the B alleged family arrangements and the effect of proposed arrangement for amalgamation on such interests were not required to be disclosed under section 393(1)(a).

In our view the aforesaid observations of the Division Bench are not C quite apposite in the light of the proposed Scheme of Compromise and arrangement which was sought to be got sanctioned by the Court. On the other hand the learned Single Judge was quite justified in taking the view that this type of interest which was of personal nature so far as director Arvind Mafatlal on the one hand and appellant on the other hand were D concerned was not at all germane to the question relating to sanctioning of the Scheme of Compromise and Arrangement with which the Court was concerned. It is obvious that when a Scheme of Compromise and Arrangement which involves two companies, namely the transferor- company and the transferee-company and their shareholders and creditors is on the anvil of scrutiny before the sanctioning Court, the court has to see that the E interest of the class of creditors or shareholders to whom the Scheme is offered for approval is any way likely to be affected by the suppression of special interest of the director in connection with such a scheme which is on the anvil. Two independent bodies which are represented by their shareholders or creditors as a class, as the case may be, have to take F commercial decisions strictly with a view to seeing that the concerned Scheme of Compromise or Arrangement is beneficial to the shareholders or creditors as a class vis-a-vis the company which is a corporate entity in so far as company's relations with these class of creditors and shareholders are concerned. If the special interest which the director has is in any way likely to be affected by the Scheme and if non-disclosure of such an interest G is likely to affect the voting pattern of the class of creditors or shareholders who are called upon to vote on the scheme, then only such special interest of the director is required to be communicated to the voters as per Section 393(1)(a). We fail to appreciate how the personal family dispute between the appellant on the one hand and Arvind Mafatlal, director of the trans- H feree-company MIL on the other regarding the right to hold shares in the

company can have any linkage or nexus with the Scheme of Amalgamation of these two companies which was put to vote before the equity shareholders. It is easy to visualize that if the suit filed by Arvind Mafatlal against the appellant succeeds and the appellant's counter-claim fails then all that would happen is that the appellant will have to sell his share-holding which is only 5% in the transferee-company to the plaintiff Arvind Mafatlal. That has nothing to do with the equity shareholders as a class which was called upon to decide whether the scheme of merging the transferor-company MFL with the transferee-company was for the benefit of the shareholders as a class. The equity shareholders of the transferee-company had to decide in their commercial wisdom whether it is worthwhile to have a larger body of shareholders on account of the merger so that apart from the shareholding of the transferee-company its objects would also get diversified and its filed of operation would be enlarged with the prospect of hike in the dividend available to these shareholders after the economic and industrial activities of both the companies so amalgamated would get elongated and whether the value of their shares in such consolidated companies were likely to get a boost in the stock market. This was the commercial decision which the equity shareholders of the transferee-company had to take. For taking this informed decision they were least concerned whether 5% share-holding of appellant in the company remained or did not remain with him in future. Consequently if Arvind Mafatlal's suit ultimately succeeded before the Bombay High Court and the appellant lost in his counter-claim that would have no effect whatsoever on the informed decision which the equity shareholders were called upon to take while approving the scheme in question.

Conversely if the appellant succeeded in his counter-claim and director Arvind Mafatlal lost in his suit then all that would happen is that Arvind Mafatlal will have to transfer his share- holding and share-holding of his group in favour of appellant so far as the transferee-company is concerned. That future possibility would have no impact on the decision making process which the equity shareholders of transferee-company had to undertake at this stage while approving the Scheme. Consequently such an eventuality was totally irrelevant for being brought to the notice of the equity shareholders before whom the scheme was put to vote. While deciding whether transferor-company should be merged with the transferee-company and the transferee-company's economic and industrial activity should be permitted to be enlarged as a result of such merger the

A equity shareholders were least concerned whether the appellant would purchase in future the share of the present director Arvind Mafatlal or vice versa. That was entirely their personal dispute which was still not adjudicated upon and its decision one way or the other had no impact on the pattern of voting of the equity shareholders of the respondent-company as a class of prudent businessmen and investors so far as the Scheme was concerned. The Scheme of Compromise and Arrangement which was put to vote was of such a nature that it had no impact or effect on the personal interest of the director Arvind Mafatlal in connection with his present share-holding in the transferee-company. Consequently it must be held that mention about such an interest was outside the statutory requirements of Section 393(1)(a) as rightly held by the learned Single Judge whose view was erroneously upset by the Division Bench. However in any case we are in entire agreement with the subsequent reasoning of the Division Bench for approving the decision of the learned Single Judge on this aspect, namely, that such non-disclosure of interest had no impact on the voting pattern adopted at the meeting by the equity shareholders who are called upon to approve the scheme. It may also be noted in this connection that the resolution of the equity shareholders approving the Scheme of Amalgamation was passed with overwhelming majority by members including through proxies, present and voting. It projected the following picture :

		In favour	Against	Total
(i)	No. of Members	5,298	143	5,441
(ii)	No. of valid votes	19,36,964	86,061	20,23,025

From the pattern of voting it became apparent that out of 100% of the share capital 75.75 per cent in value participated of which 95.75 per cent voted in favour of the proposed Scheme. Out of 95.75 per cent of the votes in value, a paltry 8.43 per cent votes had been attributed to Arvind Mafatlal group consisting of individuals and trust. 39.45 per cent were the votes attributable to financial institutions which can be said to have no interest other than their own interests as men of business in considering the proposed Scheme. Over 23 per cent votes have been attributed to public limited companies or private limited companies which held the shares of MIL and in which Arvind Mafatlal was also alleged to have interests. Thus non-mentioning of the private dispute between Arvind Mafatlal and objector in connection with the holding of shares in the transferee-company had

in fact no impact on the voting pattern of equity shareholders including the financial institutions which had nothing to do with this personal feud between the warring groups. Consequently the non-mentioning of the pending dispute between the appellant on the one and Arvind Mafatlal on the other which was pending adjudication in the Bombay High Court had in fact no impact whatsoever on the result of the voting undertaken by the equity shareholders in their class meeting. Thus the requisite statutory majority of votes approving the scheme could not have been adversely affected by the non-mentioning of this pending litigation in the explanatory note even assuming that the Division Bench was right in holding that it was required to be informed to the voters as per the requirements of Section 393(1)(a). In either view of the matter, therefore, the non-mentioning of the pending litigation between the director of the transferee-company Arvind Mafatlal on the the one hand and the appellant on the other, had no vitiating effect on the majority decision of the equity shareholders who approved the Scheme with overwhelming majority of 95.75 per cent of votes and when the dissenting vote on behalf of the appellant's group was in microscopic minority of less than 5%. It is also pertinent to note in this connection that appellant who being a party to the civil litigation before the Bombay High Court and who was very much keep to get more share-holding in transferee-company and who had already filed his counter-claim for enforcing the family arrangement of 1979, had not thought it fit to remain present in the meeting of equity shareholders and on the contrary he got himself represented through proxy who had no night to speak. Thus in substance the appellant himself never though that information about the pendency of the litigation between Arvind Mafatlal, director or the respon-dent-company and himself was so important that it was required to be brought to the voters' notice even though he had opportunity to do so by remaining personally present in the meeting for that purpose. It, therefore, clearly appears to be an afterthought when he put forward such an objec-tion for the sake of it at the time of opposing the Scheme which was put for sanction of the Court.

It may also be kept in view that the explanatory statement no way emphasised that it is the management of the transferee-company by Shri Arvind Mafatlal which is going to be better monitored and managed by him after the merger in question. In other words management of the company is not at all a germane consideration for the Scheme. Consequent-ly whether the management remains with Arvind Mafatlal or in future may

A met get changed and go in the hands of the appellant is not a consideration which has any linkage or nexus with the Scheme. Consequently the interest of Arvind Mafatlal in the share-holding or likely future impact thereon by the litigation was *de hors* the Scheme in question and was not required to be placed before the voters. The first point for determination is, therefore,
B answered in the negative.

Point No. 2

So far as this point is concerned Shri Shanti Bhushan, learned senior counsel for the appellant, submitted that in modern days corporate bodies
C even though public limited companies are mostly controlled by big, influential and economically powerful families, which have inherited entrepreneurial skill and expertise from earlier generations which had controlled such enterprises in past. That in the present case also the director of the respondent-company Shri Arvind Mafatlal, the eldest male
D member of the family, had descended from the common ancestor Mafatlal Gagalbhai who had established this empire and which has further grown with passage of years. That when such a powerful director who is the eldest male member of the family of the family is at the helm of affairs the minority interest of the appellant who, according to him, was entitled to 50% share in the family concerns as per the 1979 family settlement was
E likely to be voted out and cornered by the influence of such a towering personality as Arvind Mafatlal in the meeting of equity shareholders. Therefore, unfairness of the Scheme has to be judged also from the point of view of its impact on the minority shareholder who has a common ancestor Mafatlal Gagalbhai and who is sought to be cornered and
F deprived of his just share in the family concerns by the machinations of Shri Arvind Mafatlal. The Court has, therefore, to see whether the Scheme of Amalgamation which is sought to be put through at the behest of the director of the respondent-company is fair to the minority group of the appellant who claims 50% share in the family concerns against the director of the respondent-company Shri Arvind Mafatlal and his group. So far as
G this submission is concerned Shri Sorabjee, learned senior counsel for the respondent joined issues and submitted that factually there is no basis for such a contention as respondent-company is not controlled by Shri Arvind Mafatlal who is one of the directors along with his son Hrishikesh but there are eleven outside directors and the share-holding of Arvind Mafatlal and
H his group is not even 50% even including the share-holding of other

subsidiary companies in which also Arvind Mafatlal and his group may be shareholders. We find considerable force in the aforesaid contention of learned senior counsel for the respondent. The evidence produced in the case shows that out of total majority vote of 95.75 per cent which supported the Scheme at the meeting of equity shareholders even according to the pattern disclosed by the appellant himself individual trust controlled by Arvind Mafatlal and private companies accounted to only 16% of the shares voted in the meeting, about 44% of the share were represented by financial institutions, employees and public taken together and two companies stated to be from Mafatlal group had only 15% share. Consequently it is too much to contend that the voting pattern was dominated by the share-holding of Arvind of Mafatlal and his group when about 40% of the shares are held by financial institutions which had nothing to do with the internal feuds of director Arvind Mafatlal on the one hand had the appellant-objector on the other. It could not be said that the Scheme as put to vote was in any way unfair to appellant or that the majority shareholders acting as a class had not behaved in a *bona fide* manner for protecting the interest of the class as a while and were in any way inimical to the appellant. While considering the question of *bona fides* of the majority voters and whether they were unfair to the appellant it has to be kept in view that *bona fides* of the majority acting as a group has to be examined vis-a-vis the Scheme in question and not the *bona fides* of the person whose personal interest might be different from the interest of the voters as a class. *Bona fide* of person can only be relevant if it can be established with reasonable certainty that he represents majority or is controller of majority. Arvind Mafatlal cannot be visited with such a charge. In this connection we may usefully refer to a decision of English Court in the case of *Hellenic and General Trust Limited* reported in (1976) 1 WLR 123. In that case the Court was concerned with a Scheme of Arrangement whereunder all the ordinary shares of the company were to be cancelled and new shares were to be issued to Hambros which would make the company as wholly owned subsidiary of Hambros. Holders of such cancelled shares were to be paid by Hambros at 48 pennies. In short it was an arrangement for taking over of the company by Hambros. 53% shares of the Hellenic Company were held by another company MIT. MIT itself was a wholly owned subsidiary company of Hambros. This situation led the Court to conclude that the subsidiary company of Hambros which was holding such large number of shares placed itself vis-a-vis Hambros in the position of vendor and the

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A lifted veil of transaction showed it to be one of acquisition than of amalgamation. The aforesaid decision is a pointer to the fact that what was required to be considered while sanctioning the scheme was *bona fides* of the majority acting as a class and not of single person. It is, therefore, not possible to agree with the contention of learned senior counsel for the
B appellant that the majority had acted unfairly to the appellant and had not protected his interest when what was to be protected was the class interest of minority shareholders falling in the same class along with the majority. It is not the contention of the appellant that while voting by majority in favour of the Scheme the majority had acted with any oblique motive to fructify any adverse commercial interest qua him and his group when it
C consisted of outsiders like financial institutions or that there was any possibility of their surrendering their economic interest in the Scheme at the dictates of shareholder-director Arvind Mafatlal and his group. It is also to be kept in view that the Board of Directors of the respective companies, namely, the transferor-company as well as the transferee-com-
D pany had approved the Scheme of Amalgamation before it was put to vote. The appellant was himself one of the directors of the transferor- company who had no objection to the Scheme of Amalgamation from the point of view of the transferor-company. So far as the transferee-company is concerned though appellant was not a director he was 5% shareholder who did not think it fit to personally remain present at the time of voting and
E simply relied upon proxy. If he was feeling that the Scheme was unfair to him or was not going to protect his interest as shareholder in the respondent-company nothing prevented him from remaining present and voicing his grievance before the General Body of the equity shareholders and to apprise them of the alleged pernicious effect of the Scheme. It is, therefore,
F too late in the day for him to contend that the Scheme was unfair to him and that the family of Arvind Mafatlal had tried to dominate and engineer any adverse pattern of voting at the meeting of the equity shareholders.

In this connection we tried to know from Shri Shanti Bhushan, learned senior counsel for the appellant as to how the appellant felt that
G the Scheme was unfair to him. He submitted that under the Scheme the transferor-company was losing its identity and was getting merged in the transferee-company. That in the pending litigation between the parties in the Bombay High Court if the appellant succeeded in his counter-claim he was likely to get larger share-holding in the transferee- company and if that
H was not possible he could have got the complete control of the transferor-

company as per the family arrangement. Now once the transferor-company loses its identity then his counter-claim was likely to be infructuous as the subject-matter of the counter-claim will stand withdrawn from the possible operation of the decree if at all granted in his favour in the counter-claim. This submission was countered by learned senior counsel for the respondent by pointing out that it had no factual basis. That as earlier noted in the suit pending in Bombay High Court if Arvind Mafatlal succeeded then appellant will have to transfer his even remaining 5% share-holding in transferee-company in favour of Arvind Mafatlal. If on the other hand the appellant succeeded in his counter-claim and Arvind Mafatlal's suit was dismissed then the appellant may get the shares which are at present held by Arvind Mafatlal and his group in the transferee-company. But there is no question of appellant getting any exclusive control of the transferor-company. Therefore, impact of that litigation one way or the other is going to be totally negative so far as the existence of the transferor-company or otherwise is concerned. We find considerable force in the contention of learned counsel for the respondent. It is also pertinent to note that if the appellant felt that the Scheme was unfair inasmuch as he was likely to lose his future interest, if any, and control, if any, in the transferor-company by its merger and loss of identity on account of the Scheme it passes one's comprehension how he as sitting director of the transferor-company approved of the Scheme, did not object to the Scheme and on the contrary was a party to the resolution of the Board of Directors of transferor-company to propose the Scheme of its amalgamation with the transferee company. Not only that but even when that Scheme was put for sanction before the Bombay High Court on behalf of the transferor-company the appellant did not object meaning thereby appellant had no objection to the transferor-company losing its identity and getting merged in the transferee-company pursuant to the proposed Scheme. The appellant's own conduct, therefore, belies his apprehension that the Scheme as proposed was in any was unfair to him or that there were any *mala fides* behind the Scheme attributable to Shri Arvind Mafatlal who is the director of the transferee-company. The second point for determination, therefore, also is found to be factually not sustainable. It is, therefore, held that the Scheme of Compromise and Arrangement is neither unfair nor unreasonable to the minority shareholders represented by the appellant.

Before parting with the discussion on this point it is also worthwhile to note that apart from the pattern of voting at the meeting of the equity

A shareholders, even the share-holding of the respondent-company belies the submission put forward on behalf of the appellant that Arvind Mafatlal's group dominated the constitution of the company and could control the decisions of the shareholders. The evidence on record shows that the share- holding of ANM Group can be worked out to 30.42% approximate-
B ly. As against aforesaid share-holding the share-holding of financial institutions and MHM group in MIL would work out to 39.03% and that of appellant's group works out at 29.05% while that of other shareholders would work out to 34.34%. Hence it cannot be said that Arvind Mafatlal is at the helm of affairs of the respondent- company or is in the driver's seat or that his family is the virtual master of respondent-company. This is
C not a case where it can be urged with any emphasis that the respondent-company is an alter ego of Arvind Mafatlal who is one of the directors of the company and that he could create a show of the Scheme being apparently beneficial to the shareholders but was in fact concealing any covert and hidden device of augmenting his personal interest and interest
D of his family which was adverse to the interest of innocent investors and other equity shareholders including the appellant. It is also pertinent to note that financial institutions and statutory corporations held substantive percentage of shares in respondent-company. This class of shareholders who are naturally well informed about the business requirements and economic meeds and the requirements of corporate finance in the light of
E their personal interest would not have wholly approved the Scheme if it was contrary to the interest of shareholders as a class. Individual personal interest of a minority shareholder like the appellant is absolutely out of consideration when such class meeting acting for the benefit to the whole class of equity shareholders take up the consideration of the Scheme for
F its approval. Consequently it could not be said that the majority shareholders had sacrificed the class interest of appellant minority shareholders when they voted with overwhelming majority in favour of the Scheme. Point No. 2 is accordingly answered in the negative. That takes us to the consideration of Point No 3 for determination.

G *Point No. 3*

In a way the answer to point No. 2 necessarily results in negativing this point also. Even that apart we fail to appreciate how the Scheme of Amalgamation can be said to be unfair and amounting to suppression of
H minority shareholders represented by the appellant. It has to be kept in

view that by this proposed Scheme of Amalgamation the transferor-company was getting merged in the transferee-company. Now even if it is held that the appellant succeeds in his counter-claim in the suit pending in Bombay High Court and if he is to get the share-holding of Arvind Mafatlal and his group transferred to him so far as transferee- company is concerned, the transferee-company because of the amalgamation will then be having more diversified activities and if at all according to the appellant because of this future success, if any, in the counter-claim he is going to replace Arvind Mafatlal and his group in the management of the respondent-company he would have larger field to operate and larger company to manage. We fair to appreciate as to how such a scheme from any point of view can amount to suppression of appellant's minority interest in the share-holding of the company. This interest is not going to be in any way adversely affected. If at all, his share-holding is going to increase in the respondent-company if his counter-claim succeeds. If his counter-claim fails he will have to get out lock, stock and barrel from the respondent-company and he will have to wash his hands off the same. In either case the Scheme of Amalgamation will have no adverse impact on the appellant's interest in the respondent-company. On the other hand the Scheme of Amalgamation is likely to have a move beneficial effect on the appellant's share-holding in the respondent-company if he succeeds in his counter-claim in Bombay High Court. It has to be kept in view that the question of *bona fide* of the majority shareholders or the alleged suppression by them of the minority shareholders or their attempt to suffocate their interest has to be judged from the point of view of the class as a whole. Question is whether the majority equity shareholders while acting on behalf of the class as a whole had exhibited any adverse interest against the appellant's minority shareholders also having similar interest as members of the same class, while approving the Scheme or had acted with any oblique motive to whittle down such a class interest of the minority. As we have seen earlier no such situation ever existed both at the time when the Scheme of Compromise and arrangement was cleared and proposed by the Board of Directors of both the transferor and transferee companies and also at the stage when the Scheme was put to vote before the meeting of equity shareholders forming a common class of which the appellant was also a member though a minority member. Consequently point No. 3 will also have to be answered in the negative on the same lines and for the same reasons on the basis of which point No. 2 is answered.

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A *Point No. 4*

So far as this point is concerned the relevant provisions of the Companies Act to which we have made a reference earlier indicate that the Court has to order under Section 391(1) a meeting of creditors or class of creditors or members or class of members to whom the Scheme of B Compromise or Arrangement is offered by the company. The present controversy centers round a meeting of members. Members of the company are shareholders. Part IV of the Companies Act deals with 'Share Capital and Debentures'. Section 82 provides that 'the shares or other interest of any member in a company shall be movable property, transferable in the C manner provided by the articles of the company'. As per Section 86 the share capital of a company limited by shares formed after the commencements of this Act, or issued after such commencement, shall be of two kinds only, namely, equity share capital and preference share capital. So far as the Articles of Association of respondent-company are concerned D they also contemplate two classes of shareholders, namely, equity and preference shareholders. No separate class of equity shareholders is contemplated either by the Act or by the Articles of Association of respondent-company. Appellant is admittedly an equity shareholder. Therefore, he would fall within the same class of equity shareholders whose meeting was convened by the orders of the Company Court. However it is vehe- E mently contended by learned counsel for the appellant that because of the family arrangement of 1979 on which he relies he was a special class of minority equity shareholder who had separate rights against the director of the company and whose special interest because of the pending litigation between him and the director Shri Arvind Mafatlal was likely to be adver- F sely affected by the Scheme, therefore, a separate meeting had to be convened as he represented a class within the class of equity shareholders. It is difficult to agree with this contention. Even though the Companies Act or the Articles of Association do not provide for such a class within the class of equity shareholders, in a given contingency it may be contended by a group of shareholders that because of their separate and conflicting G interest. vis-a-vis other equity shareholders with whom they formed a wider class, a separate meeting of such separately interested shareholders should have been convened. But such is not the case of the appellant. It is not his case that his interest as an equity shareholder in respondent-company is in any way conflicting with the general interest of the equity shareholders as

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a class. Consequently it could no be urged by him with any emphasis that the General Body of equity shareholders acting as a class while considering the question of approval of the Scheme was likely to take a decision which could adversely affect the commercial interest of the appellant as an equity shareholder. His personal conflict of interests with the director was totally foreign to the scope of class meeting which was convened to consider the Scheme in question as we have seen earlier while considering earlier points for determination. It is also to be kept in view that the appellant would have urged with some justification his contention for convening a separate meeting representing for him and his group of dissenting equity shareholders if it was his case that the Scheme of Compromise and Arrangement as offered to him and his group was in any way different from the Scheme of Compromise and Arrangement offered to other equity shareholders who also belonged to the same class in the wider sense of the term. On the express language of Section 391(1) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly presupposes that if the Scheme of Arrangement or Compromise is offered to the members as a class and no separate Scheme is offered to any sub- class of members which has a separate interest and a separate Scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive. Even otherwise it becomes obvious that as minority shareholder if the appellant had to dissent from the Scheme his dissent representing 5% equity shareholding would have been visible both in a separate meeting if any, of his sub-class or in the composite meeting where also his 5% dissent would get registered by appellant either remaining present in person or through proxy. Consequently when one and the same Scheme is offered to the entire class of equity shareholders for their consideration and when commercial interest of the appellant so far as the Scheme is concerned is in common with other equity shareholders he would have a common cause with them either to accept or to reject the Scheme for commercial point of view. Consequently there was no occasion for convening a separate class meeting of the minority equity shareholders represented by the appellant and his group as tried to be suggested. It is also to be kept in view that it is not the case of the appellant that any different terms of compromise were offered to persons holding equity shares who were covering by the family arrangement of 1979 or otherwise. In fact the entire proposal of the

A B C D E F G H

A Scheme of Arrangement was one affecting equally and in the like manner all the existing equity shareholders of the respondent-company. In this connection it is profitable to refer to what the learned author Palmer in his Treatise Company Law 24th Edition, has to say :

B "What constitutes a class :

> The Court does not itself consider at this point what classes of creditors or members should be made parties to the scheme. This is for the Company to decide, in accordance with what the scheme purports to achieve. The application for an order for meetings is
> C a preliminary step, the applicant taking the risk that the classes which are fixed by the judge, unusually on the applicant's request, are sufficient for the ultimate purpose of the section, the risk being that if in the result, and we emphasis the words 'in the result' they reveal inadequacies, the scheme will not be approved. If e.q. rights
> D of ordinary shareholders are to be altered, but those of preference shares are not touched, a meeting of ordinary shareholders will be necessary but not of preference shareholders. If there are different groups within a class the interests of which are different from the rest of the class, or which are to be treated differently under the Scheme, such groups must be treated as separate class for the
> E purpose of the scheme. Moreover, when the Company has decided what classes are necessary parties to the scheme, it may happen that one class will consist of a small number of persons who will all be willing to be bound by the scheme. In that case it is not the practice to hold a meeting of that class, but to make the class a
> F party to the scheme and to obtain the consent of all its members to be bound. It is however, necessary for at least one class meeting to be held in order to give the Court jurisdiction under the Section."

It is, therefore, obvious that unless a separate and different type of Scheme
G of Compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such sub-class of the main class of members or creditors is required to be convened. On the facts of the present case the appellant has not been able to make out a case for holding a separate meeting of dissenting minority equity shareholders represented by his. The fourth
H point for determination, therefore, is answered in the negative. That takes

us to the consideration of the last point for determination placed for our consideration by the learned senior counsel for appellant. A

Point No. 5

It was submitted that the exchange ratio of equity shareholders so far as the transferee-company is concerned works very unfairly and unreasonably to them. As per the proposed Scheme 5 equity shares of transferor-company are to be exchanged for 2 equity shares of transferee-company. So far as this contention is concerned it has to be kept in view that before formulating the proposed Scheme of Compromise and Amalgamation an expert opinion was obtained by the respondent-company as well as the transferor- company, namely, MFL on whose Board of Directors appellant himself was a members. M/S. C.C. Chokshi & Co., a reputed firm of Chartered Accountants, having considered all the relevant aspects suggested the aforesaid exchange ratio keeping in view the valuation of shares of respective companies. It must at once be stated that valuation of shares is a technical and complex problem which can he appropriately left to the consideration of experts in the filed of accountancy. Pennington in his 'Principles for Company Law' mentions four factors which had to be kept in mind in the valuation on shares : B C D

"(1) Capital Cover, E

(2) Yield,

(3) Earning Capacity, and

(4) Marketability F

For arriving at the fair value of share, three well known methods are applied :

(1) The manageable profit basis method (the Earning Per Share Method) G

(2) The networth method or the break value method, and

(3) The market value method."

So many imponderables enter the exercise of valuation of shares. M/s. C.C. Chokshi & Co. considering all the relevant aspects and obviously keeping H

A in view the accounting principles underlying the valuation of shares suggested the said ratio which was found acceptable both by the Board of Directors of the respondent-company as well as the Board of Directors of the transferor-company. That the appellant himself as a director of that transferor-company gave green single to the Scheme and to this very ratio B of exchange of shares. But Shri M.J. Thakore appearing for the appellant submitted that form the point of view of the transferor-company it was very profitable to have two shares of transferee-company against five shares of transferor- company. But the difficulty arises only from the point of view of transferee-company shareholders. According to Shri Thakore the proper C exchange ratio would be one share of transferee-company to six shares of transferor-company. It is difficult to appreciate this contention of the appellant. It has to be kept in view that appellant never bothered to personally remain present in the meeting of equity shareholders for pointing out the unfairness of this exchange ratio to his brother equity D shareholders who were likely to be affected by the very same ratio as the appellant. His interest at least to that extent was entirely common and parallel to that of other equity shareholders. But he had no time to remain personally present. He sent his proxy only to record his dissent vote which was in microscopic minority of 5% as compared to 95% majority vote. Not only that even before the Court he did not submitted and contrary expert E opinion regarding the valuation of shares of transferor and transferee companies for supporting his *ipse dixit* that the correct ratio would be 6 : 1 so far as transferor and transferee companies were concerned. Shri Shanti Bhushan, learned senior counsel for the appellant having realised this difficulty submitted that at last these proceedings are continuation of F proceedings before the High Court, therefore, this Court may now in order to satisfy itself send for the opinion of an expert. It is difficult to agree. The appellant who was propounding this theory of correct exchange ratio had nothing to offer in support of his contention both before the learned Single Judge as well as before the High Court. It has to be kept in view G that the matter was fiercely contested on all permissible points before learned Single Judge. The proceedings were pending before the High Court for more than two years from 8th February 1994 till 12th July 1996 when the Division Bench disposed of the appeal. For all these years neither before the learned Single Judge nor before the High Court in appeal the H appellant thought it fit to request the Court to either call for the report of

any other expert on valuation of shares not did he himself get such report for placing for consideration of the Court in support of his supposed better ratio. It has also to be kept in view that which exchange ratio is better is in the realm of commercial decision of well informed equity shareholders. It is not for the Court to sit in appeal over this value judgment of equity shareholders who are supposed to be men of the world and reasonable persons who know their own benefit and interest underlying any proposed scheme. With open eyes they have okayed this ratio and the entire Scheme. 40% of the majority shareholders were financial institutions who were supposed to be well versed on the aspect of valuation of shares. They had no objection to the exchange of 2 shares of transferee-company for 5 shares of transferor company. As stated earlier it was a sort of a package duly considering all imponderables and implicit factors which the shareholders had to keep in view for deciding whether to approve the Scheme of Amalgamation or not. The exchange ratio was only one of the items. They though if fit in their commercial wisdom to accept the Scheme as a whole along with the exchange ration presumably in expectation of better profits in years to come when the amalgamated companies would operate and when there would be, according to the shareholders, better prospects of earning greater dividends. They willingly agreed to give in exchange two shares of transferee-company for five share of transferor-company and made them available to the shareholders of the transferor- company. The appellant was representing only 5% dissenting shareholders and his object was almost a voice in the wilderness, which did not appeal to the majority of his brother shareholders. Shri Shanti Bhushan, learned senior counsel for the appellant in this connection invited our attention to the observation of the Division Bench in its judgment at page 375 wherein it has been observed that "if one were to examine the exactitude of exchange ratio that may be offered fairly on the arithmetic scale by taking into consideration various details, there is some force in what were suggested by Mr. B.R. Shah on behalf of the appellant. However, keeping in view the scope of enquiry which the court is required to undertake and with whose findings we are concerned, it will not be permissible for us in law to undertake this exercise in the facts and circumstances of present case in absence of *bona fides*". We fail to appreciate how this observation can be of any avail to learned senior conceal for the appellant as all that the Court wanted to suggest was that even assuming that some another exchange ratio

A can be suggested to be better one, it was for the equity shareholders who acted *bona fide* in the interest of their class as a whole to accept even a less favourable ratio considering other benefits, that may offset such less favourable ratio once an amalgamation goes through. We wholly concur with this view. In this connection we may also refer to a decision of B Maughm, J., in *Re Hoare & Co. (No. 2)* case (1933) All ER 105 wherein it was laid down that where statutory majority had accepted the offer the onus must rest on the applicants to satisfy the court that the price offered is unfair. In this connection following pertinent observations were made by the learned Judge :

C

> "The other conclusion I draw is this X X X X X X the court ought to regard the scheme as a fair one inasmuch as it seems me impossible to suppose that the court, in the absence of any strong grounds, is to be entitled to set up its own view of fairness of the scheme in opposition to so very large a majority of shareholders D who are concerned. Accordingly, without expressing a final opinion on the matter because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that notwithstanding the views of a very large E majority of shareholder, the scheme is unfair."

We may also refer to a decision of the Gujarat High Court in *Kamala Sugar Mills Limited* 55 Company Cases p. 308 dealing with an identical objection about the exchange ratio adopted in the Scheme of Compromise F and Arrangement. The Court observed as under :

> "Once the exchange ratio of the shares of the transferee-company to be allotted to the shareholders of the transferor-company has been worked out by a recognised firm of chartered accountants who are experts in the field of valuation and if no mistake can be G pointed out in the said valuation, it is not for the court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders of the two companies or to say that the shareholders in their collective wisdom should not have accepted the said exchange ratio H on the ground that it will be detrimental to their interest."

These observations in our view represent the correct legal position on this aspect. We may also keep in view that in the present case not only expert like M/s. C.C. Chokshi & Co. had suggested the ratio but another independent body ICICI Security & Finance Company Limited reached the same conclusion which was conveyed by its letter dated 10th November 1993 to the company approving of the entire Scheme along with suggested ratio. A mere look at the report of the Chartered Accountants M/s. C.C. Chokshi & Co. shows that various factors underlying the Scheme of Compromise and Arrangement were taken into consideration while suggesting the exchange ratio by the said reputed firm of chartered accountants. The said opinion had taken into account the fact that on amalgamation shares have to be cancelled. Increase in share premium account in equity capital of the MIL will also have to be taken into account as a result of final call made in respect of Bond 1992 issue. It has also taken into account significant increase in the paid-up equity of MIL as a result of issue of its Bond in the international market. It has undertaken exercise in calculating net-worth of two companies. It has also referred to the method of valuation of exchange ratio on the basis of earning per share of the two companies by taking into account five years' working results of the two companies making certain adjustments. Apart from taking into consideration the past results of the two companies, the chartered accountants have taken into account the potentiality of the two companies to earn profit in future, considering existing expansion and modernisation of projected and planned expenditure by the MIL as well as subsidiary and sister concern in hard. It has also taken into account the market price of equity shares of past 24 months, declared dividend by the two companies the overall effect of security scam in the market price, realisable investment and their market value. Taking into consideration multifarious considerations detailed in the report, note was also taken of the fact that MIL held substantial shares of MFL, which shall have to be cancelled on merger of MFL with MIL. Two fully paid up equity shares of MIL of Rs. 100 each for every five equity share of Rs. 100 each of MFL, was considered to he a fair exchange ratio to be offered as term of amalgamation. It was clarified that, 'in absolute terms it would mean that the MIL is keeping consideration of equity capital of par value of Rs. 7.77 crores which at the last issue price of share amounts about to Rs. 38.84 crores and which at the correct market price amounts to Rs. 57.4 crores. At the stage of dividend declared

A for 1992-93, it will result in a cost in terms of distributable profits of Rs. 2.72 crores. For an undertaking in a diversified business activity of textile and chemicals with the total infrastructure, knowhow, technology tie up and range of established products and capacities and potential the aforesaid cost to MIL can be regarded as fair and reasonable'.

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The aforesaid report of the chartered accountants heavily weighed with the transferor-company's Board of Directors which comprised, amongst others, the appellant himself but also the Board of Directors of transferee-company and also weighed with the General Body of equity shareholders who approved the Scheme and the ratio with overwhelming
C majority. No grievance, therefore, can be make by the appellant at the stage of Company Petition proceedings for demonstrating the ratio to be *ex facie* unfair and unacceptable as the appellant would like to have it.

Undeterred by this position Shri Thakore, learned counsel for the
D appellant in support of his contention that the exchange ratio was *ex facie* unfair to the shareholders of the transferee- company, invited our attention to the statement showing the working results of both the transferor and transferee companies as found at Annexures M and N of Vol. II of the Paper Book at page 534 and 535. He submitted that these statements
E showing the working results of the company for the last five years ended 31st March 1993 showed that the earning per equity share after depreciation and tax so far as the respondent-company was concerned was Rs. 30 while earning of transferor-company Mafatlal Fine Spg. & Mfg. Company Limited was only Rs. 7 for the relevant five years. He also invited our
F attention to the break-up value of the shares of company on the basis of the Balance Sheet as on 31st March 1993 so far as respondent-company was concerned. Annexure 'Q' at page 538 showed value per equity share of Rs. 100 each at Rs. 1,515 while so far as the transferor-company was concerned the break-up value per equity share was Rs. 259. That may be so. But as a package deal when the Scheme as a whole is examined and
G found to be advantageous to the economic and commercial interest of shareholders as a class only one or two item simplicitor for deciding the exchange ratio cannot tilt the balance as so may factors and aspect would enter that exercise. It was undertaken by expert body of chartered accountants like M/s. C.C. Chokshi & Co. Before parting with the discussion on
H this point it would be apposite to refer to the decision of this Court in

Hindustan Lever Employees' Union (supra). In paragraph 41 of the Report Justice Sen speaking for himself and Venkatachaliah, CJ, and to which Sahai, J concurred has observed that the problem of valuation in the case of amalgamation of two companies has been dealt with by Weinberg and Blank in the book 'Take-overs and Mergers' in which it is stated that some or all of the 8 listed factors will have to be taken into account in determining the final share exchange ratio. The Court has also approved the fixation of exchange ratio of the shares of the companies on the basis of adoption of combination of two or more well-known methods of valuation of shares out of many such methods. In para 37 of the Report it has been observed that the question is what method should be adopted for arriving at a proper exchange ratio. The usual rule is that shares of the going concern must be taken at quoted market value. This principle was also recognised by this Court in the case of *CWT* v. *Mahadeo Jalan,* [1973] 3 SCC 157. It is not the case of the appellant that M/s. C.C. Chokshi & Co. had not taken into consideration the quoted market value of shares of both the companies which were going concerns and which were subjected to the Scheme of Amalgamation in question. For all these reasons, therefore, there is no substance in this contention canvassed on behalf of the appellant that the exchange ratio was *ex facie* unfair to the equity shareholders of the transferee- company. The fifth point for determination is also, therefore, answered in the negative.

Before parting with this appeal we may mention that written submissions comprising of 69 pages have been submitted by learned counsel for the appellant. We have gone through the written submissions. We may mention that learned counsel for the appellant was permitted to file written submissions spread over 4 to 5 pages while his written submission have gone upto 69 pages. It may also be mentioned that there was an order passed by us 21st August 1996 permitting filing of written statements within two days but the learned counsel for the Appellant has filed written submissions only on 27th August 1996. Therefore, *ex facie* his written submissions are not required to be considered. However in order to see that the appellant may not suffer on account of non-consideration of these written submission we have gone through them and have considered them in the interest of justice. But having gone through the same we find that they involve repetition of the main contentions canvassed before us during oral arguments by their learned senior counsel Shri Shanti Bhushan and by

A their counsel Shri M.J. Thakore. Some additional points also appear to have been raised in the written submissions pertaining to additional objections which were not pressed before us at the time of oral hearing and, therefore, they obviously cannot be considered in support of the contentions on which the appeal was pressed before us. The written submissions
B in connection with the points which were already pressed before us are already dealt with by us while considering the main points for determination in the earlier part of this judgment and, therefore, it is not necessary to deal with the same once again.

These were the only contentions canvassed in support of the points
C for determination which have all been answered in the negative. The inevitable result is that the appeal fails and is dismissed. In the facts and circumstances of the case, however, there will be no order as to costs.

V.S.S. Appeal dismissed.

COOCH BEHAR CONTRACTORS' ASSOCIATION AND ORS. ETC.

v.

STATE OF WEST BENGAL AND ORS.

SEPTEMBER 11, 1996

[S.P. BHARUCHA AND K. VENKATASWAMI, JJ.]

Sales Tax Law :

Bengal Finance (Sales Tax) Act, 1941 : Sections 2(c) and 6-D.

Sales Tax—Declaration forms—Denial of—To dealers under S.6-D—While advantage of using such forms was available to other dealers—Held: not violative of Article 14 of Constitution—Constitution of India, 1950, Articles 14 and 366(29- A).

Section 6-D-Scope of—Held : was a complete code so far as dealers in works contract were concerned—Hence, such dealers were not entitled to any concession other than those enumerated in S.6-D.

"Contractual transfer price"—Goods supplied to contractor by contractee and price recovered from contractor by way of adjustment—Held : value of such goods covered under "contractual transfer price".

"Contractual transfer price"—Royalty—Paid by contractor in the execution of works contract while procuring boulders, earth etc.—Includibility of—Held : royalty amounted to payment of price for goods obtained from the Government Departments and used in the works contract—Hence, includible in "contractual transfer price".

"Contractual transfer price"—Cost of freight and delivery for carrying goods to work site—Includibility of—Question left open.

Words and Phrases : "Contractual transfer price"—Meaning of—In the context of Section 6-D of the Bengal Finance (Sales Tax) Act, 1941.

The appellants were contractors who executed civil construction works under different departments of the Central and State Governments as well as Corporations. The Revenue sought to assess the appellants

A under Section 6-D of the Bengal Finance (Sales Tax) Act, 1941. The appellants filed a petition before the Taxation Tribunal challenging such assessment. The Tribunal dismissed the petition. Being aggrieved the appellants preferred the present appeal.

On behalf of the appellants it was contended that denial to dealers
B under Section 6-D of the Act the use of declaration forms which had been made available to other dealers was violative of the Constitution; that the value of the stores and materials supplied by the contractee to the contractor should not be included in the "contractual transfer price" under Section 6-D of the act; that the royalty paid by the contractor in the execution of
C works contract while procuring boulders, earth etc. should not be included in the 'contractual transfer price'; and that cost of freight and delivery for carrying goods to the work site should not be included in the 'contractual transfer price'.

Dismissing the appeal, this Court

D

HELD : 1.1. Section 6-D of the Bengal Finance (Sales Tax) Act, 1941 is a self-contained code so far as dealers in works contract are concerned. Whatever concessions the Legislature wanted to extend to such dealers were enumerated in clauses (a) to (e) of Section 6-D(2) of the Act. Moreover,
E having regard to the non-obstante clause used in Section 6-D, it is clear that no further concession was intended to be extended to the dealers in works contract. As they form a class by themselves, they cannot compare themselves with other dealers coming under sections 4 or 5 and allege discrimination to invoke Article 14 of the Constitution of India. [63-H; 64-A-B]

F *Gannon Dunkerley and Co.* v. *State of Rajasthan*, [1993] 1 SCC 364, relied on.

Builders Association of India and Others v. *Union of India and Others*, [1989] 2 SCC 645, referred to.

G

1.2. The Tribunal has found the contractor has to pay the price of the goods supplied by the contractee by way of adjustment. It is, therefore, clear that goods used in the execution of the works contract stand transferred from the contractor to the contractee at the time the goods are incorporated in the construction and the value of such goods is covered,
H under the 'contractual transfer price'. [65-E; H]

N.M. Goel & Co. v. *Sales Tax Officer & Anr.*, 72 STC 375, relied on. A

2.1. The payment of royalty in the execution of works contract while procuring boulders, earth etc. amounts to payment of price for the goods obtained from the Government Departments and used in the works contract, and covered under 'contractual transfer price'. [66-D] B

State of Madhya Pradesh v. *Orient Paper Mills Ltd.*, [1977] 2 SCC 77, relied on.

2.2. The Tribunal has not finally disposed of the issue of inclusion of cost of freight and delivery for carrying goods to the work site under 'contractual transfer price' and hence this question if left open. [67-B] C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5577-79 (NT) of 1990 Etc.

From the Judgment and Order dated 26.4.90 of the West Bengal Taxation Tribunal, in R.N. 103 (T), 367 (T) and 34(T) of 1989. D

Jayant Das, Ms. Aruna Banerjee and G.S. Chatterjee for the Appellants.

B. Sen and T. Ramachandran, Dilip Sinha, D. Krishan and J. R. Das for the Respondents. E

The Judgment of the Court was delivered by

VENKATASWAMI, J. Common questions of law arise out of a common judgment of the West Bengal Taxation Tribunal dated 26.4.1990 rendered in RN-30(T), RN-31(T) RN-34(T), RN-103(T), RN-367(T), RN-138(T), RN-338, RN-339 of 1989. F

The appellants are contractors and they execute civil construction works including construction of roads and bridges under different departments of the Central and State Governments as well as respective corporations. Such works include excavation of earth, drilling, construction of water channel and river bank protection. Such works of contract were not brought under the net of sales tax till the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as "the Act") was amended by the West Bengal Act 4 of 1984 inserting section 6D and amending section 2(c) of the Act. These amendments were pursuant to the 46th Amendment of the G H

A Constitution of India in the year 1982 inserting clause 29A in Article 366.

The constitutional validity of the 46th Amendment inserting clause 29A in Article 366 was challenged and this Court in *Builders Association of India and Others* v. *Union of India and Others*, [1989] 2 SCC 645 upheld the constitutionality of the said amendment.

B

As a result of the insertion of section 6D to the Act, all transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract was deemed to be a sale of those goods by the person making the transfer and the purchase of those goods by the C person to whom such transfer was made. The revenue sought to assess the appellants under section 6D of the Act and the appellants aggrieved by such assessments moved the High Court challenging initially the constitutionality of section 6D and finally confining their challenge to certain limited aspects which we shall refer to hereinafter. The cases were originally filed in the High Court and subsequently were transferred to West D Bengal Taxation Tribunal (hereinafter referred to as "the Tribunal") and the Tribunal in its detailed judgment repelled every one of the arguments raised on behalf of the appellants and consequently dismissed the cases.

Before us Mr. Jayant Das, learned Senior Counsel for the appellants E broadly raised three points while attacking the assessments under section 6D of the Act. The first contention raised by the learned counsel was that section 6D unjustly discriminates in the matter of grant of declaration forms to the dealers under section 6D and thereby denies the advantage gained by other dealers by using declaration forms and thus it is violative of Article 14 of the Constitution of India.

F

The second contention put forward by the learned counsel was that the value of the stores and materials supplied by the contractee to the contractor for the specific purpose of use in the execution of works contract should not be included in the 'contractual transfer price' under section 6D as according to the learned counsel in such supplies there is no G transfer of property and the property always remains with the contractee. The third submission advanced by the learned counsel for the appellants was that the royalty paid by the contractors in the execution of works contract while procuring boulders, earth etc. should not be included in the 'contractual transfer price'. Another minor point raised by the learned H counsel was that the cost of freight and delivery for carrying goods to the

works site should not also be included in the 'contractual transfer price'. A

Mr. B. Sen, learned Senior Counsel in reply submitted that none of the questions raised by the learned counsel for the appellants remain *res integra* as they are totally covered either by the decision of this Court in Builders' Association case (supra) or the recent decision of this Court in *M/s. Gannon Dunkerley and Co. and Others* v. *State of Rajasthan and Others*, [1993] 1 SCC 364. In addition to that he also invited our attention to a decision of this Court in the case of *State of Madhya Pradesh* v. *Orient Paper Mills Ltd.*, [1977] 2 SCC 77 wherein this Court has held that 'royalty' is a feudalistic euphemism for price. So far as the cost of freight and delivery for carrying the goods to the works site is concerned, the learned counsel invited our attention to the judgment of the Tribunal wherein the Tribunal has not finally decided the issue, but has left open the same for decision with reference to the facts of each case. In view of this overall submission with which we agree we do not feel it necessary to deal elaborately the contentions raised before us. B C D

For appreciation of the rival contentions, it is necessary to set out sections 2(c) and 6D of the Act as amended in the year 1984. They read as follows :

> "2(c) 'dealer' means any person who carries on the business of selling goods in West Bengal or of purchasing goods in West Bengal in specified circumstances or any person making a sale under section 6D....." E

> "6D. - Liability to payment of tax on the transfer of property in goods involved in the execution of works contract and rate thereof. - (1) Notwithstanding anything contained elsewhere in this Act. - F

> (a) any transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract (hereinafter referred to as contractual transfer) shall be deemed to be a sale of these goods by the person making the transfer and the purchase of those goods by the person to whom such transfer is made; G

> (b) (i) every dealer whose contractual transfer price during the last year ending on or before the 31st day of March, 1984 exceeds H

A rupees two lakhs shall, in addition to the tax payable by him under section 5 and section 6B, if any, be liable to pay from the 1st day of April, 1984 a tax at the rate specified in sub-section (3) of such part of his contractual transfer price as specified in sub-section (2);

B (ii) every dealer, other than a dealer referred to in sub-clause (i), whose contractual transfer price during any year ending on or after the 1st day of April, 1984 exceeds rupees two lakhs shall, in addition to the tax payable by him under section 5 and section 6B, if any, be liable to pay from the first day of the year immediately C following such year a tax at the rate specified in sub-section (3) of such part of his contractual transfer price as specified in sub-section (2);

(iii) every dealer who has become liable to pay tax under sub-clause (i) or sub-clause (ii) shall continue to be so liable until D the expiry of three consecutive years during each of which the contractual transfer price does not exceed rupees two lakhs and on the expiry of such three years his liability to pay such tax shall cease.

E (iv) every dealer, whose liability to pay tax has ceased under the provisions of sub-clause (iii), shall, if the contractual transfer price during any year again exceeds rupees two lakhs, be liable to pay from the first day of the year immediately following such year the tax at the rate specified in sub-section (3) of such part of this contractual transfer price as specified in sub-section (2);

F

(2) The tax payable under sub-section (1) shall be levied on that part of contractual transfer price of a dealer during any period which remains after deducting therefrom his contractual transfer price during the period on -

G (a) contractual transfer of goods referred to in section 14 of the Central Sales Tax Act, 1956 (74 of 1956), on a prior sale whereof in West Bengal due tax under this Act or under the West Bengal Sales Tax Act, 1954 (West Bengal Act IV of 1954), if such goods are notified for taxation under that Act, is shown to the H satisfaction of the Commissioner to have been paid;

(b) contractual transfer of goods, sales of which are declared tax-free under section 6;

(c) contractual transfer of goods, sales of which are generally exempt from tax under sub-clause (vi) of clause (a) of sub-section (2) of Section 5;

(d) contractual transfer of goods, on the purchase of which tax is payable by him under section 6C;

(e) such other contractual transfers, as may be prescribed.

(3) The tax under this section shall be levied at the rate of four per centum of such part of the contractual transfer price as specified in sub-section (2).

Explanation 1. - In this section, the expression "contractual transfer price", used in relation to any period, shall mean the aggregate of the amounts received or receivable by a dealer during such period as valuable consideration for the transfer of property in goods used in execution of a works contract, whether or not the amount receivable as valuable consideration for such transfer is separately shown in the works contract, and shall include the value of such goods purchased, manufactured, processed or procured otherwise by the dealer and the cost of freight or delivery as may be incurred by such dealer for carrying such goods to the place where these are used in execution of such works contact, but shall not include such portion of the aforesaid amounts as may be prescribed.

Explanation 2. - For the purpose of this section, the expression "goods" include commodities specified for taxation under section 25 of the West Bengal Sales Tax Act, 1954 (West Bengal Act IV of 1954) and, notwithstanding any contained in this Act or in the west Bengal Act IV of 1954), tax shall be levied on such commodities under this section."

A perusal of section 6D clearly indicates that it is a self-contained code so far as dealers in works contract are concerned. Whatever concessions the Legislature wanted to extend to such dealers were enumerated in clauses (a) to (e) of sub-section (2) of section 6D. Apart from that and

having regard to the non obstante clause used in section 6D, it is made clear no further concession was intended to be extended to the dealers in works contract. As they form a class by themselves, they cannot compare themselves with other dealers coming under sections 4 or 5 and allege discrimination to invoke Article 14 of the Constitution of India. The Tribunal has rightly taken a view by holding 'we are satisfied that the contractors, being dealers under section 6D read with section 2(c), have been appropriately grouped together in one class, distinct and separate from the other classes of dealers. The charge of arbitrariness and unreasonableness must fail. The classification cannot be faulted on account of denial of the facility of use of declaration forms, because this class of dealers has been treated and dealt with on a different footing altogether and they are governed by almost a self-contained code envisaged in section 6D.'

As rightly pointed out by learned senior counsel for the respondent Mr. B. Sen, the recent decision of this Court in *Gannon Dunkerley and Co.* v. *State of Rajasthan*, [1993] 1 SCC 364 also supports the view taken by the Tribunal. This Court has observed as follows :

"A question has been raised whether it is permissible for the State Legislature to levy tax on deemed sales falling within the ambit of Article 366 (29-A)(b) by prescribing a uniform rate of tax for all goods involved in the execution of a works contract even though different rates of tax are prescribed for sale of such goods. The learned counsel for the contractors have urged that it would not be permissible to impose two different rates of tax in respect of sale of the same article, one rate when the article is sold separately and a different rate when there is deemed sale in connection with the execution of works contract. On behalf of the States it has been submitted that it is permissible for the State to impose a particular rate of tax on all goods involved in the execution of a works contract which may be different from the rates of tax applicable to those goods when sold separately. In the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. (See : *East India Tobacco*

Co. v. *State of A.P.*, *P.M. Ashwathanarayana Shetty* v. *State of Karnataka*, *Federation of Hotel & Restaurant Association of India v. Union of India and Kerala Hotel and Restaurant Association* v. *State of Kerala*. Imposition of sales tax at different rates depending on the value of the annual turnover was upheld in *S. Kodar* v. *State of Kerala*. Similarly, imposition of purchase tax at different rates for sugar mills and Khandsari units was upheld in *Ganga Sugar Co.* v. *State of U.P.* In our opinion, therefore, it would be permissible for the State Legislature to tax all the goods involved in the execution of a works contract at a uniform rate which may be different from the rates applicable to individual goods because the goods which are involved in the execution of the works contract when incorporated in the works can be classified into a separate category for the purpose of imposing the tax and a uniform rate may be prescribed for sale of such goods."

In view of the above we hold that there is no discrimination violating Article 14 of the Constitution as alleged by the learned counsel for the appellants.

So far as the second contention urged on behalf of the learned counsel for the appellant is concerned, the Tribunal on facts has found the contractor has to pay the price of the goods supplied by the contractee by way of adjustment. This Court in 1989 (2) SCC 645 (supra) has observed as follows :

"Ordinarily unless there is a contract to the contrary, in the case of a works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building. The contractor becomes liable to pay the sales tax ordinarily when the goods or materials are so used in the construction of the building and it is not necessary to wait till the final bill is prepared for the entire work."

It is, therefore, clear that goods used in the execution of the works contract stand transferred from the contractor to the contractee at the time the goods are incorporated in the construction. It is also brought to our notice by the learned counsel for the respondents that the principle laid

down by this Court in *N.M. Goel & Co.* v. *Sales Tax Officer & Anr.*, 72 STC 375 squarely applies to the second point raised herein. While considering a similar issue, namely, whether there was sale of goods in view of the contract between the parties whereunder the custody and control of the goods remained with the P.W.D. and goods were only used in the construction under the contract, this Court held that 'in the instant case, by use or consumption of materials in the work of construction, there was passing of the property in the goods to the assessee from the P.W.D. By appropriation and by the agreement, there was a sale as envisaged in terms of clause (10) set out hereinbefore. Therefore, in our opinion, there was a sale which was liable to tax'. Though this case was sought to be distinguished before the Tribunal by contending that that ratio must be treated as one given *per incuriam* it was rightly rejected by the Tribunal. We are, therefore, in agreement with the conclusion reached by the Tribunal that 'having considered all aspects of the matter, we hold that a sale within the meaning of section 2(g) of the 1941 Act, namely, a transfer of property in goods supplied by the owner/contractee to the contractor for use in the execution of a works contract takes place in the cases under our consideration, when such goods are actually used in the construction work, provided prices of such goods are deducted from or adjusted against bills or dues of the contractor'.

So far as the third question of payment of royalty is concerned, we do not think there is any substance in that argument. As rightly pointed out by the learned counsel for the respondents that in view of the decision of this Court in *Orient Paper Mills* (supra) the payment of royalty amounts to payment of price for the goods obtained from the Government departments and used in the works contract.

Regarding the additional minor point, the Tribunal has not finally disposed of the issue and it has left open the issue by observing as follows:

> "Learned counsel for the applicants did not submit that such inclusion is in any way bad or unconstitutional. Expenses incurred on account of labour simpliciter surely cannot form a part of the contractual transfer price simply because it is not a value of or valuable consideration for any 'goods' unless such expense amounts to cost of freight or delivery for carrying the goods to the worksite. It will depend on the circumstances in which or the purpose for

which labour was employed. On this question we hold accordingly. Each case shall have to be judged on its own merits and on its peculiar facts. ..... We, therefore, do not at this stage express any opinion one way or the other on those charges and expenses as to whether or not they will form part of the contractual transfer price."

In view of the above it is not necessary to go into this issue further.

For the foregoing reasons, we do not think there is any case for interference under Article 136 of the Constitution. Accordingly, the appeals are dismissed. No costs.

V.S.S. Appeals dismissed.

A SHRI CHANDER CHINAR BADA AKHARA
UDASIN SOCIETY AND ORS.
v.
STATE OF JAMMU AND KASHMIR AND ORS.

B SEPTEMBER 11, 1996

[A.M. AHMADI CJ., N.P. SINGH AND B.N. KIRPAL, JJ.]

Education—Higher education—Admission to professional colleges:

C *Medical College—Admission—Selection procedure—Private recognised medical college run by society—No rules/guidelines framed by State Government for admission—Students seeking admission filed writ petition before High Court—Complaining that failure on part of State Government to frame rules/guidelines deprived them of opportunity of seeking admission—Society* D *impleaded as respondent to the said writ petition—Single Judge of High Court constituted Committee for selecting candidates on basis of oral interviews and fixed time schedule for admission—Pursuant to which advertisement issued on 4-10-1995 inviting applications and last date for receipt of applications was 11-12-1995—Interviews held between 15 and 17-12-1995—Classes commenced from 26-12-1975—But Division Bench in L.P.A. stayed operation of* E *order of Single Judge and directed selection be made on basis of common viva voce examination and that 75% marks for academic qualification and 25% marks for viva voce be allotted—Advertisement inviting applications stipulated that candidate must be permanent resident of State—Held : orders and directions of Single Judge as well as Division Bench of High Court not* F *consistent with orders and directions issued by Supreme Court—Time Schedule fixed by Single Judge was perse arbitrary—Percentage of marks secured at stage of higher secondary examination conducted by different Boards vary and should not form basis of selection—Allotment of 25% marks for viva voce examination was unjustified—Condition of eligibility that can-* G *didate must be a permanent resident of State also unreasonable—Common entrance examination must be held and admission made in accordance with Supreme Court's directions in—Unnikrishnan and subsequent cases.*

Medical College—Admission—Private recognised medical college—No rules/guidelines framed by State Government—Admission made in accord- H *ance with High Court's directions—Though such directions not consistent with*

orders and directions issued by Supreme Court—Held : due to indifferent attitude of State Government and haste shown by college, the so-called candidates, who were said to have been admitted, were virtually on the roads—But only on equitable grounds, a procedure which was not sanctioned by law would not be approved only to mitigate hardship of such candidates who had sought admissions in the said medical college.

The Appellant-Society had the object of promoting medical education by establishing medical colleges, hospitals and child welfare centres. A proposal was submitted to the State Government for setting up a medical college and a private hospital in the State. The State Government allotted land for the proposed medical college and charitable hospital. In due course temporary recognition to the said medical college was granted by the Medical Council of India. However, no rules/guidelines were framed by the State Government for admissions to the said medical College.

Some students seeking admission to the said medical college filed a writ petition before the High Court complaining that failure on the part of the State Government to frame rules/guidelines to regulate admission to the medical college of the Society had deprived them of the opportunity of seeking admission. The Single Judge of the High Court constituted a Committee for selecting candidates on the basis of oral interviews and fixed a time schedule for admission, pursuant to which an advertisement was issued on 4-12-1995 inviting applications. The last date for receipt of applications was 11- 12-1995 and interviews were held between 15-12-1995 and 17-12- 1995 and classes commenced from 26-12-1995.

The respondents filed a Letters Patent Appeal against the aforesaid order before the Division Bench which stayed the operation of the order of the Single Judge. The Division Bench directed that selection be made on basis of common *viva voce* entrance examination and no common entrance written examination be held. A direction was also given that out of 100 marks awarded for selection of the candidates, 75% shall be for academic qualification and 25% shall be for common entrance *viva voce* examination. Pursuant to the direction given by the Division Bench an advertisement was issued by the State Government notifying conditions of eligibility for admission to the said medical college. One of the conditions was the candidate must be a permanent resident of the State. There was no such condition laid down by the Division Bench. Being aggrieved the

A **appellant-Society preferred the present appeal.**

Dismissing the appeal, this Court

HELD : 1.1. Orders and directions of the Single Judge as well as Division Bench of the High Court are not consistent with the orders and
B **directions issued by this Court indicating the procedure for admission in private medical colleges. The time schedule fixed by the Single Judge was perse arbitrary. The percentage of marks secured by different applicants at different types of examinations at the higher secondary stage cannot be treated as uniform. Some of such examinations are conducted at the state**
C **level, others at the national level including the Indian School Certificate examination. The percentage secured at different examinations are bound to vary according to the standard applied by such examining bodies, which is well known. As such a common entrance examination has to be held. The allotment of 25% marks for *viva voce* examination is unjustified. A fresh advertisement shall be issued inviting applications and admission**
D **must be made in accordance with this Court's orders/directions issued in *Unnikrishnan* and subsequent cases. [77-D]**

***J.P. Unnikrishnan* v. *State of A.P. & Ors.*, [1993] 1 SCC 645, followed.**

E ***Ajay Hasia* v. *Khalid Mujib Sehravadi & Ors.*, AIR (1981) SC 487; *T.M.A. Pai Foundation & Ors.* v. *State of Karnataka*, [1993] 4 SCC 276; *Manipal Academy of Higher Education* v. *State of Karnataka & Ors.*, [1994] 2 SCC 201 and *T.M.A. Pai Foundation and Ors.* v. *State of Karnataka and Ors.*, [1995] 5 SCC 220, referred to.**

F **1.2. Due to the indifferent attitude of the State Government and haste shown by the appellant-Society, the so-called selected candidates, who are said to have been admitted, are virtually on the roads. But only on equitable grounds, a procedure which is not sanctioned by law cannot be approved only to mitigate the hardship of such candidates who have**
G **sought admissions in the medical college aforesaid. [77-B-C]**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 11915-17 of 1996 Etc.

From the Judgment and Order dated 22.3.96 of the Jammu &
H Kashmir High Court in L.P.A. (W) Nos. 307, 312/95 and 8 of 1996.

Dhruv Mehta and S.K. Mehta for the Appellants. A

H.N. Salve, E.M.S. Anam and Subhash Sharma and Rajeev Sharma for the Respondents.

The following Judgment/Order of the Court was delivered : B

N.P. SINGH, J. Leave granted.

Appellant No. 1 Shri Chander Chinar Bada Akhara Udasin Society (hereinafter referred to as the Society) is a society registered under the J & K Society Registration Act, the primary object being to promote medical education by establishing medical colleges, hospitals and child welfare centres. A proposal was submitted to the State Government for setting up a medical college and a private hospital in Jammu, in the year 1988. The State Government allotted 356 kanals of land for the proposed medical college and charitable hospital. A further allotment of 250 kanals of land is said to have been made by the State Government. The State Government recommended to the Jammu University for grant of affiliation to the proposed medical college to be set up by the society. The State Government also requested the Medical Council of India to grant approval/recognition to the said medical college. Inspection was made by the representatives of the Medical Council of India in respect of infrastructure including the teaching facilities. In due course temporary recognition of the institution was granted. It is said that the Society approached the State Government to issue necessary guidelines and to frame rules to regulate the admissions to the medical college established by the Society. The Society in its communication undertook to make admissions in accordance with the directions of the Supreme Court of India in the case of *J.P. Unnikrishnan* v. *State of A.P. & Ors.*, [1993] 1 SCC 645 and other directions issued by this Court. The last such communication was addressed by the Society to the State Government on 17.10.1995 saying that although it had got recognition from the Government of India, but no rules/regulations were being framed by the State Government for admissions to the said medical college. C D E F G

The State Government had issued an advertisement on 6.7.1995 inviting applications from eligible candidates for appearing at the entrance test for admission to the two government medical colleges. But while issuing such advertisement the State Government did not invite applica- H

tions for the admission into the medical college of the Society. In the brochure published by the State Government for information to the candidates, who may be willing to seek admission, nothing was said about the medical college in question, which was necessary in view of the judgments and orders of this Court for filling up the 'merit seats' and the 'payment seats'.

It is further the case of the Society that when people of the State of J & K learnt about the medical college of the Society, they approached the management for seeking admission and some applications were also submitted to the management. However, no action was taken on such applications, as no instructions had been received from the State Government.

Some students seeking admission in the medical college in question, filed a writ petition before the High Court of Jammu & Kashmir making a grievance in respect of failure on the part of the State Government to frame necessary rules/guidelines to regulate admission to the medical college of the society which had deprived them of the opportunity of seeking admission against the 'merit seats' or the 'payment seats'. The appellant-society was impleaded as a respondent to the said writ petition. Counter affidavit was filed on their behalf. All necessary records and information were placed before the High Court. Inspite of the several opportunities being given to the State Government, no affidavit on their behalf was filed. By an order dated 27.11.1995, the learned single Judge constituted a Committee consisting of :

"(a) Mr. Justice J.N. Bhat, (Rtd.) Judge of J & K High Court: Chairman.

(b) Mr. A.M. Watali, former member J & K Public Service Commission :
Member.

(c) Dr. Krishan Lal Gupta, Former Director, Health Services, J & K State :
Member.

(d) Prof. Vidya Nath Gupta, formerly Prof. and Head, Department of Hindi, University of Jammu :
Member."

A direction was given to the said committee to immediately proceed with the selection process for admission of students in the Ist year MBBS course of the said medical college. An option was given to invite or call for applications by publication through recognised modes including issuance of an advertisement in at least one leading newspaper having wide circulation. In the order, the learned Judge observed that the selection Committee may conduct oral interviews of the candidates for short-listing the applicants on basis of their inter se merit. The first meeting of the aforesaid Committee is said to have been held on 29.11.1995. An advertisement was issued on 4.12.1995 inviting applications from eligible candidates in respect of the following four catregories :-

"(a) 50% merit seats from permanent resident of the State of J&K;

(b) 20% payment seats from permanent resident of the State of J&K;

(c) 15% payment seats from candidates outside the State of J&K; and

(d) 15% from NRI's and foreigners."

The advertisement was published in the Indian Express in its issue dated 4.12.1995. In the said advertisement, 11.12.1995 was fixed as the last date for receipt of the applications saying that the interviews of the candidates shall be held between 15.12.1995 and 17.12.1995. It is the case of the Society that after the interviews were so held, a merit list was prepared on basis of the percentage of marks secured by the applicants at the Higher Secondary School Examination or equivalent examinations and the marks secured at the interview. The report of the Selection Committee was forwarded on 19.12.1995, which was placed on the notice board on 20.12.1995. Candidates so selected were admitted between 20.12.1995 to 26.12.1995. The teaching commenced from 26.12.1995.

A Letters Patent Appeal against the order dated 27.11.1995, aforesaid of the learned single Judge, had been filed on behalf of the State Government, which was listed before the Division Bench on 27.12.1995. On the basis of the caveat filed on behalf of the Society, the parties were heard on the aforesaid date. After hearing the parties, the appeal filed on behalf

A of the State Government, was admitted and the operation of the order of the learned single Judge was stayed. Ultimately, the Appeal filed on behalf of the State and the appeals filed on behalf of others were allowed on 22.3.1996. The order of the learned single Judge was set aside. The present appeals have been filed against the said judgment of the Division Bench.

B From the judgment of the Division Bench, it shall appear that after taking into consideration the different aspects of the controversy as well as the predicament of the students who claimed to have been admitted in the medical college aforesaid, the following directions were given :

C "To conclude, considering these several aspects, we make the following orders :

(1) These appeals are allowed. The order of the learned Single Judge passed on OWP No. 379/1995 dated November 27, 1995 is set aside.

D

(2) We issue a writ of Mandamus to the State Govt. to issue a Notification calling for application from the eligible candidates in the prescribed form for appearing in the common *viva voce* entrance examination. There shall be no common entrance written examination. Notification calling for applications shall be publish-

E ed in one local Daily Vernacular language and in one daily widely circulated English newspaper providing enough time. The Writ petitioners, the contesting respondents, the appellants of the LPAs who have already applied need not apply once again except those who have not applied.

F

(3) The last date for receiving the applications in the prescribed form shall be 5th April, 1996. Applications received after the date fixed above either by post or by hand would not be entertained.

(4) The Roll Nos. to the eligible candidates shall be supplied

G by the 8th April, 1996. The date for holding the common entrance *viva voce* examination is fixed as 10th April, 1996.

(5) The competent Authority shall make selection and announce the results on or before 17th April, 1996. The selection list so prepared shall be got published in atleast two leading local

H dailies of Srinagar and Jammu and it shall also be displayed at the

office of Competent Authority, Entrance Examination in Jammu and Srinagar. A

(6) Out of 100 marks awarded for selection of the candidates, 75% shall be for academic qualification and 25% shall be for common Entrance *viva voce* Examination. B

(7) The number of 100 seats shall be filled up by selecting candidates from the order of merit.

(8) At least 50% of the seats out of the 100 seats shall be filled up by the nominees of the Govt. or University as the case may be, hereinafter referred to as "free seats". These students shall be selected on the basis of merit determined on the basis of merit list by such criteria as may be determined by the Competent Authority or appropriate Authority as the case may be. The remaining 50% of the seats (payment seats) shall be filled up by those candidates who are prepared to pay the fee prescribed therefor and who have complied with the instructions regarding deposit and furnishing of cash security/Bank guarantee for the balance of the amount. The allotment of students against payment seats shall also be done on the basis of *inter se* merit determined on the same basis as in the case of free seats. C D E

(9) In so far as the reservation of the seats for persons claiming constitutionally permissible reserved, the SRO issued by the State of J&K in relation to the reservation of seats shall be followed.

(10) In so far as the fixation of the scale of fee payable by these students, the State Govt. shall constitute a committee within a period of ten days and that committee shall fix the scale of fee payable by the students in accordance with the guidelines contained in the scheme of *Unnikrishnan J.P.* AIR (1993) SC 2173." F

It is apparent from the order aforesaid that a writ of mandamus was issued to the state Government to invite applications from eligible candidates in prescribed form for appearing in the common *viva voce* entrance examination. However, there is a specific direction that no common entrance written examination shall be held. 5th April, 1996 was as the last date for receiving the applications in the prescribed form. Thereafter a time G H

A schedule was prescribed in respect of common *viva voce* entrance examination, selection and announcement of the result. A direction was also given that out of 100 marks awarded for selection of the candidates, 75% shall be for academic qualification and 25% shall be for common entrance *viva voce* examination.

B

According to the appellant-society, there was no justification on the part of the Division Bench to interfere with the directions given by the learned single Judge, which were just and proper. It was pointed out that under the predicament under which the appellant-society and the applicants had been placed because of the inaction on the part of the State C Government, the learned single Judge had no option but to constitute a Committee of persons mentioned above for selecting the applicants for admission in order to save them from losing an academic session, for no fault of theirs.

D It is true that when the Society requested the State Government to frame necessary rules/guidelines to regulate the admissions in the medical college of the society, the State Government should have taken appropriate and immediate steps and there was no sense in shelving the said issue by ignoring it outright. The learned counsel, who appeared on behalf of the State, could not give any explanation as to why the necessary guidelines E were not issued to the society in respect of the admissions in the medical college aforesaid. But the fact remains that the learned Single Judge on the writ petition filed on behalf of the students adopted a procedure and fixed a time schedule in respect of admission of the applicants, which are not consistent with the orders and directions issued by this Court in F different cases, indicating the procedure for admission in private medical colleges. There is no dispute that the advertisement inviting applications from eligible candidates was issued on 4.12.1995 and 11.12.1995 was fixed as the last date for receipt of the such applications i.e. within a week, which according to us, was perse an arbitrary time limit fixed for receipt of the applications. It is said that the interviews were held between 15.12.1995 and G 17.12.1995 and the selection list was forwarded on 19.12.1995. The selected candidates are said to have been admitted between 20.12.1995 and 26.12.1995 and classes are said to have commenced since 26.12.1995 itself. Admittedly, the Division Bench passed an interim order staying the operation of the judgment of the single Judge only the next day i.e. 27.12.1995. H In this background, it is difficult to accept the claim made on behalf of the

Society as well as applicants who are said to have been admitted in the said medical college, that their studies commenced since 26.12.1995 and as such on equitable grounds they should be allowed to pursue their studies. A

It is unfortunate that due to the indifferent attitude of the State Government and haste shown by the appellant-society, the so-called selected candidates, who are said to have been admitted, are virtually on the roads. But only on equitable grounds, a procedure which is not sanctioned by law cannot be approved only to mitigate the hardship of such candidates who have sought admissions in the medical college aforesaid. But at the same time many of the directions given by the Division Bench also cannot be approved. It has directed that selection be made on basis of common *viva voce* entrance examination and no common entrance written examination be held. According to the direction of the Division Bench, 75% marks have been allotted for academic qualification and 25% marks for the *viva voce* examination. It need not be pointed out that the percentage of marks secured by different applicants at different types of examinations at the higher secondary stage cannot be treated as uniform. Some of such examinations are conducted at the state level, others at the national level including the Indian School Certificate examination. The percentage secured at different examinations are bound to vary according to the standard applied by such examining bodies, which is well known. As such a common entrance examination has to be held. The counsel appearing for the parties could not justify the awarding of 25% marks for *viva voce* examination in view of the several judgments of this Court in connection with admission in educational institutions; one such judgment being from the State of J&K itself in the case of *Ajay Hasia Etc.* v. *Khalid Mujib Sehravadi and Others Etc.*, AIR (1981) SC 487 = (1981) 1 SCC 722. B C D E F

The learned counsel appearing on behalf of the State informed the Court that pursuant to the direction given by the Division Bench, an advertisement was issued on 27.3.1996 by the State Government, notifying the conditions of eligibility for admission in the said medical college. From the said advertisement it appears that one of the conditions is that the candidate must be permanent resident of J & K. There was no such direction given by the Division Bench. Apart from that any such condition is not consistent with the different judgments and orders of this Court. Mr. Verma, learned senior counsel, immediately offered to rectify the same and to abide by any direction given by this Court. G H

Taking all the facts and circumstances into consideration, we are of the view that for one reason or the other, now it is not possible to complete the admission in the said medical college for the session which has already commenced. As such the only reasonable course shall be that a fresh advertisement be issued for the next academic session in accordance with law in the light of directions given by this Court in the cases of *J.P. Unnikrishnan* v. *State of AP & Ors.* (supra), *T.M.A. Pai Foundantion & Ors.* v. *State of Karnataka*, [1993] 4 SCC 276; *Manipal Academy of Higher Education* v. *State of Karnataka & Ors.*, [1994] 2 SCC 201 and in the case of *T.M.A. Pai Foundation and Ors.* v. *State of Karnataka and Ors.*, [1995] 5 SCC 220. The advertisement inviting applications should be given proper publicity and thereafter the seats should be ear-marked and allotted in terms of the judgments aforesaid which prescribe the procedure for admission by the private medical colleges. Seats shall also be reserved for NRI within the percentage fixed in those judgments. The State Government shall extend all cooperation and help so that proper selections are made as per directions of this Court and the appellant-society which was established the medical college is able to pursue its goal by making the medical college functional, which shall be in the interest of the State of J & K itself. The learned counsel appearing for the State of J & K assured this Court that all necessary steps shall be taken promptly.

In the result, the appeals are dismissed but at the same time in view of the directions given above, it has to be held that we are not approving the directions given by the Division Bench. Now, the steps have to be taken by the appellant-society and the State Government in accordance with the different directions given by this Court for admission in the private medical colleges. There shall be no orders as to cost.

V.S.S. Appeals dismissed.

N.P. SINGH, J. Leave granted.

Civil Appeals are disposed of in terms of the judgment of this Court in the case of *Shri Chander Chinar Bada Akhara Udasin Society and Ors.* v. *The State of J & K and Ors.*, (Civil Appeal Nos. 11915-17 of 1996 @ SLP (C) Nos. 7924-7926 of 1996) delivered today.

V.S.S. Appeals disposed of.

AHMEDABAD URBAN DEVELOPMENT AUTHORITY

v.

MANILAL GORDHANDAS AND ORS.

SEPTEMBER 11, 1996

[A.M. AHMADI, CJ. N.P. SINGH AND SUJATA V. MANOHAR, JJ.]

Gujarat Town Planning and Urban Development Act, 1976 : Sections 17(1)(c), 9 to 17, 20 and 124.

Town Planning—Development Plan—Sanction of—State Government accorded sanction to Draft Development Plan submitted by Municipal Corporation under Bombay Town Planning Act, 1954—Subsequently 1976 Act came into force and repealed earlier Bombay Act—Urban Development Authority submitted Development Plan to State Government for sanction which covered area included in Draft Development Plan submitted by Municipal Corporation—Held : sanction of Plan submitted by Municipal Corporation without considering Plan submitted by Urban Development Authority was without application of mind—Provisions of Bombay Act inconsistent with provisions of Gujarat Act—Therefore, deeming fiction in S.124(2) would not apply and Plan submitted under repealed Act not deemed to be submitted under Gujarat Act—Final development plan in respect of area within Corporation came into force on date of sanction of draft development plan submitted under Gujarat Act—Hence, period of 10 years mentioned in S.20(2) must be computed from that date—Bombay Town Planning Act, 1954.

Administrative Law :

Judicial review—Mala fide excercise of power—Held : It must be shown that power was excercised with ulterior motive only to defeat statutory rights of persons interested.

The Bombay Town Planning Act, 1954 regulated the town planning activity within the area falling within the jurisdiction of the local authority in the State including the Municipal Corporation. On 15.1.1976 the Corporation submitted a revised development plan for the area falling within the limits of the Corporation to the State Government for its sanction. On

A 19.6.1976 the Gujarat Town Planning and Urban Development Act was enacted which came into force on 30.1.1978. On that very date Ahmedabad Urban Development Authority (AUDA) was constituted under Section 22 of the said Act. Section 124(1) of the said Act repealed the Bombay Town Planning Act, 1954.

B By a notification dated 12.8.1983 the State Government sanctioned the revised development plan submitted on 15.1.1976 by the Corporation under the Bombay Town Planning Act, 1954. AUDA prepared a draft development plan in accordance with the provisions of the Gujarat Town Planning Act and submitted to the State Government for sanction on C 23-7-1981. It also included the area covered by the Corporation. The State Government sanctioned the draft development plan submitted on 23.7.1981 by the appellant AUDA on 2.11.1987 including for the areas within the Corporation in respect of which the draft development had been sanctioned by the State Government by aforesaid notification dated 12.8.1983.

D According to the writ petitioners respondents, as the draft development plan which had been submitted on 15.1.1976 and sanctioned on 12.8.1983 by a notification saying that the sanction plan would come into force with effect from 16.9.1983, the period of 10 years as specified in Section 20(2) of the Gujarat Town Planning Act would have to be counted E with effect from 16.9.1983 so far as the area covered by notification dated 12.8.1983 was concerned. They claimed that within the aforesaid period of 10 years from coming into force of the final development plan neither the lands in question covered by that notification were acquired by agreement nor any proceedings under the Land Acquisition Act, 1894 were commenced. Thereafter, they issued notices and on expiry of the period of six F months from the date of service of such notices it was claimed on their behalf that the designation of the land had lapsed. This found favour with the High Court. Being aggrieved the appellant-AUDA preferred the present appeal.

G Allowing the appeal, this Court

HELD : 1.1. The State Government could not have sanctioned the draft development plan submitted by the Municipal Corporation on 12.8.1983 because the Gujarat Town Planning Urban Development Act, 1976 had come into force on 30.1.1978, and Section 124(2) of the Gujarat H Town Planning Act shall not save the plan submitted by the Corporation,

provisions of Sections 9 to 17 of Gujarat Town Planning Act being inconsistent with Sections 7 to 10 of the Bombay Town Planning Act, 1954. The State Government after coming into force of the Gujarat Town Planning Act should have ignored the draft development plan submitted by the Corporation on 15.1.1976. This was also necessary because a special Act, Gujarat Town Planning Act had been enacted on 19.6.1976 with the sole object to develop the urban area of the State in accordance with the provisions of the said Act. [98-G-H; 99-A-B]

1.2. From a mere comparison of the relevant Sections under the Bombay Town Planning Act, 1954 with the provisions of the Gujarat Town Planning Act it shall appear that the relevant provisions of the Gujarat Town Planning Act are inconsistent with the provisions of Bombay Town Planning Act. Provisions of Sections 7 to 10 of Bombay Town Planning Act are inconsistent with Sections 9 to 17 of the Gujarat Town Planning Act. As such after coming into force of Gujarat Town Planning Act on 30.1.1978 State Government was required to follow provisions of Sections 9 to 17 of the Gujarat Town Planning Act. Section 124(2) of Gujarat Town Planning Act was of no help when the plan submitted by Corporation was sanctioned on 12.8.1983. That could have been done if the provisions of the Gujarat Town Planning Act had been consistent with the provisions of Bombay Town Planning Act. [94-G; 95-E]

1.3. There was a complete lack of application of mind on the part of the State Government when the draft development plan submitted on 15.1.1976 by the Corporation was sanctioned under the provisions of the Gujarat Town Planning Act on 12.8.1983, overlooking the fact that in the meantime a comprehensive draft development plan had been prepared by the appellant and had been submitted on 23.7.1981 for sanction of the State Government. When Section 17(1) vests power in the State Government to sanction the draft development plan, the said statutory power should not be exercised in a casual manner without proper application of mind. The facts of the present case clearly depict how the State Government has exercised the power under Section 17(1)(c) of the Gujarat Town planning Act without proper application of mind. It appears the notification dated 12.8.1983 has been issued being completely oblivious and ignorant of the submission of a draft development plan by the appellant in the meantime on 23.7.1981 covering those areas also. If the State Government was conscious of the fact that later a more comprehensive draft development

A plan had been submitted by the appellant, there was no reason to sanction the draft development plan submitted by the Corporation which had lost jurisdiction over the area for which the draft development plan had been prepared. [93-G-H; 94-A-E]

B 2.1. The State Government should not have taken note of the plan submitted on 15.1.1976 by the Corporation after the repeal of the Bombay Town Planning Act on 30.1.1978 and coming into force of the new Gujarat Town Planning Act. There was no occasion to ignore the comprehensive plan submitted by AUDA vested with the power to submit such plan and to sanction the draft plan submitted by the Corporation. After coming into C force of the Gujarat Town Planning Act on 30.1.1978 the State Government could not have sanctioned a plan submitted by the Corporation when the AUDA had already submitted a draft development plan even covering those areas under the Gujarat Town Planning Act. [96-B-D]

D 2.2. When power has been vested in the appellant to prepare a draft development plan and there being no bar to include in the said draft development plan even area for which an earlier draft development plan had already been sanctioned, then the draft development plan which was sanctioned and notified on 2.11.1987 shall be deemed to be the final development plan within the meaning of Section 20 of the Gujarat Town E Planning Act. As such the period of 10 years has to be calculated and counted with reference to 3.12.1987 the date when such final development plan was to come into force. [97-D-E]

3. The possibility of misuse of such power does not arise because if F such power is exercised with ulterior motive and with an object to defeat the statutory right of persons interested, courts will be perfectly justified in nullifying such actions of area development authorities. But in the present case the draft development plan had been submitted by the appellant as early as on 23.7.1981 much before the draft development plan submitted by the Corporation was sanctioned on 12.8.1983. There is no G scope for attributing any bad faith or malice on the part of the appellant or the State Government in the facts and circumstances of the present case. The writ petitioners - respondents did not take such a stand that the State Government approved the draft development plan submitted by the appellant on 2.11.1987 only to defeat the right which was to accrue to the H land owners or persons interested in the next few years. [98-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 11935-11943 of 1996. A

From the Judgment and Order dated 1.8.95 of the Gujarat High Court in L.P.A. No. 296, 300, 301-02, 299, 294-95, 297 and 298 of 1995.

S.N. Shelat, Additional Advocate General, Gujarat, S.K. Dholakia, Soli J. Sorabjee, Anil B. Divan, Ashok H. Desai, S.H. Sanjanwala, Harish N. Salve, P.S. Poti and R.P. Bhatt, Sr. Advs., V.K. Bhatt, D.S. Nanavati, A.K. Agarwal, A. Chinnasamy, Y. Adhyaru, Ms. Alka Agarwal, V.D. Khanna, Mrs. Nirmala Gupta, H.S. parihar, Kuldeep S. Parihar, P.H. Parekh, E.R. Kumar, G.E. Desai, C.G. Sharma, Sandeep Parekh, A.J. Patel, C. Patel, S. Parekh, H. D. Raval, Anip Sachthey, C.D. Singh, N.N. Munshi, A.P. Medh, A. Mehrotra, A. K. Pandey, C.C. Bhalja, A.K. Pandey, A. Mehrotra, C.C. Bhalja, Ms. Tanuja Sheel and Ms. Reema Bhandari for the appearing parties. B C

The Judgment of the Court was delivered by D

N.P. SINGH, J. Leave granted.

These appeals have been filed on behalf of the Ahmedabad Urban Development Authority for setting aside the order passed by the High Court of Gujarat dismissing the Letters Patent Appeals filed on behalf of the appellants, against the judgment of the single Judge of the said High Court in different writ petitions. The writ petitions had been allowed saying that the sanction accorded by the Notification dated 12.8.1983, by the State of Gujarat in exercise of powers conferred on it by clause (c) of sub-section (1) of Section 17 of the Gujarat Town Planning and Urban Development Act, 1976 had lapsed after the expiry of period of 10 years and because of service of notice by the concerned land owners in accordance with sub-section (2) of Section 20 of the said Act, as during this period neither the lands in question were acquired by agreement nor proceedings under the Land Acquisition Act, 1894 were commenced. E F G

The Bombay Town Planning Act, 1954 regulated the town planning activity within the area falling within the jurisdiction of the local authorities in the State of Gujarat including the Ahmedabad Municipal Corporation (hereinafter referred to as the "Corporation"). On 15.1.1976 the Corporation submitted a revised development plan to the State Government for the H

A area falling within the limits of the Corporation for sanction of the State Government. Section 7 of the Bombay Town Planning Act provides that the details of the proposals for designating the use of the land for the purposes such as (1) residential (2) industrial (3) commercial and (4) agricultural as well as proposals regarding designation of and for public B purposes such as parks, play-grounds, recreation grounds, open spaces, schools, markets and for institutions should be indicated in the development plan. Section 8 prescribes, the particulars which have to be submitted to the State Government along with the development plan. In view of Section 9 within 2 months from the date of publication of the aforesaid development plan any member of the public has a right to communicate in C writing to the local authority any suggestion relating to such plan which has to be considered at any time before submitting the development plan to the State Government. On receipt of the development plan under Section 8, the State Government under Section 10 can sanction such development plan including with modifications if any. Such sanction shall be notified in D official gazette and thereafter the development plan so sanctioned shall be called "the final development plan" which shall come into force on such date as the State Government may specify in the notification issued. The Corporation submitted the development plan to the State Government for sanction on 15.1.1976. On 19.6.1976 the Gujarat Town Planning and Urban Development Act, 1976 (hereinafter referred to as the Gujarat Town E Planning Act) was enacted, which came in force on 30.1.1978 and the Bombay Town Planning Act was repealed since that date. On 30.1.1978 itself in exercise of the power under Section 22, the Ahmedabad Urban development Authority (hereinafter referred to as the AUDA) was constituted and the power to prepare development plan in respect of even the F areas which were the part and parcel of the Corporation vested in AUDA since that date.

The preamble of the Gujarat Town Planning Act says "an Act to consolidate and amend the law relating to the making and execution of development plans and town planning schemes in the State of Gujarat". G Section 7 specifies the functions of the development authority which includes to undertake the preparation of development plans under the provisions of the said Act for the development area and to undertake the preparation of town planning schemes under the provisions of the said Act; to control the development activities. Section 9 provides that as soon as H may be after the constitution of an area development authority as in the

present case AUDA, for any development area such authority shall not later than three years after the declaration of such area as a development area or within such time as the State Government may, from time to time extend "prepare and submit to the State Government a draft development plan for the whole or any part of the development area" in accordance with the provisions of the said Act. In view of Section 10 of that Act a copy of the draft development plan as prepared under Section 9 in respect of any area has to be kept open for inspection by the public. Section 12 requires such draft development plan to indicate the manner in which the use of the lands in the area covered by it shall be regulated and shall also indicate the manner in which the development therein shall be carried out. The relevant portion of sub-section (2) of Section 12 is as follows :

"12(2) In particular, it shall provide, so far as may be necessary, for all or any of the following matters, namely :

(a) proposals for designating the use of the land for residential, industrial, commercial, agricultural and recreational purpose;

(b) proposals for the reservation of land for public purposes, such as schools, colleges and other educational institutions, medical and public health institutions, markets, social welfare and cultural institutions, theatres and places for public entertainment, public assembly, museums, art galleries, religious buildings, playgrounds, stadia, open spaces, dairies and for such other purposes as may, from time to time, be specified by the State Government;

(c) .....

(d) transport and communications, such as roads, highways, parkways, railways, waterways, canals and airport, including their extension and development;

(e) .....

(f) .....

(g) .....

(h) .....

A (i) .....

(j) .....

(k) proposals for the reservation of land for the purpose of Union, any State, local authority or any other authority or body
B established by or under any law for the time being in force;

(l) .....

(m) .....

C (n) provision for preventing or removing pollution of water or air caused by the discharge of waste or other means as a result of the use of land;

(o) ....."

D Because of Section 13 such authority after "the draft development plan is prepared and submitted to the State Government under Section 9", shall publish it in the official gazette and in such other manner as may be prescribed along with a notice in a prescribed manner inviting suggestions or objections from any person with respect to the development plan within a period of two months from the date of its publication. Sub-section (2) of
E Section 13 prescribes the particulars which have to be published alongwith the draft development plan. Objections or suggestions communicated in writing within the period specified has to be considered and if necessary the draft development plan may be modified. If the modifications made by the authority in the draft development plan are of extensive or substantial
F nature the said authority has to publish the said modifications in the official gazette along with the notice in prescribed manner inviting suggestions or objections from any person with respect to the proposed modifications within a period of two months from the date of publication of the said notice, which is required by Section 15. Section 16 provides that after the development plan is published as aforesaid and the objections or sugges-
G tions thereto, if any, are received, the authority shall within a period of six months from the date of the publication of the draft development plan under Section 13 "submit to the State Government for its sanction the draft development plan and the regulations with the modifications, if any, made thereof under Sections 14 or 15". The particulars published under sub-sec-
H tion (2) of Section 13 and the suggestions or objections received under

Sections 14 or 15 have also to be submitted to the State Government along with the draft development plan because of sub- section (2) of Section 16. Section 17(1) which is relevant for the present case is as follows :

"17.(1)(a) On receipt of the draft development plan under section 16, the State Government may, by notification,–

(i) sanction the draft development plan and the regulations so received, within the prescribed period, for the whole of the area covered by the plan or separately for any part thereof, either without modifications, or subject to such modifications, as it may consider proper; or

(ii) return the draft development plan and the regulations to the area development authority or, as the case may be, to the authorised officer, for modifying the plan and the regulations in such manner as it may direct.

Provided that, where the State Government is of opinion that substantial modifications in the draft development plan and regulations are necesary, the State Government may, instead of returning them to the area development authority or, as the case may be, the authorised officer under this sub-clause, publish the modifications so considered necesary in the Official Gazette alongwith a notice in the prescribed manner inviting suggestions or objections from any person with respect to the proposed modifications within a period of two months from the date of publication of such notice; or

(iii) refuse to accord sanction to the draft development plan and the regulations and direct the area development authority or the authorised Officer to prepare a fresh development plan under the provisions of this Act.

(b) Where a development plan and regulations are returned to an area development authority, or, as the case may be, the authorised officer under sub-clause (ii) of clause (a), the area development authority, or, as the case may be, the authorised officer, shall carry out the modifications therein as directed by the State Government and then submit them as so modified to the

A State Government for sanction; and the State Government shall thereupon sanction them after satisfying itself that the modifications suggested have been duly carried out therein.

(c) Where the State Government has published the modifications considered necessary in a draft development plan as required
B under the proviso to sub-clause (ii) of clause (a), the State Government shall, before according sanction to the draft development plan and the regulations, take into consideration the suggestions or objections that may have been recieved thereto, and thereafter accord sanction to the draft development plan and the regulations
C in such modified form as it may consider fit.

(d) The sanction accorded under clause (b) or clause (c) shall be notified by the State Government in the Official Gazette and the draft development plan together with the regulations so sanctioned shall be called the final development plan.

D

(e) The final development plan shall come into force on such date as the State Government may specify in the notification issued under clause (d) :

Provided that the date so specified shall not be earlier than one
E month from the date of publication of such notification.

The State Government under the aforesaid sub-section (1) of section 17, may sanction the draft development plan forwarded by development authority either without modifications or subject to such modifications. Section 20 provides :

F

"20.(1) The area development authority or any other authority for whose purpose land is designated in the final development plan for any purpose specified in clause (b), clause (d), clause (k) or clause (n) of sub-section (2) of section 12, may acquire the land
G either by agreement or under the provisions of the Land Acquisition Act, 1894.

(2) If the land referred to in sub-section (1) is not acquired by agreement within a period of ten years from the date of the coming into force of the final development plan or if proceedings under
H the Land Acquisition Act, 1894 are not commenced within such

> period, the owner or any person interested in the land may serve a notice on the authority concerned requiring it to acquire the land and if within six months from the date of service of such notice the land is not acquired or no steps are commenced for its acquisition, the designation of the land as aforesaid shall be deemed to have lapsed.

On a plain reading, sub-section (1) of Section 20 requires the area development authority for whose purpose land is designated in the final development plan for any purpose specified in clauses (b), (d), (k) or clause (n) of sub-section (2) of Section 12 to acquire the land either by agreement or under the provisions of the Land Acquisition Act. If such land is not acquired by agreement within the period of 10 years from the date of the "coming into force of the final development plan" or if the proceedings under the Land Acquisition Act are not commenced within such period, the owner or any person interested in the land may serve a notice on the authority concerned requiring it to acquire the land. If within period of six months from the date of the service of the notice the land is not acquired or no steps are taken for its acquisition, the designation of the land as aforesaid shall be deemed to have lapsed.

Sub-section (1) of Section 124 repeals the Bombay Town Planning Act, 1954 but because of sub-section (2) of the said Section 124 notwithstanding such repeal anything done or any action taken, including any declaration of intention to make a development plan or town planning scheme, any draft development plan or draft town planning scheme published by a local authority, any application made to the State Government for the sanction of any draft development plan or draft town planning scheme, any, sanction given by the State Government to the draft development plan or draft town planning scheme *shall in so far as it is not inconsistent with the provisions of the Gujarat Town Planning Act shall have effect in relation thereto.*

(emphasis supplied)

As already mentioned above on 15.1.1976 the Corporation under the provisions of the Bombay Town Planning Act, 1954 had submitted a revised development plan to the State Government for the area falling within the limits of the Corporation for sanction of the State Government. But on 19.6.1976, the Gujarat Town planning Act was enacted which came into

A force with effect from 30.1.1978. On that very date AUDA was constituted under Section 22 of the said Act. Because of sub-section (1) of Section 124 it shall be deemed that the Bombay Town Planning Act was repealed with effect from 30.1.1978, when the Gujarat Town Planning Act came into force. Section 9 required AUDA to prepare and submit to the State Government a draft development plan within three years from the declaration of the areas as development areas. A draft development plan was prepared by AUDA for the entire area under its jurisdiction which included the area covered by the Corporation and was submitted to the State Government for its sanction on 23.7.1981.

On 12.8.1983 a notification was issued by the State Government saying :

> "WHEREAS the Ahmedabad Municipal Corporation (hereinafter referred to as "the said Municipal Corporation) has prepared a "Draft Revised Development Plan (hereinafter referred to as the said" Draft Revised Development Plan") in respect of the lands within the jurisdiction of the said Municipal Corporation under the provisions of the Bombay Town Planning Act, 1954 and advertisement regarding publication of the said draft revised Development Plan and calling; objections and suggestions in the said draft revised development plan was published in the Part II of the Gujarat Government Gazette dated 15th January, 1976;
>
> AND WHEREAS the government of Gujarat had considered it necessary to make modifications (hereinafter referred to as "the said modifications") in the said draft revised Development Plan which was submitted by the said Municipal Corporation to the State Government for sanction under the provisions of the Gujarat Town Planing and Urban Development Act, 1976;
>
> .....
>
> NOW, THEREFORE, in exercise of the powers conferred by clause (c) of sub-section (1) of section 17 of the Gujarat Town Planning and Urban Development Act, 1976, the Government of Gujarat hereby;
>
> (a) finalises the said modifications;
>
> (b) sanctions the said draft revised development plan and the

regulations thereto subject to the modifications so finalised and as set out in the schedule appended hereto; and

(c) specifies the 16th September, 1983 as the date on which the final development plan shall come into force."

From the aforesaid notification itself it is apparent that the State Government purported to sanction the draft revised development plan submitted on 15.1.1976 by the Corporation under the provisions of the Bombay Town Planning Act and State Government specified 16.9.1983 as the date on which the said final development plan shall come into force.

There is no dispute that when AUDA prepared a draft development plan in accordance with the provisions of the Gujarat Town Planning Act and submitted to the State Government for sanction on 23.7.1981 it also included the area and the draft plan with modifications already submitted by the Corporation on 15.1.1976. It is the case of the AUDA that it was considered necessary to include even that area in the draft development plan prepared by the appellant, because by that time the draft development plan which had been submitted by the Corporation had not been sanctioned by the State Government. The State Government sanctioned the draft development plan submitted on 23.7.1981 by the appellant AUDA on 2.11.1987 including for the areas within the Corporation in respect of which the draft development had been sanctioned by the State Government by aforesaid notification dated 12.8.1983.

According to the writ petitioners-respondents, as the draft development plan which had been submitted on 15.1.1976 and sanctioned on 12.8.1983 by a notification saying that the sanction plan shall come into force with effect from 16.9.1983, the period of 10 years as specified in sub-section (2) of Section 20 of the Gujarat Town Planning Act shall have to be counted with effect from 16.9.1983 so far the area covered by notification dated 12.8.1983 is concerned. They claimed that within the aforesaid period of 10 years from coming into force of the final development plan neither the lands in question covered by that notification were acquired by agreement nor any proceedings under the Land Acquisition Act were commenced. Thereafter, they issued notices and on expiry of the period of six months from the date of service of such notices it was claimed on their behalf that the designation of the land had lapsed. This has found favour with the High Court which has been questioned before this Court.

A It may be pointed out that although the aforesaid notification dated 12.8.1983 was issued under the provisions of Clause (c) sub-section (1) of Section 17 of the Gujarat Town Planning Act, admittedly the said draft plan had neither been prepared in accordance with the provisions of Gujarat Town Planning Act nor submitted by AUDA the appellant. In the B notification itself it has been specifically mentioned that the Corporation had prepared the said draft revised development plan under the provisions of the Bombay Town Planning Act and submitted the same to the State Government on 15.1.1976. It has been further said that the State Government had considered it necessary to make modifications in the said draft revised development plan which was submitted by the Corporation to the C State Government and thereafter sanction was being accorded. We are not able to appreciate as to why and how the draft revised development plan which had been submitted by the Corporation on 15.1.1976 was sanctioned and notified on 12.8.1983, when in the meantime the Gujarat Town Planning Act had come into force with effect from 30.1.1978 which had juris- D diction even over the area in respect of which the Corporation had submitted the draft development plan on 15.1.1976. Apart from that before the aforesaid notification dated 12.8.1983 was issued, the appellant had submitted its draft development plan prepared in accordance with the provisions of the Gujarat Town Planning Act to the State Government for E sanction, covering even the area which had been included in the draft development plan submitted by the Corporation on 15.1.1976 along with the much larger area for which the draft development plan was prepared by the appellant. In normal course, the State Government should not have taken note of the draft development plan submitted by the Corporation on F 15.1.1976 which remained pending before the State Government and in the meantime the Gujarat Town Planning Act came into force and a more comprehensive draft development plan prepared by the appellant had been submitted to the State Government covering even the area for which the Corporation had submitted a draft development plan. On behalf of the respondents it was pointed out that when the appellant had submitted the G draft development plan on 23.7.1981 including the area for which the draft development plan had been submitted by the Corporation, it was open to the State Government to sanction the draft development plan only in part, covering the area for which the draft development plan had been submitted earlier, while exercising power under Section 17(1)(a)(i) which says that H the State Government may by notification sanction the draft development

plan for the "whole area covered by the plan or separately for any part thereof". This argument could have been accepted if in the notification dated 12.8.1983 the State Government had referred to the draft development plan submitted by the appellant on 23.7.1981 and had specifically said that it was sanctioning only part of the said plan by that notification. In the notification dated 12.8.1983, no notice has been taken of the draft development plan submitted by the appellant on 23.7.1981, covering even the areas in respect whereof the draft development plan had been prepared by the Corporation. As such it is a futile contention that by notification dated 12.8.1983 part of the draft development plan submitted by the appellant on 23.7.1981 had been sanctioned by the State Government in exercise of the powers under Section 17(1)(a)(i).

It was then submitted that as the draft development plan had been submitted by the Corporation to the State Government before the Bombay Town Planning Act stood repealed on coming into force of the Gujarat Town Planning Act on 30.1.1978, because of sub- section (2) of Section 124 aforesaid it was open to the State Government to sanction that plan. On proper reading of sub- section (2) it appears, that it shall be deemed that the said draft development plan was pending before the State Government because of sub-section (2) of Section 124. There is a deeming fiction in sub-section (2) of Section 124 saying that any application made to the State Government for sanction of any draft development plan shall "be deemed to have been done or taken under the corresponding provisions of this Act". It shall only keep the draft development plan submitted by the Corporation pending for consideration by the State Government because it shall be deemed that it has been submitted to the State Government under the provisions of the Gujarat Town Planning Act. But before sanctioning the said plan the State Government was required to examine the said draft development plan along with the draft development plan prepared and submitted by the appellant AUDA in the meantime. It can be said that there was complete lack of application of mind on the part of the State Government when the draft development plan submitted on 15.1.1976 by the Corporation was sanctioned under the provisions of the Gujarat Town Planning Act on 12.8.1983, overlooking the fact that in the meantime a comprehensive draft development plan had been prepared by the appellant and had been submitted on 23.7.1981 for sanction of the State Government. When Section 17(1) vests power in the State Government to

A sanction the draft development Plan, the said statutory Power should not be exercised in a casual manner without proper application of mind. The facts of the present case clearly depict how the State Government has exercised the power under Section 17(1)(c) of the Gujarat Town planning Act without proper application of mind. It appears the notification dated B 12.8.1983 has been issued being completely oblivious and ignorant of the submission of a draft development plan by the appellant in the meantime on 23.7.1981 covering those areas also. Inspite of repeated queries from the counsel who appeared for the writ petitioner-respondents, they could not explain as to how while sanctioning the draft development plan sub- C mitted on 15.1.76 by the Corporation, there is no mention in the notification in question about the submission of a draft development plan by the appellant covering those very areas. Why the State Government was sanctioning the plan submitted on 15.1.1976 ignoring the more comprehensive and detailed draft development plan for a much larger area including the area for which the draft development plan had been submitted on D 15.1.1976 by the Corporation? If the State Government was conscious of the fact that later a more comprehensive draft development plan had been submitted by the appellant, there was no reason to sanction the draft development plan submitted by the Corporation which had lost jurisdiction over the area for which the draft development plan had been prepared. E The draft development plan submitted by the Corporation had been sanctioned on 12.8.1983 without proper application of mind is obvious from the fact that admittedly later the State Government on 2.11.1987 sanctioned by notification issued under Section 17(1)(i)(c) of the Gujarat Town planning Act, the draft development plan submitted by the appellant on 23.7.1981 F including the area for which the draft development plan had been submitted by the Corporation on 15.1.1976.

Apart from that from a mere comparison of the relevant Sections under the Bombay Town Planning Act with the provisions of the Gujarat G Town Planning Act it shall appear that the relevant provisions of the Gujarat Town Planning Act are inconsistent with the provisions of Bombay Town Planning Act. Section 12 of the Gujarat Town Planning Act covers a much wider field of the development and the object for development is not as limited as Section 7 of the Bombay Town Planning Act. H Section 12 takes note of the factors and objects for which provisions have to be made in the draft development plan. Keeping in view the modern

requirements for an urban development provisions have been made for zoological gardens, green belts, natural reserves sanctuaries, railways, waterways canals, airport, water supply, drainage, sewage disposal, public utility amenities including supply of electricity and gas. It also contemplates preservation, conservation and development of natural scenery and landscape, places of historical, architectural interest. It provides for controlling and regulating the use and development of land within the developed area including imposition conditions and restrictions in regard to the open space to be maintained for buildings, the percentage of building area for a plot, the location, number, size, height, number of storeys, parking spaces etc. It conceives provision for preventing or removing pollution of water or air caused by discharge of waste or other means as a result of the use of land. All this was not in Section 7 of the Bombay Town Planning Act prescribing the contents of the development plan. Similarly, the procedure prescribed for sanction of a draft development plan under Sections 13 to 17 of the Gujarat Town Planning Act are not consistent with Sections 8 to 10 of Bombay Town Planning Act. It has to be held that provisions of Sections 7 to 10 of Bombay Town Planning Act are inconsistent with Sections 9 to 17 of the Gujarat Town Planning Act. As such after coming into force of Gujarat Town Planning Act on 30.1.1978 State Government was required to follow provisions of Sections 9 to 17 of the Gujarat Town Planning Act. Sub-section (2) of Section 124 of Gujarat Town Planning Act was of no help when the plan submitted by Corporation was sanctioned on 12.8.1983. That could have been done if the provisions of the Gujarat Town Planning Act had been consistent with the provisions of Bombay Town Planning Act. Sub- section (2) of Section 124 says :

> "Notwithstanding such repeal, anything done or any action taken (including any declaration of intention to make a development plan or town planning scheme, any draft development plan or draft town planning scheme published by a local authority, any application made to the State Government for the Sanction of any draft development plan or draft town planning scheme, any, sanction given by the State Government to the draft development plan.....
>
> .....
>
> *shall, in so far as it is not in consistent with the provisions of this Act*, be deemed to have been done or taken under the corresponding provisions, of this Act, and the provisions of this Act shall have

A effect in relation thereto."

(emphasis supplied)

Provisions and procedures under Sections 7 to 10 of the Bombay Town Planning Act are different from the provisions and procedures in respect B of preparation of a development plan under the Gujarat Town Planning Act. In this background the State Government should not have taken note of the Plan submitted on 15.1.1976 by the Corporation after the repeal of the Bombay Town Planning Act on 30.1.1978 and coming in force of the new Gujarat Town Planning Act. There was no occasion to ignore the C comprehensive plan submitted by AUDA vested with the power to submit such plan and to sanction the draft plan submitted by the Corporation. According to us, after coming into force of the Gujarat Town Planning Act on 31.1.1978 State Government could not have sanctioned a plan submitted by the Corporation when the AUDA had already submitted a draft D development plan even covering those areas under the Gujarat Town Planning Act.

To prepare a scheme for the development of an urban agglomeration in the present days is a very complex issue and any development authority E as well as the State Government which is the sanctioning authority has to apply its mind on the details of such development plans. During the last few decades an urban development has assumed unprecedented importance because of the population migration from rural areas to urban areas and cry for a roof and fresh air. In such urban areas the orderly growth of the cities has to be enforced through proper development plans. For every F city as was done in Ahmedabad in the present case, development authorities have been constituted who can prepare comprehensive development plans keeping not only the present requirement but even the requirements for the 21st century in view. If the development in such areas are not carried on the well known principle, most of the cities will be converted G into slums sooner or later. There was a time when a city meant only residential area and commercial complex including industrial centres. But the whole concept has changed. While planning an urban area not only the residential, institutional, industrial and commercial, aspects have to be seen but also provisions have to be made in respect of zoological gardens, green H belts, natural reserves, sanctuaries, highways, parkways, waterways, airport,

drainage, sewage disposal. The development authority has also to reserve land for community facilities and services and for prevention of pollution of water or air caused by the discharge of waste or other means as a result of the use of land. From a bare reference to sub-section (2) of Section 12 it shall appear that framers of the Gujarat Town Planning Act have conceived the new requirements for a proper development of an urban area.

As in the present case the only question which is to be answered is as to with effect from which date 10 years period shall be counted, it has to be decided as to which date shall be deemed to be the date of coming into force of the final development plan, so far the area within the Corporation is concerned. The notification dated 2.11.1987 had been issued by the State Government covering the area notified on 12.8.1983 several years before the issuance of notices by the writ petitioners. The notification dated 2.11.1987 was neither questioned by the writ petitioners-respondents nor could have been questioned, according to us. When power has been vested in the appellant to prepare a draft development plan and there being no bar to include in the said draft development plan even area for which an earlier draft development plan had already been sanctioned, then the draft development plan which was sanctioned and notified on 2.11.1987 shall be deemed to be the final development plan within the meaning of Section 20 of the Gujarat Town Planning Act. As such the period of 10 years has to be calculated and counted with reference to 3.12.1987 the date when such final development plan was to come into force.

On behalf of the writ petitioners it was pointed out that if it is held that period of 10 years is to be counted with reference to 3.12.1987 then the right which has been provided to the land owners or the persons interested by sub-section (2) of Section 20 to give notice after the expiry of the period of 10 years from coming into force of the final development plan, can be defeated by any area development authority by notifying a fresh draft development plan just on expiry of the final plan including fresh areas. In other words any area development authority on verge of the expiry of the period of 10 years of a final development plan, may include that area into another draft development plan along with other area to defeat the right which had accrued or was likely to accrue to the land owners or the persons interested under sub-section (2) of Section 20. If such power is

A exercised with ulterior motive and with an object to defeat the statutory right of persons interested, courts will be perfectly justified in nullifying such actions of area development authorities. But in the present case as has been pointed out above the draft development plan had been submitted by the appellant as early as on 23.7.1981 much before the draft develop-
B ment plan submitted by the Corporation was sanctioned on 12.8.1983. There is no scope for attributing any bad faith or malice on the part of the appellant or the State Government in the facts and circumstances of the present case. In all fairness none of the counsel appearing for the writ-petitioners-respondents took such a stand that the State Government
C approved the draft development plan submitted by the appellant on 2.11.1987 only to defeat the right which was to accrue to the land owners or persons interested in the next few years.

We are not inclined to accept the submission made on behalf of the respondents that the effect of the sanctions given on 12.8.1983 and
D 2.11.1987 shall be that two final development plans had come into force. The effect of sanction given on 2.11.1987 shall be that the State Government had sanctioned the comprehensive draft plan prepared by the appellant with the area in respect of which State Government had purported to accord sanction on 12.8.1983. The respondents could not point out as to
E how this sanction of the State Government given by notification dated 2.11.1987 shall be illegal, invalid and not sanctioned by law. In the present case the draft development plan was submitted on 23.7.1981 by the appellant which was sanctioned on 2.11.1987. Then it shall be deemed that the area in respect of which separate draft development plan had been sanc-
F tioned on 12.8.1983 merged and became part and parcel of the scheme and plan which had been submitted by the appellant AUDA on 23.7.1981 and which was sanctioned on 2.11.1987. It will be deemed that the final plan came in force with effect from 3.12.1987, even in respect of area which was covered by the notification dated 12.8.1983.

G We have already held that the State Government could not have sanctioned the draft development plan submitted by Corporation on 12.8.1983 because the Gujarat Town Planning Act had come in force on 30.1.1978 and sub-section (2) of Section 124 of the Gujarat Town Planning Act shall not save the plan submitted by the Corporation, provisions of
H Sections 9 to 17 of Gujarat Town Planning Act being inconsistent with

Section 7 to 10 of the Bombay Town Planning Act. The State Government after coming into force of the Gujarat Town Planning Act should have ignored the draft development plan submitted by the Corporation on 15.1.1976. This was also necessary because a special Act, Gujarat Town Planning Act had been enacted on 19.6.1976 with the sole object to develop the urban areas of the State in accordance with the provisions of the said Act. A B

Accordingly, the appeals are allowed. The Judgments of the High Court are set aside and the writ petitions are dismissed. There shall be no orders for costs.

V.S.S. Appeals allowed. C

A DEPUTY COLLECTOR, MINICOY AND ORS.

v.

NAVADIGOTHI MOHAMMED AND ORS.

SEPTEMBER 11, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Tenancy and Land Laws :

Laccadive, Minicoy and Amindivi Islands Revenue and Tenancy
C *Regulation, 1965 : Section 121.*

South Pandaram Land—Allotment of—To inhabitants—Such inhabitants had only collective right of collection of coconuts and enjoyment thereof through their Mooppans as Trustees—Neither the Mooppans nor the inhabitants had right over the land or coconut trees—Mooppans as trustees
D *exercised this collective right arbitrarily—Hence notices issued for allotment of separate plots of land to inhabitants—Mooppans challenged these notices claiming right of occupancy on ground of they being in occupation of said land on behalf of inhabitants prior to commencement of Regulation—High Court allowed the claim—Held : High Court erred in granting right of oc-*
E *cupancy to Mooppans—In the circumstances of the case, Regulations, Rules and notices were valid—Lakshadweep Land Revenue and Tenancy (Allotment of Pandaram Land) Rules, 1979—Constitution of India, 1950, Article 240.*

F **The inhabitants of the South Pandaram Land collected coconuts from the trees for which purpose they were getting some remuneration in kind but at no point of time they had any vested right to the trees or the land on which the trees stood. After sometime this right was conferred as a collective right in favour of the inhabitants for enjoyment thereof through the respondents- Mooppans as trustees. When the Moppans as**
G **trustees arbitrarily exercised this collective right, the appellants promuglated Laccadive, Minicoy and Amindive Islands Revenue and Tenancy Regulation, 1965 under Article 240 of the Constitution of India. The appellants issued notices for allotting separate plots of land to the inhabitants in accordance with Lakshadweep Land Revenue and Tenancy (Allotment of Pandaram Land) Rules, 1979 framed under Section 121 of**
H **the Regulations.**

The respondents-Mooppans filed writ applications before the High Court challenging the aforesaid notices for allotment of plots which were dismissed by the Single Judge. On appeal the Division Bench held that the respondents—Mooppans were in occupation of the Pandaram Lands at the commencement of the Regulation on behalf of the inhabitants and, therefore, they were entitled to their claim of right of occupancy over the land in question. The Division Bench also held that the notices issued under the Rules were only applicable in respect of fresh lands and would not divest the persons who had already acquired right of occupancy. Accordingly, the Division Bench allowed the writ appeals. Being aggrieved the appellants preferred the present appeal.

Allowing the appeal, this Court

HELD : 1. There is no infirmity with the Laccadive, Minicoy and Amindivi Islands Revenue and Tenancy Regulations, 1965 as well as the Lakshadweep Land Revenue and Tenancy (Allotment of Pandaram Land) Rules, 1979 framed thereunder and it has been so framed in exercise of power conferred under Article 240 of the Constitution for the peace, progress and good government of the Lakshadweep group of Islands. The Regulations and the Rules sub-serve the purpose for which power has been conferred on the President under Article 240 of the Constitution and the Regulation and the Rules would achieve the object of allotting specific part of the land in favour of each individual, so that, the Mooppans will not be able to exploit the individuals. The Division Bench of the High Court was wholly in error in granting right of occupancy in favour of the respondents and in quashing the impugned notices issued by the Administrator in exercise of his power under the Regulation and the Rules framed thereunder. [105-A-C; D]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 11907-11910 of 1996.

From the Judgment and Order dated 8.2.84 of the Kerala High Court in W.A. Nos. 525-26, 547 and 550 of 1981.

P.A. Chowdhary, S.P. Singh and B. Krishna Prasad for the Appellants.

A.S. Nambiar, Ms. Shanta Vasudevan and P.K. Manohar for the

A Respondents.

The Judgment of the Court was delivered by

PATTANAIK, J. Leave granted.

B These appeals by special leave are directed against the judgment of the Division Bench of the Kerala High Court dated 8th February, 1984 in Writ Appeal No.525/81 and batch. Notices were issued under the Lakshadweep Land Revenue and Tenancy (Allotment of Pandaram Land) Rules, 1979 (hereinafter referred to as 'Rules') and challenging those notices the respondents herein filed writ applications. The learned Single Judge dis-
C missed the writ applications. In appeal the Division Bench of the High Court by the impugned judgment quashed notices issued and allowed the writ appeals filed and thus these appeals by special leave.

The case of the appellants is that South Pandaram Lands are the
D Government lands. Before the Minicoy Island came under the British Rule the Raja of Cannanore was enjoying the usufruct of the coconut trees standing on the South Pandaram Lands. The inhabitants of the Islands were getting some mamul for collecting and stacking the coconuts. After the British Rule the inhabitants of the Islands continued to collect the coconuts from the trees and for that purpose they are getting some
E remuneration in kind but at no point of time they had any right to the trees or the land on which the trees stood. Sometimes prior to 1942 the Government evolved a scheme conferring rights to the inhabitants of the Island to collect and enjoy the fruits from the coconut trees. After India became independent when Five Year Plan was implemented, on the representation
F of the people of Minicoy a new scheme was proposed and under that scheme the inhabitants were permitted not only to collect the coconuts falling from the trees but also to pluck the nuts from the trees itself. And after this right was conferred as a collective right in favour of inhabitants through their Moopppans, the Mooppan thus as a trustee for all the villagers had the right to enjoy usufruct of the coconut trees for himself as
G well as for all the villagers together and the Mooppan was distributing the coconuts amongst the villagers. While the Mooppans continued to enjoy usufruct of the coconut trees for themselves as well as for the villagers, gradually a demand for abolition of Mooppans system began. The administration considering the grievances of the villagers finally thought of
H granting separate plots and land individually to the inhabitants and ul-

timately Laccadive, Minicoy and Amindivi Islands Revenue and Tenancy Regulation, 1965 (hereinafter referred to as the 'Regulation') was promulgated under Article 240 of the Constitution of India. The Administrator thereafter framed Rules in exercise of power conferred under Section 121 of the Regulation. It is the further case of the appellants that the people of Minicoy Island never had any vested right on the land on which the coconut trees stood though they were enjoying the right of collection of yield of the coconut trees standing on the South Pandaram Land and there fore they cannot be held to have acquired right of occupancy. In accordance with the Rules framed under the Regulation notices having been issued by the appropriate authority for allotting different parts of South Pandaram Land to different persons, writ applications came to be filed by the respondents herein contending inter alia that they have acquired right of occupancy being in occupation of South Pandaram Lands prior to the Regulation coming into force and therefore the notices issued under the Rules would deprive them of their right of occupancy. The learned Single Judge on consideration of the relevant provisions of the Regulation and the rights enjoyed by the Mooppans in respect of the usufruct of the coconut trees came to hold that no right of occupancy accrued in favour of the Mooppans under Sections 83 and 84 of the Regulation. It was also further found that the Mooppans as well as the inhabitants of the Island merely enjoyed a right of plucking coconuts from the trees without having any right over the land or the trees itself and therefore they cannot be held to be in occupation of the land in question and their claim of right of occupancy is unsustainable. With these findings the writ applications having been dismissed, the respondents preferred appeals to the Division Bench. The Division Bench by the impugned judgment came to hold that the Mooppans were in occupation of the Pandaram Lands at the commencement of the Regulation on behalf of the inhabitants of the village and therefore they are entitled to their claim of right of occupancy over the land in question. The notices issued by the appropriate authority under the 1979 Rules can only be applicable in respect of fresh lands and will not divest the persons who have already acquired right of occupancy. Accordingly, the Division Bench allowed the writ appeals and hence these appeals by special leave.

Mr. Chowdhary, the learned senior counsel appearing for the appellants contended that in view of the limited right of collection of coconuts from the trees conferred upon the Mooppans and the inhabitants of the

A village without any right over the Land on which the trees stood, the Division Bench of the High Court was wholly in error to hold that they were in occupation of the land prior to Regulation coming into force. He further contended that the Mooppan of the village had been conferred certain privileges as he was representing the interest of village community at large. The Mooppans were acting as trustees but as complaints received B from several villagers the Government decided to confer individual rights on the inhabitants under the Regulation and therefore there is no infirmity with the notices issued. Mr. Nambiar, the learned senior counsel appearing for the respondents on the other hand contended that the Lakshadweep group of Islands have its own peculiar concept of rights and the Mooppans C were merely representing the entire village community. There was total unity of enjoyment and the Moopans and the villagers had absolute right over the coconut trees and therefore the Division Bench rightly held that they held the right of occupancy which right can't be taken away by the Regulation or the Rules framed thereunder.

D In view of the rival submissions at the Bar the question that arises for consideration is whether the Division Bench of the High Court was right in its conclusion that the Mooppans and the villagers can be said to have acquired the right of occupancy over the land on which the coconut trees stood prior to Regulation coming into force? If it is held that right of occupancy had accrued in their favour then that right cannot be taken E away by the administration in exercise of its power under the Regulation and Rules framed thereunder. But on examination of the materials on record and the history of the bundle of rights which the inhabitants of these Islands were enjoying, it is crystal clear that there was no demarcation of any individual property. The villagers through their Mooppans were initial- F ly getting some remuneration for collecting and stacking coconuts. In course of time they got the right to pluck coconuts from the trees but no specific individual had any specific right over any specific tree and it was a case of collective right of collection and enjoyment of the fruits through their Mooppans. Mooppan was acting as the trustee and was equality distributing the usufruct of the coconut trees. At no point of time either G the Moopans or any individual villager had an iota of right over the land or the coconut trees standing thereon. This being the position, it is difficult to accept the conclusion of the Division Bench of the High Court that the respondents had acquired a right of occupancy prior to the Regulation coming into force. Further the so-called collective rights which were being H exercised by the Mooppans on behalf of the villagers as trustees were

complained of when the Mooppans started arbitrarily exercising their power. After due enquiry the government decided to confer right of occupancy over specific parts of land in favour of each individual in accordance with the Regulation and the Rules framed thereunder. We see no infirmity with the Regulation as well as the Rules framed thereunder and it has been of framed in exercise of power conferred under Article 240 of the Constitution for the peace, progress and good government of the Lakshadweep group of Islands. The Regulation and the Rules sub-serve the purpose for which power has been conferred on the President under Article 240 of the Constitution and the Regulation and the Rules would achieve the object of allotting specific parts of the land in favour of each individual, so that, the Mooppans will not be able to exploit the individuals.

In view of our aforesaid conclusion we have no hesitation to hold that the Division Bench of the High Court was wholly in error in granting right of occupancy in favour of the respondents and in quashing the impugned notices issued by the Administrator in exercise of his power under the Regulation and the Rules framed thereunder. Appeals are accordingly allowed. The judgment of the Division Bench of the High Court in Writ Appeal No. 525/81 and batch is set aside. Writ applications filed by the respondents stand dismissed. There will be no order as to costs.

V.S.S. Appeal allowed.

A M/S. GUJARAT MACHINERY MANUFACTURERS LTD.

v.

COLLECTOR, CENTRAL EXCISE, BARODA.

SEPTEMBER 11, 1996

B [S.P. BHARUCHA AND K. VENKATASWAMI, JJ.]

Central Excises & Salt Act, 1944 :

First Schedule—Tariff Item 23A(4), general item 68—Frit—Assistant
C *Collector accepting the claim of assessee and classifying it under general item 68—Collector setting aside the order and classifying frit as other glass falling under Item 23- A(4) and demanding difference in duty—Tribunal upholding the reclassification but limited levy of duty for six months prior to the notice by Tribunal—On appeal held, since no notice was issued to the assessee by the Collector before the reclassification, the orders of the Collector and the*
D *Tribunal directing the assessees to pay the short-levied duty bad in law—Hence set aside.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 117 of 1984.

E From the Judgment and Order dated 10.6.83 of the Customs Excise and Gold (Control) Appellate Tribunal in A. No. E.D. (SB) (T) A. No. 139 of 1982-D.

D.A. Dave, Sunil Dogra, A. Roy, S. Shroff for S.A. Shroff & Co. for
F the Appellants.

Joseph Vellappally and V.K. Verma for the Respondent.

The following Order of the Court was delivered :

G We are concerned in this appeal against an order of the Customs, Excise and Gold (Control) Appellate Tribunal (the "Tribunal") with a commodity called frit, which is manufactured by the appellants.

With the introduction into Tariff Item 23-A(4) of the words "glass and", it read "other glass and glassware including tableware". The Collector
H of Central Excise issued to the appellants a notice under Section 45-A of

the Central Excise and Salt Act on 4th November, 1981, asking them to show cause why frit should not be classified under sub-item (4) of Item 23-A with effect from 1st March, 1979, and the order of the Assistant Collector accepting that classification under the general Item 68 be revised accordingly. The appellants showed cause. The collector by his order dated 3.12.1981 made the notice absolute. He set aside the Assistant Collector's order. He ordered that frit 'is hereby classified as other glass falling within the purview of Item 23-A(4) of the First Schedule'. He further ordered that the appellants 'shall pay the duty of excise at the appropriate leviable rate on frit glass manufactured and cleared by them as applicable to Item 23-A(4) of the said First Schedule or the difference in duty, as the case may be'.

The appellants preferred a revision application to the Central Government which came to be transferred to the Tribunal when it was constituted. The Tribunal considered the evidence that had been placed on record by the appellants and upheld the classification of frit as "other glass" within the meaning of Item 23-A(4). It was contended before the Tribunal that no notice had been issued to the appellants in regard to the recovery of any short-levied duty pursuant to such re-classification and that, therefore, no demand in this behalf could have been made or sustained. The Tribunal stated that the show-cause notice dated 4th November, 1981, no doubt did not, in terms, ask the appellants to show cause why recovery of the short-levied duty should not be made, but, once the Collector came to the conclusion and ordered the re-classification of frit under Item 23-A(4), he was right in demanding the payment of differential duty. However, the recovery thereof could be made only in respect of the period of six months preceding the date of the order, i.e., 30th April, 1982, as determined with regard to the provisions of Rule 11 or Section 11A. The Excise authorities were directed to re-calculate the amount of the short levy in the light of the Tribunals' order and communicate the appropriate figure to the appellants.

It is unnecessary to go into the aspect of classification because the new Tarif expressly provides for the classification of frit and because we are of the view that no notice for the recovery of short-levied duty as required by Section 35A was given to the appellants.

The relevant provisions of Section 35A read thus :-

A "S.35A.-Revision by Board or Collector.-

1.....

2. The Collector of Central Excise may, of his own motion or otherwise, call for and examine the record of any proceeding in
B which any decision or order has been passed under this Act or the rules made thereunder by a Central Excise Officer subordinate to him (not being a decision or order passed on appeal under Section 35) for the purpose of satisfying himself as to the correctness, legality or propriety of such decision or order and may pass such
C order thereon as he thinks fit.

3(a) No decision or order under this section shall be varied so as to prejudicially affect any person unless such person is given a reasonable opportunity of making a representation and, if he so desires, of being heard in his defence.

D

(b) Where the Board or, as the case may be, the Collector of Central Excise is of opinion that any duty of excise has not been levied or has been short-levied or erroneously refunded, no order levying or enhancing the duty, or no order requiring payment of
E the duty so refunded, shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time-limit specified in Section 11A."

Sub-section (2) of Section 35A empowers a Collector of Central Excise, *suo motu* or otherwise, to revise any decision or order made by a
F Central Excise officer subordinate to him. If he is satisfied as to its incorrectness, illegality or impropriety, he may pass such order thereon as he thinks fit. By reason of clause (a) of sub-section (3), no decision or order may be so varied as to prejudicially affect any person unless that person has been given a reasonable opportunity of making a representation and, if so desired, of being heard. Clause (b) of sub-section (3) applies when
G duty which has not been levied or has been short-levied or has been erroneously refunded is sought to be recovered. In such event, no order in this behalf can be made unless the person who would have to pay is a) given notice to show cause against "it", that is, against being required to pay; and b) the notice is given within the time limit specified in Section
H 11A.

The order of the Collector under Section 35A gave to the appellants no notice that he proposed to make an order that would require them to pay the duty which might be found to have been short-levied if the frit was found to be classifiable under Item 23-A(4). The orders of the Collector and of the tribunal, insofar as they required the appellants to pay the short-levied duty, even though limited to the period of six months prior to the date of the notice by the Tribunal, are bad in law.

In the result, the appeal is allowed. The order of the Tribunal is set aside insofar as it directs the Central Excise authorities to recalculate the amount of the short levy in the light of its observation that recovery of the short levied duty could be made in respect of the period of six months preceding the date of the Collector's order and requires the appellants to pay such sum. In the event that any part of such sum has been recovered, the same shall be returned to the appellants.

There shall be no order as to costs.

G.N. Appeal allowed.

A J.S. PARIHAR

v.

GANPAT DUGGAR AND ORS.

SEPTEMBER 11, 1996

B [K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Service Law :

Rajasthan Civil Engineering Services (Public Health Branch)—Seniority list of Engineers—Prepared with retrospective effect—Quashed by the High Court with a direction to prepare the seniority list afresh—Fresh seniority list prepared—Contempt proceedings initiated—Single Judge giving directions—Appeal by State—Division Bench holding that appeal not maintainable under S.19 of the contempt of Courts Act but as a Letters Patent Appeal—Set aside the directions of Single Judge—On appeal, held the Single Judge was exercising his jurisdiction to consider the matter on merits in contempt proceedings, which is not permissible—Division Bench rightly exercised its power under S.18 of the Rajasthan High Court Ordinance to correct the mistake committed by the Single Judge—Since Division Bench already seized of the matter it was not necessary for the State to go in appeal.

Contempt of Courts Act. 1971.

Ss.12, 19—Contempt proceedings—Single Judge going into merits of the case and giving directions—Not permissible—Division Bench of High Court exercising power under S.18 of Rajasthan High Court Ordinance to correct the mistake committed by Single Judge—Held, the Division Bench justified in doing so, since appeal under S.19 not maintainable—Rajasthan High Court Ordinance—S.18.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12494-96 of 1996.

From the Judgment and Order dated 3.4.96 of the Rajasthan High Court in D.B.C.S.A. No. 1-2 of 1995 and D.B.C.L. to A. No. 40 of 1995.

Sushil K. Jain for the Appellant.

Aruneshwar Gupta for the Respondent.

The following Order of the Court was delivered : A

We have heard the counsel on both sides.

Leave granted.

These appeals by special leave arise from the order of the Division B Bench dated April 3, 1996 made in Special Civil Appeal Nos. 1 & 2 of 1995. The facts are not in dispute. The controversy relates to the preparation of the seniority list of the engineers in Rajasthan Civil Engineering Services (Public Health Branch). In W.P. No. 560/79 by order dated October 6, 1988 the Division Bench of the High Court declared the C seniority list prepared with retrospective effect in terms of the amended Rules as unconstitutional; it accordingly quashed the list and directed preparation of the seniority list afresh to determine the *inter se* seniority on that basis and to grant promotion to the appellants within the specified time. The same order came to be reiterated by order of another Division Bench dated September 9, 1989 made in W.P. No. 1074/80. It was further D reiterated in the order dated March 22, 1990. When the seniority list came to be prepared, the contempt proceedings were initiated under Section 12 of the Contempt of Courts Act, 1971 (for short the "Act"). The learned single Judge on consideration of the merits in the seniority held that the respondents had not wilfully disobeyed the orders of the Court and gave E directions as under :

> "In Gyaneshwar's case, only retrospectivity of these amendments was challenged and, therefore, it was felt by the learned Judges of the Division Bench that retrospectivity of these amendments has already been held to be *ultra vires* in *Kailash Chand Goyal's* case F and so, it had not been declared as such afresh. In that case, the notifications whereby amendments were introduced were not challenged but only their retrospectivity was challenged and, therefore, the decision of this Court in Gyaneshwar's case does not hold the field. The controversy raised in this case is squarely covered by the G decision of this Court in *Kailash Chand Goyal's* case (supra) and in *Kailash Chand Goyal's* case, the impugned notifications Annexures 5 to 6 have been quashed in their entirety and so,k the seniority of the petitioner has to be determined on the basis of the directions given by this Court in *Kailash Chand Goyal's* case (supra) and promotions have to be accorded accordingly. Of H

course, it appears quite just and reasonable that the non-petitioners did not intend to disobey the directions given by this Court on account of the legal advice that has been tendered to them and on account of certain interpretations put to the judgment rendered in *Kailash Chand Goyal's* case (supra) on the basis of *Gyaneshwar's* case (supra) and as some confusion prevailed with the non petitioners on account of that, they could not comply this order. However, the non- petitioners are directed to comply with the order of this Court dated 22.3.1990 by giving effect to the ratio of the decision that has been rendered by a Division Bench of this Court in *Kailash Chand Goyal's* case (supra) and the seniority list should be prepared as directed in the judgment in *Kailash Chand Goyal's case (supra) and promotions should be accorded accordingly. If this order is not complied with within a period of six months from today, the petitioner will be free to move a contempt petition afresh against the non-petitioners.*"

The State had filed appeal against these directions. A preliminary objection was taken on the maintainability of the appeal and also arguments were advanced. The Division Bench while holding the appeal as not maintainable under Section 19 of the Act, held that the appeal would be maintainable as a Letter Patent Appeal as the direction issued by the learned single Judge would be a Judgment within the meaning of Clause (18) of the Rajasthan High Court Ordinance. Accordingly the Division Bench set aside the directions issued by the learned single Judge. Thus these appeals by special leave.

The question is : whether an appeal against the directions issued by the learned single Judge is maintainable under Section 19 of the Act? Section 19 of the Act envisages that "an appeal shall lie as of right from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt where the order or decision is that of a single Judge, to a bench of not less than two Judges of the Court". Therefore, an appeal would lie under Section 19 then an order in exercise of the jurisdiction of the High Court punishing the contemner has been passed. In this case, the finding was that the respondents had not wilfully disobeyed the order. So, there is no order punishing the respondent for violation of the orders of the High Court. Accordingly, an appeal under Section 19 would not lie.

The question then is : whether the Division Bench was right in setting aside the direction issued by the learned single Judge to redraw the seniority list. It is contended by Mr. S.K. Jain, learned counsel appearing for the appellant, that unless the learned Judge goes into the correctness of the decision taken by the Government in preparation of the seniority list in the light of the law laid down by three Benches, the learned Judge cannot come to a conclusion whether or not the respondent had wilfully or deliberately disobeyed the orders of the Court as defined under Section 2(b) of the Act. Therefore, the learned single Judge of the High Court necessarily has to go into the merits of that question. We do not find that the contention is well founded. It is seen that, admittedly, the respondents had prepared the seniority list on 2.7.1991 Subsequently promotions came to be made. The question is : whether seniority list is open to review in the contempt proceedings to find out, whether it is in conformity with the directions issued by the earlier Benches. It is seen that once there is an order passed by the Government on the basis of the directions issued by the Court, there arises a fresh cause of action to seek redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review. But that cannot be considered to be the wilful violation of the order. After re-exercising the judicial review in contempt proceedings, afresh direction by the learned single Judge cannot be given to redraw the seniority list. In other words, the learned Judge was exercising the jurisdiction to consider the matter on merits in the contempt proceedings. It would not be permissible under Section 12 of the Act. Therefore, the Division Bench has exercised the power under Section 18 of the Rajasthan High Court Ordinance being a judgment or order of the single Judge, the Division Bench corrected the mistake committed by the learned single Judge. Therefore, it may not be necessary for the State to file an appeal in this Court against the judgment of the learned single Judge when the matter was already seized of the Division Bench.

The appeals are accordingly dismissed. It may be open to the aggrieved party to assail the correctness of the seniority list prepared by the State Government, if it is not in incomformity with the directions issued by the High Court, if they so advised, in an appropriate forum. No costs.

G.N. Appeals dismissed.

A SH. S.K. VAISH

v.

UNION OF INDIA AND ORS.

SEPTEMBER 11, 1996

B [K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Service Law :

Efficiency Bar—Crossing of—Employee kept under suspension and disciplinary proceedings initiated against him—Punishment of compulsory C *retirement imposed—On appeal, department directed that the punishment be treated partly as suspension and partly in service—Tribunal directing that the employee be treated as on duty for all purposes including pay and allowances—It also held that DPC had considered his case for efficiency bar and found him not fit and therefore the employee not entitled to cross efficiency* D *bar—On appeal held, after reinstatement the employee had hardly worked for three months—For three successive years there were adverse entries against him—DPC recommended that he was unfit to cross efficiency bar—Tribunal accepted the position—Hence no interference called for.*

E CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 19774 of 1996.

From the Judgment and Order dated 15.2.96 of the Central Administrative Tribunal, Delhi in O.A. No. 978 of 1992.

F Sant Lal, Pradeep Kumar and B.S. Gupta for the Petitioner.

The following Order of the Court was delivered :

Delay condoned.

G This Special Leave Petition has been filed against the order dated February 15, 1996 made in O.A. No. 978/92 of the CAT, Principal Bench, New Delhi. The admitted position is that the petitioner after his promotion as Assistant Engineer in Telecom Engineering Service Group 'B' on April 16, 1979 was kept under suspension and disciplinary proceedings were initiated against him. On June 30, 1986, punishment was imposed by way H of compulsory retirement. The same came to be challenged by way of an

appeal. On appeal, the Department directed that the punishment be treated partly as suspension and partly as in service by proceedings dated February 16, 1979. When the petitioner challenged the same in O.A. No. 1690/90, by order dated February 14, 1992, the same was allowed and direction was given to treat him as on duty for all purposes including pay and allowances. After reinstatement, the petitioner retired from service on attaining superannuation on May 31, 1992. He had prior to that filed representation for crossing his efficiency bar. In the impugned order, the Tribunal has held that the D.P.C. had considered his case for efficiency bar and found him not fit and, therefore, he is not entitled to the relief. Thus, this special leave petition.

It is contended by the learned counsel for the petitioner that when he was reinstated into service the efficiency bar was required to be considered after taking into account his subsequent record. What was stated was adverse entries for the year 1979-80, 1980-81-1981-82. There was no reconsideration in the light of the direction issued by the Ministry in the letter dated September 18, 1991 in O.M. No. 7(28)/EIII/91 that all pending cases should be considered to bring the pending cases of the employee so as to bring them on par with the scale of pay recommended by the 4th Pay Commission. The petitioner had given a representation but the same was not considered; even direction given to produce the record was not followed. Therefore, the Tribunal ought to have drawn adverse inference against the Government and should have directed that he was entitled to cross the efficiency bar. He also contended that the sealed cover procedure as is invogue should have been adopted for crossing the efficiency bar and kept pending when the departmental enquiry was pending against him.

We find no force in the contention. The petitioner has not brought to our notice any circular issued by the Government and it is obviously incongruous for the reason that in the event of the petitioner's disciplinary proceedings becoming final the exercise to consider the question of crossing the efficiency bar would be fruitless. It would be unnecessary to consider the case for efficiency bar. It would be only in the event of his being reinstated in the service that the question of consideration of his crossing the efficiency bar would arise. Therefore, the sealed cover procedure in consideration of question of efficacy bar does not apply. It is seen that after the representation was made by the petitioner on June 8, 1990,

A the matter was referred for consideration by the D.P.C. D.P.C. had met on January 21, 1992 and considered the record of the petitioner. After reinstatement, he had hardly worked for three months. It would appear that for three successive years, there were adverse entries against the petitioner. Consequently. DPC as considering the record of the petitioner which was available, recommended that he was unfit to cross efficiency bar. B The same came to be informed to the petitioner vide letter dated February 7, 1992. The Tribunal also had accepted this position. Under these circumstances, we do not find any illegality in the order passed by the Tribunal warranting issue of notice.

C The special leave petitiion is dismissed.

G.N. Petition dismissed.

PRAMOD LAHUDAS MESHRAM

v.

STATE OF MAHARASHTRA AND ORS.

SEPTEMBER 11, 1996

[K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Service Law :

Selection—Post of Oversear/Junior Engineer (Civil Engineering)—Advertisement—On the basis of recommendation letter from Member-Secretary 3 candidates appointed on probation for one year—Services of the said candidates terminated on the basis that the earlier letters carried unauthorised recommendations—Writ Petition filed in High Court challenging the termination orders dismissed—On appeal held the letters of recommendation were not authorised and according to rules—Therefore the cancellation of the said appointments could not be found fault with—State Government directed to refer the matter to appropriate State CID enquiry to make an independent investigation into the matter and to find out as to who were responsible for such malpractice and to launch appropriate criminal prosecution against the culprits.

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 19775 of 1996.

From the Judgment and Order dated 6.3.96 of the Bombay High Court in W.P. No. 885 of 1993.

A.K. Sanghi and S.V. Deshpande for the appearing parties.

The following Order of the Court was delivered :

Delay condoned.

The petitioner complains that he being a qualified candidate with Diploma in Engineering and Secondary Education had applied for the post of Oversear/Junior Engineer (Civil Engineering) as per the advertisement dated April 30, 1991 published in daily 'Tarun Bharat' on May 2, 1991. The advertisement indicated that of the 3 posts, two were reserved for backward classes and one was for general candidates. Petitioner being a

A reserved class, hailing from the Scheduled Caste, received letter of appointments from the Chief Executive Officer, Zilla Parishad, Gadchiroli; in letter No. PWB/Estt-I/1108/1/93 dated March 31, 1993 it was stated that a recommendation had been made by Member Secretary, Regional Subordinate Service Selection Board, Nagpur in their letter No. RSB/Nag/1210/M-792/PS-1/92 dated June 15, 1992 that 3 candidates were B selected. The names had been repeated and as regards the petitioner, his recommendation letter No. RSB/Nag/1160/M-792/1992/PS-I dated July 31, 1992/7.8.92 was said to be issued by the Member Secretary selecting the petitioner as Junior Engineer (Civil). Pursuant thereto, he came to be appointed as a Junior Engineer with probation for one year. After comple- C tion of nine months service, he received the letter dated November 16, 1992 stating therein that the above letters carried unauthorised recommendations; therefore, the services of the petitioner were terminated. The order of the Chief Executive Officer, Zilla Parishad, Gadchiroli was impugned by the petitioner and others in the W.P. No. 885/93 in the High Court of D Bombay, Nagpur Bench claiming that they had been regularly appointed to the posts which were advertised; therefore, their services could not be terminated during the probation period without affording opportunity of hearing in the enquiry. The High Court has dismissed the writ petition. Thus, this special leave petition.

E Shri A.K. Sanghi, learned counsel for the petitioners has contended that when the posts were advertised and the candidates were found eligible, it does not mandate that there should be an interview and selection. Obviously, the Service Selection Board having found the petitioner to be eligible and qualified, recommended him and was accordingly appointed F as Junior Engineer, when it was sought to be cancelled on a letter written by Member Secretary of the Service Selection Board, they are entitled to be heard. No such opportunity has ever been given before cancellation of their appointments. It was, therefore, violative of principles of natural justice. We find no force in the contention. It is seen that on their own admission they have merely applied for the post pursuant to an advertise- G ment made for the selection. It is the case of the Selection Board that a regular selection has to be made and selecting the eligible candidates, recommendation for appointment would be made. Therefore, the letter can be said to have conveyed that the recommendations were not authorised and according to the rules; such being the admitted position, we do not H find any fault to cancel the appointments. Under those circumstances, we

do not find any illegality in the action taken by the respondents. However, such things will not be permitted to be kept under the carpet. The State Government is directed to refer the matter to the appropriate State CBI enquiry and the concerned Inspector would make an independent investigation into the matter to find out as to who were responsible for such mal- practice committed and it will be open to take appropriate criminal prosecution launched against the culprits.

The SLP is dismissed. This order to be communicated to the D.G.P., Maharashtra.

G.N. Petition dismissed.

A BABU SINGH BAINS ETC.

v.

UNION OF INDIA AND ORS. ETC.

SEPTEMBER 11, 1996

B [K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Capital of Punjab (Development & Regulations) Act, 1952 : Section 8-A—Prescribed in-built procedure of giving an opportunity and right to adduce evidence—Consideration thereof by the Estate Officer before resumption C *and to pass reasoned order which is subject to an appeal before the Chief Administrator—Also subject to judicial review under Art, 226—Resumption is not only in case of non-payment of dues under the sale but also for violations of the conditions of the sale, the rules, regulations and other relevant conditions applicable in that behalf—Hence the provision is not violative of Art. 14—Constitution of India, Art, 14.*

D

Ram Puri **v.** *Chief Commissioner, Chandigarh,* **AIR (1982) P&H 301 and** *Maganlal Chhagganlal (P) Ltd.* **v.** *Municipal Corporation of Greater Bombay & Ors.,* **AIR (1974) SC 2009, relied on.**

Jagdish Chand **v.** *State of Punjab,* **AIR (1972) SC 2587 and** *Northern* E *India Caterers (Pvt.) Ltd.* **v.** *State of Punjab & Anr.,* **AIR (1967) SC 1581, referred to.**

Chandigarh (Sale of Sites and Buildings) (Amendment) Rules, 1979 :

Rule 11-D—Application under the proviso—Making of—Inordinate F *delay of 13 years—Condonation of—Explanation for the delay that the appellant was carrying on litigation but was not properly advised at the appropriate stages to avail the remedies—Appellant landed himself in trouble on account of his own conduct—High Court rightly pointed out that there was no proper explanation for the inordinate delay—Hence no interference called for.*

G

Chandigarh Administration **v.** *Johnson Paints,* **[1996] 3 SCALE 680 and** *R.C. Chawla* **v.** *State of Haryana & Ors.,* **JT (1996) 1 SC 633, referred to.**

CIVIL APPELLATE/ORIGINAL JURISDICTION : Civil Appeal H No. 12931 of 1996 Etc.

From the Judgment and order dated 27.1.93 of the Punjab and Haryana High Court in C.W.P. No. 14183 of 1992. A

M.S. Gujral, S.K. Bagga, Swaraj Kaushal, V.N. Ganpule, Sr. Adv. Sarup Singh, Dr. Meera Agarwal, R.C. Mishra, Mahabir Singh, Altamesh Rein, Subhash Sharma, M.R. Vij, N.P. Sharma, M.S. Tanuj Bagga, Seeraj Bagga, Mrs. S. Bagga, Ms. Kamini Jaiswal, (Ms. Kusum Chaudhary and B.K. prasad) Advs. (NP), Ms. Shruti Pandey, Ms. Mukti Sinha, Ms. Indu Malhotra, Satish K. Agnihotri, Ashok Singh, Ashok K. Mahajan and Mahabir Singh for the appearing parties. B

The following Orders of the Court was delivered : C

C.A. No. 12931/96 @ SLP No. 4559/93 & *W.P. No. 520/94.*

Application for impleadment is dismissed.

Leave granted in the special leave petition. D

The City of beauty, Chandigarh, carefully architectured and meticulously executed as a modal city in India by famous architect, Shri Le. Corbursier; when it was getting desideration compounded by disfiguration of beauty and elegance, statutory regulations stepped in to stamp out erosion and to restore its natural environment. These cases are instances of blatent misusage of the buildings or plots in the planned structures. E

This appeal by special leave arises from the order of the Division Bench of the Punjab & Haryana High Court made on January 27, 1993 in C.W.P. No. 14183/92 upholding the order of the Estate Officer who refused to condone the delay in making application under Rule 11-D of the Chandigarh (Sale of Sites and Buildings) (Amendment) Rules, 1979 (for short, the "Rules"). F

The writ petition under Article 32 of the Constitution was filed by the petitioner challenging the validity of Section 8A of the Capital of Punjab (Development & Regulation) Act, 1952 (Punjab Act of 1952) (for short, the "Act"). G

The facts are long and tendentious. Suffice it to state, in nutshell, that the appellant/petitioner having had the allotment of free hold plot in residential Sector 21-A, viz., bearing House No. 341 in Street 'D' had H

A constructed a double-storeyed house. He had used it as Blue Star Guest House, contrary to the regulations. Consequently, a notice of resumption under Section 8 of the Act was given to the appellant/petitioner. After following the procedure prescribed thereunder, the resumption order came to be passed on October 17, 1977. The revision against that order came to be dismissed on August 28, 1978. Thus the resumption order had become final. Subsequently, notice under Section 5 of the Public Premises Act was issued to the appellant/petitioner for taking possession of the land. Those proceedings also ultimately culminated in the judgment of this Court made in C.A. No. 3102/81 on March 13, 1992. Therein, this court had given an opportunity to the appellant/petitioner to argue afresh on merits of resumption but he could not point out any invalidity in the resumption order. Accordingly, the resumption was upheld. Even on the ground of eviction also this Court had upheld the order on merits thus :

> "Learned counsel for the appellant was unable to point out any infirmity whatsoever of order passed by the Estate Officer under the Eviction Act. In view of the circumstances, we find no force in this appeal and it is accordingly dismissed."

However, one year's time was given to the appellant/petitioner to vacate the premises subject to his giving an undertaking. Since he had not filed the undertaking within the prescribed time, it is not in dispute, possession was taken. Thus the resumption order as well as order of eviction became final and conclusive against the appellant/petitioner. His right, title and interest in the said property stood divested and the Chandigarh Administration became owner thereof. The appellant/petitioner then filed an application on April 6, 1992 and April 9, 1992 under Rule 11-D of the Rules. The Estate Officer dismissed the petition giving elaborate reasons in support thereof. The High Court in the impugned order thereunder has pointed out that the appellant/petitioner has not given any satisfactory explanation for the delay of 13 years in filing the application and no fault could be found with the order passed by the Estate Officer. Thus this appeal by special leave and the writ petition.

When the matter came up for hearing before a Bench of two learned Judges, by order dated February 14, 1995 reference was made to a three-Judge Bench to consider the validity of Section 8A of the Act and the

question of resumption since it has got a vital bearing on the right to property held by a defaulter. Thus these cases have come up before this Bench. A

It has been very strenuously argued by Shri Swaroop Singh, learned counsel for the appellant with painstaking efforts, realising the tight spot in which the appellant was placed, that the appellant though had used the house partly for residence and partly for non-residential purpose, (which we need not enter upon for adjudication) Section 8A of the Act would be invoked only when the instalments of purchase price of the site, or other dues were not paid by the purchaser. On their due discharge, power under Section 8A gets exhausted. For the violation of the rule for misuser of the property, there is no power under Section 8A of the Act to resume the property. Such power would be available and be invoked only when available under any State law. The only remedy provided under Section 15 of the Act is to stop misusage without invoking the power of resumption, laying prosecution under Section 15 and to collect the penalty. The power under Section 8A cannot be resorted to in case of misuse; such invocation of power would be an arbitrary exercise of power violating Article 14 of the Constitution. It is also contended that the appellant has been using all legal recourse open to redress his legal injury and was diligently prosecuting the remedies available under the law. There was no need for him to challenge the resumption order in any court of law for the reason, that the resumption at one point of time was only divestiture of the title but not of dispossession from the property. When his possession was sought to be interdicted by having him ejected from the premises, he had challenged the eviction order which was ultimately upheld by this Court. Thereafter, the appellant had availed of the right and remedy provided in Rule 11-D of the Rules and that, therefore, this was the proper explanation in filing the application at a belated point of time. The Estate Officer and the High Court have committed error of law in not considering the delay from this proper perspective. He further contended that the appellant/petitioner having invested huge money in construction of double-storeyed building, he cannot be visited with the penalty of divestiture of title to and ejectment of him from the said property. When penalty could be collected under Section 15, the recourse for eviction was bad in law. So, he availed of the right as provided in Rule 11-D of the Rules. The exercise of the power of the Estates Officer in refusing to condone the delay and not re-transferring the property is vitiated by manifest error of law warranting interference. B C D E F G H

A Mrs. Kamini Jaiswal, learned counsel for the respondent, has argued that the resumption and eviction order having become final, it is no longer open to the appellant/petitioner to challenge the validity of Section 8A. In fact, the validity of Section 8A was dealt with and upheld by majority of the Full Bench of the High Court in *Ram Puri* v. *Chief Commissioner, Chandigarh,* AIR (1982) P&H 301. When this Court had given an opportunity to the appellant/petitioner to point out illegality, if any, in the action taken under Section 8A of the Act, he could not satisfy this Court as to any invalidity thereof. Under these circumstances, he cannot be permitted to raise these contentions in the writ petition. He is not entitled to challenge the validity of Section 8A in the writ petition since his remedy has already been closed by the orders of this Court. She also contended that the action for resumption was taken to maintain the ecology sanitation and beauty of the city constructed as per the design and planning, as a model city. Contravention of the scheme renders the beauty of the city irreversible. The appropriate course open to the authorities is to resume the land and prevent such misuser. The appellant/petitioner having allowed all the options closed to him, it is no longer open to him now to challenge the validity of Section 8A of the Act at this belated stage. Even otherwise, Section 8A is *ultra vires* the Act as it seeks to sustain the purpose and policy of the Act which otherwise would be rendered ineffective and toothless. She further contends that he having slept over for 13 years, the appellant cannot be permitted to file an application under Rule 11-D of the Rules. He has no right as such. *He has only benefit of making an application*. It is a discretionary relief available to him under the Rules to be considered by the Estate Officer. In view of the background of the case, the Estate Officer had considered the totality of the facts and given elaborate reasons for refusing to condone the delay and to re-transfer of the property. In support thereof, she relies upon the judgment of this Court in *Chandigarh Administration* v. *Johnson Paints,* (1996) 3 SCALE 680. The High Court also has given cogent reasons for refusing to grant the relief sought for. Accordingly, no case has been made out warranting interference.

In view of the diverse contentions raised, the only question is; whether the appellant/petitioner is entitled to avail of the remedy under Article 32 of the Constitution? But for the reference made by the Bench of two learned Judges, we would have straightaway held that the doors to a litigant citizen under Article 32 of the Constitution are closed fast and writ petition is not maintainable since it amounts to reviewing the order

passed by this Court in C.A. No. 3102/81 March 13, 1992. It is settled law that once an order passed on merits by this Court exercising the power under Article 136 has become final, no writ petition under Article 32 on the self-same issue is maintainable. Though the resumption order was not challenged, this Court had permitted the appellant to convince this Court as to the invalidity of the resumption order passed under Section 8A but he could not point out any invalidity nor did he raise any contention as regards the validity of Section 8A. Therefore, the principle of constructive *res judicata* stands fast in his way to raise the same contention once over. However, since the two-Judge Bench has made the reference in this behalf, it is necessary to briefly deal with the contentions raised by Sri Swaroop Singh, learned counsel for the appellant.

After unsuccessful challenge to Section 9 of the Act under Article 226 before the Full Bench of the Punjab & Haryana High Court, on appeal, this Court in *Jagdish Chand* v. *State of Punjab,* AIR (1972) SC 2587 had declared that Section 9 was invalid since the purchaser had already paid the entire consideration amount and thereafter the power under Section 9 was not available for resuming the property. Consequently, the Parliament amended the Act and introduced Section 8A deleting Section 9 and 11 of the Act. The Statement of Objects in that behalf read as under :

> "The Supreme Court in *Jagdish Chand Radhey Shyam* v. *State of Punjab,* Civil (Appeal No. 1099 of 1967) declared Section 9 of the Capital of Punjab (Development and Regulation) Act, 1952 (Punjab Act XXVII of 1952), as in force in the Union Territory of Chandigarh, as being violative of Articles 14 and 19(1)(f) of the Constitution and held that the Central Government is not entitled to resume the site or building transferred under Section 3 of that Act, or to forfeit the money paid in respect of such transfer under the said Section 9. The main ground on which the *Supreme Court had based its conclusions was that there is nothing in the Act to guide the exercise of power by the Government as to when and how any of the methods for recovering the amount of consideration in arrears specified in Sections 3, 8 and 9 of the Act, will be chosen.* (Emphasis supplied).
>
> 2. The decision of the Supreme Court has created several practical difficulties in administering the provisions of the Act.

A Further, the situation created by the decision of the Supreme Court is already having an adverse effect on the regulation and development of the entire city of Chandigarh, which has been planned and developed with great care and at considerable expense over the past several years. *It is, therefore, essential to remove the objections pointed out by the Supreme Court by amending the Act retrospectively from the 1st of November, 1966* being the date on which the Union Territory of Chandigarh was formed, and to validate the actions taken under the impugned provisions of the Act (Emphasis supplied).

C 3. The Bill seeks to achieve the aforesaid objection."

(emphasis supplied)

A reading thereof would clearly indicate the animation of the Legislature that the aforesaid decision of this Court was causing inconvenience D for preventing misuser of the property defeating the scheme of the Act. Therefore, it necessitated to amend the Act and bring on statute Section 8A for resumption of the property used in violation of the conditions of the sale, provisions of the Act and the Rules made in that behalf. Majority of the Full Bench in *Ram Puri's* case (supra) had considered the effect of Section 8A and held in paragraph 66 thus :

E

"66. Adverting specifically to Sec. 8A the restrictions for the exercise of the powers vested thereby exist not only in the express provision thereof, but are equally discernible from the larger purpose of the Act, its preamble as also the other sections thereof when read with the statutory rules framed thereunder. The larger F purpose of the planed development and regulation of the new capital city, as spelled out in the preamble of the Act, is the fixed Pole Star to which the ultimate exercise of the power of resumption under Section 8A is hitched. What deserves highlighting herein is that this power of resumption under Section 8-A is merely a G discretionary and an enabling power. The statute does not lay down any mandate that it must necessarily be exercised in a particular situation. In sub- section (1) thereof it is first in the discretion of the Estate Officer that he may issue a notice to show cause why an order of resumption of site or building may not be made. Equally under sub-section (2) after considering the cause shown H against such a notice it is optional for the Estate Officer to order

such resumption or not. The word used in both the sub-sections is 'may' and not 'shall'. Mr. Anand Swaroop rightly pointed out that this power of resumption is indeed the last arrow in the quiver of a number of sanctions to enforce the planned development and the regulation of the capital and to be only resorted to in a situation commensurate with its necessary exercise. To put it in plain language it is not mandatory for the authority to order resumption, but only in extreme cases it enables it to do so when the other powers and sanctions to enforce the purpose of the Act have failed, or in the circumstances it is the only remedial power which can be applied. Therefore, it is farcical and imaginary to assume that the authority would necessarily use this power arbitrarily and whimsically and that they will use this hammer to swat a fly. As Section 8-A now stands (in sharp distinction to the deleted Section 9) it mandatorily required a notice to show cause to the person concerned whenever the exercise of this power is contemplated. Not only is such a person entitled to have a reasonable opportunity of contesting such a notice, but the law in terms confers on him the power to lead evidence in support of his stand. The mandate as laid on the Estate Officer is to record his reasons in case he orders resumption. Apart from these inbuilt safeguards under Section 8-A, it is the statutory rules which provide for an appeal against the order of resumption by the Estate Officer, to the Chief Administrator. It is thereafter that the rules zealously provide for a revision to the Chief Commissioner, who is the executive head of the Union Territories. Obviously in a proper case, the right to approach the Court under Article 226 of the Constitution of India is equally open.

68. In conclude, in the larger conspectus of the purposes of the Act itself, its preamble; the setting in which it is placed along with the supplementary sections of the Act and the rules framed thereunder it has to be held that the enabling power of resumption conferred thereby is only a reasonable restriction on the fundamental right to hold, acquire and dispose of property and is, therefore, in no way violative of Article 19(1)(f)."

Accordingly, the Full Bench had held that Section 8-A was brought on statute which a view to bring it in conformity with the purpose the Act seeks to subserve. Learned counsel for the appellant relied upon the

A minority judgment of learned Judge. It would, however, appear that the learned Judge, with due respect, sought to set the clock back to the Amendment by constructing the meaning of the words 'forfeiture' and 'resumption' and the consequential effect on general principles of law without giving needed effect to the object of the Amendment. Once the statute occupied the field and gave power to resume the land or building B subject to the conditions mentioned therein, the general principles of resumption and other principles considered therein absolutely remained no more relevant. The majority judgment has rightly focussed the question in the correct perspective and had held that Section 8-A is valid in law and, therefore, not violative of Article 14. In *Northern India Caterers (Pvt.) Ltd.* C v. *State of Punjab & Anr.,* AIR (1967) SC 1581, this Court had held that when there are two modes of procedure, one being more drastic and harsher than the other without any guidelines, invocation of the former was violative of Article 14 which was reversed by a larger Bench in *Maganlal Chhagganlal (P) Ltd.* v. *Municipal Corporation of Greater Bombay & Ors.,* AIR (1974) SC 2009 knocking the bottom of the plea of constitutional D invalidity of Section 8-A on the anvil of Article 14. Though softer course under Section 15 was available, Section 8A does not become invalid on that score. Section 9 has been deleted and procedural safeguards have been provided in Section 8-A. Therefore, Section 8-A, having provided fair procedure, does not become arbitrary and violative of Article 14.

E For these reasons and also for the reasons given in the majority judgment, we are of the view that Section 8-A is not violative of Article 14 since it has prescribed an in-built procedure of giving an opportunity and right to adduce evidence and consideration thereof by the Estate Officer before resumption and to pass a reasoned order in support thereof. The F order is also subject to an appeal before the Chief Administrator. It permissible, within circumscribed paramaters, appellate order may be subject to judicial review under Article 226. Since this procedure was not available under Section 9 of the Act, this Court had declared it as *ultra vires* of Article 14. The vice pointed out by this Court in *Jagdish Chander's* case (supra) has been cured by introducing Section 8-A. It would, there- G fore, be clear that the resumption under Section 8-A is not only in case of non-payment of dues under the sale but for violation of the conditions of the sale, the rules, regulations and other relevant conditions applicable in that behalf. Therefore, we do not find any invalidity in Section 8-A.

H It is then to be seen : whether the appellant's application under Rule

11-D of the Rules has not been considered in proper perspective by the Estate Officer and whether any illegality has been committed by the High Court by not interfering therewith. Having considered the reasoning given by the Estate Officer in his order and the conclusion reached by the High Court, we do not think that they have committed any illegality in refusing to condone the delay. This Court has pointed out in *Johnson Paints's* case (supra) in paragraph 6 that once the original allotment stands cancelled and resumption by the Estate Officer becomes final, the allottee has no right to the allotment of the site or building. Rule 11-D deals with only discretionary power given to the Estate Officer. It does not clothe the former allottee with any right to reallotment. The power under Rule 11-D is only discretionary; he may give the benefit to the former transferee subject to fulfilment of the conditions mentioned therein which includes power to refuse to order reallotment. In fact, this Court has doubted the wisdom behind Rule 11-D of reopening the issue once over through back door entry under Rule 11-D, after the entire process of resumption has become final and received quiteous. It would be a constant sprout of corruption and abuse of Rule 11-D for diverse reasons which in the interest of smooth administration need to remove the irritant. However, we need not dwell upon it any further as it is not necessary for the purpose of deciding the question in this case. Suffice it to state that Rule 11-D is only an enabling provision to make an application. The Estate Officer has discretion to re-grant the land or building which stood already resumed and vested in the State. Of course, he cannot arbitrarily reject the petition; he has to give reasons in support thereof as contemplated in Rule 11-D itself.

Thus considered, the High Court has rightly pointed out that the appellant has not given any proper explanation for inordinate delay of 13 years in not making the application. It is true that the appellant was carrying on the litigation but was not properly advised at the appropriate stages to avail the remedies; he landed himself in trouble on account of his own conduct. Considered from this perspective, having regard to the facts in this case, we do not think that it is a case warranting interference.

The appeal and the writ petition accordingly stand dismissed. No costs.

IW.P. (C) No. 412/96

The writ petition is dismissed as withdrawn.

A *C.A. Nos. 12936-37/96 (@ SLP (C) Nos. 8118-19/90*

Leave granted.

These appeals by special leave arise from the judgment and order of the High Court of Punjab and Haryana at Chandigarh made on January B 25, 1990 and March 16, 1990 in Review Petition No. 45 of 1990 and CWP No. 8266 of 1988.

Admittedly the appellants, though doctors, are using the premises for nursing home/clinic. Admittedly, the premises are located in residential zone. Therefore, it would clearly be a contravention of the rule by misuser C of the house for non-residential purpose. Accordingly we do not find any illegality in the action taken by the respondents. However, six months' time is granted to the appellants to stop the misuser. The appellants should give an undertaking before the Estate Officer within four weeks from today that they would stop misuser on expiry of six months from to-day. In case they D do not stop misuser on expiry of six months, the Estate Officer is entitled to resume the property without any further order or action. For misuser, in lieu of resumption, the Estate Officer may impose any reasonable penalty which the appellants shall pay.

The appeals are accordingly disposed of. No costs.

E

C.A. Nos. 12932-33/96 (@ SLP (C) Nos. 15376-77/90

Application for intervention is dismissed.

Leave granted.

F

These appeals by special leave arise form the judgment and order of the High Court of Punjab & Haryana made on January 25, 1990 and March 16, 1990 in Review Petition No. 49/90 and CWP No. 8317/88.

The appellant is using part of the property for non-residential pur- G pose, viz., a shop and, therefore, it is clear case of conversion of user of the property from residential to non-residential. The action taken by the authorities is perfectly legal. However, we give six months' time to the appellant to stop the misuser. He should give an undertaking to the Estate Officer within one month from today that he would stop misuser within H six months from today. If he continues the misuser even after expiry of six

months from today or any time thereafter, the Estate Officer is at liberty to resume the property without any further order or proceedings. Similarly the Estate Officer is at liberty to impose any reasonable penalty for misuser which the appellant shall pay over.

The appeals are accordingly ordered. No costs.

C.A. No. /96 (@ SLP (C) No. 12491/90

Leave granted.

This appeal by special leave arises out of the judgment and order of the High Court of Punjab & Haryana made on March 16, 1990 in Review Petition No. 47/90 and W.P. No. 5576/88. The appeal filed against the main writ petition has already been disposed of by this Court in *R.C. Chawla* v. *State of Haryana & Ors.,* JT (1996) 1 SC 633.

The appeal is disposed of in terms of decision in *R.C. Chawla's* case. No. costs.

C.A. Nos. 12947-48/1996 (@ SLP (C) Nos. 12389-90/1650 of 1990 and C.A. Nos. 12952-53/96 @ S.L.P. (C) Nos. 14-15/91

Leave granted.

These appeals by special leave arise out of the judgment and order of the High Court of Punjab and Haryana made on March 16, 1990 and January 25, 1990 in Review Petition No. 46/90 in W.P. 5258/88 and other matters.

Admittedly, the appellants were using the premises for non- residential purpose in a residential area. Therefore, the authorities were well within their power to issue notice for resumption of the properties. However, pending disposal of these matters, the appellants have stated that they had already stopped misuser an year ago. The appellants should file an affidavit before the Estate Officer stating that they have already stopped misuser of the premises. On such an affidavit being filed, it would be open to the Estate Officer to have it verified whether they have already stopped the misuser. If they have already stopped misuser, the order of resumption may be revoked. If they have not, the order passed by this Court would not be of any help to the appellants. The order of resumption would stand

upheld. The Estate Officer may six any reasonable penalty for misuse and the appellants shall pay over the same. If they were to repeat the misuser, the Estate Officer would be free to resume the property without taking any recourse to fresh proceedings.

The appeals are accordingly disposed of. No costs.

C.A. Nos. 12949, 12934-35, 12955, 12938-43, 12945-46/96 @ S.L.P. (C) Nos. 885/91, 15393-94, 7960, 9174-79 & 11578-79/90

Leave granted.

These appeals by special leave arises from the judgment and order of the High Court of Punjab and Haryana made on January 25, 1990 in CWP No. 1162/89 and other matters.

The appellants, admittedly, have been using the residential premises for non-residential purpose converting it into a shop contrary to the conditions of the sale and also the Rules. Thereby, it is a clear case of misuser of the premises. However, an opportunity is given to the appellants to stop the misuser within six months from today and pay reasonable penalty levied by Estate Officer on misuser. They should file an undertaking before the Estate Officer within one month from today that they would stop the misuser within six months from today. On expiry of six months, it would be open to the Estate Officer to verify whether the appellants have stopped the misuser. If they would have not, the resumption order would get revived and thereafter it would be open to the Estate Officer to deal with the property in accordance with law without further reference to the appellants or taking any further action in this behalf. If the misuser is repeated, he would free to resume the property without further proceedings. Reasonable penalty may be fixed and the appellants shall pay over the same.

The appeals are accordingly disposed of. No costs.

W.P. 250/96

This writ petition filed by the petitioners challenging the resumption orders passed by the Estate Officer for contravention of the conditions of the sale. Therefore, it would be open to the petitioners, to avail of remedy, if any, available under the law.

The writ petition is accordingly dismissed. One month's time is given to the petitioner to approach the High Court. In the meanwhile, *status quo* as on to-day shall be maintained.

Civil Appeal No. 12954 of 1996.

ORDER

Leave granted.

This appeal by special leave arises against the judgment dated August 31, 1990, made in W.P. No. 3278/81 by the High Court of Bombay. The admitted facts are that the appellants had from the Government 4 acres of land on April 5, 1946 for construction of Ayurvedic Karkhana in the industrial zone subject to the following conditions :

> "(a) The land (and the building to be constructed thereon) should be used for the purpose for which it is granted, viz. Manufacture and sale of Ayurvedic Medicines, and conducting an Ayurvedic School or College, and an Ayurvedic Hospital.
>
> (b) The management of the Shahu Aryopushadhi Karkhana should agree to abide by all the building rules and regulations of the Kolhapur Municipal Borough; and
>
> (c) The management should also agree to purify its discharges to such extent as may be laid down by the Municipality from time to time and let them out in the Municipal drains and sewage at such intervals and at such times as may be fixed by the Municipality from time to time."

On inspection made by the Collector, he found that 1 Hectare 29 acres of land allotted to him was to be vacant; that he had the information that the appellant was attempting to alienate the property; and that the appellants had not used the assigned land in compliance of the three conditions enumerated hereinbefore. Therefore, notice was given to the appellant as to why the land could not be resumed; If not reply was not received within 10 days from the date of the receipt of the letter, it was to be presumed that the appellants had no cause or grievance for resumption of the land by the Government. After passage of two years, they gave reply on February 5, 1980. An order came to be passed after consideration of

A the submissions made by the appellants on September 5, 1981 rejecting the contentions opposing presumption of the land. Calling that order in question, they filed a writ petition in the High Court. The High Court in the above writ petition has dismissed the same.

Shri V.N. Ganpule, learned senior counsel appearing for the appel-
B lants, contended that under the provisions of the Maharashtra Land Revenue Code, the Collector has no power to resume the land and that, therefore, the action taken by the Collector is without authority of law. We find no force in the contention. Admittedly, the Collector being the Chief Executive, Revenue Head of the District and the property being situated
C within Kohlapur District, he had the competence to inspect the land; he found that the land was not used for the purpose for which the grant was made under the Government Grant Act. Consequently, when he noticed that there was a breach of the covenants in the grant, a notice was issued to the appellants as to why the lands granted in their favour should not be resumed. He had power and competence to initiate the action for cancel-
D lation of grant and for resumption thereof. Even belated show cause notice was duly considered by the District Collector who refused to accede to the request made to him. Consequently, the resumption became valid. The High Court, therefore, has not committed any error of law in this behalf.

E It was also contended in the High Court that subsequent to the resumption order passed by the Collector followed by actual resumption, the Government have passed a resolution on November 21, 1987 for re-grant subject to the conditions mentioned thereunder, we do not have the advantage to see the grounds on which the re-grant was sought to be made etc. However, the High Court refused to go into that question. It may
F be open to the appellants to make an application to the District Collector and it is for the District Collector to consider and dispose it of according to law. It is stated by the appellants that they had already made a representation before the Commissioner and it was not considered. It is seen that the direction was to make representation before the Collector and not
G the Commissioner. It was a misconceived action taken by the appellants. He did not avail of the remedy as directed by the High Court. Therefore, we cannot go into that question.

The appeal is accordingly dismissed. No costs.

H G.N. Petition and Appeal dismissed.

THE CANTONMENT BOARD, MATHURA

v.

KRISHNA BRICKS AND LIME FACTORY

SEPTEMBER 12, 1996

[N.P. SINGH AND S.B. MAJMUDAR, JJ.]

Cantonments Act, 1924 : Section 60.

Imposition of Tax—By cantonment Board—On trades and callings—Rate of tax—Held : must be within the ceiling limit fixed by Art. 276(2)—S. 60 linked Board's power to impose tax with that of any Municipality in the State where Cantonment was situated—Since power of municipality was subject to ceiling fixed by Art. 276(2), Board's power was also subject to such ceiling—Hence, Board did not have unlimited taxing power—U.P. Municipalities Act, 1916, S. 128(1)(ii)—Constitution of India, 1950, Art. 276(2).

The respondent was the owner of a brick kiln and was carrying on the business of manufacturing and selling of bricks. A suit was filed by the respondent for restraining the appellant-Board from realising tax at the rate of 0.75p per thousand bricks by raising it from 0.19p per thousand bricks. It was contended by respondent that it neither derived any advantage from the Board nor any service was provided by the Board to it. As such, the realisation of the tax at the aforesaid rate was in contravention and in violation of Section 60 of the Cantonments Act, 1924 read with Section 128(1)(ii) of the U.P. Municipalities Act, 1916. The suit was dismissed and the judgment was affirmed in first appeal. However, in second appeal, the High Court came to the conclusion that the ceiling and restriction imposed by Article 276(2) of the Constitution, as applicable to the State, any municipal, district board, local board or other local authority within such State in respect of imposition of taxes on professions, trades and callings, was applicable even on the Board which had been established under the aforesaid Cantonments Act. On that finding the notification raising the rate of tax was declared to be invalid being hit by Article 276(2) of the Constitution. Being aggrieved the appellant-Board preferred the present appeal.

Dismissing the appeal, this Court

A HELD : 1.1. Article 276 of the Constitution within a prescribed limit, enables the legislature of the State to make law for imposition of taxes on income for the benefit of the State or municipality, district board, local board to other local authority from professions, trades, callings saying that such law shall not be invalid on the ground that it relates to a tax on income. In view of Article 276, no law of legislature of a State relating to imposition B of taxes for the benefit of the State or of a municipality, district board, local board, or other local authority therein in respect of professions, trades, callings shall be valid, if it provides the total amount payable in respect of any one person to the State, exceeding the limit fixed by Article 276(2) of the Constitution. [144-C]

C

1.2. In the instant case the impugned notification imposing enhanced tax of 0.75p per thousand bricks on brick-kiln owners was issued by the Cantonment Board under Section 60 of the Cantonments Act, 1924. As such the said notification shall not be deemed to have been issued in exercise of power under a law enacted by the legislature of the State for the objects D mentioned in Article 276. Section 60 of the Cantonments Act, prescribes two conditions for imposition of tax by the Board. Firstly, that there must be a previous sanction of the Central Government and secondly that only such tax can be imposed within any cantonment which under any enactment for the time being in force may be imposed in any municipality in the State E wherein such cantonment is situated. The framers of the Cantonment Act did not desire to delegate and authorise the Board to impose any tax.

[144-E-G]

1.3. In exercise of power under Section 128(1)(ii) of the U.P. Municipalities Act, 1916, the Municipal Board of any municipality within F the State could impose a tax on trades and callings carried on within the municipal limits. Therefore, any Board within the State can also impose such tax within the cantonment area because of Section 60 of Cantonments Act. When Section 60 links the power to impose tax with any enactment for the time being in force in respect of any municipality in the State where the cantonment is situated, then it shall be deemed that it has also G prescribed the limit of the ceiling of such tax with reference to the said enactment in force in respect of any municipality in that State. The Board cannot have unlimited power without any ceiling to tax on professions, trades or callings being carried on within the cantonment area. If it is held otherwise, it will lead to an anomalous position, so far the nature of tax is H concerned, because of Section 60 the power of the Board is circumscribed

with reference to any enactment for the time being in force in respect of municipality in that State whereas the rate of such tax which is more vital, has been left to the discretion of the Board. But the Board cannot excercise unlimited taxing power under Section 60 on the plea that any such tax including the rate thereof had to be first sanctioned by the Central Government. [145-F; H]

Bharat Kala Bhandar Ltd. **v.** *Municipal Committee, Dhamangaon,* **AIR (1966) SC 249 and** *Mahapalika of the City of Agra* **v.** *The Agra Brick Kiln Owners Association and Anr.,* **[1976] 3 SCC 42, relied on.**

Madan Lal **v.** *Cantonment Board, Mathura,* **(1978) All LJ 1147;** *Narain and Anr.* **v.** *Cantonment Board, Nasirabad,* **AIR (1963) Raj 190 and** *Hiralal & Anr.* **v.** *Union of India & Anr.,* **(1972) Tax L.R. 2051, approved.**

M/s. Punjab Lime and Lime-Stone Co., Dehradun **v.** *Cantonment Board, Deharadun & Anr.,* **AIR (1967) All 15, overruled.**

Poona City Municipal Corporation Case, **AIR (1965) SC 555, cited.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 799-802 of 1981.

From the Judgment and Order dated 20.10.78 of the Allahabad High Court in S.A. Nos. 347-350 of 1978.

K.N. Shukla, Ms. Binu Tamta and C.V. Subba for the the Appellant.

M.P. Shorawala for the Respondent.

The Judgment of the Court was delivered by :

N.P. SINGH, J. These appeals have been filed on behalf of the cantonment Board, Mathura (hereinafter referred to as the 'Board') for setting aside the judgment of the Allahabad High Court, declaring notification dated 22.11.1958, by which tax at the rate of 0.75 p. per thousand bricks had been fixed by the Board within the cantonment area as invalid.

The respondent is the owner of a brick kiln and was carrying on the business of manufacturing and selling of bricks. A suit was filed on behalf of the said respondent for restraining the appellant-Board from realising

A tax form the said respondent at the rate of 0.75 per thousand of bricks. It was alleged that previously the Board was realising the tax from the manufacturers of bricks at the rate of 0.19 per thousand. But by impugned notification, it raised the rate of the tax at 0.75 per thousand of bricks. It was alleged and asserted that the respondent as the manufacturer of bricks
B was neither deriving any advantage from the Board nor any service was being provided by the Board. As such, the realisation of the tax at the aforesaid rate was in contravention and in violation of Section 60 of the Cantonments Act, 1924 read with Section 128(1)(ii) of the U.P. Municipalities Act, 1916. The suit filed on behalf of the respondent was dismissed by the Trial Court. That judgment was affirmed by the Court of
C Appeal. However, on second appeal being filed on behalf of the said respondent, the High Court came to the conclusion that the ceiling and restriction imposed by Article 276(2) of the Constitution, as applicable to the State, any municipal, district board, local board or other local authority within such state in respect of imposition of taxes on professions, trades
D and callings, was applicable even on the Board which had been established under the aforesaid Cantonments Act. On that finding the notification was declared to be invalid being hit by Article 276(2) of the Constitution.

Section 3 of the Cantonments Act provides that the Central Government may, by notification in the Official Gazette, declare any place or
E places in which any part of the Forces is quartered or which, being in the vicinity of any such place or places, is or are required for the service of such forces to be a cantonment for the purposes of the said Act and may by a like notification, declare that any cantonment shall cease to be a cantonment. In view of sub-section (4) of Section 3 Central Government
F may, by notification in the Official Gazette, direct that any place declared a cantonment under sub-section (1) the provisions of any enactment relating to local self-Government other than this Act shall have effect only to such extent or subject to such modifications, or that any authority constituted under any such enactment shall exercise authority only to such
G extent, as may be specified in the notification. Section 6 provides that when by a notification under Section 3, any cantonment ceases to be a cantonment, the local area comprised therein shall immediately be placed under the control of a local authority, the balance of the cantonment fund and other property vesting in the Board shall also vest in such local authority, and the liabilities of the Board shall be transferred to such local authority.
H Similarly, Section 7 and 8 make provisions in respect of cantonment fund

and its property which is placed under the control of some other local authority, in view of the notification under Section 4, because of which any local area forming part of cantonment ceases to be under the control of a particular Board. Section 60 of the Cantonments Act provides :

> *General Power of taxation -*
>
> (1) The Board may, with the previous sanction of the Central Government, impose in any cantonment any tax which under any enactment for the time being in force, may be impose in any municipality in the State wherein such cantonment is situated :
>
> (2) Any tax imposed under this section shall take effect from the date of its notification in the Official Gazette or where any later date is specified in this behalf in the notification, from such later date.

Because of aforesaid Section 60 the Board may with previous sanction of the Central Government impose in any cantonment, any tax 'which under any enactment for the time being in force, may be imposed in any municipality in the State where such cantonment is situated'. For imposing any tax in exercise of the power under Section 60, two conditions have to be fulfilled and complied with (1) there must be a previous sanction of the Central Government to impose such tax and (ii) the tax to be imposed must be such which under any enactment for the time being in force may be imposed in any municipality in the State wherein such cantonment is situated.

So far the municipality within any State is concerned, its power to impose a tax in respect of professions, trades or callings is governed and controlled by Article 276 of the Constitution, which says :

> "Taxes on professions, trades, callings and employments -
>
> (1) Notwithstanding anything in article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.
>
> (2) The total amount payable in respect of any one person to the

A State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two thousand and five hundred rupees per annum.

B (3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments."

C

There is a non-obstante clause in Article 276(1) of the Constitution saying that notwithstanding anything contained in Article 246 no law made by the legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board, or other local authority therein in D respect of professions, tradings, callings or employments shall be invalid on the ground that it relates to a tax on income. Having said so a ceiling on the amount of tax has been imposed by Article 276(2), which was Rs. 250 earlier and has been raised to Rs. 2,500 by the Constitution (Sixtieth Amendment) Act, 1988 with effect from 20.12.1988. In the case of *Bharat Kala Bhandar Ltd.* v. *Municipal Committee, Dhamangaon,* AIR 1966 SC E 249 = [1965] 3 SCR 499 a Constitution Bench in its majority judgment said:

"Before we deal with these cases it is necessary to point out the rational upon which S. 142-A of the Govt. of India Act, 1935 was F enacted and on which Art. 276 of the Constitution now rests. It is that the legislative spheres of the Provinces and the Centre came to be clearly demarcated in regard to items falling within Lists I and II of Schedule VII of the Govt. of India Act and now to those falling within the same lists of Schedule VII of the Constitution. G *Taxes on professions, trades callings and employments are taxes on income and are thus outside the provincial and now State - lists and belong exclusively to Parliament and before that to the Central Legislature.* Yet under a large number of laws enacted before the Govt. of India Act, 1935 came into force, power was conferred on local Governments and local authorities to impose taxes on such H activities. This was obviously in conflict with S. 100 of the Govt. of

India Act. When this was realised S. 142-A was enacted by the British Parliament which saved the power conferred by pre- existing laws but limited the amount payable to Rs. 50 after 31st March, 1939. A saving was made, however, of pre-existing laws subject to certain conditions with which we are not concerned. The provisions of this section have been substantially reproduced in Article 276 of the Constitution with the modification that the upper limit of such tax payable per annum would be Rs. 250 instead of Rs. 50. A tax can be recovered only if it is 'payable' and it would be payable only after it is assessed. It is, therefore, futile to contend that the ban placed by the aforesaid provisions extends only to recoveries and not to an earlier stage.

(emphasis supplied)

.....

We may further observe that where there is an express prohibition in a statute against a local authority from imposing a tax, as for instance, the recovery in the Statute construed by this Court in the Poona City Municipal Corporation case, C.A. No. 582 of 1961, date 5.5.1964 : (AIR 1965 SC 555) (supra) or where a prohibition can be implied - whether it be with regard to an item of taxation or with regard to the rate of tax or the quantum of tax payable by an individual assessee - the action of a local authority or of any of its instrumentalities in transgressing that prohibition must be regarded as being in excess of its jurisdiction. Here there is a prohibition in S. 142-A of the Government of India Act and now in Art. 276 of the Constitution, which precludes a State Legislature from making a law enabling a local authority to impose a tax on "professions, trades, callings and employments" in excess of Rs. 250 per annum. These provisions have to be read in the Act or to be deemed by implication to be there as the Constitution is the paramount law to which all other laws are subject as was the Government of India Act, 1935 before January 26, 1950. If, therefore, after the date specified in S. 142-A of the Government of India Act or after the commencement of the Constitution a local authority or any of its instrumentalities imposed or imposes a tax which is in excess of the permissible amount, it would be exceeding

A its jurisdiction and a provision like S. 84(3) of the Act will not bar the jurisdiction of a civil Court to entertain a suit instituted by a person from whom it is collected for the repayment of the money recovered from him in excess of the permissible amount..... Here since the Assessing Officer had no authority to levy a tax beyond what S. 142-A of the Government of India Act, 1935 permitted or what Art. 276 permits his proceedings are void in so far as they purport to levy a tax in excess of the permissible amount and authorise its collection and the assessment order is no answer to the suit for the recovery of the excess amount. To this extent, even the order of assessment cannot obtain the protection of S. 84(3) of the Act and, therefore, the appellant's suit is maintainable."

Again in the case of *Mahapalika of the city of Agra* v. *The Agra Brick Kiln Owners Association and Another,* [1976] 3 SCC 42, the scope of Article 276(2) was considered by this Court in connection with the aforesaid U.P. Municipalities Act, 1916. The State Government issued a notification in the year 1947 imposing a tax under Section 128(1)(ii) of the said Act, at the rate of 14 annas per thousand bricks. Brick kiln owners who were effected by the said notification filed a suit for declaration that the tax was void as such could not be realised in view of Section 142-A of the Government of India Act, 1935 and Article 276 of the Constitution. This Court said :

"The Government of India Act, 1935, certainly set a maximum on the tax on trades and callings and we agree that the High Court was right in holding that the Municipal Board's light to levy tax under the notification Ex. H could be valid up to Rs. 50 per year and, to the extent it went beyond that limit, was void. So, we affirm the High Court' holding for the period upto January 26, 1960 that no sum higher than Rs. 50 as set out in the Government of India Act, 1935 can be exacted under Section 128 of Act II of 1916.

From the Raj to the Republic was a big break in constitutional law, but there was some continuity maintained. A certain ceiling on taxes on professions. trades, callings and employments had been set by Article 276 of one Constitution of India, but this maximum was not Rs. 50 as in the Government of India Act, 1935 but Rs. 250.

. . . . . .

Inevitably it follows that during the post- constitution period nothing by way of taxes on trades or callings above the limit so set is recoverable and hence the maximum levy form each person under the notification issued under Act II of 1916 rises to Rs. 250.

. . . . . .

This does not mean that anything beyond Rs. 250 (the tax freeze under Article 276(2) can be levied. No. The constitutional maximum prevails as it covers all taxes on trade or calling even today. Therefore, until Parliament makes any other law, as contemplated in the proviso to Section 172 of the Adhiniyam, the maximum of Rs. 250 binds. We have to read down the notification Exhibit H for the post-Constitution period, in tune and conformity with the Constitution and uphold its validity to the extent of constitutional permissibility."

In the case of *Mahapalika of Agra* v. *Agra brick Kiln Owners Association* (supra) the validity of a notification issued under Section 128(1)(ii) of the U.P. Municipalities Act, 1916 in respect of Agra Municipal Board imposing a tax on brick manufacturers at the rate of 14 annas per thousand bricks was considered by this Court and it was held that any such notification must conform and fulfil the requirement of the ceiling fixed by Article 276(2) of the Constitution.

In view of Article 276, it has to be held that no law of legislature of a State relating to imposition of taxes for the benefit of the State or of a municipality, district board, local board, or other local authority therein in respect of professions, trades, callings shall be valid, if it provides the total amount payable in respect of any one person to the State or to any one municipality, district board, local board, or other local authority in the State, exceeding the limit fixed by Article 276(2) of the Constitution.

Now the question which is to be answered is whether the ceiling prescribed by Article 276(2) of the Constitution shall also be applicable to Board which has been established under the Cantonments Act. It need not be pointed out that the Board has been established under Cantonments Act which is a Central Act. So far Article 276 is concerned, it relates to the power of the legislature of a State to make law for the benefit of the State or of a municipality, district board, local board or other local

A authority in respect of taxes on professions, trades, callings saying that it shall not be invalid on the ground that it relates to tax on income. But at the same time, by Article 276(2) a ceiling has been fixed in respect of the amount payable to the State, or anyone municipality, district board, local board or other local authority in the State. This was necessary because the power to tax on income has been provided under Entry No. 82 of List I in the Seventh Schedule and only Parliament can enact a law in respect thereof. The State legislature cannot make a law in respect of taxes on the income of individuals within the State. It can be said that Article 276 of the Constitution within a prescribed limit, enables the legislature of a State to make law for imposition of taxes on income for the benefit of the State or municipality, district board, local board or other local authority from professions, trades, callings saying that such law shall not be invalid on the ground that it relates to a tax on income.

So far the Board is concerned which has been established under the Cantonments Act, has issued the impugned notification in exercise of the power under Section 60 of the Cantonments Act. As such the said notification shall not be deemed to have been issued exercise of power under a law enacted by the legislature of the State for the objects mentioned in Article 276. To that extent, we are not in agreement with the opinion expressed by the learned Judge of the High Court. Whether the provisions of Article 276 shall be applicable has to be examined by construing the scope of Section 60 of the Cantonments Act. Section 60 of the Cantonments Act, prescribes two conditions for imposition of tax by the Board. Firstly, that there must be a previous sanction of the Central Government and secondly that only such tax can be imposed within any cantonment which under any enactment for the time being in force may be imposed in any municipality in the State wherein such cantonment is situated. The framers of the Cantonment Act did not desire to delegate and authorise the Board to impose any tax. The power of the Board to impose a tax was circumscribed by prescribing a limitation that the Board may impose in the cantonment any tax which under any enactment for the time being in force, may be imposed in any municipality in the State wherein such cantonment is situated.

Section 128(1)(ii) of the U.P. Municipalities Act, 1916 provides :

"A tax on trades and callings carried on within the municipal limits

and deriving special advantages from, or imposing special burdens on, municipal services." A

In exercise of power under Section 128(1)(ii), the Municipal Board of any municipality within the State of Uttar Pradesh could impose a tax on trades and callings carried on within the municipal limits. Therefore, any Board within the State of U.P. can also impose such tax within the cantonment area because of Section 60 of the Cantonments Act. In view of the clear and unambiguous provision of Section 60, the learned counsel appearing for the appellant-Board did not contest this position. But according to him, it does not mean, that Board is also bound by the rates of the taxes so imposed by the municipality or the local board within that State. It can prescribed its own rates of taxes on the trades and callings. According to us, it is difficult to accept this contention. If the framers of the Constitution did not give this liberty and latitude to the legislature of a State in respect of taxes on professions, trades or callings for benefit of the State or municipality, district board, local board or other authority under Article 276 of the Constitution, how an unlimited power so far the rate of tax is concerned, can be conceded in favour of the Board which is a creature and authority established under the Cantonments Act? When Section 60 links the power to impose tax with any enactment for the time being in force in respect of any municipality in the State where the cantonment is situated, then it shall be deemed that it has also prescribed the limit of the ceiling of such tax with reference to the said enactment in force in respect of any municipality in that State. If it is held otherwise, it will lead to an anomalous position, so far the nature of tax is concerned, because of Section 60 the power of the Board is circumscribed with reference to any enactment for the time being in force in respect of municipality in that State whereas so far the rate of such tax which is more vital, has been left to the discretion of the Board. B C D E F

On behalf of the appellant-Board it was pointed out that the Board cannot exercise arbitrary power under Section 60 because any such tax including the rate thereof, has to be first sanctioned by the Central Government. According to us, because of Article 276 if the State legislature cannot tax on professions trades or callings for the benefit of the State, municipality, district board, local board or other local authority, beyond the limit prescribed by Article 276(2) as it amounts to tax on income, then how it can be held that the Board has unlimited power without any ceiling G H

A to tax on professions, trades or callings being carried on within the cantonment area? When Section 60 provides that Board may with Previous sanction of the Central Government impose in any cantonment any tax which under any enactment for the time being in force may be imposed in any municipality in the State wherein such cantonment is situated, such B restriction shall not be only in respect of the nature of the tax, but also in respect of the ceiling on rates prescribed under the enactment, relating to the municipality.

On behalf of the appellant, reference was made to the judgment of Allahabad High Court in the case of *M/s. Punjab Lime and Lime-stone Co., Dehradun* v. *Cantonment Board, Dehradun and Another,* AIR (1967) Al- C lahabad 15. A learned Judge in connection with Section 60 of the Cantonments Act said :

> "Section 60 of the Cantonments Act nowhere says that Cantonment Boards can levy taxes which can be levied by municipalities D subject to the same limitations. It simply provides that the taxes which are realisable by Municipal Boards are also realisable by Cantonment Boards. This does not mean that the limitations on the powers of Municipal Boards to levy their taxes must also be applied to taxes levied by Cantonment Boards."

E

A contrary view was expressed in the case of *Madan Lal* v. *Cantonment Board, Mathura,* (1978) All L.J. 1147 by a learned Judge of the same High Court saying that Cantonment Board while imposing a tax on per thousand of bricks must fix the maximum limit which does not contravene the provisions of Article 276 of the Constitution. A Division Bench of F Rajasthan High Court in the case of *Narain and Another* v. *Cantonment Board, Nasirabad,* AIR (1963) Rajasthan 190 said :

> "Considering section 60 of the Act, we may point out that the legislature empowering the respondent to levy and collect taxes used the word "impose only and evidently, therefore, the terms G should be taken to have been used in a wider sense. Besides the object and purport underlying section 60 appears to be that the taxes to be imposed by the respondent (Cantonment Board) should be consistent with and should conform to the State laws relating to imposition of taxes by the local authorities. Section 60 further H does not refer to State laws in force at a particular point of time

but the State laws generally as might be from time to time have been referred to. It will be hardly in keeping with the object and policy underlying section 60 that the respondent should be permitted to continue taxes in contravention of State laws. The term "impose" should, therefore, be taken to have been used in wider sense in section 60 and that being so, the respondent cannot collect taxes in contravention of State laws." A B

In the case of *Hira Lal and Another* v. *Union of India and Another,* (1972) Tax L.R. 2051, the Himachal Pradesh High Court has also come to the conclusion that under Section 60 of the Cantonments Act, while imposing a profession tax, Article 276(2) of the Constitution cannot be violated.

Accordingly, the appeals fail and are dismissed. There shall be no order as to costs. C

V.S.S. Appeals dismissed.

A K.C.P. LIMITED

v.

THE PRESIDING OFFICER AND ORS.

SEPTEMBER 12, 1996

B [A.M. AHMADI, CJ., S.B. MAJMUDAR AND B.N. KIRPAL, JJ.]

Labour Law :

Industrial Disputes Act, 1947 : Sections 2(k) & (p), 2-A and 18(1).

C *Settlement—Otherwise than in conciliation proceedings—Dispute between employer company and workmen—Resulted in dismissal of certain workmen—Sole recognised and representative trade union participated in conciliation proceedings on behalf of all workmen including the dismissed ones who continued to be members of trade union—Conciliation proceedings* D *ultimately failed—Pursuant to which industrial dispute raised under S. 2(k)—No industrial dispute raised under S. 2-A by dismissed workmen—During pendency of dispute before Labour Court, the said trade union and employer arrived at settlement—Option either to accept reinstatement with continuity in service without back wages or accept a specified lumpsum amount with other monetary benefits—Some dismissed workmen did not* E *approve settlement—But trade union entered into settlement on behalf of all dismissed workmen including the dissenting ones—However, Labour Court declined to pass award in terms of settlement—Held : settlement was not ex facie, unjust or unfair—Therefore, it was binding even on such dismissed workmen who did not approve the settlement—Hence, Labour Court should* F *have passed an award in terms of settlement and should not have continued the industrial dispute in relation to dismissed workmen who did not approve settlement.*

*Settlement—Otherwise than in conciliation proceedings—Certain dis-*G *pute between employer company and workmen led to go slow, strike and lock out—Disciplinary action against 29 workmen for various acts of misconduct resulted in their dismissal—Subsequently, settlement arrived at between employer and trade union—Option either to accept reinstatement with continuity in service without back wages or accept a specified lumpsum amount with other monetary benefits—All striking workmen other than dismissed ones* H *reinstated without back wages—Held : In the circumstances of the case, the*

terms of settlement relating to proposed reinstatement of dismissed workmen without back wages neither unfair nor unjust. A

The appellant-Company had an Engineering Unit where it manufactured machinery and employed about 500 workmen. Respondent No. 2 was the only recognised and a representative trade union of all the workmen in the said establishment. Certain disputes between the appellant and the B workmen led to go slow, strike and lock out declared by the appellant-Company. Disciplinary action against 29 workmen for various acts of misconduct resulted in their dismissal. The respondent No. 2-trade union participated in the concilation proceedings on behalf of all workmen including the dismissed ones, which ultimately failed. An industrial dis- C pute under Section 2(k) of the Industrial Disputes Act, 1947 was raised by the respondent No. 2-trade union on behalf of the said 29 workmen. However, none of the said 29 workmen raised industrial dispute in their individual capacity under Section 2-A of the Act.

During the pendency of the said industrial dispute before the Labour D Court the said trade union entered into a settlement with the appellant-Company under Section 18(1) of the Act otherwise than in the course of conciliation proceedings on behalf of all the said 29 dismissed workmen giving option to either accept reinstatement with continuity of service without back wages or accept a specified lumpsum amount with other E monetary benefits. However, 12 workmen out of the said 29 workmen did not accept the aforesaid settlement. The Labour Court declined to pass an award in terms of the settlement on the ground that the 12 workmen had not approved the settlement and industrial dispute in respect of them would continue and proceed further. However, out of the said 29 workmen, F 17 workmen had agreed to abide by the terms of the settlement and were reinstated in exercise of their option. The 12 workmen were members of the respondent No. 2-trade union who were acting on their behalf and still continued to be members of the union.

The appellant-Company filed a writ petition before the High Court G challenging the decision of the Labour Court to continue the dispute in connection with the said 12 workmen. The High Court dismissed the writ petition. Hence this appeal.

On behalf of the appellant-Company it was contended that when respondent No. 2-Union had espoused the cause of all the 29 dismissed H

A workmen, and the reference was made under Section 2(k) of the Act, the union which represented all the workmen including the said 12 workmen was entitled to act on behalf of all of them and enter into a settlement; and that under these circumstances individual workmen had no independent right to contest their dismissal orders and were bound by the settlement which was not in any way *ex facie*, unfair or unjust.

B

Allowing the appeal, this Court

HELD : 1.1. The settlement arrived at by the respondent No. 2-union with the appellant-company was not in the course of conciliation proceed-
C ings. Therefore, it would be binding under Section 18(1) of the Industrial Disputes Act, 1947 to the parties to the agreement, namely, the appellant-company on the one hand and respondent No. 2-union representing all the 29 dismissed employees, who were its members and on whose behalf it had raised the industrial dispute under Section 2(k) of the Act, on the other. The
D settlement was duly signed by both the parties. Under these circumstances, respondent Nos. 3 to 14 (in all 12 workmen) also would be ordinarily bound by this settlement entered into by their representative union with the company unless it is shown that the said settlement was *ex-facie*, unfair unjust or *malafide*. No. such case could be even alleged much less made out by the dissenting respondent Nos. 3 to 14 before the trial court. The entire in-
E dustrial dispute was raised by respondent No. 2-union on behalf of all the 29 dismissed workmen and as it was not an industrial dispute covered by Section 2A of the Act whereunder individual dismissed workman could come in the arena of contest, it could not be held, as wrongly assumed by the Labour Court that this settlement was not entered into under Section 18(1)
F of the Act by these dissenting workmen when the respondent-union did represent them from beginning to end and is still representing them as they are members of the union at present. The terms of the settlement cannot be considered to be in any way *ex-facie*, unjust or unfair and that the said settlement consequently must be held to be binding on these contesting workmen also. Hence, the entire industrial dispute should have been dis-
G posed of in the light of this settlement and an award in terms of the settlement should have been passed by the first respondent-court in the case of respondents 3 to 14 also. [157-C-D; 157-F-H]

Ram Prasad Vishwakarma v. *The Chairman, Industrial Tribunal,*
H [1961] 3 SCR 196; *Herbertsons Ltd.* v. *The Workmen of Herbertsons Ltd. &*

Ors., **AIR (1977) SC 322 and** *Baruni Refinery Pragatisheel Sharmik Parishad* **v.** *Indian Oil Corporation,* **[1991] 1 SCC 4, relied on.** A

1.2. The relief of reinstatement without back wages could not be said to be unreasonable as all other workmen also lost their back wages only because they they supported the cause of these 29 colleagues of theirs and hence there was no reason why the workmen who indulged in the acts of misconduct and who were also to be taken in service should not also lose, their wages. Relief of reinstatement was made available to respondents 3 to 14 on the same line as it was made available to their 17 remaining colleagues who were covered by the very same settlement and who accepted the same. Such a package deal entered into by respondent No. 2 in the best interest of these workmen could not be said to be unfair or unjust from any angle. On the contrary, if the back wages were given to them, then the remaining workmen against whom there was no disciplinary action or any alleged misconduct and who had also lost wages only because they were in sympathy with these 29 dismissed workmen would have stood discriminated against. Consequently, it is not possible to agree with the contention of the respondent Nos. 3 to 14 that the said settlement was in any way unfair or unjust. [162-F-H; 163-A; B] B C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11944 of 1996. E

From the Judgment and Order dated 4.4.95 of the Madras High Court in W.A. No. 1186 of 1993.

N.B. Shetye, V. Balaji and A.T.M. Sampath for the Appellant.

V.G. Pragasam, M.A. Krishnamoorthy and M.A. Chinnasamy for the Respondents. F

The Judgment of the Court was delivered by

S.B. MAJMUDAR, J. Leave granted. G

This appeal by special leave arises out of the judgment and order dated 4th April, 1995 of the High Court of Judicature at Madras in Writ Appeal No. 1186 of 1993. A Division Bench of the High Court dismissed the appeal of the appellant company and confirmed the judgment and order of the learned Single Judge in writ petition No. 611 of 1993 dismiss- H

A ing the same.

A few relevant facts leading to this appeal deserve to be noted at the outset. The appellant is having an Engineering Unit at Tiruvottiyur, Madras where it manufactures machinery for sugar, cement and allied industries and employs about 500 workmen. Respondent No. 2 is the only recognised B and a representative union of all the workmen working in the said establishment. In the past all industrial disputes were settled by the appellant company on the basis of long time settlements entered into with the 2nd respondent union, the last of which was dated December 30, 1991.

C In September, 1990 when the issue of bonus for the financial year 1989-90 was under consideration the workmen at the instance of 2nd respondent union resorted to go slow insisting the appellant to pay more bonus even though as contended by the appellant under the provisions of the Payment of Bonus Act only minimum bonus of 8.33% of the earned wages was payable for the financial year 1989-90. The go slow resorted to D by the workmen resulted in total stoppage of work and an alleged illegal strike on and from October 26, 1990. It is the case of the appellant that in view of the deteriorating situation and with a view to protect personal security of the Supervisory and Managerial staff, it had to declare a lock out on October 30, 1990. The appellant also chargesheeted 29 workmen E including respondents 3 to 14 herein on November 5, 1990 for various acts of misconduct allegedly committed by them between September 25, 1990 and October 29, 1990 when the workmen had resorted to go slow and other alleged violent acts of misconduct.

The explanation given by 29 workmen having not been found satis- F factory the appellant decided to hold inquiry into the charges involved against the said 29 workmen. Inquiries were conducted by the two retired District Judges and during the inquiries all the 29 workmen participated in the inquiry proceedings which continued from January 8, 1991 to August 21, 1992.

G On October 31, 1990 the Government of Tamil Nadu intervened and initiated conciliation proceedings to bring about settlement in respect of the pending disputes including lock out. As no settlement could take place during conciliation proceedings, the Conciliation Officer submitted report to the Appropriate Government on April 9, 1991. On May 7, 1991 the H Government of Tamil Nadu issued three different orders referring certain

industrial disputes for adjudication. G.O. No. 485 was in respect of revision of scale of pay, revision of dearness allowance, revision of house rent allowance etc. By G.O. No. 486 the Government of Tamil Nadu declined to refer certain disputes such as leave facility, housing scheme, medical facilities etc. for adjudication by giving reasons in the said G.O. No. 486. The third G.O. No. 487 was issued under Section 10-B of the Industrial Disputes Act, 1947 (hereinafter referred to s 'the Act') directing the appellant to lift lock out on or before 13.5.1991 and allow all except 29 workmen to resume work. In the said G.O. No. 487 the appellant was directed to maintain status quo obtaining prior to the date of the lock out in regard to the terms and conditions of service and the appellant was further directed to complete inquiry proceedings against 29 workmen on or before 10.6.1991 and to pay them full wages during the period of disciplinary proceedings. In the said G.O. No. 487 the workmen were directed to maintain normal production which they were giving prior to the date of the High Court order and also to maintain discipline in the factory.

By August 19, 1991 inquiries in respect of all the 29 workmen were completed and on the basis of the findings by the Inquiry Officer and other extenuating circumstances, the 29 workmen were dismissed from service between 23.8.1991 to 1.10.1991.

In a meeting held before the Joint Commissioner of Labour on October 4, 1991 between the appellant and the 2nd respondent, an agreement was reached on the quantum of increase in wages, recoverable advance and issue of bonus for the years 1989-90 and 1990-91. It was further agreed that the issue of non-employment of 29 dismissed workmen would be discussed separately and on that basis all workmen except the said 29 workmen agreed to resume work in a phased manner not later than October 12, 1991 although the lock out was lifted on May 13, 1991.

Subsequently, a settlement was arrived at between the appellant and the 2nd respondent under Section 12(3) of the Act wherein it was agreed that the issue of non-employment of 29 dismissed workmen would be discussed in the proceedings to be initiated by the Joint Labour Commissioner as early as possible. The Joint Labour Commissioner held meetings between January 8, 1992 and March 6, 1992 and as no settlement could be reached report with regard to failure of the conciliation proceedings was submitted to the Government of Tamil Nadu which by order dated

A 13.5.1992 referred the issue of non-employment of 29 workmen for adjudication to the 1st respondent. The said reference was registered as I.D. No. 708 of 1992 on the file of the 1st respondent.

The said industrial dispute was referred for adjudication pursuant to the demand espoused by all the workmen and raised by the 2nd respondent
B union under Section 2(k) of the Act. All the said 29 workmen who were members of the union had also authorised the 2nd respondent to represent them before the Conciliation Officer whereafter reference was made to the 1st respondent. None of the said 29 workmen raised industrial dispute in their individual capacity under Section 2A of the Act.

C

It appears that thereafter the appellant company on the one hand and second respondent - union on the other held discussions regarding non-employment of 29 workmen. Ultimately on 7th November, 1992 an understanding was reached between the appellant and the 2nd respondent - union that option would be given to the said 29 workmen either to accept
D reinstatement without backwages or a lumpsum amount of Rs. 75,000 with other monetary benefit may be accepted by the concerned workmen.

Respondent Nos. 3 to 14 (in all 12 workmen) out of these 29 workmen did not accept the proposed settlement and accordingly ad-
E dressed a letter to the Commissioner of Labour on 2nd December, 1992. Thereafter, the 2nd respondent entered into a settlement with the appellant company under Section 18(i) of the Act on behalf of all the 29 workmen whose industrial dispute with regard to non-employment was espoused and raised by it under Section 2(k) of the Act. On 14th December, 1992 a comprehensive settlement was arrived at and signed by the appellant and
F the 2nd respondent - union. Copies of the said settlement were also forwarded to various authorities as contemplated under the provisions of the Act and Rule thereunder.

A joint memorandum signed by respondent No. 2 and the appellant company was filed before the Presiding Officer. First Additional Labour
G Court, Madras, respondent No. 1 herein, before whom the industrial dispute was pending for adjudication. It was requested that an award in terms of the settlement may be passed in the pending industrial dispute reference No. 708 of 1992. However, respondent No. 1, by his order dated 28th December, 1992 declined to make an award in terms of the settlement
H dated 14th December, 1992 on the ground that the respondent Nos. 3 to

14 had not approved the settlement and therefore industrial dispute in respect of these respondents will continue and proceed further. It may be stated that out of the 29 dismissed workmen in connection with whose dismissal, respondent No. 2 - union had raised the industrial dispute under Section 2(k) of the Act., 17 workmen had already agreed to abide by the terms of the settlement and had got reinstated in exercise of their option. Only the remaining 12 dismissed workmen, respondent Nos. 3 to 14 herein. proceeded with the dispute and did not agree to the terms of the settlement even though admittedly they were members of the respondent No. 2 - union who was acting on their behalf and even till date they have continued to be the members of the said union.

As the 1st respondent decided to continue the reference in connection with respondent Nos. 3 to 14, the appellant company filed Writ Petition No. 611 of 1993 before the Madras High Court. As seen earlier, the learned Single Judge by his Judgment and order dated 29th September. 1993 dismissed the said Writ petition. The appellant thereafter moved the Division Bench of the High Court in appeal which also got dismissed on 4th April, 1995 and that is how the appellant company has moved this appeal on special leave.

Learned counsel for the appellant company vehemently submitted that when respondent No. 2 - union had espoused the cause of all the 29 dismissed workmen, and the reference was got made by it under Section 2(k) of the Act, the union which represented all the workmen including the dismissed respondents 3 to 14 was entitled to act on behalf of all of them by way of collective bargaining and could legitimately enter into the settlement which was for the benefit of all concerned workmen. Under these circumstances, individual workmen had no independent right to contest their dismissal orders and were bound by the settlement which was not shown by them to be in any way *ex-facie*, unfair or unjust; that it was a package deal entered into by respondent No. 2 - union with the appellant company and in such a collective industrial bargaining there was always give and take; that there were no exceptional grounds for rejecting such a settlement which was for the benefit of all concerned workmen and the Labour Court ought to have acted upon the same. Consequently, the order of the Labour Court refusing to act upon the said settlement so far as respondent Nos. 3 to 14 are concerned, was patently erroneous in law and hence, the order of the learned Single Judge of the High Court confirming

A such order of respondent No. 1 and further order of the Division Bench also equally suffered from patent errors of law. In support of these submissions, various decisions of this Court were cited to which we will refer a little later.

B Learned counsel for respondent Nos. 3 to 14 on the other hand submitted that though these respondents were admittedly members of the respondent - union, they had not accepted the terms of the settlement and the said settlement was not binding on them; that in fact, according to the learned counsel, a settlement was arrived at by respondent No. 2 - union not on behalf of these contesting workmen but only for the remaining 17 C workmen who had accepted the settlement by giving it in writing to the President of respondent No. 2 - union. He also tried to submit that in any case, the settlement was not fair and just as the workmen were required to give up all the back wages even though they were given reinstatement with continuity of service and they were further required to give a letter in writing to the Management stating that they would acquit themselves in an D orderly manner and would assure that they would not give a room for any misconduct and disciplinary action in future. It was submitted that under these circumstances the contesting respondents were entitled to insist that their dispute should be adjudicated on merits by the Labour Court.

E Having given our anxious consideration to these rival submissions, we find that the terms of the settlement cannot be considered to be in any way *ex-facie*, unjust or unfair and that the said settlement consequently must be held to be binding on these contesting workmen also.

F It has to be kept in view that the industrial dispute was raised by respondent No. 2 - union on behalf of all the 29 workmen who were dismissed from service by the appellant company. It was an industrial dispute as defined by Section 2(k) of the Act raised by the union on behalf of its members. Respondent Nos. 3 to 14 were at the relevant time, members of the union and even till date they continue to be the members G of the sponsoring union. This was not a reference raised by a dismissed employee as per Section 2A of the Act. Consequently, as per Section 36 of the Act, it was respondent No. 2 union which was incharge of the proceedings and could represent all the 29 dismissed workmen on whose behalf the dispute was raised by it. When the said union having considered H the *pros and cons* of the situation, entered into the settlement on behalf of

all the workmen for whom it had taken cudgels unless the said settlement was found to *ex- facie*, unjust or unfair it could not be gone behind by these respondents who can be said to be parties to the same through their representative union - respondent No. 2. In this connection a reference is also required to be made to Section 18(1) of the Act which lays down as under : A B

> "A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement."

It is not in dispute that the settlement arrived at by respondent No. 2 - union with the appellant company was not in the course of conciliation proceedings. Therefore, it would be binding to the parties to the agreement, namely, the appellant company on the one hand and respondent No. 2 - union representing all the 29 dismissed employees, who were its members and on whose behalf it had raised the industrial dispute under Section 2(k) of the Act, on the other. C D

Section 2(p) of the Act defines a settlement to mean a settlement arrived at in the course of conciliation proceedings and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceedings where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorised in this behalf by the appropriate Government and the Conciliation Officer. E

It is also not in dispute that parties to the settlement were the appellant company on the one hand and respondent No. 2 - union on the other, which acted on behalf of all the 29 dismissed workmen for whom reference was pending in the Labour Court. It was duly signed by both these parties. Under these circumstances, respondent Nos. 3 to 14 also would be ordinarily bound by this settlement entered into by their representative union with the company it is shown that the said settlement was, *ex-facie*, unfair, unjust or *malafide*. No such case could be even alleged much less made out by the dissenting respondent Nos. 3 to 14 before the trial court. It is interesting to note that before the Labour Court the only argument put forward on behalf of respondent Nos. 3 to F G H

A 14 was that they were not parties to the settlement and therefore, it was not binding on them. Once it is kept in view that the entire industrial dispute was raised by respondent No. 2 union on behalf of all the 29 dismissed workmen and as it was not an industrial dispute covered by Section 2A whereunder individual dismissed workman could come in the
B arena of contest, it could not be held, as wrongly assumed by the Labour Court that this settlement was not entered into under Section 18(1) of the Act by these dissenting workmen when the respondent - union did represent them from beginning to end and is still representing them as they are members of the union even at present. In the case of *Ram Prasad*
C *Vishwakarma* v. *The Chairman, Industrial Tribunal,* [1961] 3 SCR 196 a Bench of three Hon'ble Judges of this Court had an occasion to consider the effect of a settlement entered into by the union of workmen which had espoused the cause of its members by raising an industrial dispute under Section 2(k) of the Act and the further question whether under
D these circumstances an individual workman had any independent *locus standi* in proceedings before the reference court. Rejecting the contention on behalf of the individual workman, it was observed by Das Gupta., J. speaking for the Court that the concerned workman was not entitled to separate representation when already represented by the Secretary of the
E union which espoused his cause. A dispute between an individual workman and an employer cannot be an industrial dispute as defined in Section 2(k) of the Act unless it is taken up by a union of workmen or by a considerable number of workmen. When an individual workman becomes a party to a dispute under the Act he is a party, not inde-
F pendently of the union which has espoused his cause. It was further observed that although no general rule can be laid down in the matter, the ordinary rule should be that representation by an officer of the trade union should continue throughout the proceedings in the absence of exceptional circumstances justifying other representation of the workman concerned.

G

It is true that the said decision was rendered prior to the insertion of Section 2-A in the Act by which individual workmen were also given a fight to raise industrial dispute in case of discharge, dismissal or retrenchment or otherwise termination of service. It is also true that the present
H controversy has arisen after the coming into operation of Section 2-A but

as noted earlier the industrial dispute raised for 29 dismissed workmen was raised by the union - respondent No. 2 under Section 2(k) of the Act and there was no reference under Section 2-A of the Act, so far as respondent nos. 3 to 14 are concerned.

In the case of *Herbertsons Ltd.* v. *The Workmen of Herbertsons Ltd. and Ors.*, AIR (1977) SC 322 another Bench of three learned Judges of this Court considered the effect of a settlement arrived at by recognised union of majority of workers pending appeal to Supreme Court. It was observed by Goswami, J., speaking for the Court that when a recognised union negotiates with an employer the workers as individuals do not come into the picture. It is not necessary that each individual worker should know the implications of the settlement since a recognised union, which is expected to protect the legitimate interests of labour enters into a settlement in the best interests of labour. This would be the normal rule. There may be exceptional cases where there may be allegations of *mala fides*, fraud or even corruption or other inducements. But in the absence of such allegations a settlement in the course of collective bargaining is entitled to due weight and consideration.

In connection with the justness and fairness of the settlement it was observed that this has to be considered in the light of the conditions that were in force at the time of the reference. When, therefore, negotiations take place which have to be encouraged. particularly between labour and employer in the interest of industrial peace and well-being, there is always give and take. The settlement has to be taken as a package deal and when labour has gained in the matter of wages and if there is some reduction in the matter of dearness allowance so far as the award is concerned, it cannot be said that the settlement as a whole is unfair and unjust. It was further observed that it is not possible to scan the settlement in bits and pieces and hold some parts good and acceptable and others bad. Unless it can be demonstrated that the objectionable portion is such that it completely outweights all the other advantages gained the Court will be slow to hold a settlement as unfair and unjust. The settlement has to be accepted or rejected as a whole.

It has to be kept in view that under the Scheme of labour legislations like the Act in the present case, collective bargaining and the principle of industrial democracy permiate the relations between the management on

A the one hand and the union which resorts to collective bargaining on behalf of its members- workmen with the management on the other. Such a collective bargaining which may result in just and fair settlement would always be beneficial to the management as well as to the body of workmen and society at large as there would be industrial peace and tranquility pursuant to such settlement and which would avoid unnecessary social strife and tribulation on the one hand and promote industrial and commercial development on the other hand. Keeping in view the aforesaid salient features of the Act the settlement which is sought to be impugned has to be scanned and scrutinised. Settlement of labour disputes by direct negotiation and collective bargaining is always to be preferred for it is the best guarantee of industrial peace which is the aim of all legislations for settlement of labour disputes. In order to bring about such a settlement more easily and to make it more workable and effective it may not be always possible or necessary that such a settlement is arrived at in the course of conciliation proceedings which may be the first step towards resolving the industrial dispute which may be lingering between the employers and their workmen represented by their unions but even if at that stage such settlement does not take place and the industrial dispute gets referred for adjudication, even pending such disputes, the parties can arrive at amicable settlement which may be binding to the parties to the settlement unlike settlement arrived at during conciliation proceedings which may be binding not only to the parties to the settlement but even to the entire labour force working in the concerned organisation even though they may not be members of the union which might have entered into settlement during conciliation proceedings. The difference between the settlement arrived at under the Act during conciliation proceedings by parties and the settlement arrived at otherwise than during conciliation proceedings has been succinctly brought out by the decision of this Court in *Barauni Refinery Pragatisheel Shramik Parishad Etc. Etc.* v. *Indian Oil Corporation Ltd. Etc. Etc.*, [1991] 1 SCC 4 wherein Ahmadi, J. (as His Lordship then was) spoke for the Court to the following effect :

> "Settlements are divided into two categories, namely, (i) those arrived at outside the conciliation proceedings [Section 18(i)] and (ii) those arrived at in the course of conciliation proceedings Section 18(3). A settlement which belongs to the first category has limited application in that it merely binds the parties to the agreement. But a settlement arrived at in the course of conciliation

proceedings with a recognised majority union has extended application as it will be binding on all workmen of the establishment, even those who belong to the minority union which had objected to the same. To that extent it departs from the ordinary law of contract. The object obviously is to uphold the sanctity of settlements reached with the active assistance of the Conciliation Officer and to discourage an individual employee or a minority union from scuttling the settlement. There is an underlying assumption that a settlement reached with the help of the Concilition Officer must be fair and reasonable and can, therefore, safely be made binding not only on the workmen belonging to the union signing the settlement but also on the others. That is why a settlement arrived at in the course of conciliation proceedings is put *on par* with an award made by an adjudicatory authority.'

As in the present case the settlement arrived at between the parties was not during conciliation proceedings, it would remain binding to parties to the settlement as per Section 18(1) of the Act. But as we have seen above, respondent No. 2 union while entering into that settlement acted on behalf of all the 29 dismissed workmen who were its members including the present respondent nos. 3 to 14 who are also its members as noted earlier. We have also seen earlier that the Labour Court had erred in taking the view that respondents 3 to 14 were not parties to the said settlement as individually they had no *locus standi* and they were represented by their union respondent no. 2 which had signed the settlement on behalf of its members for whom the dispute was raised by the union. Nothing could be alleged by respondents 3 to 14 to the effect that the said settlement was in any way unjust or unfair or was a *mala fide* one. There were no exceptional circumstances to reject this settlement qua even the contesting respondents. However, as learned counsel for the respondent-workmen tried to faintly suggest to that effect we have carefully gone through the circumstances which are brought on record which had led to the settlement. It may be noted that about 500 workmen had gone on strike and that had resulted in the lock-out by the appellant company and ultimately disciplinary action was initiated against 29 workmen who had indulged into various acts of misconduct. It is for these 29 workmen who were ultimately dismissed from service that the respondent-union had raised a dispute under Section 2(k) of the Act on their behalf. Earlier the remaining workmen had gone on

A strike for nearly 5 months Ultimately. the strike was withdrawn; lock-out was lifted and broad understanding was reached between the appellant company and the workmen represented by their union whereby it was agreed that 29 workmen, who were dismissed, would be either given Rs. 75,000 as compensation or reinstatement with continuity of service without
B back wages and the concerned workmen should express apology for misconduct and also assure good conduct in future.

Out of 29 workmen for whom the industrial dispute was raised 17 workmen agreed and accepted this settlement and joined the service
C Remaining 12 workmen (respondent Nos. 3 to 14) have not agreed to the said settlement. It is under these circumstances that the settlement arrived at by the union on behalf of all of them has to be scrutinised. It has clearly transpired on the record of this case that all the 500 workmen excluding 29 dismissed workmen had espoused the cause of these dismissed workmen and had struck the work. Ultimately, when they were reinstated in service
D leaving aside the 29 workmen for whom industrial dispute lingered on, all the remaining workmen lost their wages from 20.10.1990 to 12.5.1991 and also from 13.5.1991 to 6.10.1991. They lost their wages because they were expressing sympathy for their 29 colleagues who were facing disciplinary action and even for these 29 workmen respondent no. 2 union entered into
E a settlement so that they could be reinstated in service with continuity of service or could walk out from service with Rs. 75,000 and other monetary benefits. All that was agreed to by the union as a condition for reinstatement was that the workmen would give up back wages and had to sign a written undertaking to behave properly in future. In our view there was
F nothing unreasonable or unfair in these terms of settlement. The relief of reinstatement without back wages could not be said to be unreasonable as for nearly 12 months all the other workmen lost their back wages only because they supported the cause of these 29 colleagues of theirs and hence there was no reason why the workmen who indulged in the acts of misconduct and who were also to be taken in service should not lose their wages
G for 12 months. Relief of reinstatement was made available to respondents 3 to 14 on the same line as it was made available to their 17 remaining colleagues who were covered by the very same settlement and who accepted the relief of settlement without back wages or a lumpsum compensation of Rs. 75,000 and other monetary benefits in lieu of that. In our view
H such a package deal entered into by respondent no. 2 in the best interest

of these workmen could not be said to be unfair or unjust from any angle. On the contrary, it the back wages were given to them, then the remaining workmen against whom there was no disciplinary action or any alleged misconduct and who had also lost wages for 12 months only because they were in sympathy with these 29 dismissed workmen would have stood discriminated against. Consequently, it is not possible to agree with the learned counsel for respondent nos. 3 to 14 that the said settlement was in any way unfair or unjust. Once this conclusion is reached it is obvious that the entire industrial dispute should have been disposed of in the light of this settlement and an award in terms of the settlement should have been passed by the first respondent-court in the case of respondents 3 to 14 also. Consequently, the judgment and order of the Division Bench of the High Court dated 4th April, 1995 and the order of learned Single Judge dated 29th September, 1993 are quashed and set aside. The writ petition filed by the appellant company will stand allowed with a direction to the first respondent-Labour Court to pass award in terms of the settlement dated 14th December, 1992 by treating it to be binding to respondent nos. 3 to 14 also.

Learned counsel for these respondents ultimately submitted that the time during which the concerned workmen had to exercise their option as per the terms of the settlement is now over and the appellant company may not make available the said option to them. His apprehension on behalf of the respondents was set at rest by learned counsel for the appellant company who stated that the appellant company is willing to make available the option to these respondent nos. 3 to 14 to either accept reinstatement with continuity of service without back wages on their executing the writing as per the said settlement or to be paid Rs. 75,000 each in addition to gratuity as per the payment of Gratuity Act, wages for unavailed leave and bonus, if any payable.

In view of this fair stand taken by the appellant company it is directed that if the respondent nos. 3 to 14 exercise their option as per the procedure laid down in the settlement dated 14th December 1992 either to get reinstatement without back wages for the period of non-employment and with continuity of service or to accept a lumpsum monetary compensation as laid down in the settlement within a period of 8 weeks from today, the appellant company will act upon the said option exercised by the said workmen and shall give appropriate benefit of the option as per the

A settlement to the concerned workmen. As the period of lumpsum payment of Rs. 75,000 by instalments (as laid down by the settlement) is already over, it is directed that if any of the concerned workmen-respondents 3 to 14 exercises the option of receiving the lumpsum amount of Rs. 75,000 in lieu of the reinstatement, a sum of Rs. 40,000 out of the said amount shall be paid to the concerned workmen within 15 days of the exercises of such option and the balance of the Rs. 35,000 with other monetary benefits as indicated in the settlement shall be paid to the concerned workmen within a further period of 2 months thereafter.

B

The appeal is allowed in the aforesaid terms. In the facts and circumstances of the case, there shall be no order as to costs.

C

V.S.S. Appeal allowed.

AKHIL BHARTIYA SOSHIT KARAMCHARI SANGH, THROUGH ITS SECRETARY AND ANR.

v.

UNION OF INDIA THROUGH ITS SECRETARY, MINISTRY OF RAILWAYS AND ORS.

SEPTEMBER 12, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Service Law :

Seniority—By the time a senior person belonging to the general category gets promoted to the higher grade if the junior person belonging to a reserved category who had been promoted to still higher grade—Question of granting seniority to the general category candidate in the promoted category could not arise—Roster meant for reserved category candidate followed—No bar for filling up vacancies in the general category even in favour of candidate belonging to reserved category if such candidate is entitled to the same on the basis of his general seniority.

R.K. Sabharwal & Ors. **v.** *State of Punjab & Ors.,* **[1995] 2 SCC 745;** *Union of India & Ors.* **v.** *Virpal Singh Chauhan & Ors.,* **[1995] 6 SCC 684;** *Managing Director ECI Hyderabad & Ors.* **v.** *B. Karunakar & Ors.,* **[1993] 4 SCC 727;** *Union of India* **v.** *Mohd. Ramzan Khan,* **[1991] 1 SCC 580;** *Indian Administrative Service (S.C.S.)* **v.** *Union of India & Ors.,* **[1993] Supp. 1 SCC 730;** *Mohd. Shujat Ali & Ors.* **v.** *Union of India & Ors.,* **[1975] 1 SCR 449;** *Mohd. Bhakar* **v.** *Krishna Reddy,* **(1970) SLR 768;** *State of Mysore* **v.** *G.B. Purohit,* **(1967) SLR 753);** *Ramchandra Shankar Deodhar* **v.** *State of Maharashtra,* **[1974] 1 SCC 317 and** *Syed Khalid Rizvi & Ors.* **v.** *Union of India & Ors.,* **[1993] Supp. 3 SCC 575, relied on.**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 16812 of 1996

From the Judgment and Order dated 30.4.96 of the Central Administrative Tribunal, Allahabad Bench in O.A. No. 304 of of 1992.

Rajeev Dhawan, Manoj Goel and Ms. Abha R. Sharma for the Petitioners.

A The following Order of the Court was delivered :

G.B. PATTANAIK, J. Special Leave Petition was listed before us on 6th September, 1996 and the same was dismissed but it was indicated that the reasoned order will follow and accordingly this order is being passed.

B The question for consideration is whether the Central Administrative Tribunal, Allahabad Bench, committed any error in dismissing the O.As. filed before it on interpretation of the different circulars issued by the Railways and following the constitution Bench decision of this Court in *R.K. Sabharwal's & Ors.* v. *State of Punjab & Ors.,* [1995] 2 SCC 745, on the C question of promotion of a reserved category candidate on the basis of his normal seniority in the cadre from which he is being promoted.

Petitioner Nos. 1 and 2 filed O.A. No. 304 of 1992 challenging the promotion of Shri A.S. Rana, respondent No. 6 to the post of D.S.K.-I D made on 26.2.1991. The case of the petitioners was that petitioner No. 2 joined the Railways as a Jr. Clerk on 4.12.1956 and was promoted as Sr. Clerk on 1.4.1966. He was promoted to D.S.K.-III on 16.10.1978 and further promoted to D.S.K.-II on 24.3.1989. The respondent No. 6 belonging to the reserved category was appointed in the Railways as Jr. Clerk on 30.10.1983 and was promoted as Sr. Clerk on 16.8.1984. He was promoted E as D.S.K.-III on 26.11.1986. The said respondent No. 6 was promoted earlier to petitioner No. 2 to the cadre of D.S.K.-II on 8.10.1987, in view of the post available in the cadre of D.S.K.- II for the reserve category people. When the question of promotion to cadre of D.S.K.-I came up for consideration against the vacancies meant for general category said respon- F dent No. 6 Shri Rana was promoted on 26.2.1991 on the basis of his accelerated seniority, he having taken advantage of accelerated promotion being a member of the reserved category. The petitioner No. 2 filed a representation before the authorities making the grievance that respondent No. 6 could not have been promoted to a post meant for general category and the authorities illegally promoted him. but not being successful therein, G challenged the promotion of respondent No. 6 before the Tribunal. The railway administration filed their counter-affidavit before the Tribunal taking several technical objections regarding the maintainability of the proceedings at the behest of the association. So far as the merits of the case are concerned, it was contended that no doubt respondent No. 6 had H been promoted to the cadre of D.S.K.- III and D.S.K.-II against the

reserved vacancy following the roster but so far as promotion to the cadre of D.S.K.-I is concerned he was considered against a vacant post in the general category on the basis of his normal seniority and ultimately he has been promoted in accordance with the circulars issued by the railway administration and in accordance with the law laid down by this Court in *Sabharwal's* case (supra). The Tribunal following the decisions of this Court in *Sabharwal's* case as well as *Virpal Singh Chauhan's* case rejected the application on the conclusion that the alleged promotion of respondent No. 6 was much prior to the decision of this Court in *Sabharwal's* case in the year 1995 and promotion already made cannot be interfered.

Dr. Rajiv Dhawan appearing for the petitioners, however, vehemently contended that the accelerated promotion of a reserve category candidate cannot confer on him the seniority in the promotion cadre and therefore the impugned promotion of respondent No. 6 made in February, 1991 to the cadre of D.S.K.-I must be held to be invalid and inoperative and Tribunal committed gross error in rejecting the O.A. We find no force in the aforesaid contention. In *Sabharwal's* case this Court was considering the question of promotion and the filling up of the post in the promoted cadre and the implementation of the rosters indicating the reserved point. In explaining legal position this Court held that the "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster but in the event or non-availability of a reserve candidate at the roster point it would be open to the State Government to carry forward the point in a just and fair manner. Having indicated the law as above it was categorically held that the principle should operate only prospectively. In further elaborating the point of computation of the percentage of reservation this Court further held :

> "When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserved categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserved category

A candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition."

In the case of *Union of India & Ors.* v. *Virpal Singh Chauhan & Ors.*, [1995] 6 SCC 684, this Court again considered the case of accelerated promotion and *inter se* seniority between a general and reserve candidate in the promoted category and after considering the several circulars issued by the railway administration, held :

"Hence, the seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position. We have discussed hereinbefore the meaning of the expression 'panel' and held that in case of non-selection posts, no 'panel' is prepared of or is necessary to be prepared. If so, the question arises, what did the circular/letter dated 31.8.1982 mean when it spoke of seniority being governed by the panel position? In our opinion, it should mean the panel prepared by the selecting authority at the time of selection for Grade 'C'. It is the seniority in this panel which must be reflected in each of the higher grades. This means that while the rule of reservation gives accelerated promotion, it does not give the accelerated - or what may be called, the consequential - seniority. There is, however, one situation where this rule my not have any practical relevance. In a given case, it may happen that by the time the senior general candidate gets prompted to the higher grade, the junior reserved category candidate (who was promoted to the said higher grade earlier) may have got promoted to yet higher grade. In other words, by the time the senior general category candidates enters, say, Grade 'B', his junior Scheduled Caste/Scheduled Tribe candidate is promoted to Grade 'A'. It is obvious that in such a case, the rule evolved in the aforesaid circulars does not avail the senior general candidate for there can be no question of any seniority as between, say, a person in 'B' grade and a person in 'A' grade."

This Court in *Chauhan's* case accepted the direction in *Sabharwal's* case that appointments according to roster already made prior to the judgment in *Sabharwal's* case are legal and valid. In effect, they were declared legal and valid and direction was given to determine seniority in the light of the principles laid down therein. It was held that when the panel/select list was prepared at the time of making selections for promotion to the selection post it would be that panel and not the panel/select list prepared at the time of appointment to the initial grade that would determine the seniority to the posts. It would obviously apply to future case in accordance with the rule, the subject matter of the interpretation in the judgment in *Chauhan's* case. Therefore, the two judgment became effective from the date of the decision in *Sabharwal's* case. All appointments made prior to that date being legal and valid including right to seniority in

promoted post or cadre, they require to be given effect to.

In *Managing Director, ECIL, Hyderabad & Ors.* v. *B. Karunakar & Ors.,* [1993] 4 SCC 727 the Constitution Bench considered the scope of prospective operation of the judgment and held that as on the date of the judgment the order of dismissal or action taken prior to the date of the judgment, as held in *Union of India* v. *Mohd. Ramzan Khan,* [1991] 1 SCC 580 could not be reopened. The Judgment will be prospective in nature, i.e., it will be operative from the date when it is made; if the copy of the enquiry was not supplied to the delinquent officer, from that date the order or action would get vitiated under Article 311(2) of the Constitution.

In *Indian Administrative Service (S.C.S.)* v. *Union of India & Ors.,* [1993] Supp. 1 SCC 730 at 745-46 in paragraph 14 and 15, a Bench of three Judges had held that there is a distinction between right and interest. No one has a vested right to promotion or seniority, but an officer has an interest to seniority acquired by working out the rules. It could be taken away only by operation of valid law.

In *Mohd. Shujat Ali & Ors.* v. *Union of India & Ors.,* [1975] 1 SCR 449 a Constitution Bench had held a rule which confers a right of actual promotion or a right to be considered for promotion, is a rule prescribing condition of the service. Another Constitution Bench in *Mohd. Bhakar* v. *Krishna Reddy,* (1970) SLR 768 had held that any rule which affects the promotion of a person relates to his condition of service and is not arbitrary or unconstitutional. In *State of Mysore* v. *G.B. Purohit,* (1967) SLR 753, another Bench of three Judges had held that the rule which merely affects chances of promotion cannot he regarded as varying a condition of service. Chances of promotion are not condition of service, which principle was reiterated in another Constitution Bench judgement in *Ramchandra Shankar Deodhar* v. *State of Maharashtra,* [1974] 1 SCC 317. In *Syed Khalid Rizvi & Ors.* v. *Union of India & Ors.,* [1993] Supp. 3 SCC 575, another Bench of three Judges referred with approval and relied on these cases and had held in para 31 at page 602 that no employee has a right to promotion but he has only the right to be considered for promotion according to rules. Chances of promotion are not conditions of service and are defeasible. An illustration was given as regards the *inter se* claim between general candidate and a reserved candidate and their right to seniority in the promotional post. When a reserved candidate was

promoted according to the roster and got promotion to a higher post, it was observed that such a reserved candidate having scaled a march over the senior general candidate to higher service, the senior general candidate in the lower cadre who was subsequently promoted to the higher cadre cannot claim seniority over the reserved candidate.

In *P.S. Ghalaut* v. *State of Haryana & Ors.*, [1995] 5 SCC 625, a Bench of two Judges has held that in fixing *inter se* seniority as per the roster, order of merit prepared by the Public Service Commission gets displaced and the reserved candidate gets seniority over the general candidate in accordance with the roster, though the general candidate has been recommended by the Public Service Commission to be more meritorious. It was held that when the roster is maintained to give effect to the constitutional policy of reservation in respect of places reserved for reserved candidates and fitted the general candidates and reserved candidates according to roster, the changed order of merit invariably gets affected which is not arbitrary or unconstitutional.

Thus by the time a senior person belonging to the general category gets promoted to the higher grade if the junior person belonging to a reserved category who had been promoted to the said higher grade earlier has been promoted to still higher grade, question of granting seniority to the general category candidate in the promoted category could not arise. This being the position, and the promotion of respondent No. 6 to D.S.K.-I having been made as early as in February, 1991 much prior to the judgment of this Court in *Sabharwal's* case as well as *Virpal Singh Chauhan's* case, the Tribunal was wholly justified in rejecting the O.A. filed before it. That apart in a particular cadre after following the roster meant for reserved category candidate, there is absolutely no bar for filling up the vacancies in the general category even in favour of candidate belonging to the reserved category if the said reserved category candidate is entitled to the same on the basis of his general seniority, No materials have been placed before us to hold that the promotion of respondent No 6 was not on the basis of his general seniority in D.S.K.-II. In the aforesaid premises, we find no substance in the contention of Dr. Rajiv Dhawan and the special leave petition must fail.

G.N. Petition dismissed.

A GAJRAJ SINGH ETC.

v.

STATE TRANSPORT APPELLATE TRIBUNAL AND ORS. ETC.

SEPTEMBER 12, 1996

B [K. RAMASWAMY, B.L. HANSARIA AND S.B. MAJMUDAR, JJ.]

Motor Vehicles Act, 1988 : Sections 217(2)(a) & (b) and (4), and 70, 72 and 81.

C *Stage carriage permit—Granted under repealed Act of 1939—Permit valid till commencement of new Act—Permit renewed under new Act which came into force on 1.7.1989—Validity of—Saving under S.217(2)(a) or (b)—Conditions precedent for applicability of—Held : grant of permit under new Act not a vested or accrued right but only a privilege—Provisions of repealed Act inconsistent with those of new Act as regards renewal—Hence,* D *S.217(2)(a) or (b) not attracted—Permit granted under repealed Act stood expired on 1.7.1989 unless application for renewal pending under S.58 of repealed Act—If no application was pending fresh application must be made under S.70 of new Act for grant of permit—S.6 of General Clauses Act applicable.*

E *Stage Carriage Permit—Renewal—Grant of—Nature—Explained.*

Stage Carriage Permit—Scheme approved and published under Chapter IV-A of repealed Act of 1939—Such permits held by named private operators—Scheme continued after commencement of new Act on F *1.7.1989—Held: Scheme was self-contained and self-operative and law by itself and saved by S.217(2)(a)—Rights of such named private operators alone for grant or renewal of their permits preserved—Such a right was not violative of Art. 14 on ground of invidious discrimination—Procedure for grant or renewal of permit laid down—Motor Vehicles Act, 1939, Ss.68-F(1-D) &* G *68-F(1-F).*

General Clauses Act, 1897 : Section 6.

Repeal of Act—Effect of—Held : Obliterated the Act completely from record of Parliament as if it never existed except for transactions past and H *closed.*

Repeal of Act—Followed simultaneously by fresh legislation on same subject—Held : S.6 would be applicable unless new legislation manifested contrary or inconsistent intention—Hence, Court had to ascertain such incompatibility from relevant portions of new Act. A

Interpretation of Statutes : B

Interpretation—Subsidiary rules of—Legal fiction—Meaning and effect of—Explained.

Administrative Law : C

Repealed Act—Right acquired or accrued under—Permit/licence—Grant of renewal of—Held : amounted to fresh grant—Discretion given by Statute—To be exercised on basis of rules of reason and justice and not arbitrarily—Subject to rejection of application for renewal for reasons to be recorded—Hence, right to renewal of permit was not a vested or accrued right but only a privilege—General Clauses Act, 1897, S.6(c). D

The appellant was granted a stage carriage permit on the route under Section 47(3) of the Motor Vehicles Act, 1939 (Repealed Act) for a period of 3 years. The said permit was renewed under Section 81 of the Motor Vehicles Act, 1988 (which came into force on 1.7.1989) for a further period of 5 years and a second renewal was also granted. The respondents had applied under Section 70 of the Act for grant of stage carriage permits under Section 72 of the Act on the route which intersected a part of the route on which the appellant was operating his stage carriage. Despite objections raised by the appellant, the State transport Authority (STA) granted permits to them which were challenged in the revision petition filed under Section 90 of the Act before the State Transport Appellate Tribunal (STAT). The STAT dismissed the revision petition on the ground that the renewal of the permit granted to the appellant was not valid in law as the appellant did not get a new permit under the Act. The High Court dismissed the writ petition filed by the appellant. Hence this appeal. E F G

On behalf of the appellant it was contended that the renewal of the permit of the appellant granted under the Repealed Act was a permit under the Act and its operation was saved by Section 217(2)(a) read with sub-section (4) thereof and Section 6 of the General Clauses Act, 1897; therefore, the second renewal of the permit granted under Section 81 of H

A the Act which was renewable under Section 68-F(1-D) of Chapter IV-A of the Repealed Act was valid in law; that there was no need for the appellant to obtain a fresh permit under the Act as the renewal was a continuation of the original permit which was a vested right; that Section 217(2)(b) of the Act would be applicable only if the permit was inconsistent with the B provisions of the Act in which case the life of the permit granted under the Repealed Act got extended for the balance period of the permit; and that since the appellant was not paid compensation, he was entitled to renewal of permits as a matter of right.

On behalf of the respondents it was contended that the scheme of C the Act was inconsistent with the scheme of operation in the Repealed Act; that the STA or the Regional Transport Authority as the case may be, would be devoid of power and jurisdiction to grant permit under the act; that under Section 217(2)(b) of the Act the permit was valid only for the unexpired period granted under the Repealed Act; that between the dates of application for permit and its grant the Act provided for grant of D temporary permits; that any grant of permit should only be consistent with the provisions of the Act; and that the Repealed Act continued to remain in operation in spite of its express repeal by Section 217(1) of the Act.

Disposing of the appeal, this Court

E

HELD : 1.1. *Ex abundenti cautela* clauses (a) to (e) of Section 217(2) of the Motor Vehicles Act, 1988 elaborate the enumeration of rights. They would apply to specific rights given to an individual upon the happening of one or other of the events specified in the statute. Section 217(2)(a) of the Act gives an elongated operation as regards all transactions, which F being consistent with the provisions of the Act should be deemed to have been issued, made, granted, done or taken under the corresponding provisions of the Act. [198-C-D]

1.2. By operation of Section 217(4) of the Act read with Section 217(2), Section 6 of the General Clauses Act, 1897 (GC Act) steps in and G the proceedings initiated before Motor Vehicles Act, 1939 (the Repealed Act) was repealed, would be continued and concluded under the Act as if the Act was not enacted. However, four things would emerge from its operation. First there must exist a corresponding provision under the Act *pari materia* with the Repealed Act; secondly, that the order or permit H granted must exist and be in operation as on 1.7.1989—the day on which

the Act had come into force; thirdly, it must not be inconsistent with the provisions of the Act; and fourthly some positive acts should have been done before 1.7.1989 to further secure any right. All the four conditions should be satisfied as conditions precedent for application of Section 6 of the GC Act by operation of Section 217(4) and then Section 217(2)(a) steps in and starts operation thereof. [199-B-G]

1.3. This may be angulated from yet another legal perspective, namely, consequences that would flow from the meaning of the word 'renewal' of a permit under Section 81 of the Act. Grant of renewal is a fresh grant though it breaths life into the operation of the previous lease or licence granted as per existing appropriate provisions of the Act, rules of orders or acts *intra vires* or as per the law in operation as on the date of renewal. Grant of renewal under Section 81 is a discretion given to the State Transport Authority (STA) or Regional Transport Authority (RTA) subject to the conditions and the requirement of law. Discretion given by a statute connotes making a choice between competing considerations according to rules of reason and justice and not arbitrary or whim but legal and regular. Sections 70 and 71 read with Section 81 of the Act do indicate that grant of permit or renewal thereof is not a matter of right or course. It is subject of rejection for reasons to be recorded in support thereof. Therefore, right to renewal of a permit under Section 81 is not a vested or accrued right but a privilege to get renewal according to law in operation and after compliance with the pre-conditions and abiding the law. There is a distinction between right acquired or accrued, and privilege, hope and expectation to get a right. A right to apply for renewal and to get a favourable order would not be deemed to be a right accrued unless some positive acts are done, before repeal of the Repealed Act or corresponding law to secure that right of renewal. [199-H; 200-E-H]

Provash Chandra Dalui & Anr. v. *Bishwanath Banerjee & Anr.*, [1989] Supp. 1. SCC 487; *Ambika Quarry Works* v. *State of Gujarat*, [1987] 1 SCC 213; *Rural Litigation and Entitlement Kendra* v. *State of U.P.*, [1989] Supp. 1 SCC 504; *State of M.P. & Ors.* v. *Krishnadas Tikaram*, [1995] Supp. 1 SCC 587 and *Gujarat Electricity Board* v. *Shantilal*, AIR (1969) SC 239 relied on.

Black's Law Dictionary, p.1296 and *P. Ramanatha Aiyar's "The Law Lexicon"* (Reprint Edition 1987), referred to.

2.1. If no action under the Repealed Act was set in motion before

A 1.7.1989, by valid application for renewal of a permit, there was no right acquired or accrued to pursue the remedy under the Act. The privilege to obtain renewal of a permit is not an accrued right. Section 58(2) of the Repealed Act gives, as stated supra, preferential right to a holder of a permit for renewal thereof. Section 71 of the Act gives preferential right in
B favour of State Transport Undertaking (STU) for grant of permit in Chapter V which is not available under the Repealed Act. Therefore, even for grant of a permit or a renewal under Section 72 or 81, the STU is entitled to preferential right over the private citizens. Thereby, the Act manifests intention inconsistent with and incompatible to that in Chapter
C IV of the Repealed Act. Similarly, even on the approved routes under a Scheme framed in Chapter IV-A, an execution has been carved out in the scheme with a *non-obstante* clause in favour of STU, which is a self-operative law by itself. The rights of the existing operators for renewal thereof under Section 68F(ID) under the Repealed Act were saved. But, under the Act, Chapter VI does not speak of renewal of the permits to the private
D operators, though permits were saved in the scheme itself. Chapter VI manifested inconsistency in its operation from the law in Chapter IVA of the Repealed Act. Similarly, other provisions are inconsistent with those in the Repealed Act. Therefore, Section 217(2)(a) would not get attracted, even if it were to apply to grant of permit being a "thing done" as contended
E by the appellant. Let it be said that a permit is preceded by an order granting permit by the concerned RTA or STA, as the case may be, under the Repealed Act. The said order stands merged with the grant of permit and gets exhausted. [202-C-H]

F 2.2. By operations of Section 217(2)(b) of the Act a permit granted under the Repealed Act shall continue to have the same operation under the Act under the same terms and conditions and for the same period, as if the Repealed Act was in operation and as if the Act had not been passed. This is the fiction of law by which, though the Repealed Act was wiped out,
G its operation gets revived. The intention, thereby, appears to be that the Act breaths life into the dead permits etc. and allows full play to the permits granted under the Repealed Act, even if inconsistent, till their period expired by efflux of time. Any other view would tantamount to allowing the Repealed Act to remain in operation in perpetuity simultaneously with the operation of the Act. Both cannot co-exist in the same
H shelter. [203-A]

State of Punjab v. *Mohar Singh*, [1955] 1 SCR 893 and *Universal Imports Agency & Anr.* v. *The Chief Controller of Imports and Exports & Ors.*, [1961] 1 SCR 305, held inapplicable. A

D. Nataraja Mudaliar v. *The State Transport Authority, Madras*, [1978] 4 SCC 290, referred to.

B

2.3. It must, therefore, be held that grant of renewal of the stage carriage permit should necessarily be preceded by a grant of a permit to stage carriage under Section 72, in accordance with the procedure laid down in Sections 70 and 71. This should be made before the expiry of the period prescribed in the permit granted under the Repealed act. Therefore, C for stage carriage permits granted under Chapter IV of the Repealed Act, if they stand to expire or expired after 1-7-1989 without any pending application for renewal having been made under Section 58 as on 1-7-1989, fresh applications under Section 70 should be filed and after consideration under Section 71, permits be obtained as per law under Section 72. If there is any delay to obtain permits pending consideration, by operation of D providing stage carriage service, Section 87 gives power to grant temporary permit without following the procedure laid down in Section 70. The argument of arbitrariness, discrimination or avoidable inconvenience to the holders of permits etc. under the Repealed Act and to the travelling public would be hypothetical and without force. [203-H; 204-A-D]

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Mithilesh Garg & Ors. v. *Union of India & Ors.*, [1992] 1 SCC 168, relied on.

3.1. Section 68F (1D) and Section 68F (1F) of the Repealed Act had prescribed that renewal of the permits granted to the private operators and F STU should be renewed under the scheme; similar provision does not find place in Chapter VI of the Act. Rules do prescribe procedure to apply for renewal by the private operators as well as STU but the rules or procedure do not confer substantive right to renewal of the permits granted under the scheme; when Chapter VI is *Sub silentio*, rules cannot travel beyond the Act. G [205-C-D]

3.2. However, the approved scheme under the Repealed act or in the Act is a self-contained and self-operated scheme. It is a law by itself. The schemes published under the Repealed Act are saved by Section 217(2)(a) of the Act. Therefore, until they are modified or cancelled under Section H

A 102, the scheme should continue to be in operation in the notified area, route or part thereof. The right to apply for and obtain permit in the notified scheme was totally frozen to the private operators giving exclusive right to the STU to apply for and obtain permits to run the stage carriages or additional service under Section 101 of the Act on the notified area, route or a part thereof and none else. With a *non-obstante* clause in Section B 101, the right to apply for and obtain temporary permits under Section 87 by private operators was taken away. There is no need for STU to obtain such permits, as an intimation to concerned RTA of its providing such additional service on special occasions like fair or religious gatherings for conveyance of passangers, is sufficient. Yet the scheme itself saved and C preserved the rights of the named existing operators in respect of overlapping routes in the specified permits, subject to the corridor restrictions of picking up and setting down the passengers *en route* the prescribed prohibited route. They became entitled to run their stage carriages subject to the law. Though, their permits are saved, the named operators being D private operators, the Parliament appear to have thought that there was no necessity to expressly retain in Chapter VI itself their right of renewal as the same was already provided in Section 81 of the Act corresponding to Section 68F(1D) of Chapter IV-A of the Repealed Act. There is no express indication of their rights being taken away under the Act; nor it is so by necessary implication. [206-G-H; 207-A-F]

E

3.3. Thus the rights of the existing named operators saved in the appropriate approved schemes in respect of specified permits were not destroyed. By necessary implication of Section 104, they were saved. they became entitled to avail of their right to apply for grant of permit in F accordance with the procedure prescribed under Sections 70 and 71 and to obtain permit under Section 72, before the expiry of the permit or renewed permit saved under the approved scheme and should obtain permit afresh to ply their stage carriages before expiry of the period mentioned therein; periodical renewals from time to time should be obtained under Section 81 of the Act in accordance with the operation of G the law. The RTA or STA, as the case may be, should consider and may grant permits or renewal of permits as per law or rejection thereof for reasons to be recorded in that behalf. [209-H; 210-A-C]

Krishan Kumar v. *State of Rajasthan & Ors.*, [1991] 4 SCC 258, relied H on.

3.4. The contention that such a construction creates and brings about invidious discrimination offending Article 14 of the Constitution is without force. Section 217(2)(a) read with Section 217(4) of the Act manifest the distinction between acts done or actions taken consistent with the provisions of the repealed Act but inconsistent with the Act. The Act saves only acts done or actions taken etc. which are consistent with the provisions. By implication, all inconsistent acts done or actions taken, except those completed and closed, would not be considered to be done or taken under the Act and consequently could not be operative under the Act. They are obliterated completely from statute as if they never existed except to the extent of limited operation provided in the appropriate clauses in Section 217(2) of the Act. [211-D-E-F]

3.5. Accordingly, the named transport operators whose permits were saved in the relevant scheme shall apply for permits under Sections 70 and 71 and obtain permits afresh under Section 72 of the Act before the expiry of the period mentioned in the permit issued either under Section 47 or Section 48 or renewal under Section 58 or Section 68F (1D) of the Repealed Act. No third party/private operators are entitled to apply for permits on the same notified route or part thereof, nor are they entitled to compete with them for grant of permit, since the right of all other private operators to apply for and operate in the approved notified area, route or a part thereof, has been frozen. The right is reserved only in relation to the named operators and that too for specified permit, and none else. Along with the application under Section 70 filed for grant of permit under Section 72 or renewal under Section 81 made by the named holder of a specified permit in an approved scheme, he should enclose an authenticated copy of the approved scheme, the details of the route on which he was plying his stage carriage with corridor restrictions on over lapping routes. the RTA or STA, as the case may be, should verify the original scheme under which the named operator, whose specified permit was saved, whether he is entitled to ply the stage carriage in the approved scheme with the condition of the corridor restrictions on the notified scheme and if so to what extent. What is the duration of his right saved in the approved scheme? Whether he had plied his stage carriage on complying with the law in force? His right to permit under Section 72 or renewal under Section 81 cannot be higher than the original right saved in the approved scheme. The STU also should be heard in that behalf, in relation to grant of stage carriage permit or renewal thereof, the appropriate authority may grant or reject; in the latter event,

A for reasons to be recorded in support of the rejection. The authorities should consider their applications in accordance with the law and the prescribed procedure and may grant new permits under section 72 and later on before the expiry thereof, to renew it in accordance with the procedure prescribed in Sections 80 and 81, that too, on compliance with law, until the scheme is duly modified or cancelled in accordance with law. This
B right is available exclusively to the named private operators and that too in respect of the specified permits and with same restrictions continued in the scheme and none else and no more. [211-H; 212-A-E]

3.6. Since the appellants had obtained permits by mistake of the law
C and misconception of law on the part of the competent authorities applied under Section 81 and had been granted renewal of their respective permits under Section 81 after 1.7.1989, such grant of renewal of the permits should be treated to be temporary permits under Section 87 of the Act. Therefore, the private operators, be they covered by Chapter V or VI, should apply for and obtain afresh permits before the expiry of the period
D mentioned in their respective permits or renewed for consideration under Section 71 and grant under Section 72 of the permits afresh consistently with Section 2(31) of the Act. Such permit alone would be a permit defined in Section 2(31) of the Act. Therefore, before expiry thereof, they shall apply for and the concerned STA/RTA may grant or refuse renewals of permit
E for reasons to be recorded under Section 81 of the Act. [212-F-H; 213-A]

Secretary, Quilon Distt. Motor Transport Workers' Cooperative Society Ltd. v. *Regional Transport Authority & Ors.*, [1994] Supp. 3 SCC 210, affirmed.

F *M/s. Gurcharan Singh Baldev Singh* v. *Yashwant Singh & Ors.*, [1992] SCC 428, held inapplicable.

Mysore State Road Transport Corporation v. *Mysore State Transport Appellate Tribunal*, [1974] 2 SCC 750; *Adarash Travels Bus Service & Anr.* v. *State of U.P. & Ors.*, [1985] 4 SCC 557; *T.V. Nataraj & Ors.* v. *State of*
G *Karnataka & Ors.*, [1994] 2 SCC 32; *Ram Krishna Verma & Ors.* v. *State of U.P. & Ors.*, [1992] 2 SCC 620 and *Nisar Ahmad & Ors.* v. *State of U.P. & Ors.*, [1994] Supp. 3 SCC 640, referred to.

4.1. Whenever an Act is repealed it must be considered, except as to
H transactions past and closed, as if it had never existed. The effect thereof

is to obliterate the Act completely from the record of the Parliament as if it had never been passed, it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was existing law. Repeal is not a matter of mere form but is of substance depending on the intention of the Legislature. If the intention indicated either expressly or by necessary implication in the subsequent statute was to abrogate or wipe off the former enactment wholly or in part, then it would be a case of total or *pro tanto* repeal. [193-B-C]

India Tobacco Co. Ltd. v. *The Commercial Tax Officer, Bhavanipore & Ors.*, [1975] 3 SCC 512, relied on.

4.2. When there is a repeal and simultaneous re-enactment, Section 6 of the GC Act would be applicable in such cases unless the new legislation manifests intention inconsistent with or contrary to the application of the section. Such incompatibility would have to be ascertained from all relevant provisions of the new Act. Therefore, when the repeal is followed by a fresh legislation on the same subject, the Court would undoubtedly have to look to the provisions of the new act only for the purpose of determining whether the new Act indicates different intention. The object of repeal and re-enactment is to obliterate the Repealed Act and to get rid of certain obsolete matters. [193-D-E]

Bishambhar Nath Kohli & Ors. v. *State of U.P. & Ors.*, AIR (1966) SC 573, relied on.

Crawford's Interpretation of Law (1989), pp. 626, 627, 657; *G.P. Singh: "Principles of Statutory Interpretation"*, (Sixth Edn.), 1996, pp. 413, 418; *Jagdish Swarup : "Legislation and Interpretation "*, (1974) Edn.), p. 539; *Maxwell On the Interpretation of Statutes,* (12th. Edn.) p. 17; *Sutherland Statutory Construction"*, (3rd. Edn.) Vol. 1 paras 2043 to 2045; *Francis Benion's Statutory Interpretation*, (Second Edn.) p. 210 and *Randall : "Cardinal Rules of Legal Interpretation"*, (3rd. Edn.), A.E., 1924, pp. 531-32, referred to.

Brown v. *Mc. Lachian*, (1872), LR. 4 PC 543; *In re Busfield*, (1886) 32 Ch. D 123; *Hume* v. *Somerton*, (1890) 25 QBD 239 and *In re R.*, (1906) 1 Ch. 730, cited.

5. Legal fiction is one which is not an actual reality and which the

A **law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the State of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the**
B **circumstances. [192-C-D]**

CIVIL APPELLATE/ORIGINAL JURISDICTION : Civil Appeal No. 2003 of 1996 Etc.

From the Judgment and Order dated 13.10.95 of the Allahabad High
C Court in C.W.P. No. 26132 of 1995.

H.N. Salve, S.K. Dhaon, Rani Chhabra, V.P. Gupta, S.C. Garg, Rachna Srivastava, Abha Jain, Gaurav Jain, Vijay K. Mehta, Ms. Nirmala Gupta, Pramod Swarup, Anil Karnwal, Krishan Singh Chauhan, A.K. Goel for the appearing parties.

D

The Judgment of the Court was delivered by

K. RAMASWAMY, J. Common questions of law have arisen in all these cases. The facts in *Gajaraj Singh's* case are sufficient for disposal of all these cases. Though notices were served on respondents, Shri Goel
E appeared for the State and Shri Pramod Swarup for the UPSRTU, none is appearing in other cases.

In 1988, the appellant was granted a stage carriage permit on the Meerut-Baraut route under Section 47(3) of the Motor Vehicles Act, 1939
F (4 of 1939) (for short, the 'Repealed Act') for a period of 3 years. The Motor vehicles act, 1988 (59 of 1988) (for short, the 'Act') came into force w.e.f. July 1, 1989. The said permit was renewed under Section 81 of the Act in 1991 for a further period of 5 years and the second renewal was granted in 1995. Respondents 3 to 17 had applied under Section 70 for
G grant of stage carriage permits under Section 72 on the Meerut-Gangoh route which intersects part of the route on which the appellant was operating his stage carriage. Despite objections raised by the appellant, the State Transport Authority (for short, 'STA') granted permits to them on November 23, 1992 which came be challenged by the appellants in revision filed under Section 90 before the State Transport Appellate Tribunal (for short,
H 'STAT'). The respondents questioned the appellant's *locus standi* under

the preliminary objection that the renewal granted under Section 81 to the appellant was void. By order dated August 9, 1995, the STAT upheld the preliminary objection and held that the appellant has no *locus standi* to object the grant of permits to the respondents, since the renewal of the permit granted to the appellant was not valid in law as he had not got any new permit under the Act. The High Court in the impugned judgment dated October 13, 1995 made in Writ Petition No. 26132 of 1995 has upheld the order of the STAT. Thus, this appeal by special leave.

Shri K.K. Venugopal, learned senior counsel for the appellant, contended that the renewal of the permit of the appellant granted under the Repealed Act is a permit under the Act and its operation was saved by Section 217(2)(a) read with sub-section (4) thereof. Therefore, the second renewal granted under Section 81 was valid in law. There was no need for the appellant to obtain a fresh permit under the Act as the renewal is a continuation of the original permit which is a vested right. The effect of saving provisions in Section 217(2)(a) is to allow all the permits granted under the Repealed Act to continue after renewal under the Act. Section 217(2)(a) and sub-section (4), thus, obviate the need to obtain fresh permit under the Act and, therefore, it would be unnecessary. In support thereof, he placed strong reliance on *M/s. Gurcharan Singh Baldev Singh* v. *Yashwant Singh & Ors.*, [1992] 1 SCC 428. He further contended that this Court in *Secretary Quillon Distt. Motor Transport Workers' Cooperative Society Ltd.* v. *Regional Transport Authority & Ors.*, [1994] Supp. (3) SCC 210 did not intend to lay down that after the Act came into force, all the holders of stage carriage permits granted under the Repealed Act would be required to obtain fresh permits under the Act. Section 6 of the General Clauses Act (for short, the 'GC Act') read with Section 217(2)(a) and (4) saves operation of all those permits which were alive when the Act came into force. Consequently, renewals granted under Section 81 were valid. For contra construction, an argument of inconvenience was forcefully projected. He argued that Section 217(2)(b) would be applicable only if the permit is inconsistent with the provisions of the Act in which event the life of the permit granted under the Repealed Act gets extended only for the balance period of permit.

Shri S.K. Dhaon, learned Counsel appearing in C.A. @ SLP (C) No. 27335/95, contended that the permits granted to the existing operators under the nationalised scheme in Chapter IV-A of the Repealed Act are

A not required to be renewed under Section 81 of the Act as they have already been saved being existing permits. So the need to obtain fresh permits under the Act would be inconsistent with the scheme of the Repealed Act as well as the Act. Shri Venugopal buttressed the contention emphasising that the renewal is only a continuation of the existing permit granted under the Repealed Act. The need for fresh permit arises only if the renewal is inconsistent with the provisions of the Act. Therefore, the view of the High Court is clearly not sustainable in law. In support thereof, Shri Venugopal placed strong reliance on *D. Nataraja Mudaliar* v. *The State Transport Authority, Madras*, [1978] 4 SCC 290; *State of Punjab* v. *Mohar Singh*, [1955] 1 SCR 893 and *M/s. Universal Imports Agency & Anr.* v. *The Chief Controller of Imports and Exports & Ors.* [1961] 1 SCR 305. Shri Harish N. Salve, appearing for some of the existing operators in the nationalised schemes, contended that they were not paid compensation since permits in their names were saved with corridor restrictions. They are, therefore, entitled to renewal of permits as a matter of right.

Shri Adrash Kumar Goel, learned counsel for the state, resisted the contentions. According to him, the scheme of the Act in many a provision is inconsistent with the scheme of operation in the Repealed Act. When the Legislature manifested its intention as to its inconsistency in the operation of the Act with the provisions of the Repealed Act, the STA or the Regional Transport Authority (for short, 'RTA'), as the case may be, would be devoid of power and jurisdiction to grant renewal of permit under the Act. Consequently, the erstwhile holders of permits are required to obtain fresh permits under the Act. The Repealed Act has been saved only to the extent of validating, under Section 217(2)(b), the continuation of the permit for the unexpired period granted under the Repealed act. The owner of the vehicle, thereby, became entitled to operate, for the balance period, stage carriage on the respective route. On its expiry, the erstwhile holder of the permit ceases to have the permit under the Act until he obtains afresh stage carriage permit under the Act. To obviate the difficulty of running the stage carriage between the date of application for permit and the date of grant, the Act provides for grant of temporary permits. There is no hiatus in the operation in that behalf and any grant of permit or renewal should only be consistent with the provisions of the Act. Otherwise, the Repealed Act continues to remain in operation, in spite of its express repeal by Section 217(1) of the Act. The ratio of this Court in *Secretary, Quillon District Motor Transport Worker's Cooperative Society*

Ltd.'s case (for short, 'Quillon's case) would be applicable to the situation. The ratio in *Gurucharan Singh's* case (supra) would be applicable only to a pending application for renewal filed before the Act came into force which would be disposed of by operation of Section 217(2)(a) as saved by Section 217(4) of the Act. If so understood, there is no inconsistency in the ratio of the aforesaid two decisions of this Court and the operation of the provisions of the two Acts.

We issued notice to Shri Promod Swarup to appear on behalf of STUs and argue on the question of renewal of permits covered by the schemes. He contended that they are not entitled to renewal under Chapter VI of the Act. Chapter V does not apply to them. Therefore, they have no right to apply or obtain permit under Section 72 or renewal under Section 81.

We may make it clear at this juncture that when the cases had come up for admission and Shri Venugopal had pointed out to plausible misapprehension in the operation of the the ratio laid down by this Court in the above two cases, we had referred the matter to three Judge Bench. Thus, the matter has come before this Bench.

The question for consideration is : whether the holder of a stage carriage permit under the Repealed Act is required to obtain fresh permit or a renewal of the permit as per the provision of the Act? To appreciate the contentions in proper perspective, it would be profitable to refer to the provisions of the Act, extent of their operation and their inconsistency with the provision in the Repealed Act so as to focus the true intentment and operation of the Act. Section 2(31) of the Act defines *"permit" to mean a permit issued by the State or Regional Transport Authority or an authority prescribed in this behalf under the Act* (emphasis supplied) authorising the use of motor vehicle as a transport vehicle. "Transport vehicle" has been defined under Section 2(47) to mean a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle. "Stage carriage" has been defined under Section 2(40).to mean motor vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey. "Route" has been defined under Section 2(38) to mean a line of travel which specifies the highway which may be traversed by a motor vehicle

A between one terminus and another. "Public service vehicle" has been defined by Section 2(35) to mean any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage. These definitions similarly had found place in the Repealed Act with slight variations.

B Chapter V of the Act under the heading "Control of transport vehicle" regulates use of, or permission for use of, the vehicles and the necessity to obtain permits in that behalf by an owner of motor vehicle. Section 66 enjoins every owner of a motor vehicle to obtain permit and no owner shall use the motor vehicle as stage carriage except in accordance C with the conditions of the permit granted or countersigned by the prescribed authority for its use in the public place. The manner in which the vehicle should be used gets regulated by the conditions of the permit, the rules and the law; the details thereof are not material. Section 67 empowers the State Government to control road transport. Section 68 D enumerates the manner in which the RTA or the STA or other authorities under the Act would exercise the powers and perform functions specified under the Act. Section 69 enjoins the owner of a vehicle to make application for permit.

E Section 70 specifies the procedure for making an application to obtain stage carriage permit and the conditions subject to which the application is required to be dealt with. Section 71 prescribes the procedure for STA or RTA to consider such applications for grant of stage carriage permits. It envisages, under sub-section (3) thereof, that subject to the number of vehicles, road conditions and the relevant matters, the F State Government shall, by a notification, direct an STA or RTA to limit the number of stage carriages generally or of any specified, type as may be fixed and specified in the notification, operating on city routes in towns with a population of not less than five lakhs. Its, operation is subject to clause (b) and (c) thereof. The proviso to sub-section (3) of Section 71 envisages that other conditions being equal, preference shall be given to G applications for permits from (1) State transport undertakings; (ii) co-operative societies registered or deemed to have been registered under any enactment for the time being in force; (iii) ex-servicemen; and (vi) any other class or category of persons, as the State Government may, for reasons to be recorded in writing, consider necessary. On other routes, H except town service, no restrictions are imposed unlike in Section 47(3) of

the Repealed Act to grant stage carriage permits. Section 72 empowers the RTA or STA to decide an application for grant of a permit to operate a Stage carriage with any one or more of the conditions enumerated under sub- section (2) thereof or the rules or conditions attached to the permit. A

Section 80 prescribes procedure to apply for and grant of renewal of permits. Sub-section (2) envisages that on an application made under sub-section (1) at any time, the STA or RTA or any prescribed authority under Section 66, *shall not ordinarily refuse to grant an application for permit of any kind made under the Act.* (emphasis supplied). The proviso lifts the embargo of sub-section (2) and permits summary refusal of the application, if such a grant would have the effect of "increasing the number of stage carriages as fixed and specified in a notification" under Section 71(3)(a) or of the contract carriages as fixed and specified in a notification under Section 74(3)(a). Under the proviso to Section 71(1), prior to its amendment thereof by Section 23 of Amendment Act 54 of 1994, the RTA/STA was prohibited to grant permit for a route of 50 kilometers or less to all juristic persons and to grant permit "only to an individual or a State Transport undertaking". The Amendment became operative from November 14, 1994 and the above prohibition no longer operates. B C D

Section 81 regulates renewal of permits and duration thereof. Sub-section (1) visualises that a permit, other than a temporary permit issued under Section 87 or special permit issued under Section 88(8), shall be effective from the date of issuance or renewal thereof for a period of 5 years. Under the proviso, the period of countersigned permit is coterminus with the validity of the primary permit. Sub-section (2) prescribes the limitation within which an application for renewal should be made before expiry of original grant or renewal. Sub-section (3) gives discretion to condone the delay in making the application for the grounds mentioned thereunder. Sub-section (4) enumerates grounds for refusal of renewal of a permit for one or more of the grounds enumerated thereunder. The terms and conditions subject to which stage carriage permit is required to be renewed are different from those of Section 58 of the repealed Act except the procedural part. Sub-section (2) of Section 58 of the Repealed Act gives preferential treatment for renewal of a permit in favour of the holder of the permit, while Section 81 of the Act does not give such preferential right to renewal. On the other hand, if the permits granted under Section 72 exceed the limit prescribed by the State Government for town service, there would be danger of refusal or renewal subject to giving E F G H

A reasons in support thereof. Equally, in relation to other routes, discretion is given to reject renewal of a permit for reasons to be recorded in the order.

Chapter VI deals with special provisions relating to State Transport Undertakings (for short, 'STU') which is equivalent to Chapter IV-A of
B the Repealed Act. By operation of Section 98, Chapter VI and the rules and orders made thereunder shall have overriding effect over the inconsistent provisions contained in Chapter V or in any other law for the time being in force or in any instrument having effect by virtue of any such law. The STU shall provide an efficient, adequate, economical and properly co-
C ordinated road transport service on the notified area or route or portion thereof to the exclusion of the private operators except as exempted in the scheme itself which itself is a self-operative law. The details are not material for the purpose of this case except that under the said Chapter, there is no specific provision, like Section 68F(1D) for renewal in favour of any person or any class in relation to an area or route or portion thereof
D covered by such scheme for renewal, or Section 68F(1E) in favour of STU.

Section 217 repeals the existing laws and provides savings from its operation. Sub-section (1) specifically repeals Act 4 of 1939 and any law corresponding to that Act in force in any State before July 1, 1989.
E Sub-section (2) with a *non obstante* clause provides certain savings as provided thereunder :

Clause (a) of Section 217(2) provides that notwithstanding the repeal of act 4 of 1939 or any other analogous enactments in operation, any notification issued, rule, regulation made, order passed or notice issued or
F any appointment or declaration made, or exemption granted or any confiscation made, or any penalty or fine imposed, any forfeiture, cancellation or *any other thing done* (emphasis supplied) or any other action taken under the Repealed Act and in force immediately before July 1, 1989 shall, *so far as it is not inconsistent with the provisions of the Act* (emphasis supplied)
G be deemed to have been issued, made, granted, done or taken under the corresponding provision of the Act. In other words, clause (a) saves such of those enumerated events under the Repealed Act which are consistent with the provisions in the Act.

Clause (b) of Section 217(2) provides that any certificate of fitness
H or registration or licence or *permit* (emphasis supplied) issued or granted

under the repealed enactment *shall continue to have effect after such commencement under "the same conditions and for the same period" as if the Act had not been passed* (emphasis supplied). In an emphatic manner, the saving provision provides that, notwithstanding the repeal of Act 4 of 1939 or any corresponding law, the permit issued under the Repealed Act should continue to operate *proprio vigore* till its life expires under the same conditions and for the same period as if the Act was not passed. Other clauses are not relevant. Hence they are not dealt with.

Clause (e) deals with the scheme under Section 68-C or under the corresponding law in operation, which shall be disposed of under Section 100 of the Act. Similarly, temporary permits issued under sub-section (1-A) of Section 68F of the Repealed Act or under the corresponding provisions shall, because of use of clause (f), continue to remain in force until approved scheme under Chapter VI of the Act is published. The omission to provide similar right of renewal of permanent permit like one available under Section 68F(1D) to a private operator or to STU under Section 68(1F) is significant and deliberate. It should be presumed that the Parliament having made similar provision in Section 81 for renewal of permits issued in Chapter V of the Act, the omission thereof in Chapter VI in relation to the private operators manifests the intention of the Parliament that the right to obtain stage carriage permit, contract carriage permit or temporary permit on the notified area or route or a portion thereof has been frozen to all private operators except to the extent of the right to ply stage carriage on the basis of the permits saved under Chapter IV-A of the Repealed Act. Therefore, the result would be that even the private operators whose permits were saved also would have limited operation under Section 217(2)(b) to ply their stage carriages for the unexpired period only. So, limited validity of permits to run stage carriages etc. on the nationalised routes or notified area or portion thereof in the approved scheme was saved so that the holder of the stage carriage permits will have full course of unexpired life of the permits granted under the Repealed Act. In other words, Section 217(2)(b) breathed limited life into all permits granted under the repealed Act except those granted to STU under approved or draft schemes to run its full course. It was so manifested by Section 217(4) and Section 6 of the GC Act. The operation of law in Chapter IVA of the Repealed Act as declared by this Court would be of much assistance for interpretation in this behalf.

A In Mysore State Road Transport Corporation v. *Mysore State Transport Appellate Tribunal*, [1974] 2 SCC 750, it was held that no licence can be granted to any private operator whose route traversed or overlapped any part of a notified route or routes as prohibited in Chapter IV-A of the Repealed Act. An applicant seeking grant of a permit on a route which overlapped even on a portion of a notified route was held to be not B entitled to the grant of the permit. In *Adarsh Travels Bus Service and Another* v. *State of U.P. & Ors*, [1985] 4 SCC 557, a Constitution Bench of this Court approved the above law and had held that under Sections 68FF, 68B, 68C, 68D read with Section 2 (28A), once a scheme was published under Section 68D in relation to any area or a route or portion thereof, C whether to the exclusion, complete or partial, of other persons or otherwise, no person other than the State Transport Undertaking may operate on the notified area or notified route except as provided in the scheme itself. No private operator can operate his vehicle on any portion of the notified are or notified route unless authorised to do so by terms of the D scheme itself. Therefore, corridor shelter was impermissible on a notified area, route or a portion of the route. It was further held that unless the scheme provides for exempting operators already having permit for common sector from the scheme by incorporating appropriate conditional clauses in the scheme to enable them to ply their vehicles over common sectors without picking up or setting down passengers on the common E sectors, it was not open to the RTA or STA to grant permits on the notified area or notified route providing corridor shelter.

In *T.V. Nataraj & Ors.* v. *State of Karnataka & Ors.*, [1994] 2 SCC 32, a Bench of two Judges of this Court considered the integrity of the route, F the effect of the notification of the scheme under Section 68C of the Repealed Act and held that on publication of the approved scheme under Section 68A, the private operators were excluded, unless saved by the scheme itself, to operate on an approved area or route by obtaining permits to run the stage carriage on the approved route under the Scheme. In the absence of any express exemption in the Scheme, the exclusion of the G private operators to operate the stage carriage on the approved scheme is total and complete. It was only for the State Government to take steps to put vehicles on approved schemes so as to avoid any inconvenience to the travelling public.

H In *Ram Krishna Verma & Ors.* v. *State of U.P. & Ors.*, [1992] 2 SCC

620 another Bench of two Judges had considered the scheme of Chapter IV-A of the Repealed Act and Sections 80 and 98 of the Act. It was held that the scheme published under Section 68D of the Repealed Act (Chapter VI of the Act) is a law and it has over-riding effect over chapter IV of the repealed Act (Chapter V of the Act). The scheme operates against everyone unless it is modified. It excluded private operators from the notified area or notified route or a portion thereof covered under the scheme except to the extent saved under the scheme itself. The right of the private operators to apply for and to obtain permits under Chapter IV of the Repealed Act (Chapter V of the Act) had been totally frozen and prohibited. The result was that on the approved nationalised route or area, the private operators were totally prohibited to obtain permits under Section 72 or renewal under Section 81 of the Act to ply their stage carriages. This ratio was reiterated by another Bench in *Nisar Ahmad & Ors.* v. *State of U.P. & Ors.*, [1994] Supp. 3 SCC 460 holding that the approved scheme is a law by itself and everyone, whether or not party to the earlier order of this Court *K.K. Verma's* case, was bound by the law laid down and directions given by this Court under Article 142(2) of the Constitution.

It is seen that Chapter VI of the Act empowers STU to frame schemes which have over-riding effect, by operation of Section 98, on Chapter V and other laws. Section 101 with a *non obstante* clause gives power to the STU to operate additional services for the conveyance of the passengers on special occasions such as to and from fairs and religious gatherings. Section 102 empowers the State Government to modify or cancel the approved scheme only in the public interest. Section 103 gives exclusive right to the STU to apply for and obtain stage carriage permits or goods carriage permits or contract carriage permits in respect of a notified area or notified route or portion thereof. Section 104 prohibits STA or RTA to grant any permit except in accordance with the scheme. Thus, private operators whose named permits were saved from the scheme, became entitled to operate their stage carriages subject to corridor restrictions of picking up on up and setting down the passangers enroute on the overlapped route.

It would, thus, be clear that there is no provision like Section 68F(1D) of the Repealed Act to obtain renewal of a permit saved under the scheme to private operators. In contrast, sub-section (2) of Section 103

A gives power to the STA or RTA, on application made by the STU under Section (1) thereof, either to grant any other permit or reject a pending application or to cancel an existing permit or to modify the terms of an existing permit in the manner indicated in clause (c) of sub-section (2) of Section 103. It would, thereby, indicate the inconsistency with the
B provisions contained in Chapter IVA of the Repealed Act.

Whenever an Act is repealed it must be considered, except as to transaction past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of the Parliament as if it had never been passed, it never existed except for the purpose of those
C actions which were commenced, prosecuted and concluded while it was existing law. Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs
D which in actuality is non- existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances. Therefore, when Section 217(1) of the Act repealed Act 4 of 1939 w.e.f. July 1, 1989, the law in Act 4 of 1939 in effect came to be non-existent except as regards the transactions, past and closed or saved.

E In Crawford's Interpretation of Law (1989) at page 626, it is stated that "(A)n express repeal will operate to abrogate an existing law, unless there is some indication to the contrary, such as a saving clause. Even existing rights and pending litigation, both civil and criminal, may be affected although it is not an uncommon practice to use the saving clause
F in order to preserve existing rights and to exempt pending litigation". At page 627, it is stated that "(M)oreover, where a repealing clause expressly refers to a portion of a prior Act, the remainder of such Act will not usually be repealed, as a presumption is raised that no further repeal is necessary, unless there is irreconcilable inconsistency between them. In like manner, if the repealing clause is by its terms confined to a particular Act, quoted
G by title, it will not be extended to an act upon a different subject". Section 6 of the GC Act enumerates, *inter alia*, that where the Act repeals any enactment, unless a different intention appears, the repeal shall not (a) revive anything not in force or existing at the time at which the repeal takes effect; or (b) affect the previous operation of any enactment so repealed
H or anything duly done or suffered thereunder; or (c) affect any right,

privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced. In *India Tobacco Co. Ltd.* v. *The Commercial Tax Officer, Bhavanipore & Ors.*, [1975] 3 SCC 512 at 517 in paras 6 and 11, a Bench of three Judges had held that repeal connotes abrogation and obliteration of one statute by another from the statute book as completely as if it had never been passed. When an Act is repealed, it must be considered, except as to transactions past and closed, as if it had never existed. Repeal is not a matter of mere form but is of substance, depending on the intention of the Legislature. If the intention indicated either expressly or by necessary implication in the subsequent statute was to abrogate or wipe off the former enactment wholly or in part, then it would be a case of total or *pro tanto* repeal.

When there is a repeal and simultaneous re-enactment, Section 6 of the GC Act would apply to such a case unless contrary intention can be gathered from the repealing Act. Section 6 would be applicable in such cases unless the new legislation manifests intention inconsistent with or contrary to the application of the section. Such incompatibility would have to be ascertained from all relevant provisions of the new Act. Therefore, when the repeal is followed by a fresh legislation on the same subject, the Court would undoubtedly have to look to the provisions of the new Act only for the purpose of determining whether the new Act indicates different intention. The object of repeal and re- enactment is to obliterate the Repealed Act and to get rid of certain obsolete matters.

On "Saving of rights acquired", in the Principles of Statutory Interpretation by G.P. Singh [(Sixth Edition) - 1996] at page 413, the learned author has stated that the effect of clauses (c) to (e) of Section 6 of GC Act is, speaking briefly, to prevent the obliteration of a statute in spite of its repeal to keep intact rights acquired or accrued and liabilities incurred during its operation and permit continuance or institution of any legal proceedings or recourse to any remedy which may have been available before the repeal for enforcement of such rights and liabilities. At page 418, the learned author has stated that the privilege to get an extension of a licence under an enactment is not an accrued right and no application can be filed after the repeal of the enactment for renewal of the licence. In Legislation and Interpretation by Jagdish Swarup (1974 Ed.) at page 539, it is stated that the power to take advantage of an enactment may

A without impropriety be termed as a "right", but the question is whether it is a "right accrued". A mere right (assuming it to be properly so called) existing in the members of the community or any of them to take advantage of an amendment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued".

B In *Bishambhar Nath Kohli & Ors.* v. *State of Uttar Pradesh & Ors.*, AIR 1966 SC 573 a Constitution Bench of this Court was to consider application of Section 6 of the GC Act to Section 27 of the Administration of Evacuee Property Act, 1950. Regarding saving of rights accrued thereunder by operation of Section 6 of the GC Act this Court, after an C elaborate consideration, had held that by Section 58 (3) of the Administration of Evacuee Property Act the Legislature had not expressed any reservation in the application of that section and none can be implied. The order of the Deputy Custodian was declared final by operation of Section 30(6) of Ordinance 1 of 1949, but the liability was subject to the provisions of sub-sections (1) to (5) of Section 30. If fictionally order is deemed to D have been passed under Act 31 of 1950 (Administration of Evacuee Property Act) as if the Act were in operation on October 12, 1949, it is difficult to escape the conclusion that the order would be subject to the appellate or revisional jurisdiction of the authorities who have the appellate or revisional power by virtue of provisions conferring those powers and E which must also be deemed to have been in force on the date when the impugned order was passed. It was held that Section 6 was inapplicable to revive the Act that became final.

The question, therefore, is: what rights were preserved by saving F provisions in Section 217(2) of the Act? In Crawford's Statutory Interpretation it is stated under Section 322 at page 657 thus :

> "Often the legislature instead of simply amending a pre-existing statute, will repeal the old statute in its entirety and by the same enactment re-enact all or certain portions of the pre-existing law. G Of course, the problem created by this sort of legislative action involves mainly the effect of the repeal upon rights and liabilities which accrued under the original statute. Are those rights and liabilities destroyed or preserved? The authorities are divided as to the effect of simultaneous repeals and re-enactments, some H adhere to the view that the right and liabilities accruing under the

repealed act are destroyed, since the statute from which they sprung has actually terminated, even though for only a very short period of time. Others, and they seem to be in the majority, refuse to accept this view of the situation, and consequently maintain that all rights and liabilities which have accrued under the original statute are preserved and may be enforced, since the re-enactment neutralizes the repeal, thereby continuing the law in force without interruption. Logically, the former attitude is correct, for the old statute does cease to exist as an independent enactment, but all practical considerations favour the majority view. This is so even where the statute involved is a penal act."

In Maxwell on the Interpretation of Statutes (12th Ed.) it is stated at page 17 that the effect of repealing Acts passed after August 30, 1889, is now dealt with by Section 38(2) of the Interpretation Act. Such repealing Acts are, unless the contrary intention appears, not to....." (b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or (c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed; or (d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid".

In Sutherland Statutory Construction (3rd Edition) Vol. I by Horack, in paras 2043 to 2045, it is stated that :

"Under common law principles of construction and interpretation all rights, liabilities, penalties, forfeitures and offences which are of purely statutory derivation and unknown to the common law are effaced by the repeal of the statute which granted then, irrespective of their accrual. Likewise, where a common law principle is abrogated, its effective existence is destroyed both as to past actions and to pending proceedings. However, a right of a common law nature which is further embodied in statutory terms exists as an enforceable right exclusive of the statute declaratory of it, and therefore the right is not expunged by the repeal of the statute.

Since the effect of a repeal is to obliterate the statute and to destroy its effective operation in futuro, or to suspend the operation of the common law when it is a common law principle which is abrogated, any proceedings which have not culminated in a final judgment prior to the repeal are abated at the consummation of the repeal. When, however, the repeal does not contemplate either a substantive common law or statutory right, but merely the procedure prescribed to secure the enforcement of the right, the right itself is not annulled but remains in existence enforced by applying the new procedure.

Effect on vested rights

Under common law principles of construction and interpretation the repeal of a statute or the abrogation of a common law principle operates to divest all the rights accruing under the repealed statute or the abrogated common law, and to halt all proceedings not concluded prior to the repeal. However, a right which has become vested is not dependent upon the common law or the statute under which it was acquired for its assertion, but has an independent existence. Consequently, the repeal of the statute or the abrogation of the common law from which it originated does not efface a vested right, but it remains enforceable without regard to the repeal.

In order to become vested, the right must be a contract right, a property right, or a right arising from a transaction in the nature of a contract which has become perfected to the degree that the continued existence of the statute cannot further enhance its acquisition.

Effect up On inchoate rights

Rights of action which are dependent upon a statute, and which are still inchoate and not reduced to possession or perfected by final judgment, are lost by the repeal of the statute from which they stem. This rule of construction is simply a restatement of the common law principle of construction that the repeal of a statute operates to divest all rights accruing under the repealed statute and all proceedings not concluded prior to the repeal, since inchoate rights are by definition not vested rights such as to escape

the common law rule of effacement. The inchoate rights are but an incident to the statute and fall with its repeal." A

In Francis Bennion's Statutory Interpretation (Second Edition) it is stated at page 210 thus :

"Where an Act passed after 1978 repeals and re- enacts as enactment (with or without modification) then, unless the contrary intention appears, anything done, or having effect as if done under the enactment repealed, in so far as it could have been done under the provision re-enacted, has effect as if done under that provision." B C

In Cardinal Rules of Legal Interpretation (3rd Edition) by Randall, A.E., 1924, it is stated at page 531-32 thus :

"Their lordships.....conceived that, in dealing with a statute which professes merely to repeal a former statute of limited operation, and to re-enact its provisions in an amended form, they are not necessarily to presume an intention to extend the operation of those provisions to classes of persons not previously subject to them unless the contrary is shown, but that they are to determine on a fair construction of the whole statute, considered with reference to the surrounding circumstances, whether such an intention existed.". *Brown* v. *Mc. Lachlan*, [1872] L.R. 4 P.C. 543, at p.550; 42 L.J.P.C. 18, at p.23, Sir W. Colville, delivering the judgment of the Judicial Committee. D E

"Where you have a repeal, and you have also a saving clause, you have to consider whether the substituted enactment contains anything incompatible with the previously existing enactment. The question is, Aye or No, is there incompatibility between the two? And in those cases the judges, in holding that there was a saying clause large enough to annul the repeal, said that you must see whether the true effect was to substitute something incompatible with the enactment in the Act repealed; and that if you found something in the repealing Act incompatible with the general enactments in the repealed Act, then you must treat the jurisdiction under the repealed Act as pro tanto wiped out. That is settled by the cases of In *re Busfield* (1886), 32 Ch. D. 123; 55 L.J. Ch. 467; F G H

A and *Hume* v. *Somerton*, [1890], 25 Q.B.D. 239; 59 L.J. Q.B. 420." - In re R., (1906) 1 Ch. 730, at p. 736; 75 L.J. Ch. 421, at p. 423, Collins, M.R."

It is already seen that the operation of sub-section (1) of Section 217 is to obliterate the Act 4 of 1939 and any corresponding law in force in any B State from operation with effect from 1st July, 1989, However, repeal shall not affect any right or liability acquired, accrued or incurred. Sub-section (2) enumerates and saves from the obliteration of Act 4 of 1939 and corresponding law by fiction with its *non obstante* clause. *Ex abundenti cautela* clauses (a) to (3) elaborate the enumeration of rights. They would C apply to specific rights given to an individual upon the happening of one or other of the events specified in the statute. Clause (a) preserves continued operation of any notification, rules, regulations, order or notice issued etc. and any appointment or declaration made etc. under the Repealed Act in force immediately before July 1, 1989. Those enumerated D acts or actions shall be deemed to have been issued, made, granted, done or taken under the corresponding provisions of the Act *which are not inconsistent with the provisions of the Act.* In other words, Section 217(2) (a) gives an elongated operation as regards all transactions, which being consistent with the provisions of the Act should be deemed to have been issued, made, granted, done or taken under the corresponding provisions E of the Act. Existence of the corresponding provisions similar to the repealed provisions is a condition precedent. If the operation of the provisions in the Act is inconsistent and incompatible, it gets obliterated and the earlier provisions no longer revive or survive. If anologous provision in the Repealed Act does not find place in the Act, the rights F accrued or acquired thereunder would not continue under the Act unless fresh rights are acquired under the Act.

By operation of clause (b), any certificate of fitness of a motor vehicle or its registration or licence issued or permit granted under the repealed enactments, shall continue to have effect after such commencement under G the same conditions and for the same period as if this Act had not been passed. In other words, a permit granted under the Repealed Act 4 of 1939 shall continue to have the same operation under the Act under the same terms and conditions and for the same period, as if the Repealed Act was in operation and as if the Act had not been passed. This is the fiction of H law by which, though Act 4 of 1939 was wiped out, its operation gets

revived. The intention, thereby, appears to be that the Act breaths life into the dead permits etc., and allows full play to the permits granted under the Repealed Act, even if inconsistent, till their period expired by efflux of time.

On expiry of the period of permit granted under Act 4 of 1939 or corresponding law, what would be the consequence is the question? It is true, as contended by Shri Venugopal, that by operation of sub-section (4) of Section 217, read with clause (a) of sub- section (2) of Section 217, Section 6 of the GC Act steps in and the conjoint operation thereof leaves no manner of doubt that the notification issued, rules or regulations made, orders passed, notice issued, or any appointment or a declaration made, exemption granted or any confiscation made or any penalty or fine imposed in or any other thing done or any other action taken *under the repealed enactment* in force immediately before such commencement shall, as far as it is not inconsistent with the provisions of the Act, be deemed to have been corresponding issued, made, granted, done or taken under the Act and their operation thereby gets saved by appropriate clause in Section 6 of the GC Act read with Section 217(2)(a) to (e) of Act. In other words, proceedings initiated before Act 4 of 1939 was repealed, would be continued and concluded under the Act as if the Act was not enacted. However, four things would emerge from its operation. First there must exist a corresponding provision under the Act *pari materia* with the Repealed Act; secondly, that the order or permit granted must exist and be in operation as on July 1, 1989 - the day on which the Act had come into force; thirdly, it must not be inconsistent with the provisions of the Act; and fourthly some positive acts should have been done before July 1, 1989 to further secure any right. All the four conditions should be satisfied as conditions precedent for application of Section 6 of the GC Act by operation of sub-section (4) of Section 217 and then clause (a) of sub-section (2) of Section 217 steps in and starts operation thereof. We are concerned with permits, let it be said that a permit is preceded by an order granting permit by the concerned RTA or STA, as the case may be, under the Repealed Act. The said order stands merged with the grant of permit and gets exhausted.

This may be angulated from yet another legal perspective, namely, consequences that would flow from the meaning of the word 'renewal' of a permit under Section 81 of the Act. Black's Law Dictionary defines the word 'renewal' at page 1296 thus :

A "The act of renewing or reviving. A revival or rehabilitation of an expiring subject; that which is made anew or re-established. The substitution of a new right or obligation for another of the same nature. A change of something old to something new. To grant or obtain extension of;"

B In P. Ramanatha Aiyar's "The Law Lexicon" (Reprint Edition 1987), the word 'renewal' is defined at page 1107 to mean "a change of something old for something new. The renewal of a 'license' means a new license granted by way of renewal". the renewal of a negotiable bill or note is regarded simply as a prolongation of the original contract. The office of a C "renewal", as it is termed, of a life policy, is to prevent discontinuance or forfeiture.

In *Provash Chandra Dalui & Anr.* v. *Bisawanath Banerjee & Anr.*, [1989] Supp. 1 SCC 487 at 496 in para 14, this Court drew the distinction D between the meaning of the words extension and renewal. It was held that a distinction between extension and renewal is chiefly that in the case of renewal, a new lease is required while in the case of extension the same lease continues in force during additional period by the performance of stipulated act. In other words, the word 'extension' when used in its proper and usual sense in connection with a lease, means prolongation of the E lease.

It is settled law that grant of renewal is a fresh grant though it breaths life into the operation of the pervious lease or licence granted as per existing appropriate provisions of the Act, rules, or orders or acts *intra* F *vires* or as per the law in operation as on the date of renewal. The right to get renewal of a permit under the Act is not a vested right but a privilege subject to fulfilment of the conditions precedent enumerated under the Act. Under Section 58 of the Repealed Act, renewal of a permit is a preferential right and refusal thereof is an exception. But the Act expresses different intention. Sections 66, 70, 71 and 80 prescribe procedure for G making application and compliance of the conditions mentioned therein. Existence of the provisions of the Act consistent with the Repealed Act is a pre-condition. Grant of renewal under Section 81 is a discretion given to the authority (STA or RTA) subject to the conditions and the requirement of law. Discretion given by a statute connotes making a choice between H competing considerations according to rules of reason and justice and not

arbitrary or whim but legal and regular. Sections 70 and 71 read with Section 81 do indicate that grant of permit or renewal thereof is not a matter of right of course. It is subject of rejection for reasons to be recorded in support thereof. Therefore, right to renewal of a permit under Section 81 is not a vested or accrued right but a privilege to get renewal according to law in operation and after compliance with the pre-conditions and abiding the law.

In *Ambika Quarry workis* v. *State of Gujarat*, [1987] 1 SCC 213 this Court was to deal with right to renewal of a mining lease under the Gujarat Mines and minerals Concessions Rules. When the renewal of the lease was not granted, due to statutory embargo created by Section 2 of the Forest (Conservation) Act, 1980, this Court had held that though the right to renewal was in accordance with the rules, with the interposition of the Act for conservation of the forests, it puts an embargo on the right to renewal. Therefore, the refusal to grant renewal of lease was upheld.

In *Rural Litigation and Entitlement Kendra* v. *State of U.P.*, [1989] Supp. 1 SCC 504 at 523-24 after considering the above ratio, it was held that though the lessees of the mines were entitled to apply for renewal as per the law and clauses in the lease, this Court prohibited obtaining of renewals applying Section 2 of the Forests (Conversation) Act, 1980.

In *State of M.P. & Ors.* v. *Krishnadas Tikaram*, [1995] Supp. 1 SCC 587 this Court had held that it is settled law that renewal is a fresh grant and must be granted consistent with law in operation as on that date. In that case, it was held that renewal of mining lease in the forest area for extraction of minerals under the Mining and Mineral Concessions Rules should be consistent with Forest (Conservation) Act, 1980. Section 2 mandates the State Government to obtain prior approval of the Central Government, renewal granted without prior approval was subsequently cancelled. When its validity was questioned, the High Court set aside the order. On appeal, this Court reversed the High Court's order and had held that the Government was not precluded to cancel the renewal of the lease granted without obtaining prior approval of the Central Government. The order of cancellation was, therefore, upheld.

There is a distinction between right acquired or accrued, and privilege, hope and expectation to get a right, as rightly pointed out by the High Court in the impugned judgment. A right to apply for renewal and

A to get a favourable order would not be deemed to be a right accrued unless some positive acts are done. before repeal of Act 4 of 1939 or corresponding law to secure that right of renewal. In *Gujarat Electricity Board* v. *Shantilal*, AIR (1969) SC 239, this Court had pointed out that before Section 71 of the Electricity Supply Act was amended, the appellant had
B issued a notice under Section 7 thereof, exercising the option to purchase the undertaking. It was held that a right to purchase the electrical undertaking which had accrued to the Electricity Board was saved by Section 6 of the GC Act.

So, if no action under the Repealed Act was set in motion before
C July 1, 1989, by a valid application for renewal of a permit, there was no right acquired or accrued to pursue the remedy under the Act. The privilege to obtain renewal of a permit is not an accrued right. Section 58(2) of the Repealed Act gives, as stated supra, preferential right to a holder of a permit for renewal thereof. Section 71 of the Act gives
D preferential right in favour of STU for grant of permit in Chapter V which is not available under the Repealed Act. Therefore, even for grant of a permit or a renewal under Section 72 or 81, the STU is entitled to preferential right over the private citizens. Thereby, the Act manifests intention inconsistent with and incompatible to that in Chapter IV of the Repealed Act. Similarly, even on the approved routes under a scheme
E framed in Chapter IVA, an exception has been carved out in the scheme with a *non obstante* clause in favour of STU, which is a self-operative law by itself. The rights of the existing operators for renewal thereof under Section 68F(1D) under the repealed Act were saved. But, under the Act, Chapter VI does not speak of renewal of the permits to the private
F operators, though permits were saved in the scheme itself. In other words, Chapter VI manifested inconsistency in its operation from the law in Chapter IVA of the Repealed Act. Similarly, other provisions are inconsistent with those in Act 4 of 1939 which exist in the Act as are apparent but they are not relevant for our present propose and hence need no
G elaboration. Therefore, clause (a) of sub-section (2) would not get attracted, even if it were to apply to grant of permit being a "thing done" as contended by Shri Venugopal. So, any permit issued to operate a stage carriage under the Repealed Act would survive, by virtue of clause (b) of sub-section (2) of Section 217 of the Act by fictional operation of law; and this would be on the same conditions and for the same period mentioned
H under the Repealed Act, as if the Act was not enacted. Any other view

would tantamount to allowing the Repealed Act to remain in operation in perpetuity simultaneously with the operation of the Act. Both cannot co-exist in the same shelter. A

In *State of Punjab* v. *Mohar Singh*, [1955] SCR 893 the facts were that the respondent filed a claim as an evacuee under EP (Registration of Land Claims) Act, 1948. The claim was investigated into and it was found to be false; it was held to be an offence under the Act. At the trial, on his confession, the respondent was convicted and was sentenced to imprisonment. On *suo motu* revision, the District Magistrate found the sentence to be inadequate and referred the case to the High Court to be dealt with under Section 437, Cr. P.C. The High Court found that since the Ordinance was repealed, he could not be convicted under Section 7 of the Act. This Court, on appeal reversed the decision and upheld the conviction applying Section 6 of the GC Act. Interpreting that section, this Court had held that the words "anything done" occurring in Section 11 of 1948 Ordinance did not mean act done by a person but an official act done by the authority in exercise of the powers conferred by or under the Ordinance. Far from helping the appellants, the ratio would apply to official acts done or orders issued etc. covered by Section 217(2)(a) of the Act. As stated earlier, after permit was in fact issued, the order passed by STA or RTA out lived its purpose and grant of the permit and its operation was saved to the extent provided in clause (b) of Section 217(2). B C D E

The ratio of M/s. Universal Imports Agency and Anr. v. *The Chief Controller of Imports and Exports & Ors.*, [1961] 1 SCR 305 also is not of assistance to the appellants. Therein, before the Government of India issued notification applying the French Establishments' (Application of Laws) Order, 1954 to the territory of Pondicherry, the appellant had entered into a contract with the foreign buyers for the import of the goods which, after the said Order came into force, were imported into Pondicherry. The question therein was whether Section 6 of the GC Act would apply, Majority of three Judges, dissented by minority opinion of two Judges, had held that the words "things done" in para 6 of the French Establishments' (Application of Laws) Order was comprehensive enough to take within its ambit not only things done but also the effect of the legal consequences flowing therefrom. The ratio is not at all applicable to the facts of this case. F G

We, therefore hold that grant of renewal of the stage carriage permit should necessarily be preceded by a grant of a permit to stage carriage H

A under Section 72, in accordance with the procedure laid down in Sections 70 and 71. This should be made before the expiry of the period prescribed in the permit granted under the Repealed Act. Therefore, for stage carriage permits granted under Chapter IV of the Repealed Act, if they stand to expire or expired after 1st July, 1989, without any pending application for renewal having been made under Section 58 as on 1st July, 1989, fresh B applications under Section 70 should be filed and after consideration under Section 71, permits be obtained as per law under Section 72. If there is any delay to obtain permits pending consideration, by operation of Section 76, to avoid hiatus in continued operation of providing stage carriage service, Section 87 gives power to grant temporary permit without following the C procedure laid down in Section 70. In *Mithilesh Garg & Ors.* v. *Union of India & Ors.*, [1992] 1 SCC 168, this Court had laid down different criteria for grant of inter-region, intra-region and interstate permits under the Act under Section 88 and 80 of the Act which did not find place in the Repealed Act. It was held that such distinction was neither discriminatory D nor violative of Article 14 of the Constitution. Thus considered, the argument of arbitrariness, discrimination or avoidable inconvenience to the holders of permits etc. under the Repealed Act and to the travelling public would be hypothetical and without force.

The appeals arising out of SLP Nos. 924/96, 1913/96, 27355/95 relate E to renewal of state carriage permits of the appellants, whose permits were saved under the nationalised schemes. It is an admitted position that before the Act had come into force on July 1, 1989 they had their permits saved by the schemes approved and published under Chapter IVA of the Repealed Act and renewable under Section 68F (ID) of the Repealed Act F and were renewed under Section 81 of the Act without obtaining fresh permits under the Act. The extreme contention of Sri S.K. Dhaon was that the definition of "permit" under Section 2(31) of the Act is so wide as to include permits granted under the Repealed Act and the approval and publication of the schemes under Section 68D of Chapter IVA of the Repealed Act stands nullified since there is no saving thereof under the G Act. Therefore, every one is free to obtain permits under the nationalised scheme after expiry of the period for which the permit was granted under the Repealed Act. We find it difficult to give acceptance to this extreme contention. It is settled law that the scheme approved under Chapter IVA, which is equivalent to Chapter VI of the Act, is a self contained and H self-operative scheme and is a law by itself. The scheme operates to the

exclusion of private operators with *non-obstante* clause that the STU should obtain permits to run stage carriages in the notified area, routes or a portion thereof to provide coordinated efficient, adequate and economical road transport service. Thereby the right to apply for and obtain a stage carriage permit has been frozen to all private operators, except as saved under the scheme itself. Until the scheme gets modified or cancelled by the State it would continues to be in operation. We find no inconsistency under the Repealed Act and the Act in this behalf. Resultantly, all schemes remain operative under Section 217 (2)(a) of the Act.

The question, therefore, is: Whether a private operator saved under the scheme is not liable to get permits under Section 72 and renewal of the permits under Section 81 of the Act? It is true that Section 68F(1D) and Section 68F (1F) of the Repealed Act had prescribed that renewal of the permits granted to the private operators and STU should be renewed under the scheme; similar provision does not find place in Chapter VI of the Act. Rules do prescribe procedure to apply for renewal by the private operators as well as STU but the rules or procedure do not confer substantive right to renewal of the permits granted under the scheme; when chapter VI is *sub silentio,* rules cannot travel beyond the Act.

The question, therefore, is: whether the named holder of a specified stage carriage permit has the right of renewal under the Act after the expiry of the period mentioned in the permit granted under the Repealed Act? Did the Parliament intend to put an end to and denude the right of a private named operator to operate the stage carriage, or to that extent the right to apply for and obtain permit under Sections 70 to 72 or renewal under Section 81 was preserved?

Two views are plausible under the Scheme of the Act. The first is that after the expiry of the permit or renewed permit under the Repealed Act, the named private operator saved under the scheme gets denuded of his right of renewal of his permit under the Act, since "permit" defined under Section 2(31) would mean permit granted *under the Act*, which occasion does not arise as the field, occupied by the exclusive right to operate stage carriages was given to STU. Thereby, he ceases thereafter to have any right to ply stage carriages, though saved under the self operative scheme which continues to be in existence after the Act came into force. The other view is that the rights of the private named operators whose

A specified permits were saved under the respective schemes, were not expressly taken away under the Act. Being private operators, they would be entitled to avail of the right and remedy given in Chapter V of the Act, with exclusion of other private competitors. Thereby they should apply for and obtain permit afresh under Section 72 and renewal thereafter under Section 81. In this behalf, it is relevant to note the contention of S/Shri B Venugopal and Salve. Their contention is that in the scheme, such named operators whose specified permits were mentioned in the scheme alone were given exclusive rights to ply their stage carriages on the named routes subject to corridor restrictions mentioned in the scheme. Other persons whose permits were nationalised were paid compensation under the C Repealed Act or under Section 105 of the Act but the appellants were not paid compensation as their permits were saved. By operation of Section 217 (2)(e) and Section 100 of the Act, even pending schemes should be finalised under the Act within the limitation prescribed therein. Until its finalisation, the existing operators are allowed to ply their vehicles and to D obtain temporary permits. This would indicate the legislative intention that the Act did not intend to destroy the rights, saved under the respective schemes, of the named operators in respect of the specified permits. The contention of Mr. Pramod Swarup for U.P.S.R.T.U. is that after the expiry of the period mentioned in the permits granted to the named operators of the specified permits, they lost their right to renewal of their permits since E the right to renewal, similar to Section 68F(1D), does not find place in Chapter VI. The grant of renewal to them, unless modified by the scheme under Section 102 of the Act, is inconsistent and, therefore, the private operators are not entitled to the renewal of their permits. The exclusive right, thereby, was given to the STU to ply their stage carriages, goods F carriages or contract carriages so as to avoid inconvenience and hardship to the travelling public.

After giving careful and anxious consideration to the respective contentions, we find that there is some force in the contention of the respective counsel for the appellants. It bears repetition to state that the G approved scheme under the repealed Act or in the Act is a self-contained and self-operative scheme. It is a law by itself. The schemes published under the Repealed Act, as held earlier, are saved by Section 217(2)(a) of the Act. Therefore, until they are modified or cancelled under Section 102, the scheme should continue to be in operation in the notified area, route H or part thereof. The right to apply for and obtain permit in the notified

scheme was totally frozen to the private operators giving exclusive right to the STU to apply for and obtain permits to run the stage carriages or additional service under Section 101 of the Act on the notified area, route or a part thereof and none else. With a *non obstante* clause in Section 101, the right to apply for and obtain temporary permits under Section 87 by private operators was taken away. There is no need for STU to obtain such permits, as an intimation to concerned RTA of its providing such additional service on special occasion like fair or religious gatherings for conveyance of passengers, is sufficient. Yet the scheme itself saved and preserved the rights of the named existing operators in respect of over lapping routes in the specified permits, subject to the corridor restrictions of picking up and setting down the passengers *en route* the prescribed prohibited route. They became entitled to run their stage carriages subject to the law. Though, their permits are saved, the named operators being private operators, the Parliament appear to have thought that there was no necessity to expressly retain in Chapter VI itself their right of renewal as the same was already provided in Section 81 of the Act corresponding to Section 68F(1D) of Chapter IV-A of the Repealed Act. The reason appears to be obvious. Every private operators falls within the field covered by Chapter V of the Act. It would seem that the Parliament is of the view that the named operators,being saved under the schemes, are entitled to apply for and obtain necessary permit or renewal thereof to ply their stage carriages only on overlapped routes subject to the corridor restrictions mentioned in the scheme itself. It may be stated that we do not find any express indication of their rights being taken away under the Act; nor do we find it by necessary implication in that behalf and to that effect. This view does justice also to all concerned.

As far as the STU is concerned, they having had the monopoly to ply stage carriages, goods carriages, contract carriages or special services in the notified areas or route or part thereof under the scheme, it was thought unnecessary to bother them to obtain renewal of permits for of stage carriages etc. Section 101 itself provides for such an intention. Resultantly, the Legislature appears to have obviated the need to obtain periodical renewals of permits for stage carriages etc. run by the STU. Parliament was aware of the need to obtain the renewal of permits by the STU under Section 68F (1F) of the Repealed Act and absence of such a provision in the Act is further eloquent and self-explanatory.

A In *Krishan Kumar* v. *State of Rajasthan & Ors.*, [1991] 4 SCC 258, a contention was raised that since Section 100(4) of the Act prescribes limitation within which the State Government should hear and consider the objections on the draft scheme, finalise the scheme and publish the same in the official Gazette, after the Act had come into force, the limitation of one year stood lapsed. Though Section 217(2)(e) empowers the State Government to finalise the pending draft schemes, they stood lapsed from the date on which draft scheme was published. The contention was rejected by this Court for the obvious reason that the Repealed Act did not prescribed any limitation to finalise the draft scheme as indicated in sub-section (4) of Section 100 of the Act. As years rolled by from the date of publication of draft scheme for finalisation, the Parliament for the first time prescribed limitation in Section 100(4) putting a fetter on the exercise of the power of the Government in approving the draft scheme and publication thereof after complying with the requirements of law. The right of the private operators and the remedy of finalisation of the draft scheme were harmoniously interpreted by this Court and it held that the limitation of one year starts running from the date the Act had come into force, namely, July 1, 1989. We are of the view that same harmonious interpretation is required to be adopted in this case also. Applying the same harmonious interpretation, we hold that the rights of named private operators to apply for and obtain permits and renewal of the specified stage carriage permits are saved and they alone are eligible to avail of that right and remedy under Chapter V of the Act, while preserving monopoly of the STU in Chapter VI.

In Chapter V, permits are required to be obtained on non-nationalised routes. The STU also has the right to apply for and obtain permits to run the stage carriages, goods carriages or contract carriages on permits, as the case may be, and in some instances the preferential right under the Act is given to the STU. In respect of permits had under the Repealed Act or the Act, the need to apply for and obtain renewals of the stage carriage permits, goods carriages or contract carriage permits for plying on non-nationalised routes was to comply with the procedure prescribed in Chapter V, which should be adhered to. This is in relation to non nationalised routes only. But as regards the approved schemes, in Chapter VI or continued schemes saved by section 217(2)(a) read with sub-section (4) read with Chapter IVA of the Repealed Act, there is no need for STU to obtain periodical renewals of permits of stage carriages,

contract carriages, or goods carriages in respect of the notified area, route or portion thereof, notwithstanding anything contained in Chapter V. The STU retains its exclusive right to ply the stage carriages or special service or goods carriage or contract carriage on the notified area or route or part thereof, until the scheme is duly modified or cancelled in accordance with law prescribed in Section 102 of Chapter VI. A B

It is required to be stated that along with the application under Section 70 filed for grant of permit under Section 72 or renewal under Section 81 made by the named holder of a specified permit in an approved scheme, he should enclose an authenticated copy of the approved scheme, the details of the route on which he was plying his stage carriage with corridor restrictions. The RTA or STA, as the case may be, should verify the regional scheme under which the named operator, whose specified permit was saved, whether he is entitled to ply the stage carriage in the approved scheme with the condition of the corridor restrictions imposed in the notified scheme and if so to what extent. What is the duration of his right saved in the approved scheme? Whether he had plied his stage carriage on complying with the law in force? His right to permit under Section 72 or renewal under Section 81 cannot be higher than the original right saved in the approved scheme. The STU also should be heard in that behalf. On consideration of these and all other relevant facts in relation to grant of stage carriage permit or renewal thereof, the appropriate authority may grant or reject. In the later event, for reasons to be recorded in support of the rejection. C D E

In *Mithilesh Garg's* case (supra) a Bench of three Judges considered the right of the existing operators in conformity with Article 19(1)(g) of the Constitution and the procedure prescribed under the liberal policy for grant of permits to the new entrants, while continuing the same right to existing operators under the new provisions in the Act. It was harmoniously interpreted and this Court had held that there was no cause for complaint by the existing operators when the liberal policy had given right to apply for and obtain permits under Chapter V on the non-nationalised routes to augment facility to the travelling public. Section 104 does not stand in the way of the named private operaters whose specified permits were/are saved in that behalf. On the contrary, it would say "except in accordance with the provisions of the scheme." F G

Thus considered, we are of the view that the rights of the existing H

named operators saved in the appropriate approved schemes in respect of specified permits were not destroyed. By necessary implication of Section 104, they were saved. They became entitled to avail of their right to apply for grant of permit in accordance with the procedure prescribed under Sections 70 and 71 and to obtain permit under Section 72, before the expiry of the permit or renewed permit saved under the approved scheme and should obtain permit afresh to ply their stage carriages before expiry of the period mentioned therein; periodical renewals from time to time should be obtained under Section 81 of the Act in accordance with the operation of the law. The RTA or STA, as the case may be, should consider and may grant permits or renewal of permits as per law or rejection thereof for reasons to be recorded in that behalf.

It is true that some renewals of stage carriage permits to the holders of permits or renewed permits under the Repealed Act were granted under Section 81. Some of them are still in operation. With a view to prevent hiatus in operational efficacy we would declare that though renewals of state carriage permits were granted under Section 81, they must be deemed to be temporary permits granted under Section 87, till regular permits are granted or refused. The ratio of *Gurucharan's* case (supra), does not help the appellants. Therein the application for renewal of stage carriage permit under Section 58(2) of the Repealed act was pending consideration as on 1st July, 1989. Consequently, Section 6 of the GC Act saved its operation. This Court had, therefore, held that applications for renewal filed under Section 58 of the Repealed Act must be disposed of under Section 80 read with Section 81 of the Act. However, it is stated that disposal must be taken to be, not of a permit granted under the Act, but one under deemed fiction. There would be no further fiction of law created under the Act to be a deemed renewal of permit under the Act.

In *Quillon's* case (supra) this Court did not have the occasion to consider the effect of Section 6 of the GC Act and clause (a) of sub-section (2) of Section 217 since the case fell under clause (b). Therein, the proviso to unamended Section 71(1) prohibited the Society to obtain a permit. Consequently, it could not obtain renewal of stage carriage permit, being inconsistent with the provisions of the Act It was held that the stage carriage permit issued under the Repealed Act would remain operative for the period for which it was granted as if the Act had not been passed. After its expiry, the appellant therein was required to obtain a permit under

Section 72 of the Act. Thereby, it was held that the Society was not entitled to the renewal under Section 81 of the Act. In view of the consideration of the operation of the relevant provisions mentioned hereinbefore, there is no conflict between *Gurcharan Singh's* case and *Quillon's* case. the interpretation in *Quilon's* case is also consistent with the consideration hereinbefore made.

The next contention of Shri Venugopal is that the Act intends that all permits issued under the Repealed Act would be continued under the Act and be given effect *in toto* so long as such of those permits or certificates or licences are not inconsistent with the provisions of the Act. To that extent, their operations are saved giving limited operation under clause (b) of sub-section (2) of Section 217. However, notifications etc. issued under the Repealed Act and saved by clause (a) of sub-section (2) of Section 217, as mentioned earlier, are distinct from the permits issued in furtherance of the orders passed by the STA or RTA, as the case may be. The further contention that such a construction creates and brings about invidious discrimination offending Article 14 of the Constitution is without force. Section 217(2)(a) read with Section 217(4) of the Act manifest the distinction between the acts done or actions taken consistent with the provisions of the Repealed Act but inconsistent with Act. The Act saves only acts done or actions taken etc. which are consistent with the provisions. By implication, all inconsistent acts done or actions taken, except those completed and closed, would not be considered to be done or taken under the Act and consequently could not be operative under the Act. They are obliterated completely from statute as if they never existed except to the extent of limited operation provided in the appropriate clauses in sub-section (2) of Section 217 of the Act.

Accordingly, we hold that the named transport operators whose permits were saved in the relevant scheme shall apply for permits under Sections 70 and 71 and obtain permits afresh under Section 72 of the Act before the expiry of the period mentioned in the permit issued either under Section 47 or Section 48 or renewal under Section 58 or Section 68F(1D) of the Repealed Act. No third party/private operators are entitled to apply for permits on the same notified route or part thereof, nor are they entitled to compete with them for grant of permit, since the right of all other private operators to apply for and operate in the approved notified area, route or a part thereof, has been frozen. The right is reserved only in relation to the

named operators and that too for specified permit, and none else. Along with the application under Section 70 filed for grant of permit under Section 72 or renewal under Section 81 made by the named holder of a specified permit in an approved scheme, he should enclose an authenticated copy of the approved scheme, the details of the route on which he was plying his stage carriage with corridor restrictions on over lapping routes. The RTA or STA, as the case may be, should verify the original scheme under which the named operator, whose specified permit was saved, whether he is entitled to ply the stage carriage in the approved scheme with the condition of the corridor restriction on the notified scheme and if so to what extent. What is the duration of his right saved in the approved scheme? Whether he had plied his stage carriage on complying with the law in force? His right to permit under Section 72 or renewal under Section 81 cannot be higher than the original right saved in the approved scheme. The STU also should be heard in that behalf. On consideration of these and all other relevant facts in relation to grant of stage carriage permit or renewal thereof, the appropriate authority may grant or reject; in the later event, for reasons to be recorded in support of the rejection. The authorities should consider their applications in accordance with the law and the prescribed procedure and may grant new permits under Section 72 and later on before the expiry thereof, to renew it in accordance with the procedure prescribed in Sections 80 and 81, that too on compliance with law, until the scheme is duly modified or cancelled in accordance with law. We reiterate that this right is available exclusively to the named private operators and that too in respect of the specified permits and with same restrictions continued in the scheme none else and no more.

Since the appellants had obtained permits by mistake of the law and misconception of law on the part of the competent authorities applied under Section 81 and had been granted renewal of their respective permits under Section 81 after July 1, 1989, such grant of renewal of the permit should be treated to be temporary permits under Section 87 of the Act. Therefore, the private operators, be they covered by Chapter V or VI, should apply for and obtain afresh permits before the expiry of the period mentioned in their respective permits or renewed for consideration under Section 71 and grant under Section 72 of the permits afresh consistently with Section 2(31) of the Act. Such permit alone would be a permit defined in Section 2 (31) of the Act. Thereafter, before expiry thereof, they shall apply for and the concerned STA/RTA person authority may grant or

refuse renewals of permit for reasons to be recorded under Section 81 of the Act. A

This interpretation of the law would relieve undue hardship to all the operators and at the same time it would also be consistent with the scheme of the Act to subserve the rights and protection provided under the Act so as to avoid rigour in the operation of the law. B

Thus considered, for the reasons given above, the view taken by the High Court is in conformity with law but subject to above modification in the judgment.

The appeals and the writ petition are accordingly disposed of but, under the circumstances, without costs. C

V.S.S. Appeal and petition disposed of.

A BIKRAM SINGH AND ORS.

v.

THE LAND ACQUISITION COLLECTOR AND ORS.

SEPTEMBER 12, 1996

B [K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Income Tax Act, 1961 :

Sections 4,5, 194-A—Interest received as income on the delayed pay-
C *ment of compensation determined under S.28 or 31 of Land Acquisition Act—Held : It is revenue receipt exigible to tax under S.4—S.194A not applicable as it relates to deduction of tax at source.*

Land Acquisition Act, 1894 :

D *Sections 28,31—Interest received as income on the delayed payment of compensation—Is a revenue receipt exigible to tax under S.4 of the Income Tax Act, 1961.*

Dr. Shamlal Narula **v.** *Commissioner of Income tax, Jammu*, **53 ITR**
151; *TMK Gvoindaraju Chetty* **v.** *Commissioner of Income-tax, Madras*, **66**
E **ITR 465;** *Rama Rai & Ors.* **v.** *CIT Andhra Pradesh*, **181 ITR 400 and** *K.S. Krishna Rao* **v.** *CIT, A.P.*, **181 ITR 408, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12497-12500 of 1996.

F

From the Judgment and Order dated 13.12.91 of the Punjab & Haryana High Court in C.W.P. Nos. 10558, 10556, 11495 and 10557 of 1991.

K. G. Bhagat, S.S. Dahiya, Kamal Baid and G.G. Singh for the Appellants.

G

R.R. Misra, Ms. Lakshmi Iyengar and Anil Srivastava for the Respondents.

The following Order of the Court was delivered :

H Leave granted.

We have heard learned counsel on both sides. A

This appeal by special leave arises from the judgment of the High court of Punjab & Haryana made in CWP Nos. 1558/91 and batch on December 13, 1991. The admitted facts are that the appellants had received notice on July 31, 1991 for payment of income-tax on the delayed interest amount recovered under the Land Acquisition Act, 1894 (for short, the "LA Act"). calling that notice in question, they filed writ petitions. The High Court relying upon decisions of this Court dismissed the petitions with a finding as under : B

> "This now leads us to the consideration of the question whether interest paid on the amount of compensation for compulsory acquisition of land is "income" and, therefore, taxable under the Act. Matters which have to be considered for awarding compensation for compulsory acquisition of land are enumerated in section 23 of the Land Acquisition Act. While sub- section (2) of that section provides for payment of certain solatium for acquisition of compulsory nature, interest is not included as an item of compensation. Instead, interest is payable by force of section 34 of the Act, if compensation is not paid or deposited on or before taking possession of the land. By force of section 28 also, the court, on a reference if it enhances the compensation offered by the Collector is entitled to award interest on the amount of such enhanced compensation. Section 28 also provides that the court, on a reference, shall award interest on the amount of enhanced compensation. It will thus appear from the text of section 34 of the Land Acquisition Act that interest is not payable as compensation but is paid if the compensation is not paid before taking possession of the land. Interest is thus payable because of the deprivation of the possession of that land before compensation for compulsory acquisition of that land is paid. This position is now well- settled. In *Dr. Shamlal Narula* v. *CIT*, (1964) 53 ITR 151 SC ; AIR (1964) SC 1878, the observation is that interest has to be paid on the amount awarded from the time the Collector takes possession until the amount is paid or deposited. Interest is not an item of compensation nor is it consideration for acquisition of land. Payment of interest has been provided for separately under section 34 of the Land Acquisition Act. This is so because interest is paid after the C D E F G H

compensation has been determined. It is something in addition to the capital amount though it arises out of it. It has expressly been held that interest under section 34 of Land Acquisition Act is not compensation paid to the owner for depriving him of his right to possession of the land acquired, but is given to him for the deprivation of the use of the money representing the compensation for the land acquired. This interest under section 34 of the Land Acquisition Act is thus paid for the delayed payment of the compensation amount and, therefore, a revenue receipt liable to tax under the Income-tax Act. The Supreme Court expressly distinguished the decision of the Privy Council in *Inglewood Pulp and Paper Co. Ltd.* v. *New Brunswick Electric Power Commission*, AIR (1928) PC 287. This decision of the Privy Council as also the decision in *Abhay Singh Surana* v. *Secretary , Ministry of Communication*, AIR (1987) SC 2177 are authorities only for the proposition that interest is payable on the amount of compensation determined either under the Land Acquisition Act or under the Requisition and Acquisition of Immovable Property Act, 1952. Neither of these authorities considered the question of exigibility of such interest to income-tax. This principle in *Narula's* case (1964) 53 ITR 151 SC has subsequently been applied by the Supreme Court in a later decision in *T.N.K. Govindaraju Chetty* v. *CIT*, (1967) 66 ITR 465 also, where the property was acquired under the Requisition and Acquisition of Immovable Property Act which did not make any specific provision for the award of interest on the amount of compensation, the application of sections 28 and 34 of the Land Acquisition Act, 1894, dealing with the payment of interest on the amount awarded as compensation could not be deemed to be excluded. When the owner of property was dispossessed pursuant to an order for compulsory acquisition, an agreement that the acquiring authority will pay interest on the amount of compensation was implied. It has been expressly held that the view in *Shamlal Narula's* case (1964) 53 ITR 151 SC, that the interest received is chargeable to tax as income, will apply if interest is payable under the terms of an agreement, express or implied, and the court or the arbitrator gives effect to the terms of the agreement and awards interest which has been agreed to be paid. It has, therefore,to be held that the amount received as

interest on the amount of compensation assessed under the Land Acquisition Act or under the Requisition and Acquisition of Immovable Property Act is income taxable under the Income Tax Act. Certainly, it is not agricultural income since it is neither rent nor revenue derived from the land used for agricultural purposes It is, therefore, not exempt from income-tax under section 10(1) of the Income-tax Act as agricultural income. The Land Acquisition Collector is, therefore, perfectly justified in retaining the amount of interest payable to the holders of agricultural lands compulsorily acquired in terms of section 194A of the Act. The Land Acquisition Collector is also justified in demanding the sum paid on account of interest under section 194A of the Act. The notices issued and challenged in these petitions are, therefore, valid and perfectly justified."

The question for consideration is : whether the delayed interest on the compensation paid under the Land Acquisition Act is chargeable to income tax under Sections 4 & 5 of the Income Tax Act, 1961 (for short the "Act") It is contended for the appellants that "interest" has been defined under Section 2 (28A) as:

"Interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised."

Under Section 194A dealing with "interest on securities" provides as under :

"194A. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest on securities shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income- tax thereon at the rates in force.

Explanation-For the purposes of this section, where any income by way of interest as aforesaid is credited to any account, whether

A called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly."

B In the circular issued by the Board of Direct Taxes, the concept of "interest" defined under Section 2(28A) has been explained with the added explanation as under :

"The terms "interest" has been defined in new clause (28A) inserted C in Section 2 of the Income-Tax Act with a view to removing doubts about the true character of fees or other charges paid in respect of moneys borrowed or in respect of the credit facilities which have not been utilised. The definition is very wide and covers interest payable in any manner in respect of loans, debts, deposits, claims and other similar rights or obligations. It also includes any D service fees or other charges in respect of such loans, debts, deposits, etc. as also fees in the nature of commitment charges on unutilised portion of credit facilities. This definition will be applicable for all purposes of the Income-tax Act.:

E Relying upon these three provision, it is contended that the definition of "interest" is confined only to money-lending business between debtor and the creditor and if the creditor receives any amount by way of interest from the debtor, it is in the nature of a receipt of income on a charge paid in respect of money borrowed or in respect of the credit facility given which have been utilised and, therefore, the definition would be applicable only F when the money is lent by a creditor and received by the debtor. Then only interest is chargeable to income-tax. When interest is paid either under Section 34 or Section 28 of the LA Act, it is only a payment in consideration of loss of enjoyment of the possession by the owner. It is not by way of any charge on compensation determined under Section 23(1). Therefore, G it is not exigible to income tax. We find no force in the contention.

The controversy is no longer *res integra*. This question was considered elaborately by this Court in *Dr. Shamlal Narula* v. *Commissioner of Income-tax, Jammu* 53 ITR 151. Therein K. Subba Rao, J. as he then was, considered the earlier case law on the concept of "interest" laid down by the H Privy Council and all other cases and had held at page 158 as under :

"In a case where title passes to the State, the Statutory interest provided thereafter can only be regarded either as representing the profit which the owner of the land might have made if he had the use of the money or the loss he suffered because he had not that use. In no sense of the term can it be described as damages or compensation for the owner's right to retain possession, for he has no right to retain possession after possession was taken under Section 16 or Section 17 of the Act. We, therefore, hold that the statutory interest paid under Section 34 of the Act is interest paid for the delayed payment of the compensation amount and, therefore, is a revenue receipt liable to tax under the Income-tax Act".

This position of law has been consistently reiterated by this Court in the case of *TMK Govindaraju Chetty* v. *Commissioner of Income Tax, Madras*, 66 ITR 465; *Rama Rai & Ors.* v. *CIT, Andhra Pradesh*, 181 ITR 400 and K.S. Krishna Rao v. *CIT, A.P.*, (181) ITR 408. Thus by a catena of judicial pronouncements, it is settled law that the interest received on delayed payment of the compensation is a revenue receipt exigible to income tax. It is true that in amending the definition of "interest" in Section 2(28A), interest was defined to mean interest payable in any manner in respect of any money borrowed or debt incurred including a deposit, claim or other similar right or obligation and includes anv service, fee or other charges in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised. It is seen that the word "interest" for the purpose of the Act was interpreted by the inclusive definition. A literal construction may lead to the conclusion that the interest received or payable in any manner in respect of any moneys borrowed or a debt incurred or enumerated analogous transaction would be deemed interest. That was explained by the Board in the circular referred to hereinbefore.

But the question is: whether the interest on delayed payment on the acquisition of the immovable property under the Acquisition Act would not be exigible to income-tax? It is seen that this Court has consistently taken the view that it is a revenue receipt. The amended definition of "interest" was not intended to exclude the revenue receipt of interest on delayed payment of compensation from taxability. Once it is construed to be a revenue receipt, necessarily, unless there is an exemption under the appropriate provisions of the Act, the revenue receipt is exigible to tax.

A The amendment is only to bring within its tax net, income received from the transaction covered under the definition of interest. It would mean that the interest received as income on the delayed payment of the compensation determined under Section 28 or 31 of the Acquisition Act is a taxable event. Therefore, we hold that it is a revenue receipt exigible to tax under
B Section 4 of the Income-Tax Act. Section 194A of the Act has no application for the purpose of this case as it encompasses deduction of the income tax at the source. However the appellants are entitled to spread over the income for the period for which payment came to be made so as to compute the income for assessing tax for the relevant accounting year.

C Under these circumstances, we do not think that there is any error of law committed by the High Court in the Judgment under appeal warranting interference

The appeals are accordingly dismissed. But in the circumstances without costs.

D G.N. Appeals dismissed.

STATE OF RAJASTHAN AND ORS. A

v

D.R. LAXMI AND ORS.

SEPTEMBER 12, 1996

[K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.] B

Land Acquisition Act, 1894 :

Section 4(1)—Does not envisage specification of the nature of the land as to whether it is waste or arable land when the notification is published. C

Section 17(4)—Though lands situated in Urban areas, Urban Land Ceiling Act recognises the existence of agricultural lands within urban agglomeration—When the lands were capable of raising crops, they remain to be arable lands—Hence exercise of power under S.17(4) by the Government was not bad in law. D

Sections 4(1), 6, 16, 17(2) & 48—Absence of publication of the substance of the notification in the locality—Whether renders the proceedings void—Held, conduct of parties to be considered—After possession was taken, the lands stood vested in the State free from all encumbrances—Therefore the title validly vested in the Government cannot be divested—Moreover determination of compensation attained finality—Also it was not a case to shift the date for the determination of compensation—Court should be loathe to quash the notification. E

Constitution of India, 1950 : F

Art. 226—Extraordinary jurisdiction—Discretionary powers—Exercise of—All relevant factors to be taken into pragmatic consideration—Land Acquisition proceedings—Award passed and has become final—Land also vested in Government—Filing of writ petition after inordinate delay—In such circumstances Court should be loathe to quash the notifications. G

Ishwarlal Girdharilal Joshi **v.** *State of Gujarat,* **[1968] 2 SCR 267, followed.**

Sanjeevanagar Medical & Health Employees' Co-operative Society **v.** *Mohd. Abdul Wahab & Ors.,* **[1996] 3 SCC 600;** *Satendra Prasad Jain* **v.** *State* H

A *of U.P.*, **[1993] 4 SCC 369 and** *Municipal Corporation of Greater Bombay* **v.** *Industrial Development & Investment Co. (P) Ltd.*, **C.A. No. 282 of 1989 decided on 6.9.96, relied on.**

Nutakki Sesharatanam **v.** *Sub-Collector*, **L.A. Vijayawada, [1992] 1 SCC 114, dissented from.**

B

Ujjain Vikas Pradhikaran **v.** *Raj Kumar Johri & Ors.*, **[1992] 1 SCC 328, distinguished.**

Raja Anand Brahma Shah **v.** *The State of Uttar Pradesh & Ors.*, **AIR (1967) SC 1081 and** *M.P. Housing Board* **v.** *Mohd. Shafi & Ors.*, **[1992] 2** C **SCC 168, referred to.**

"Administrative Law" **by H.W.R. Wade (7th Edition) pages 342-43 referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2411 of D 1993.

From the Judgment and Order dated 2.9.85 of the Rajasthan High Court in D.B.C.W.P. No. 602 of 1978.

Aruneshwar Gupta for the Appellants.

E

Rajinder Sachhar, H.K.Puri, Ujjwal Banerjee and Rajesh Srivastava, for the Respondent.

Ms. Niranjana Singh for Ms. Sushma Suri for the Respondent Nos. 5-6.

F

The following Order of the Court was delivered :

This appeal by special leave arises from the Division Bench judgment of the High Court of Rajasthan made on September 2, 1985 in W.P. No. 602/78. The admitted facts are that the notification under Section 4(1) of G the Land Acquisition Act, 1894 (1 of 1894) (for short, the 'Act') was published in the State Gazette on March 23, 1977 acquiring 31.28 acres of land for defence purpose. Enquiry under Section 5-A was dispensed with in exercise of the power under Section 17(4) of the Act and declaration under Section 6 was published on April 28, 1976. Possession was taken on H May 19, 1977. The award was passed under Section 11 on March 21, 1978.

The reference under Section 18 was sought and made in March 1978 to Civil Court for enhancement of the compensation. In September 1978, the respondent filed writ petition in the High Court seeking to quash the notification under Section 4(1) and the declaration under Section 6. The learned single Judge referred the matter to the Division Bench. The Division Bench has held that the acquired land is not an arable or waste land and, therefore, the exercise of the power under Section 17(4) of the Act was bad in law. Substance of the notification under Section 4(1) was not published in the locality. The notification under Section 4(1) did not mention that it was a waste or arable land. On these grounds, the learned judges have quashed the notification. Thus, this appeal by special leave.

Shri Aruneshwar Gupta, learned counsel for the appellants, has contended that the view of the High Court is clearly erroneous. It is not necessary that the notification under Section 4(1) should contain a declaration that the needed land is a waste or arable land. The finding that it is neither waste nor arable land is not correct so long a the land is capable of cultivation. If no cultivation was made it would still be arable land. Therefore, the view that it is neither waste nor arable land is not correct. It is difficult to accept that the entire six acres of land which is now claimed by the respondents was within the compound wall as found by the High Court. The view that substance of the notification was not published in the locality was not correct in law without any further discussion on facts or legal principles. Even the finding cannot be well supported by any material on record; in law the High Court was wrong in intereferring under Article 226 of the Constitution. Shri Rajinder Sachar, learned senior counsel for the respondents, contended that since the substance of the notification under Section 4(1) was not published which is mandatory, the notification under Section 4(1), and declaration under Section 6 could be challenged at any time even after the award was made or possession was taken. Since publication of the notification under Section 4(1) is the foundation for taking further steps for the acquisition, procedural steps required under the Act should be followed. The substance of the notification under Section 4(1) was not published in the locality. So all the proceedings which had subsequently been taken place stand nullified. Therefore, the Court would in an appropriate case grant the declaration including to quash the award and future steps. He also contended that it would be difficult to accept that the lands are arable lands, if not waste land. The finding that the land is arable land is based on consideration of the material on record. Therefore,

A it is not arable land. Further, it is contended that the respondent had stated in the High Court that he was prepared to accept the compensation provided the date of notification under Section 4(1) was shifted to four or five years later to the actual date of the notification under Section 4(1) published on March 23, 1977. He would stand by the same offer and, therefore, it is not a case warranting interference.
B

The questions, therefore, are: (1) whether the notification under Section 4(1) should contain the declaration that the lands are waste or arable lands; (2) whether the exercise of the power under Section 17(4) was vitiated by the finding that the lands were not capable of cultivation
C being situated in urban area; (3) whether the substance of the notification published under Section 4(1) was not published in the locality; if it not complied with, when the entire acquisition proceedings had become final, whether the High Court was justified in exercising the power under Article 226? It is not necessary to recapitulate all the facts narrated above. Suffice
D it to state that after the reference was made to the Civil Court, it passed an award under Section 26 which was challenged by the State by filing an appeal under Section 54 against the enhanced compensation. Thereby, the respondents had accepted the award. The State feeling aggrieved by the enhanced compensation, filed an appeal in the High Court. The High
E Court, by judgments dated May 5, 1982 and September 23, 1982, dismissed the appeals which became final. Thus, the acquisition proceedings became final.

The question, therefore, as said above is : whether the High Court
F is justified in interfering with these matters? Section 4(1) of the Act does not require to specify the nature of the land, i.e. whether it is arable or waste land. The object of the publication of the notification under Section 4(1) was that (1) the land is needed for a public purpose or is likely to be needed; (2) the officers of the State are authorised to enter upon the land and carry on measurement etc.; and (3) the owner/interested person was
G put on notice that any encumbrance hereafter would not bind the State. Therefore, Section 4(1) does not envisage specification of the nature of the land, i.e. whether it is waste or arable land, when the same was published. The view, therefore, of the High Court that the notification under Section 4(1) should contain a declaration of the nature of the land is clearly
H erroneous.

Second question whether the land is waste or arable, is a mixed question of facts and law. It depends upon the facts in each case. In this case, it is seen that on their own showing, the land of an extent of 6 acres belonging to the respondents was sought to be acquired along with other vast extent of land. It consists of open land as well as building and the servant quarters. The award of the Land Acquisition Officer has been placed before us. The building was not acquired for the public purpose but only servant quarters came to be acquired. From this background, the question arises: whether the land is arable land? This question was considered by a Bench of three Judges in *Ishwarlal Girdharilal Joshi* v. *State of Gujarat*, [1968] 2 SCR 267. After elaborate consideration of the various judgments of the High Courts and dictionary meaning of the words "arable" in that behalf, this Court has relied thus :

> "There is no definition of the word 'arable' in the original Land Acquisition Act. A local amendment includes garden lands in the expression. Now lands are of different kinds: there is waste-land desert-land, pasture-land, meadow-land, grass-land, wood-land, marshy-land, hilly-land, etc. and arable land. The Oxford Dictionary gives the meaning or 'arable' as capable of being ploughed; fit for tillage; opposed to pasture-land or wood land and gives the root as arable is in Latin. The learned Judges have unfortunately not given sufficient attention to the kinds of land and the contrast mentioned with the meaning. Waste- land comes from the Latin vastitas or vastus (empty, desolate, without trees or grass or buildings). It was always usual to contrast vastus within incultus (uncultivated) as in the phrase 'to lay waste' (agri vastate). A meadow or pasture-land is pratum and arable is arvum and Cicero spoke of *prata et arva (meadow and arable lands). Grass-land is not meadow or pasture- land and in Latin is known as campus as for example the well- known Campus Martius at Rome, where the comitia (assembly of the Roman people) used to meet. Woodlands is silvae, nemora or saltus.*"

This was considered also by the Constitution Bench in *Raja Anand Brahma Shah* v. *The State of Uttar Pradesh & Ors.*, AIR 1967 SC 1081. In that case, the acquired lands were mineral lands for mining purpose. Therefore, the question arose: whether they were arable lands? On the facts of this case, the Constitution bench came to the conclusion that since

A they were not arable lands, the exercise of the power under Section 17(4) was not justified in law. In view of the fact that the Act itself has considered as to when the land could be considered to be arable land, as explained by this Court, the interpretation put up in *Ishwar Lal's* case is in the correct perspective. The Court has power to consider the question in that light. In
B considering the question whether the land is arable or waste, dictionary meaning does not help the Court to solve the problem. Pragmatic approach is required to be adopted in considering the question on the facts in each case. Though the lands in this case were situated in urban area, the urban Land Ceiling Act itself recognises existence of the agricultural lands within the urban agglomeration and they are dealt with accordingly. When
C the lands were capable of raising crops, they remained to be arable lands. Therefore, the exercise of the power under Section 17(4) by the Government was not bad in law. On facts, it is an arable land capable to cultivation. It is seen that it being a small area comprising servant quarter as part of a large area, including six areas of respondent's lands, it cannot be said
D that the rest of the land is occupied by the buildings or is within the compound though situated in urban area. The view of the High Court, therefore, was clearly erroneous.

The question is: whether the absence of the publication of the substance of the notification in the locality renders the entire proceedings
E void? We need not dilate upon the question whether local publication of substance of Section 4(1) notification is mandatory or directory. Since this Court has consistently taken the view that compliance of the requirement of the publication of the notification under Section 4(1) in the Gazette as well as publication of the substance of the notification in the locality now
F under the Amended Act in the newspaper, is mandatory requirement. As the facts are not in controversy, as mentioned in the judgment of the High Court, the substance of the notification was not published in the locality; we proceed on the premise that second step, namely, publication of the substance of the notification in the locality, was not taken. The question
G then is : whether Section 4(1) notification and Section 6 declaration are required to be quashed? In this regard, we have to consider the conduct of the parties and the effect thereof. Under the Scheme of the Act, After the possession of the land was taken either under Section 17(2) or Section 16, the land stands vested in the State free from all encumbrances. Thereafter, there is no provision under the Act to divest the title which was
H validly vested in the State. Under Section 48(1) before possession is taken,

the State Government is empowered to withdraw from the acquisition by its publication in the Gazette. In this regard, a three-Judge Bench of this Court has considered the question in *Sanjeevanagar Medical & Health Employees' Co-operative Society* v. *Mohd. Abdul Wahab & Ors.*, [1996] 3 SCC 600 and held in paragraph 12 thus :

> "That apart, as facts disclose, the award was made on 24.11.1980 and the writ petition was filed on 9.8.1982. It is not in dispute that compensation was deposited in the Court of the Subordinate Judge. It is asserted by the appellant Society that possession of the land was delivered to it and the land had been divided and allotted to its members for construction of houses and that construction of some houses had been commenced by the date the writ petition was filed. It would be obvious that the question of division of the properties among its members and allotment of the respective plots to them would arise only after the Land Acquisition Officer had taken possession of the acquired land and handed it over to the appellant Society. By operation of Section 16, the land stood vested in the State free from all encumbrances. In *Satendra Prasad Jain* v. *State of U.P.*, [1993] 4 SCC 369, the question arose: whether notification under Section 4(1) and the declaration under Section 6 gets lapsed if the award is not made within two years as envisaged under Section 11-A? A Bench of three Judges had held that once possession was taken and the land vested in the government, title to the land so vested in the State is subject only to determination of compensation and to pay the same to the owner. Divesting the title to the land statutorily vested in the Government and reverting the same to the owner is not contemplated under the Act. Only Section 48(1) gives power to withdraw from acquisition that too before possession is taken. That question did not arise in this case. The property under acquisition having been vested in the appellants, in the absence of any power under the Act to have the title of the appellants divested except by exercise of the power under Section 48(1), valid title cannot be defeated. The exercise of the power to quash the notification under Section 4(1) and the declaration under Section 6 would lead to incongruity. Therefore, the High Court under those circumstances should not have interfered with the acquisition and quashed the notification and declaration under Sections 4 and 6 respectively. Considered from either

A perspective, we are of the view that the High Court was wrong in allowing the writ petition."

In *Satinder Prasad Jain's* case another Bench of three Judges had held that though award under Section 11-A was not made within two years after the Amendment Act 68 of 1984 came into force, the title having been B vested in the State, the notification under Section 4(1) and declaration under Section 6 do not get lapsed and non-compliance of statutory provisions does not have the effect of divesting the title of the land vested in the Government free from all encumbrances.

C Recently, another Bench of this Court in *Municipal Corporation of Grater Bombay* v. *Industrial Development & Investment Co. (P) Ltd.*, C.A. No. 282 of 1989 decided on September 6, 1996 re-examined the entire case law and had held that once the land was vested in the State; the Court was not justified in interfering with the notification published under ap- D propriate provisions of the Act. Delay in challenging the notification was fatal and writ petition entails with dismissal on grounds of laches. It is thus, well settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loathe to quash the notifications. The High Court has, no doubt, discretionary powers under Article 226 of the constitution to E quash the notification under Section 4(1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power F under Article 226. The fact that no third party rights were crated in the case, is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned single Judge dismissing the writ petition or the ground of laches. Reliance was placed by Shri Sachhar on *M.P. Housing Board* v. *Mohd. Shafi* G *& Ors.*, [1992] 2 SCC 168 in particular paragraph 8, wherein it was held that compliance of the requirements is mandatory and non-compliance thereof renders all subsequent proceedings connected therewith unexceptionably illegal; but the question is what will be its effect. That was not the question in that case, since no award had come to be passed in *Nutakki Sesharatanam* v. *Sub-Collector, L.A., Vijayawada*, [1992] 1 SCC 114 a H two-Judge Bench of this Court had held that if the requirements of Section

4 are not complied with, all proceedings had become invalid and possession was directed to be re-delivered to the appellant. We are of the view that the ratio therein is not correctly laid down. The question whether violation of the mandatory provisions renders the result of the action as void or voidable has been succingly considered in "Administrative Law" by H.W.R. Wade (7th Edition) at page 342-43 thus :

> "The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plantiffs's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another. A common case where an order, however void, becomes valid is where a statutory time limit expires after which its validity cannot be questioned. The statute does not say that the void order shall be valid; but by cutting of legal remedies it produces that result."

The order or action, if *ultra vires* the power, it becomes void and it does not confer any right. But the action need not necessarily set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances. It is seen that the acquisition has become final and not only possession had already been taken but reference was also sought for; the award of the Court under Section 26 enhancing the compensation was also accepted. The order of the appellate court had also become final. Under those circumstances, the acquisition proceedings having become final and the compensation determined also having become final, the High Court was highly unjustified in interfering with and in quashing the notification under Section 4 (1) and declaration under Section 6.

A It is true that the respondent had offered to accept the compensation by shifting the date of the notification by 4 to 5 years from the date of the notification under Section 4(1). For this view, reliance was placed by Shri Sacher on the judgment of this Court in *Ujjain Vikas Pradhikaran* v. *Raj Kumar Johri & Ors.* [1992] 1 SCC 328 where this Court had allowed the shifting of the date for the determination of the compensation. In that case since the award had not been passed, this Court had given the direction but in this case award determining the compensation has attained finality. it is not a case to shift the date for the determination of the compensation. Thus considered, we are of the view that the High Court was not justified in interfering with the notification and declaration under Section 4(1) and 6.

The appeal is accordingly allowed. The judgment of the High Court stands set aside. The writ petition stands dismissed but, in the circumstances, without costs.

G.N. Appeal allowed.

BASANT KUMAR ETC. A

v.

UNION OF INDIA ETC.

SEPTEMBER 12, 1996

[K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.] B

Land Acquisition Act, 1894 :

Compensation—Award—All lands cannot and should not be classified as possessed of same market value-Burden on claimant to prove market C *value—Courts should adopt realistic standards and pragmatic approach in evaluation of the evidence—Doctrine of equality in determination and payment of same compensation for all claimants involved in the same notification is not good principle—Deduction towards providing amenities like roads, parks, electricity, sewages water facilities etc.—High Court not justified in* D *adopting ad-hoc principle—Claimants entitled to enhanced compensation, interest on enhanced compensation at the rate of 6% per annum and 15% solatium on the enhanced compensation from the date of taking possession till the date of deposit into Court.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4327 of E 1991 Etc. Etc.

From the Judgment and Order dated 8.7.91 of the Delhi High Court in L.P.A. No. 97 of 1980.

P.C. Jain, N.K. Jain and Ms. Sheela Goal for the Appellants. F

The following Order of the Court was delivered :

These appeals by special leave arise from the judgment of the Division Bench of the High Court of Delhi made on July 8, 1996 in Letters Patent Appeal No. 97/80 and other cases. G

Notification under Section 4(1) of the Land Acquisition Act, 1894 (1 of 1894) (for short, the 'Act') was published on October 24, 1961 acquiring a large extent of 1669 bighas 18 biswas of land for the planned development of Delhi. The said lands are situated in revenue estate of Posangipur. The H

A Land Acquisition Officer categorised the lands into two blocks - Block A and Block B. He assessed the compensation at the rate of Rs. 1400 per bigha for Block A and Rs. 1200 per bigha for Block B. On reference under Section 18, the Additional District Judge by his award and decree dated March 8, 1968 enhanced the compensation to Rs. 3050 per bigha. On B Regular First Appeal, the learned Single Judge dismissed the appeal confirming the award of the reference Court. When the LPA was filed, the Division Bench held that the LPA did not lie.

In *Balbir Singh* v. *Union of India,* in RFA No. 214/68 by judgment dated may 14, 1980, the same was taken on merits in the appeal. Similar C is the case in SLP (C) No. 17055/92 relating to Chhajju in RFA No. 65/69 of the even number dated May 14, 1980. Thus, these appeal by special leave.

The extent of the land involved in *Basant Kumar's* case, viz., CA No. D 4327/91 is not clear as no one is appearing for the appellant. But as regards the appeal of Chhajju, his lands are of an extent of 37 bighas 10 biswas in which his share is one-half. As regards Balbir Singh's lands, he has 66 bighas, 10 biswas in which he has 1/3rd share. The question for consideration is : what will be the reasonable compensation which the lands under E acquisition were capable to secure as on the date of the notification?

Shri N.C. Jain, the learned senior counsel appearing for the appellants, contended that in RFA No. 55/70 *Raghuvir Singh* v. *Union of India,* arising out of the same notification, another Division Bench of the High Court had determined the compensation at the rate of Rs. 8700 per bigha F and less Rs. 500 per bigha for the notified lands; and similar was the view taken by another Bench of that Court in LPA No. 137/80 and batch decided on April 19, 1991 titled *Chet Ram & Ors.* v. *Union of India,* all these lands being situated in the same village, the appellants are also entitled to the same rate of compensation. The Union of India has not filed any appeals G against those cases. The lands are possessed of same potential value and, therefore, the appellants are entitled to the same compensation. We had adjourned the case on the last occasion, as no one appeared for the Union of India; Since, even today, no one is appearing for the Union of India, we have taken assistance of Shri Jain and have waded through the entire H material evidence. The question is : whether the appellants are entitled to

the same compensation as was determined by the High Court in the appeals arising out of *Raghuvir Singh's* and *Chet Ram's* case? It has been firmly settled law by beed role of decisions of this Court that the Judge determining the compensation under Section 23(1) should sit in the arm chair of a willing prudent purchaser in an open market and see whether he would offer the same amount proposed to be fixed as market value as a willing and prudent buyer for the same or similar land, i.e., land possessing all the advantageous features and to the same extent. This test should always be kept in view and answered affirmatively, taking into consideration all relevant facts and circumstances. If feats of imagination are allowed to sway, he out steps his domain or judicial decision and lands in misconduct amenable to disciplinary law. We have gone through the record and judgment in *Chet Ram* case and *Raghuvir Singh* case decided by the two division Benches. The learned Judges have adopted the principle that the entire lands in the village shall be treated as one unit and the compensation shall uniformly be determined on that basis. The principle is wholly unsustainable in law and cannot be a valid ground for determination of compensation. It is common knowledge that even in the same village, no two lands command same market value. The lands abutting main road or national highway command higher market value and as the location goes backward, market value of interior land would be less even for same kind of lands. It is a settled legal position that the lands possessed of only similar potentiality or the value with similar advantages offer comparable parity of the value; It is common knowledge that the lands in the village spread over the vast extent. In this case, it is seen that land is as vast as admeasuring 1669 bighas, 18 biswas of land in the village. So, all lands cannot and should not be classified as possessed of same market value. Burden is always on the claimant to prove the market value and the Court should adopt realistic standards and pragmatic approach in evaluation of the evidence. No doubt, each individual had different parcels of the land out of the vast land. If that principle is accepted, as propounded by the High Court, irrespective of the quality of the land, all will be entitled to the same compensation. That principle is not the correct approach in law. The doctrine of equality in determination and payment of same compensation for all claimants involved in the same notification is not good principle acceptable for the aforestated reasons. When both the lands are proved to be possessed of same advantages, features etc., the only equal compensation is permis-

A sible.

It is then to be seen that the learned Judges have further pointed out that when the amount claimed in the High Court in appeal under Section 54 was more them what was determined by the reference Court; to what extent of the said amount, as claimed in appeal, could be granted was the B test laid down. It is also obviously on illegal principal. What has to be determined under Section 23(1) is the market value prevailing as on the date of notification published under Section 4(1) but not what was claimed by the parties even pursuant to notice under Section 10 or its reference under Section 18 or grounds of appeal under Section 54. Prior to Amend- C ment Act 68/84 under Section 22(1), the Court had no power to grant higher than was claimed under notice in Section 9 and 10. But now it stood deleted. Even the estimate of the market value given by the claimant is not decisive. Therefore, the principle laid down by the Court in the said two cases is obviously illegal and cannot form a legal basis. Though these D judgments became final, we cannot repeat, on principle of parity, the same illegality.

It is true, as pointed out by the High Court and also stressed very vehemently by Shri Jain, that compensation cannot be determined on the E basis of the face of the claimants or the status of the claimants. Compensation requires to be determined for the land acquired and not on the basis of the status of the person from whom the land was acquired. In *Raghbir Singh's* case as the lands acquired were developed ones, Rs. 9,000 and Rs. 8700 per bigha were determined. It is settled legal position that if the land is already developed then what has to be seen is the nature of development F and money expanded by the developer and as to what was the market value prevailing on that basis as on the date of notification, and what was the situation of the acquired land on that date; all these and other relevant facts have to be taken into consideration and then market value should be determined. Merely because a land is developed or developing land, it G would not be that some compensation is to be adopted to determine the market value for the entire land as a developed land. If it is to be developed, it is settled legal position that at least 1/3rd of the compensation has to be deducted towards providing amenities, like roads, parks, electricity, sewage, water facilities etc. This Court had upheld deduction of H even 60% towards development charges. The High Court, therefore, was

also not right in adopting *ad hoc* principle. A

The question then is : what would be the reasonable compensation which the lands of appellants were capable to secure as on the date of notification? It is seen that the appellants have produced two sale transactions; in respect of land acquired in September 1961 the market B price fetched was not more than Rs. 3250 per bigha; for land acquired in the year 1958 the market value fetched was about Rs. 5000 per bigha. We do not have any material indicating as to what were the reasons behind the sale in respect of those sale deeds and the nature and situation of that land. Under these circumstances, the reference Court rightly had C not placed reliance on the 1958 sale transactions since the appellants have not produced any evidence on record to show whether the lands of the appellants were developed and fit for construction of the houses. Therefore, what we have to consider is that the lands are agricultural lands and possess potential for being used for building purposes only in future D which is not relevant. Therefore, since the lands as on the date of notification were agricultural lands, the value has rightly been determined on the bigha basis instead of yards basis. Since the appellants have produced sale deeds indicating the maximum which was secured, viz., Rs. 3,250 per bigha, necessarily, the appellants would be entitled to the E maximum rate of Rs. 3, 250 per bigha.

The next question is : whether the LPA would lie against the judgment of the learned single Judge? It is settled legal position that under F Section 54 of the Land Acquisition Act, the appeal would lie to the High Court; when the appeal on the basis of the pecuniary value was decided by a single Judge necessarily, it being the judgment of the single Judge, an appeal would lie to the same Court in the form of LPA to Division Bench. The Division Bench was not right in holding that the LPA would not lie to the High Court against the judgment of the single Judge. To that extent, G the view of the High Court is not correct. The judgment in cases of Chet Ram and Raghbir Singh proceeded on wrong principles of law and determined the compensation. We do not approve of the views as correct and, therefore, we cannot base the same market value to be the market value for the lands under consideration. H

A The appellants are entitled to the enhanced compensation at the rate of Rs. 3,250 per bigha and interest on enhanced compensation at the rate of 6% per annum from the date of taking possession till the date of deposit into court. They are also entitled to 15% solatium on the enhanced compensation from the date of taking possession till the date of deposit.

B The appeals are accordingly allowed, but in the circumstances, without costs.

G.N. Appeals allowed.

JAHAR SINGH

v.

UNION OF INDIA AND OTHERS

SEPTEMBER 13, 1996

[M.K. MUKHARJEE AND S.P. KURDUKAR, JJ.]

Service Law :

Appointment—Appellant after obtaining the due permission appeared in the examination for the post of accountant and qualified—His candidature was cancelled on the ground of being L.D.C. and for organisational ineligibility—Held, Cancellation of the candidature illegal—Other similarly situated persons allowed to appear—Contrary and conflicting stands in opposing the appeal only to forestall the claim of the appellant—Appellant entitled to all the consequential benefits upon his having been declared successful.

The appellant, an employee of the Savings Bank Control Organisation (SBCO), Uttar Pradesh Circle, under the Ministry of Communications, appeared in the examination held for appointment of Accountants in the Post Office and Railway Mail Service and qualified. Inspite of his being qualified, he did not get any appointment as an Accountant but on the other hand he was intimated by Assistant Director General, New Delhi vide letter dated July 23rd, 1993 addressed to ADDS (Rectt.) U.P. Circle that as the appellant was working as Lower Division Clerk (LDC) in the SBCO, he was not eligible to appear in the aforesaid examination and his candidature be immediately cancelled. The representation of the appellant against the cancellation of his candidature having been rejected by the Director General of Post, New Delhi, the appellant approached the Central Administrative Tribunal. Before the Tribunal the respondent contested the claim of the appellant on the ground mentioned in letter dated 23rd July, 1993 and also on the ground that there was a separation of cadre of Assistants of SBCO from that of the PO and RMS. The Tribunal held that the respondents were not justified in cancelling his candidature and set aside the order dated 23rd July, 1993. But the Tribunal did not grant the main relief of appointment for the reason that there was separation of cadres of Assistants of SBCO from those PO and RMS.

A The appellant moved this Court in appeal. The respondents contested on the ground that the appellant was not eligible as he was an L.D.C. and that the permission was granted inadvertantly as there was organisational ineligibility of the appellant to appear in the examination due to seperation of cadres.

B Allowing the appeal, this Court

HELD : 1. The respondents have taken different and contradictory stands and filed affidavits making patently incorrect and untrue statements only to forestall the claim of the appellant. [242-A]

C 2. The cancellation of the candidature of the appellant on the ground that he was LDC (SBCO) is unfounded which is apparent from the letter dated 23rd July, 1993 itself, wherein the respondent mentioned the designation of the appellant as P.A. and not LDC, as well as from the affidavit filed in this Court by the respondent on March 29th, 1996 wherein it was D stated that the appellant was Postal Assistant in Savings Bank Control Organisation. [242-B-C]

3. The plea of organisational ineligibility of the appellant to appear in the examination is also without any substance, as the respondent allowed E two P.As. of the SBCO to appear in the examination held in the year 1993 for appointment as Accountant. Therefore, the rule and the circular shown by the respondent disentitling the appellant to appear in the examination due to seperation of cadres has no substance. [242-H; 243-G]

4. The impugned order dated 23rd July, 1993 is quashed and the F respondents are directed to grant all the benefits to the appellant consequent upon his having been declared successful in the examination held on 22nd May 1992 for the post of Accountant in P.O. and RMS and this direction has to be complied by 31st October, 1996. [244-A-B]

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11929 of 1996.

From the Judgment and Order dated 23.2.96 of the Central Administrative Tribunal, Allahabad in O.A. No. 403 of 1994.

H S. Muralidhar and Ms. Neeru Vaid for the Appellant.

P.A. Chaudhary and C.V. Subba Rao for the Respondents. A

The Judgment of the Court was delivered by

M.K. MUKHERJEE, J. Special leave granted. Heard the learned counsel for the parties.

B

At all material times the appellant was - and still is - an employee of Savings Bank Control Organisation (SBCO), Uttar Pradesh Circle, under the Ministry of Communications, Department of Posts, New Delhi. In May 1992 while working in the Agra Head Post Office he appeared in the examination held for appointment of Accountants in the Post Office (PO) and Railway Mail Services (RMS); and the Senior Superintendent of Post Offices, Agra Division, Agra vide his letter No. 82/Exam/po and RMS/Accountant/92 dated November 30, 1992 informed him that he had qualified for that post. The appellant, however, did not get any appointment to the post of Accountant in spite of his such qualification and, on the contrary, on August 26, 1993, he received a copy of a letter dated July 23, 1993 sent D by Shri A.K. Kaushal, an Assistant Director General in the office of the Director General (Posts), New Delhi, to Shri jagdamba Singh, ADOS (Rectt.) attached to the office of the Chief Post Master General, U.P. Circle, intimating him that as he (the appellant) was working in SBCO as an LDC (Lower Division Clerk) he was not eligible to appear for the PO E and RMS Accountant examination and his candidature may be cancelled immediately, Since this letter has an important hearing on this appeal we quote the same in extenso :

C

"A.K. KAUSHAL
ASSTT. DIR. GENL. (SPN) F

141-230/92-SPB-II 23.7.93

Dear Shri Singh,

Please refer to your d.o. letter No. Rectt. /M- 67/May-92/3 G dated 4.5.93 regarding posting of Shri Jahar Singh, SBCO Agra H.P.O. as Accountant.

2. The mater has been examined. Since *Shri Jahar Singh was working in SBCO as an LDC* he was not eligible to appear for the *PO* & RMS Accountant Exam as per rules. The candidature of H

A Shri Jahar Singh may be cancelled immediately and he cannot, therefore, be considered for appointment as an Accountant.

With best wishes,

Yours sincerely,
B (A.K. KAUSHAL)

Shri Jagdamba Singh, A.D.O.S. (Rectt.)
O/o the Chief Postmaster General,
U.P. Circle,
C *LUCKNOW*

Copy to :

1. The PMG Agra Region, Agra.

D 2, *Shri Jahar Singh, PA (SBCO) Agra H.P.O.* with reference to his letter dated 28.3.1993 addressed to Member (D), Department of Posts, Dak Bhavan, New Delhi,

(A.K. KAUSHAL)
Asst. Director General (SPN)"

E

(emphasis supplied)

Against such cancellation of his candidature the appellant made a representation to the Director General of Posts, New Delhi which was rejected. He then filed an original application in the Central Administrative F Tribunal. (CAT) Allahabad Bench wherein he asserted that though his initial appointment in 1983 was as in LDC in SBCO since August 1, 1991 he was working there as a Postal Assistant (PA) and the permission that was granted to him to appear in the examination for appointment as an Accountant was unqualified - and not provisional. He, therefore, submitted G that the respondents were not justified in rejecting his claim for appointment to that post after his success in the examination.

In contesting the application the respondents reiterated that the appellant was working as an LDC at the time he appeared for the examination. The other contention that was raised on their behalf was that even H the PAs of SBCO acquired an identity of its own after it (SBCO) was

reorganised with effect from August 1, 1991 with a different and distinct channel of promotion which did not entitle them to become Accountants in PO and RMS under the extant Rules.

In disposing of the application the Tribunal observed that though from the admitted facts of the case it was apparent that the appellant was allowed to appear in the examination for appointment as an Accountant by mistake as he belonged to a separate cadre, the respondents were not justified in cancelling his candidature as he was a *bona fide* candidate and there was no lapse on his part. It further observed that no rules or circulars were brought to its notice which empowered the respondents to cancel his candidature. Accordingly, the Tribunal set aside the order dated July 23, 1993 cancelling the candidature of the appellant as an Accountant and all orders made pursuant thereto. Inspite thereof, the Tribunal did not grant the relief sought for by the appellant on the ground that he had become ineligible for promotion to the post of Accountant by virtue of separation of cadres of Assistants of SBCO from those PO and RMS. Dissatisfied with the above order the appellant filed a review application contending that after having quashed the order of cancellation of his candidature the Tribunal was not justified in refusing him the consequential relief of being appointed as an Accountant in PO and RMS. The Tribunal, however, rejected the application observing that even a defective reasoning of an order could not be made the basis for setting aside the same in review. Hence this appeal at the instance of the appellant.

Besides, reiterating the contentions raised before the Tribunal Mr. Murlidharan, the learned counsel appearing for the appellant submitted, relying upon the averments made by the appellant in the supplementary affidavit he filed in this Court, that the contention of the respondents that PAs of SBCO were not eligible for appointment to the post of Accountants in PO and RMS was patently untrue for in the following year (1993) also PAs of SBCO were permitted to appear in the examination held for the above post. In opposing the above contentions Mr. Chaudhary, the learned Senior counsel appearing for the respondents, assailed the finding of the Tribunal that the cancellation of the appellant's candidature was improper but supported the other finding of the Tribunal that the appellant was not entitled to the post of Accountant in the PO and RMS, as SBCO has a distinct identity and separate channel of promotion.

A To appreciate the respective contentions of the parties we have carefully gone through the entire materials on record and the only conclusion we draw therefrom is that the respondents have taken different and contradictory stands only to forestall the claim of the appellant and Shri Kaushal, who has filed affidavits on their behalf, has made patently incorrect and untrue statements therein.
B

From a cursory glance of the letter dated July 23, 1993 written by Sri Kaushal (reproduced earlier) it is apparent that the only ground that was canvassed by the respondents to cancel the candidature of the appellant was that he was working in SBCO as LDC. In the affidavit that Shri
C Kaushal filed in this Court on December 9, 1995 while opposing the special leave petition of the appellant, he reiterated :

> "He (the appellant) wrongly mentioned in his application (obviously referring to his application seeking permission to appear in the examination) that he was Postal Assistant and inadvertently he was
D allowed to sit in the examination. When it was realised that the permission given to him was contrary to the rules it was rightly cancelled and naturally he was not entitled to any consequential benefits."

E That the above stand of the respondents, as put forward through the affidavit of Shri Kaushal, is unfounded will be apparent, first from the letter dated July 23, 1993 itself wherein, while indicating that a copy of the letter was being forwarded to the appellant his designation was shown as 'PA (SBCO) Agra HPO' - and not LDC - and secondly, from the following statement made by Shri Kaushal in paragraph 3 of his affidavit filed in this
F Court on March 29, 1996 :

> "It is submitted that the petitioner Sri Jahar Singh is a postal assistant in Savings Bank Control Organisation....."

Since the post the appellant was holding was made the sole basis for
G cancelling his candidature - as the letter dated July 23, 1993 clearly demonstrates - the above discussion of ours would have been sufficient to allow this appeal but as later on the respondents took the organisational ineligibility of the appellant to appear in the examination as a further ground for such cancellation we may advert to the same. In canvassing this
H ground it has been stated by Shri Kaushal in the affidavit filed on Decem-

ber 9, 1995 as under : A

> "It is further submitted that according to Rule 273 of the Postal Manual Vol. IV Postal Assistants and Sorting Assistants, Railway Mail Service are eligible for appearing in the examination of Post Office and Railway Mail Service Accountants. The petitioner belongs to Savings Bank Control Organisation Unit of Post Office and thus he was not entitled to appear in the said examination held in May, 1992. The petitioner (the appellant) *was inadvertently permitted because on his application form he had written his designation as Postal Assistant, SBCO.*" B C

(emphasis supplied)

Apart from the above Rule, reliance has also been placed on a circular dated July 26, 1991 issued by the Assistant Director General, Government of India, Ministry of Communications, Department of Posts, D which refers to the proposed reorganisation of the SBCO with effect from August 1, 1991, and particular emphasis laid on Para (viii) thereof which reads that "consequent upon reorganisation, the distinct identity of the SBCO will be maintained and Postal Assistants (SBCO) will not be interchangeable with the Postal Assistants of the Post Office." E

The above additional ground of the respondents so far it seeks to justify the cancellation of the candidature of the appellant as an Accountant even after he was given permission to appear in the examination in which he came successful is also without any substance. The averment in the above quoted paragraph that the permission was 'inadvertently' granted F because the appellant had wrote in his application form that his designation was P.A., SBCO is patently incorrect for on the showing of the respondents (as discussed earlier) the appellant was holding that post. Besides, in spite of the above Rules and Circular, two PAs of SBCO, Auraiya Office, namely Satya Prakash and H.C. Ram were permitted to appear in the PO and G RMS examination held in the year 1993 for appointment of Accountants as will be evident from the supplementary affidavit filed by the appellant on February 23, 1996. It is pertinent to mention here that in the affidavit that Shri Kaushal filed later on March 29, 1996, he did not dispute the above assertion of the appellant, nor give any explanation as to why such permission was granted to them in spite of the above Rules and Circular. H

A For the foregoing discussion we quash the impugned order dated July 23, 1993 and direct the respondents to grant all the benefits which the appellant would be entitled to consequent upon his having been declared successful in the examination held on May 22, 1992 for the post of Accountant in PO and RMS. This direction should be complied with by October 31, 1996. The appeal is thus allowed with costs, qnantified at Rs. 5,000.

B

H.K. Appeal allowed.

SAHIB SINGH

v.

STATE OF PUNJAB

SEPTEMBER 13, 1996

[M.K. MUKHERJEE AND S.P. KURDUKAR, JJ.]

Criminal Law :

Terrorist and Disruptive Activities (Prevention) Act, 1987 : Section 5.

Revolver and six live cartridges—Recovery of—No independent people of locality witnessed search—Arms and ammunition allegedly recovered from accused not packeted and sealed—No evidence to indicate with whom revolver was after its seizure till it was sent to Arms Expert—Held : In the circumstances of the case, accused was entitled to benefit of reasonable doubt—Armed Act, S. 25.

The appellant was convicted and sentenced under Section 25 of the Arms, 1959 and Section 5 of the Terrorists and Disruptive Activities (Prevention) Act, 1987. Hence this appeal

According to the prosecution, the appellant was apprehended on suspicion and on search by police officers a revolver with six live cartridges were recovered from the bag the appellant was holding in his right hand.

On behalf of the appellant it was contended that no independent people of the locality were called upon by prosecution to witness the search; that the Designated Court was not justified in solely relying upon the evidence of police officers in convicting the appellant; that the arms and ammunition recovered from the appellant were not packeted and sealed; and that there was no evidence to indicate with whom the revolver was after its seizure till it was sent to the Arms Expert.

Allowing the appeal, this Court

HELD : 1. Before conducting a search the concerned police officer is required to call upon some independent and respectable people of the locality to witness the search. In a given case it may so happen that no such person is available or, even if available, is not willing to be a party

to such search. It may also be that after joining the search, such persons later on turn hostile. In any of these eventualities the evidence of the police officers who conducted the search cannot be disbelieved solely on the ground that no independent and respectable witness was examined to prove the search but if it is found - as in the present case - that no attempt was even made by the concerned police officer to join with him some persons of the locality who were admittedly available to witness the recovery, it would affect the weight of evidence of the police officer, though not its admissibility. The arms and ammunitions allegedly recovered from the appellant and seized were not packeted and sealed. There was no evidence to indicate with whom the revolver was after its seizure till it was sent to the Arms Expert for testing. This missing link also weakens the prosecution case. For all these infirmities the appellant is entitled to the benefit of reasonable doubt. [247-F-H; 248-A-B]

Amarjit Singh **v.** *State of Punjab,* **[1995] Supp. 3 SCC 217, relied on.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 61 of 1992.

From the Judgment and Order dated 21.12.91. of the Designated Court, Amritsar, in S.C. No. 61 of 1991.

Ms. Naresh Bakshi for the Appellant.

Ms. Rupinder Wasu for R.S. Suri for the Respondent.

The Judgment of the Court was delivered by

M.K. MUKHERJEE, J. This appeal is directed against the judgment and order dated December 21, 1991 rendered by the Additional Judge, Designated Court, Amritsar in Sessions Case No. 21 of 1991 convicting and sentencing the appellant under Section 25 of the Arms Act, 1959 and Section 5 of the Terrorists and Disruptive Activities (Prevention) Act, 1987.

According to the prosecution case on May 12, 1990 at or about 12.30 P.M. when Inspector Gurmit Chand of Chheharata Police Station (P.W. 3) along with Sub-Inspector Rattan Lal (P.W. 2) and other police officials were on patrol duty near Bole-di-Bambi they apprehended the appellant on suspicion and on search recovered a revolver with six live cartridges from the bag he was holding in his right hand.

The appellant pleaded not guilty to the above accusation and his defence was that he was falsely implicated at the instance of his neighbour Sewa Singh. A

To prove its case, prosecution examined four witnesses of whom Manohar Lal (P.W. 1), a clerk in the office of the District Magistrate, Amritsar, proved the sanction accorded for prosecution of the appellant under the Arms Act; P.Ws. 2 and 3 spoke about the arrest of the appellant and the recovery of the revolver and the cartridges from him and Sital Singh (P.W. 4), an Armourer, claimed to have mechanically tested the revolver and found it in working order. Accepting their evidence the learned Judge recorded the impugned order of conviction and sentence, B C

It was first contended on behalf of the appellant that since no independent witness was examined by the prosecution to prove the alleged recovery of the arms and ammunitions from the appellant the designated Court was not justified in convicting him relying solely upon the evidence of the two police officers. It was next contended that since no evidence was led by the prosecution to prove that the offensive articles were packeted and sealed after their seizure the possibility of tampering with them could not be ruled out. It was lastly contended that from the test report of P.W. 4 (Ex. PF) it would appear that one Head Constable Baita Singh produced the revolver before him (P.W. 4) but neither he was examined nor any other witness to explain how he (the constable) got the revolver from P.W. 3. D E

Having gone through the record we find much substance in each of the above contentions. Before conducting a search the concerned police officer is required to call upon some independent and respectable people of the locality to witness the search. In a given case it may so happen that no such person is available or, even if available, is not willing to be a party to such search. It may also be that after joining the search, such persons later on turn hostile. In any of these eventualities the evidence of the police officers who conducted the search cannot be disbelieved solely on the ground that no independent and respectable witness was examined to prove the search but if it is found - as in the present case - that no attempt was even made by the concerned police officer to join with him some persons of the locality who were admittedly available to witness the recovery, it would affect the weight of evidence of the Police Officer, though not its admissibility. We next find from the record that the arms F G H

A and ammunitions allegedly recovered from the appellant and seized were not packeted and sealed. In *Amarjit Singh* v. *State of Punjab,* [1995] 3 SCC 217 this Court has observed that non-sealing of the revolver at the spot is a serious infirmity because the possibility of tampering with the weapon cannot be ruled out. From the record we further find that there is no evidence to indicate with whom the revolver was after its seizure by P.W. 3 till it was sent to the Arms Expert for testing through constable Baita Singh. This missing link also weakens the prosecution case. For all these infirmities we are of the view, that the appellant is entitled to the benefit of reasonable doubt.

C We, therefore, allow this appeal and set aside the conviction and sentence against the appellant. The appellant, who is on bail, is discharged from his bail bonds. Fine, if paid, be refunded to him.

V.S.S. Appeal allowed.

DEVINDER

v.

STATE OF HARYANA

SEPTEMBER 13, 1996

[M.K. MUKHERJEE AND S.P. KURDUKAR, JJ.]

Indian Penal Code, 1860—Section 302 :

Code of Criminal Procedure, 1973, Section 157—Circumstances for benefit of doubt—Non-disclosure of the names of the accused at the earliest opportunity—Delay in sending the special report to the Magistrate—Benefit of doubt can be given to the accused—Arms Act, 1959—Ss. 25, 27—TADA Act, S. 6.

At about 9.00 A.M. on 26th July, 1986 the appellant was alleged to have given two blows to the victim with knife-one on the left side of the chest and the other on the abdomen, in presence of two eye witnesses, who carried the injured to the Hospital, where he was examined by the doctor, who certified that at the time of admission the victim was fully conscious. The medico-legal report contained the name of his father, address, occupation and an account as to how the injuries were caused to him. The A.S.I. recorded the statement of P.W. 10 in the Hospital at 2.40 P.M. and the same was treated as FIR and a case under section 307 was registered. The injured succumbed to his injuries the next day at about 11.30 A.M. and on his death the case was converted to section 302 IPC and then only a special report was sent to the Magistrate. Charges were framed against the accused under section 302 IPC and under section 25 and 27 of the Arms Act 1959 read with Section 6 of TADA for unlawful possesion and user of a spring activated knife. The Designated Court, relying upon the testimony of the eye witnesses held the accused guilty of the charges and convicted him, against which the present appeal was moved before this Court.

Allowing the appeal, this Court

HELD : 1.1. Though apparently there is no reason to disbelieve the two eye witnesses, yet there are certain underlying circumstances due to which, benefit of reasonable doubt can be given to the appellant. [253-B; C]

A **1.2. According to the prosecution, after the infliction of the injuries, the victim was immediately taken to the hospital where he was examined and a medico-legal report was prepared which contained all material particulars like parentage, occupation, and an account as to how the injuries were received, except the name of the assailant. Obviously these material particulars had been furnished either by the victim himself or by the eye witnesses present. In this view of the matter, it was expected that if the appellant was really the assailant, then his name would have been disclosed by all or any one of them. Legitimately it can be inferred that at the earliest available opportunity the name of the appellant was not disclosed. [253-C-E]**

C **1.3. No special report in respect of the registration of the case was sent to the Magistrate on the day of occurrence and it was forwarded to the Magistrate only after the case was converted to one under section 302 IPC consequent upon the death of the victim on July 27, 1986 and was received in Magistrate's office at 10 P.M. This glaring circumstance indicates that the FIR did not see the light of the day till the death of the victim and the version of the prosecution that the FIR was recorded on July 26, 1986 is not true. [253-G-H; 254-A]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 446 of 1987.

From the Judgment and Order dated 26.7.86 of the Designated Court, Rohtak, Haryana in Sessions Case No. 550 of 1986.

Ms. Rajni Anand (A.C.) for the Appellant.

Prem Malhotra for the Respondent.

The Judgment of the Court was delivered by

M.K. MUKHERJEE, J. The subject matter of challenge in this appeal is the judgment and order dated May 30, 1987 rendered by the Designated Court, Rohtak, while disposing of Sessions Case No. 550 of 1986 and Arms Act Case No. 551 of 1986. By the impugned judgment and order the Court convicted and sentenced the appellant Devinder @ Pappy under Section 302 IPC and Sections 25 and 27 of the Arms Act, 1959 read with Section 6 of Terrorist and disruptive Activities (Prevention) Act, 1985 ('TADA' for short).

2. Shorn of details the prosecution case is as under : (a) Ramphal (the deceased) used to sell vegetables from his shop-cum- residence in the Janta Colony, Rohtak city. On July 26, 1986 at or about 9 A.M. the appellant went to his shop and asked for some vegetables on credit. Ramphal told the appellant that as he had not paid his earlier dues he would not oblige him any more. Since such refusal of Ramphal was in the presence of two others, namely, Jagdish (P.W. 10) and Satbir Singh (P.W. 11), the appellant felt insulted and left in a huff.

(b) About twenty minutes thereafter the appellant came back with a knife and remarked that he would teach him (Ramphal) a lesson for insulting him in the presence of others. Ramphal, who was then cooking, stood up and attempted to escape. He however could not succeed in his attempt as the appellant gave him two blows with the knife - one of the left side of the chest and the other on the abdomen. Jagdish and Satbir Singh, who were there still then, and one Umesh, who reached there by chance, witnessed the assault.

(c) Jagdish and Umesh then carried Ramphal in a rickshaw to the Medical College Hospital, Rohtak where he was examined by Dr. Sushil Kumar Jain (P.W. 5) first, After examination, Dr. Jain sent a medico legal report (Ex. PS) and a *rukka* (Ex. PD) to the Police Post attached to the hospital where an entry in terms thereof was made by Constable Mangal Singh (P.W. 1) in the daily diary book at 1.45 P.M. (Ex. PE).

(d) In the meantime, however, - at 11.30 A.M. to be precise - the City Police Station, Rohtak had received a telephonic message from the above Police Post about the admission of Ramphal in the hospital with injuries on his person and, after recording that message in the daily dairy book (Ex. PF), ASI Tota Ram (P.W. 12) had left for the hospital. Reaching there he found Jagdish present and recorded him statement (Ex. PZ) at 2.40 P.M. which was treated as the FIR. After forwarding the statement to the Police Station for registering a case, Tota Ram took up investigation and went to the spot. He prepared a rough site plan and seized some blood-stained earth therefrom in the presence of Jagdish and Satbir.

(e) Ramphal, who was admitted as an indoor patient in the hospital, was operated upon by Dr. Pradeep Kumar (P.W. 7) for his injuries but he succumbed to them on the following day i.e. July 27, 1986 at 11.30 A.M. On receipt of that information the case which was earlier registered against

A the appellant under Section 307 I.P.C. was converted into one under Section 302 I.P.C. and a special Report (Ex. PH) was sent to the local Magistrate, ASI Tota Ram then went to the hospital and after holding inquest upon the dead body of Ramphal, sent it for autopsy which was performed by Dr. M.K. Bishnoi (P.W. 9).

B (f) In course of the investigation the appellant was arrested on July 29, 1986 and pursuant to a statement made by him to Tota Ram on July 31, 1986 (Ex. PEE) a spring activated knife concealed under the bricks in a deserted *kotha* towards the southern boundary wall of Hanuman Park, Rohtak was recovered in the presence of Jagdish (P.W. 10) and Daya C Chand. After recovery of the knife a separate case was registered against the appellant under the Arms Act, 1959 read with Section 6 of TADA.

(g) The blood-stained earth recovered from the spot, the shirt removed from the dead body of Ramphal and the knife recovered pursuant to the statement of the appellant were sent to the Forensic Science D Laboratory (F.S.L.), Madhuban for chemical examination and human blood was detected on all those articles on such examination. On completion of the investigation ASI Tota Ram submitted two separate charge-sheets against the appellant; one under Section 302 I.P.C. for the murder of Ramphal on July 26, 1986 and the other under Section 25 and 27 of the E Arms Act, 1959 read with Section 6 of TADA for unlawful possession and user of a spring actuated knife.

3. The two cases arising out of the above charge-sheets were clubbed and tried together and were disposed of by the impugned judgment in the manner indicated above.

F

4. The appellant pleaded not guilty to the charges levelled against him and his defence was that at the instance of Jagdish and Ramphal he was falsely implicated in the case as he had, three days prior to the alleged murder of Ramphal, a quarrel with Jagdish and Umesh over their mis-G behaviour in their locality under the influence of liquor.

5. In support of their respective cases prosecution examined twelve witnesses and the defence one.

6. To sustain the charge of murder levelled against the appellant the H prosecution rested its case principally upon the ocular version of Jagdish

(P.W. 10) and Satbir (P.W. 11). The Designated Court found them to be the most probable and natural witnesses and as their evidence stood amply corroborated by the evidence of the doctors, the recovery of the knife pursuant to the statement of the appellant, and the report of the Forensic Science Laboratory held the appellant guilty of both the charges levelled against him. A B

7. Having carefully gone through the entire materials on record, we are unable to sustain the impugned judgment. Though apparently there is not reason to disbelieve the two eye witnesses, there are certain underlying circumstances which persuade us to give the benefit of reasonable doubt to the appellant. According to the prosecution case - and as testified by Jagdish - immediately after the assault Ramphal was taken to the hospital by him (Jagdish) and Umesh (not examined), who were present at the time of the assault. Dr. Jain testified that at the time of admission Ramphal was fully conscious and his blood pressure and pulse were normal. From the medico legal report (Ex. PS) that the doctor sent to the police after examining Ramphal we find that apart from his name, the father's name of Ramphal, his address, his occupation and an account as to how the injuries were caused find place. Obviously all these particulars had been furnished by Ramphal, and/or Jagdish and Umesh, who had accompanied him. In that context it was expected, if really the appellant was the assailant, that his name would be disclosed by all or any of them while furnishing the cause of the injuries. It can, therefore, be legitimately inferred that at the earliest available opportunity the name of the appellant was not disclosed. C D E

8. It was, however, contended by Mr. Malhotra appearing on behalf of the respondent that since the F.I.R. was lodged by Jagdish with promptitude and therein the name of the appellant as the assailant had been mentioned, non-disclosure of his name earlier before the doctor, who was under no statutory obligation to record the name of the assailant, was of no moment. If the F.I.R. was recorded at 2.40 P.M. (on July 26, 1986) as indicated therein we might have persuaded ourselves to accept the contention of Mr. Malhotra but we find, suprisingly enough, that no special report in respect of the registration of the case was sent to the Magistrate on that day; and, indeed, as the evidence on record unmistakably shows that it was forwarded to the Magistrate only after the case was converted to one under Section 302 IPC consequent upon the death of Ramphal on July 27, 1986 and received in his office at 10 P.M. This glaring circumstance F G H

A prompts us to hold that the F.I.R. did not see the light of the day till the death of Ramphal and the version of the prosecut on that the F.I.R. was recorded on July 26, 1986 is not true.

9. For the foregoing discussion the prosecution case as presented before the Court cannot be accepted. We, therefore, allow this appeal, set B aside the conviction and sentence recorded against the appellant and acquit him. The appellant, who is in jail, be released forthwith unless wanted in connection with some other case.

H.K. Appeal allowed.

ALL INDIA STATE BANK OFFICERS FEDERATION AND ORS. A

v.

UNION OF INDIA AND ORS.

SEPTEMBER 13, 1996

B

[J.S. VERMA AND B.N. KIRPAL, JJ.]

Service Law :

State Bank of India Officers (Determination of Terms and Conditions of Service) Order, 1979 : Paragraph 17. C

Promotion—Candidates—From post of Senior Management Grade Scale V to Top Executive Grade Scale VI in State Bank of India—Zone of consideration—Omission to limit number of candidate—Validity of—Originally minimum two years' service in the previous grade/scale required and zone of consideration limited to three to four times the number of vacancies—However, promotional policy dated 7.3.1989 discontinued limitation of zone of consideration and raised minimum service from two to four years—Held : promotional policy not illegal—State Bank of India (Supervising Staff) Service Rules, 1975—State Bank of India Act, 1955—Ss. 17 and 43. D E

Promotion—Candidates—From Senior Management Grade Scale V to Top Executive Grade Scale VI—Eligibility of—Promotional policy dated 7.3.1989—Modification in norms of—Held: promotional policy not arbitrary—Eligibility norms made on realistic basis—To choose best talents to man critical positions—Court could not sit in appeal to decide what was good for Bank. F

Promotion—From Senior Management Grade Scale V to Top Executive Grade Scale VI—Interview—Candidates—Number of—Guidelines dated 23.6.1986 issued under Regn. 17—Limited number of candidates to be interviewed to three to four times of vacancies—Applicability of—Held : applicable only to Nationalised Banks and not to State Bank of India—Furthermore, said guidelines could not be regarded as directions under Section 18 of State Bank of India Act—Government of India, Ministry of Finance Guidelines dated 23.6.1986—Officers Service Regulations Regn. 17—Banking Regulation Act, 1949. G H

A *Promotion—Candidates—From Senior Management Grade Scale V to Top Executive Grade Scale VI—Eligibility of—Promotional policy dated 7.3.1989—Modification in norms of—Made by Central Board of State Bank of India—Allegedly motivated to benefit certain candidates—Conditions precedent for such allegations to succeed—Held : person making such allega-*
B *tion must conclusively show that intended beneficiaries wielded influence over all members of Board—Neither this condition fulfilled nor Chairman or Directors impleaded—Hence, petitioners could not be allowed to raise said allegations of mala fides.*

Promotion—Candidates—From Senior Management Grade Scale V to
C *Top Executive Grade Scale VI—Consideration of past records—Absence of uniform appraisal system—Annual Confidential Reports—Replaced by assignment appraisal system throughout the Bank not simultaneously but in a phased manner from 1986 to 1990—Consequently, in case of some officers annual confidential reports considered while in case of others assignment*
D *appraisal reports considered—Held : absence of uniform appraisal system did not vitiate selection—Consideration of two types of reports did not result in discrimination—Constitution of India, 1950, Art. 14.*

Promotion—Candidates—From Senior Management Grade Scale V to Top Executive Grade Scale VI—Past record for period which exceeded min-
E *imum length of service in post immediately below—Consideration of—Whether valid—Held : consideration of performance of six years while minimum service for eligibility was four years did not cause prejudice to any officer.*

Promotion—Candidates—From Senior Management Grade Scale V to
F *Top Executive Grade Scale VI—Interview—Prescribed minimum 60% marks as eligibility criterion—Validity of—Held : interview marks represented only 25% of aggregate marks—No exaggerated weightage given to marks prescribed in interview.*

G *Practice and Procedure :*

Affidavit—False allegation in—Challenge of promotion to Top Executive Grade Scale VI in State Bank of India in writ petition by petitioner—Federation—In rejoinder affidavit, the then President of petitioner—Federation deposed that in fact only V, an officer of Bank, had allotted marks on
H *the individual promotion appraisal forms on basis of which list of candidates*

prepared and signed by three members of Screening Committee—Supreme Court directed the then President to verify on affidavit the said allegation specifying precise source of information—Supreme Court also warned that if allegation was found false that also would have its own consequences—President filed additional affidavit deposing that he derived information from V himself and another officer of Bank—Chief General Manager (Personnel) of Bank as well as two officers, referred to in said additional affidavit, filed their own affidavits denying said allegation—Furthermore, allegation not substantiated by photo copies of appraisal forms of promotees—Held : In such circumstances, said allegation in rejoinder affidavit of the then President absolutely false—The then President already apologised to Supreme Court for some mis-statements in an earlier affidavit—Supreme Court expressed its disapproval and anguish over that matter—But did not dismiss petition in view of offer of Bank to contest the case on merits—Since the then President once again made false statements in his affidavit despite said observations of Supreme Court, he deserved to be prosecuted—However, since he was no longer President of Federation and since prosecution might take further time, instead of directing him to be prosecuted, the petition dismissed with costs, quantified at Rs. 20,000 of which Rs. 10,000 to be paid by him personally—Constitution of India, 1950, Art. 32—Judicial strictures.

The petitioner-Federation filed a writ petition before this Court challenging the new promotional policy framed by the respondent-Bank on 7.3.1989 relating to the promotion from the post of Senior Management Grade Scale V to Top Executive Grade Scale VI. The said Policy was framed by the Central Board under paragraph 17 of the State Bank of India Officers (Determination of Terms and Conditions of Service) Order, 1979 which had been framed under Section 43 of the State Bank of India Act, 1955. The State Bank of India (Supervising Staff) Service Rules, 1975 framed under Section 43 of the Act, dealt with various grade and scales of officers, conduct rules, salary, seniority, promotion, etc. From 1975 onwards the Central Board approved a promotion policy under which assignment appraisals and interviews were made the two components of the selection procedure. According to the petitioners zone of consideration from amongst the eligible officers had been varying from time to time. From 8.6.1982 onwards two years' service in the previous grade/scale became a condition of eligibility for promotion but the zone of consideration was limited to three to four times the number of vacancies. In the policy framed on 7.3.1989 the Central Board made three modifications

A which were as follows :

(i) The minimum service in the previous grade/scale for being eligible for promotion was raised to four years.

(ii) The maximum marks for interview and performance appraisal
B were refixed as 50 and 150 instead of 100 and 100 respectively.

(iii) The limitation of the zone of consideration was discontinued.

From 1986 onwards the system of writing of annual confidential reports was substituted by a new appraisal system in which the appraisee
C got an opportunity of writing self appraisal. However, this new system was not introduced throughout the Bank simultaneously but was completed in a phased manner only in 1990.

The main contention of the petitioners was that it was unreasonable
D not to limit the zone of consideration to three to four times of the number of vacancies. It was further contended by the petitioners that the change in the policy was completely arbitrary and without any reason; that the guidelines dated 23.6.1986 issued by the Government of India, Ministry of Finance under Regulation 17 of the Officers Service Regulations mentioned that the number of persons to be considered for promotion from
E one scale to another should normally be restricted to three or four times the number of vacancies; that the promotion policy should not have been in conflict with the said guidelines; that the change in policy in 1989 was motivated with a view to benefiting respondents 4 and 5; that uniform system of appraising the work was not followed in that in case of some
F employees annual confidential reports were considered and in case of others assignment appraisal reports were considered which had caused prejudice to a section of the employees of the Bank; that with the change in the eligibility norm to four years instead of the actual five/six service there was a need for reducing the consideration of period of appraisal from
G six years to four years; that as this had not been done the junior officers who were considered were at an advantageous position because their performance in Scale V as well as in the lower Scale IV was considered whereas in the case of senior officers their performance in Scale V alone was considered because they had rendered more than five to six years service in that grade; that prescribing of 60 per cent marks for the
H interview as an eligibility criteria was arbitrary, unfair and unjust; and

that the percentage of marks in the *viva voce* examination should not have not more than 15 per cent. A

Dismissing the petition, this Court

HELD : 1. Having a reasonable eligibility condition, as four years in the present case, may become meaningless if all the eligible officers are not considered for promotion. By increasing the number of years from two to four the field has been somewhat restricted and considering that selection has to be made only on the basis of merit, it is not unreasonable to give an opportunity to all the eligible officers to compete with each other and for the best persons to be selected. Therefore, it cannot be held that the change of the policy brought by the Board in its meeting on 7.3.1989 in this regard is in any way bad in law. [271-G-H] B C

Ashok Kumar Yadav v. *State of Haryana,* [1985] 4 SCC 417; *V.J. Thomas & Ors.* v. *Union of India & Ors.,* [1985] Supp. SCC 7 and *S.B. Mathur & Ors,* v. *Chief Justice of Delhi High Court,* [1989] Supp. 1 SCC 34, held inapplicable. D

2. There is nothing wrong if the bank devised a policy defining the eligibility norms on a realistic basis and devised a system whereby the best available talent would be chosen to man the critical positions. Keeping this objective in view the changes in the promotion policy have been made. It is always for the employer to see how to promote and utilise the best talent available in the organisation. The promotion policy originally framed in the year 1975 has been amended from time to time. The changes have now been made in 1989 keeping in mind the requirement of the bank and based on the experience of the bank in regard to making selection for promotion. The changes so made cannot be regarded as arbitrary and the Court cannot sit in appeal and decide as to what is good for the institution. Under the new policy the petitioners are also eligible for consideration and they cannot have any grievance because certain persons who were eligible under the old policy, but in practice were not considered for promotion, are now considered under the new policy. The object of the new policy seems to be not only to redress the injustice to those officers resulting on account of the difference between the rules and the practice but also with the object of selecting the best talent for the top executive posts. [274-H; 275-A-C] E F G

3. The guidelines in question have been issued by the Government H

A under the Regulations framed under the Banking Regulations Act, 1949 which Act does not apply to the State Bank of India. The said guidelines dated 23.6.1986 are addressed to the Chief Executives of twenty nationalised banks and only a copy of the same was marked to the Chairman of the respondent bank. Furthermore as far as State Bank of
B India is concerned paragraph 17 of the State Bank of India Officers (Determination of Terms and Conditions of Service) Order, 1979 empowers the Central Board or the Executive Committee to lay down a policy regarding promotion to all grades of officers in the Bank. The aforesaid guidelines which have been issued expressly relate to the nationalised banks, and not to the State Bank of India, and cannot be regarded as
C directions which are issued under Section 18 of the State Bank of India Act, 1955 as was sought to be suggested by the petitioners. [272-C-F]

4.1. The modification was approved by the Chairman and all the Directors who were present in the meeting of the Board. For an allegation of *mala fide* to succeed it must be conclusively shown that respondents 4
D and 5 wielded influence over all the members of the Board who were present in the said meeting. No such allegation has been made. The decision to modify the promotion policy was taken by a competent authority, namely, the Central Board in a duly constituted meeting held on 7.3.1989 and it is not possible to accept that this change in the policy was brought about
E solely with a view to help respondents 4 and 5. [274-C-D]

4.2. Moreover, the person against whom *mala fides* are alleged must be made a party to the proceeding. The allegation that policy was amended with a view to benefit respondents 4 and 5 would amount to the petitioners contending that the Board of Directors of the Bank sought to favour
F respondents 4 and 5 and, therefore, agreed to the proposal put before it. Neither the Chairman nor the Directors, who were present in the said meeting, have been impleaded as respondents. This being so the petitioners cannot be allowed to raise the allegations of *Mala fide*. [274-E-F]

G 5. It is no doubt that in the case of some employees annual confidential reports were considered and in the case of other employees assignment appraisal reports were considered. However, this cannot be a good ground for holding that the selection is vitiated. No particulars have been given in the writ petition in order to show that the officers in whose case that annual confidential reports were considered had suffered a disadvantage. Each
H report of an officer, whether an annual confidential report or assignment

appraisal report, had to be considered on its own and the performance assessed. There is nothing to suggest that such assessment on the basis of the annual confidential report or the assignment appraisal report could not have been given. It is, therefore not possible to hold that the consideration of two types of reports had resulted in any discrimination.

[275-G; 276-C-D-E]

6. The procedure of considering the assignments in respect of the positions held during the past six years was in vogue even when the eligibility criteria was two years which has how been revised to four years. Furthermore even in the case of some senior officers the assignments would cover a portion of their tenure as Scale IV officers. In considering such reports what has to be seen is whether the assignment targets which are set have been satisfactorily met or not. It would not be very material as to in which scale the officer was while adjudging this aspect. Normally in order to assess the merit of an officer a period covering three assignments was considered to be necessary. This being so six years annual assignment reports had to be considered and such consideration could not be said to have caused any prejudice to any officer. This contention, therefore, is without any substance. [277-F; G; H]

7.1. There can be no rigid or hard and fast rule that the interview marks can only be 15 per cent and no more. The percentage of marks for *viva voce* or interview which can be regarded as unreasonable will depend on the facts of each case. What the interview or *viva voce* marks should be, may vary from service to service and the office or position or the purpose for which the interview is to be held. But the interview marks should not be so high as to give an authority unchecked scope to manipulate or act in an arbitrary manner while making selection. Where merit can be best judged by holding an interview there such marks may be high but each case will have to be judged on its own facts. Interview marks may be the minimal in such cases as relating to admission to a college. [278-B-C-D]

Periakarupan v. *State of Tamil Nadu,* [1971] 1 SCC 38 and *Ajay Hasia* v. *Kalid Mujib Sehrawardi,* [1981] 1 SCC 722, relied on.

7.2. In the present case, the interview marks represent only 25 per cent of the aggregate, i.e. 200 marks. In order to be eligible a candidate is required to obtain 60 per cent of these fifty marks. Considering the fact that the selection has to be made for appointment to the top executive

A cadre and keeping in view the job requirements and the nature of responsibility the bank has raised the minimum qualifying percentage from 50 per cent to 60 per cent. At the same time the total number of interview marks have been reduced from 100 to 50. Under the circumstances it cannot be contended that exaggerated weightage has been given to the
B marks to be obtained in the interview. [279-G-H; 280-A]

Lila Dhar v. *State of Rajasthan,* [1981] 4 SCC 159; *State of U.P.* v. *Rafiquddin,* [1987] Supp. SCC 401 and *Mehmood Alam Tariq & Ors.* v. *State of Rajasthan & Ors.,* [1988] 3 SCC 241, relied on.

C 8.1. In the rejoinder affidavit the then President of the petitioner-Federation deposed that in fact only V, an officer of the Bank had allotted the marks on the individual promotion appraisal forms on the basis of which a list of candidates was prepared by three members of the Screening Committee. This Court directed the then President to verify on affidavit
D specifying the precise source of information from which the said allegation was derived. This Court also warned that if the allegation was found false that also would have its own consequences. The then President filed an additional affidavit deposing that he had derived the information from V himself and another officer of the Bank. The Chief General Manager (Personnel) of the Bank as well as the two officers, referred to in the said
E additional affidavit, filed their own affidavits, denying the said allegation. Furthermore, the allegation was not substantiated by photo copies of the appraisal forms of the promotees. In such circumstances, the said allegation in the rejoinder affidavit of the then President of the petitioner-Federation is absolutely false. [280-A]

F 8.2. The then President had already "tendered an unqualified appology" to this Court for some mis-statements made in an earlier affidavit. This Court expressed its disapproval and anguish over that matter but did not dismiss the petition in view of the offer of the respondent-Bank to contest the case on merits. Since the then President had once again made
G false statements in his affidavit despite the said observations of this Court he deserved to be prosecuted for having committed perjury. However, since he is no longer the President of the Federation and considering that prosecution may take further time, instead of directing him to be prosecuted, this writ petition is dismissed with costs which are quantified
H at Rs. 20,000 of which Rs. 10,000 will be paid by him personally. [284-E-F]

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 507 of 1989. A

(Under Article 32 of the Constitution of India.)

WITH

B

Writ Petition (C) No. 1260 of 1989.

Under Article 32 of the Constitution of India.

Rajinder Sachher, R. Vasudevan, D.S. Chauhan, K.D. Saini for Lawyers Inn for the Petitioners. C

Dr. A.F. Julian and A. Mariarputham for the Petitioner.

Shanti Bhushan, Shanti Swarup Sharma, Sanjay Kapur, Rajiv Kapur, A.V. Rangam and A. Ranganathan for the Respondents.

D

The Judgment of the Court was delivered by

KIRPAL, J. The All India State Bank Officers Federation, which is registered as a trade union of the officers of the State Bank of India working throughout the country, is seeking to challenge a new promotional policy framed by the respondent bank on 7th March, 1989 relating to the E promotion from the post of Senior Management Grade Scale V to Top Executive Grade Scale VI.

The respondent bank was established by the State Bank of India Act, 1955 (for short 'the Act') and according to Section 17 of the said Act its Management is entrusted to the Central Board constituted under the Act. F Under Section 43 of the said Act the Bank is empowered to appoint such number of officers, advisers and employees as it considers necessary or desirable for the efficient performance of its functions. Sub-section (1) of Section 43 gives the bank the power to determine the terms and conditions of the appointment of such persons. G

The bank framed State Bank of India (Supervising Staff) Service Rules, 1975, in exercise of its powers under Section 43 of the Act. These rules deal with various grades and scales of officers, conduct rules, salary, seniority, promotion etc. Again, under Section 43 of the Act, the Central Board of the bank framed the State Bank of India Officers (Determination H

A of Terms and Conditions of Service) Order 1979 (hereinafter referred to as 'DTCS Order'). This Order deals with various grades and scales of officers, salary perquisites, appointments, probation, confirmation, promotion, age of retirement rules, terminal benefits etc. The grades and scales of officers are as follow :

B

"*From 1.10.79* (consequent upon revision of service conditions)	*From 1.2.84* (consequent upon wage revision)
Junior Management Grade I and all officer Gr. II	Junior Management Gr. I
Middle Management Grade Scale II	Middle Management Grade Scale II
Middle Management Grade Scale III	Middle Management Grade Scale III
Senior Management Grade Scale IV	Senior Management Grade Scale IV
Senior Management Grade Scale IV-A	Senior Management Grade Scale V
Senior Management Grade Scale V	Top Executive Grade Scale VI Dy. General Manager
Top Executive Grade Scale VI General Managers	Top Executive Grade Scale VII - General Managers
Top Executive Grade Scale VII Chief General Managers	Top Executive Grade Special Scale I-Chief General Managers
Top Executive Grade Special Scale I Dy. Managing Directors	Top Executive Grade Special Scale II- Dy. Managing Directors"

Paragraph 17 of the DTCS Order specifically deals with promotion of staff and is as under :

H "Promotions to all grades of officers in the Bank shall be made

in accordance with the policy laid down by the Central Board or the Executive Committee from time to time." A

In exercise of the powers under this paragraph the Central Board of the Bank has, from time to time, been determining the policy for promotion to various grades of scales of officers. The policy for promotion from Senior Management Grade Scale V to Top Executive Grade Scale VI, with B which we are concerned in the present petition, and Top Executive Grade Scale VI to Top Executive Grade Scale VII was framed by the Central Board in its meeting held on 28th November, 1975. Prior to 1975 the promotion policy which was in force for promotion to Top Executive Grade Scale VI and to Scale VII did not provide for any selection proce- C dure. From 1975 onwards the Central Board approved a promotion policy under which assignment appraisals and interviews were made the two components of the selection procedure. According to the petitioners zone of consideration from amongst the eligible officers had been varying from time to time. Generally the Bank had been following a ratio of 1 : 3 or 1 : 4 between the number of vacancies and the number of candidates. The D Central Board at its meeting held on 8th June, 1982 approved a modification in the promotion policy in terms of which officers with two years service in Senior Management Grade Scale V were to be eligible for promotion to Top Executive Grade Scale VI and officers with two years service in Top Executive Grade Scale VI were to be eligible for promotion E to Top Executive Grade Scale VII. It is an admitted fact that as the zone of consideration was restricted to three to four times the number of vacancies, the candidates who were actually considered for promotion to Top Executive Grade Scale had put in a minimum five to six years of service in Scale IV, even though the minimum eligibility condition was of F only two years service.

In its meeting held on 7th March, 1989, the Central Board of the Bank made two modifications in the then existing policy which were as follow :

G

(i) The eligibility criterion for consideration for promotion to Top Executive Grade Scale VI was refixed at four years service in the previous grade/scale, instead of the existing two years service.

(ii) Previously evaluation of the eligible officers was done by allotment of marks on the performance appraisal and interview. An aggregate H

A of 200 marks were being allotted; 100 marks used to be allotted for performance appraisal and another 100 marks for interview. The qualifying marks both for performance appraisal and interview were 60 per cent. Now as a result of the modification made on 7th March, 1989 out of the aggregate of 200 marks, 150 marks were now allotted for performance appraisal (in lieu of the earlier 100 marks) and 50 marks (in lieu of the earlier 100 marks) had been allotted for interview. The qualifying marks for performance appraisal had been changed from 60 per cent to 80 per cent, while the qualifying marks for interview remained unaltered at 60 per cent.

C The manner in which the performance has been appraised has also undergone a change from time to time. Since long there had been in force a system of writing annual confidential reports. Since 1974 or 1975 a system of assignment appraisal was also introduced by the bank. In the year 1986, according to the petitioners, the bank brought about further change in the system of performance appraisal. The old system of writing of annual confidential reports was substituted by a new and more open and participatary appraisal system. According to the writ petition in this new system the appraisee got an opportunity of writing self appraisal. However, this new system was not introduced throughout the bank simultaneously. The old system of recording of annual confidential reports remained in position till that was gradually replaced by the self appraisal system. We were informed that now since 1990 the system invoked is only that of self appraisal and the old system of writing annual confidential reports no longer exists.

F The writ petition has been filed challenging the aforesaid modification in the promotion policy which was approved by the Central Board in its meeting held on 7th March, 1989. There are various grounds of attack to the resolution approving the new promotion policy. It is also the case of the petitioners that the manner in which the process of promotion has been undertaken was defective.

G

The main thrust of arguments of Mr. Rajindar Sachar, learned senior counsel appearing on behalf of the petitioners, was that it was unreasonable not to limit the zone of consideration to three to four times the number of vacancies. As a result of the new policy, it was submitted, a much larger H number of relatively junior officers have been considered and promoted.

In order to show that injustice had been done to senior eligible officers, as a result of the change in the policy, our attention was drawn to the following statement with regard to the filling up of 58 vacancies in Scale VII on selection made in 1989 :

	No. of officers who qualified with 70% marks in the past performance	No. of officers who qualified with 60% marks in the interview	No. of officers promot ed
Total number of officers considered under the impugned policy and belonging to the 1982, 1983 1984 and left over of earlier batches.	270	104	58
498			
Number of officers belonging to the 1982 and left over of earlier batches out of the total of 498 officers considered.	102	62	16
212			

The contention on behalf of the petitioners was that eligible candidates after the 1982 batch should not have been considered and if the zone of consideration had been limited to three to four times then the filed of choice would have been restricted and only those officers who were in Scale V in the year 1982 or earlier would have been considered and promoted. In support of his contention that doing away with the zone of consideration was not reasonable, reliance was placed on the decision of this Court in the case of *Ashok Kumar Yadav* v. *State of Haryana,* [1985] 4 SCC 417.

Ashok Kumar Yadav's case was concerned with the recruitments made by the Haryana Public Service Commission to 61 posts in Haryana

A Civil Service (Executive) and other allied services. The relevant rules provided that a competitive examination was to be held consisting of written examination in different papers having an aggregate of 700 marks and a *vive voce* examination carrying 200 marks. The rules, *inter alia,* further provided that no candidate was eligible to appear in the *vive voce* B test unless he obtained 45 per cent marks in aggregate in all the subjects. In response to the said advertisement 6000 candidates applied and appeared for the written examination and out of these over 1300 secured 45 per cent marks and had thus qualified for being called for the interview or the *vive voce* examination. Though originally the recruitment was only for C 61 posts but during the time when the selection process was under way a total number of 119 posts became available. The Haryana Public Service Commission invited all the 1300 and odd candidates who had qualified for the *viva voce* test and the interview lasted for almost half a year. On the basis of the total marks obtained in the written examination as well as *viva voce* test 119 candidates were selected and recommended by the Commis- D sion to the State Government. Some of the candidates who were not selected filed a writ petition in the Punjab and Haryana High Court challenging the said selection. Five of the selected candidates, including Ashok Kumar, were impleaded as respondents.

E The Division Bench of the High Court allowed the writ petition and held that the Haryana Public Service Commission should not have called for interview all the candidates who had obtained more than 45 per cent marks in the written examination and the number of candidates to be called for interview should not have exceeded twice or thrice the number of F vacancies required to be filled. This was one of the grounds on which the selection of Ashok Kumar and other candidates was quashed. Thereupon appeals were filed by Ashok Kumar Yadav and the State of Haryana. Their appeal was allowed by this Court and the selection made by the Haryana Public Service Commission was upheld. While dealing with the submissions relating to the Haryana Public Service Commission calling the 1300 and G odd candidates for *viva voce* test, who had secured 45 per cent or more marks in the written examination for only 61 seats, it was observed by this Court that merely because minimum qualification for eligibility to appear at the *viva voce* test for a candidate was to obtain at least 45 per cent marks in the aggregate in the written examination the Haryana Public Service H Commission was under no obligation to call for *viva voce* test all the

candidates who satisfied the minimum eligibility requirements. It was open to the Commission to call for *viva voce* test a limited number of candidates who figured at the top of the list. After referring to Kothari Committee's Report on "Recruitment Policy and Selection Methods for the Civil Service Examination" at page 447 it was observed as follows :

> "We are therefore of the view that where there is a composite test consisting of a written examination followed by a *viva voce* test, the number of candidates to be called for interview in order of the marks obtained in the written examination, should not exceed twice or at the highest, thrice the number of vacancies to be filled. The Haryana Public Service Commission in the present case called for interview all candidates numbering over 1300 who satisfied the minimum eligibility requirement by securing a minimum of 45% marks in the written examination and this was certainly not right, but we may point out that in doing so, the Haryana Public Service Commission could not be said to be actuated by any *mala fide* or oblique motive, because it was common ground between the parties that this was the practice which was being consistently followed by the Haryana Public Service Commission over the years and what was done in this case was nothing exceptional."

Relying upon the aforesaid passage it was strongly contended by Mr. Sachar that the policy of 7th March, 1989 which did away with the concept of zone of consideration was clearly contrary to the aforesaid observations of this Court in *Ashok Kumar Yadav's* case.

In our opinion *Ashok Kumar Yadav's* case can be of no assistance to the petitioners. It is no doubt true that this Court did make the aforesaid observation that the number of candidates to be called for interview should not exceed twice or at the highest thrice the number of vacancies to be filled. Nevertheless after making this observation the Court posed a question as to "whether this had any invalidating effect on the selections made by the Haryana Public Service Commission". The answer to this was provided in the subsequent paragraph in the following words "We do not think that the selection made by the Haryana Public Service Commission could be said to be vitiated merely on the ground that as many as 1300 and more candidates representing more than twenty times the number of

A available vacancies were called for interview, though on the view taken by us that was not the right course to follow and not more than twice or at the highest thrice the number of candidates should have been called for the interview. Something more than merely calling an unduly large number of candidates for interview must be shown in order to invalidate the
B selections made."

It is clear from the aforesaid that this Court was of the opinion that while it was desirable that the number of candidates who were called for *viva voce* examination should not be unduly large but it did not agree with the conclusion of the High Court that calling large number of candidates
C invalidated the selection. In other words not having a restricted zone of consideration was not regarded as illegal or bad in law. An unduly large number of candidates to be interviewed may make it impossible to carry out a satisfactory *viva voce* test and the interview may tend to be casual, superficial or sloppy. The above quoted observations are only words of
D caution lest the *viva voce* test be reduced to farce. Notwithstanding the fact that the Court did not approve of a large number of candidates being called for interview, nevertheless the selections so made by the Haryana Public Service Commission were not invalidated by this Court and the judgment of the High Court was set aside and the selection made was upheld.

E

Whereas in *Ashok Kumar Yadav's* case for 61 vacancies, which were originally notified, 1300 and odd candidates were called for *viva voce* examination and this Court held that this was not invalid, in the present case for 58 vacancies only 498 eligible officers were considered for promo-
F tion. Applying the ratio of decision of *Ashok Kumar Yadav's* case to the facts of the present case it cannot be said that the policy of considering all the eligible officers for promotion, without having a restricted zone of consideration is in any way bad in law. In fact in this manner no eligible officer can have a grievance, which may be legitimate, that he was not considered even though he was eligible.

G

Our attention was also drawn to the case of *V.J. Thomas and Ors.* v. *Union of India and Ors.*, [1985] Supp. SCC 7. The decision in this case has no application here because there the Court was concerned with a case where it was held that if the vacancies were few, and the candidates were
H disproportionately large in number, department could make a classification

amongst eligible candidates on the basis of their lenght of experience so as to restrict the examination only for those having longer service leaving others to appear in the next examination. Similarly the decision in *S.B. Mathur and Ors.* v. *Chief Justice of Delhi High Court and Ors.,* [1989] Supp. 1 SCC 34 holding that the zone of consideration or field of choice can be limited to a multiple of number of vacancies, on the basis of seniority, has no application to the point in issue here. In fact the Court referred to the decision in *Ashok Kumar Yadav's* case (supra) and, in principle to the observation on which reliance has been placed by Mr. Sachar, and in was observed at page 51 para 19 as under :

> "The Bench however, went on to hold that, in its view, merely because the Haryana Public Service Commission had called all the 1300 candidates who obtained 45 per cent or more marks in the written examination to appear in the interview that did not invalidate the selection made. This decision points out that the minimum eligibility qualification has to be kept distinct from the zone of consideration and even if there are a large number of candidates who satisfy the minimum eligibility requirement it is not always required that they should be included in the zone of consideration, it being open to the authority concerned to restrict the zone of consideration amongst the eligible candidates in any reasonable manner."

Our attention has not been drawn to any decision or observation of this Court which has taken a contrary view. Having a reasonable eligibility condition, as four years in the present case, may become meaningless if all the eligible officers are not considered for promotion. By increasing the numbers of years from two to four the field has been somewhat restricted and considering that selection has to be made only on the basis of merit, it is not unreasonable to give an opportunity to all the eligible officers to compete with each other and for the best persons to be selected. Moreover, this case relates to in-service promotion while Ashok Kumar Yadav was a case of direct recruitment. We are, therefore, unable to agree with the petitioners that the charge of the policy brought by the Board in its meeting on 7th March, 1989 in this regard is in any way bad in law.

It was then contended that on 23rd June, 1986 the Government of India, Ministry of Finance, had issued guidelines under Regulation 17 of

A the Officers Service Regulation. In the said guidelines it was mentioned that the number of persons to be considered for promotion from one scale to another should normally be restricted to three to four times the numbers of vacancies for which the promotions are being considered. The modification on 7th March, 1989 in the promotion policy, it was submitted, should not have been done in a way which was in conflict with the said guidelines and, therefore, doing away with the zone of consideration was not warranted.

We do not find any merit in this contention, for more reasons than one. Firstly, these guidelines have been issued by the Government under the Regulations framed under the Banking Regulations Act, which Act does not apply to the State Bank of India. The said letter of 23rd June, 1986, enclosing the guidelines, is addressed to the Chief Executives of twenty nationalised banks and only a Copy of the same was marked to the Chairman of the respondent bank. As far as the State Bank of India is concerned the central Government can issue directions under Section 18 of the State Bank of India Act, 1955 and no directions in this behalf have been issued. Furthermore as far as State Bank of India is concerned paragraph 17 of the DTCS Order of 1979, which has been quoted earlier, empowers the Central Board or the Executive Committee to lay down a policy regarding promotions to all grades of officers in the Bank. The aforesaid guidelines which have been issued expressly relate to the nationalised banks, and not to the State Bank of India, and cannot be regarded as directions which are issued under Section 18 of the State Bank of India Act, as was sought to be suggested by the counsel for the petitioners.

It was then contended by Mr. Sachar that the change in the policy in 1989 was motivated with a view to benefit respondents 4 and 5. The allegation in the writ petition in this regard was that respondent No. 4 was working as Chief Officer (Industrial Relations) in the central office of the bank and was of 1984 batch officer in scale IV. Respondent No. 5 was also a scale V officer of 1983 batch and was working as Private Secretary to the Chairman of the Bank at Central Office, Bombay. It was alleged that on account of the positions so held they wielded a lot of power in determining the personal policies of the bank. These respondents, it was alleged, succeeded in getting some imaginary hardships of junior scale IV officers highlighted in the conference of Chief General Managers held in January,

1988. In proof of the influence which respondents 4 and 5 had, it was submitted that the memorandum dated 2nd March, 1989 containing the proposal for the amendment in the promotion policy was not included as an agenda item of the meeting of the Central Board which was to be held on 7th March, 1989, and was not circulated in advance. This memorandum was presented before the Board as a table item and the Chairman, it was contended, ought not to have allowed the introduction of this memorandum without its being included as a regular item on the agenda.

The allegations relating to *mala fides* so made in the writ petition have been denied in the affidavit failed on behalf of the respondent bank. It has been explained therein that the Chief General Managers and other top executives are concerned with the development of human resources. As such, all policy matters, before being formulated, are discussed with Chief General Managers at an appropriate forum. It is after such a conference was held that various suggestions and views had emerged. They were examined by a group headed by a Senior Managing Director and other senior functionaries. A report submitted by the group was then examined by the Central Management Committee of the bank which decided that the recommendations of the Cadre Management Group, relating to promotions to Top Executive Grade Scale VI and VII, be accepted and should be implemented from the current year itself. This decision was taken by the Central Management Committee in late February, 1989. As certain vacancies in these Scales VI and VII had been identified, the Central Management Committee felt that these positions should be fitted up as early as possible so that important positions in the bank do not remain vacant. On 2nd March, 1989 the Deputy Managing Director (Personnel and Systems) prepared and signed a memorandum seeking the approval of the Central Board of the said policy. A meeting of the Central Board had already been fixed for 7th March, 1989 and the next meeting was expected to be held after one and a half on two months. With a view to expedite the consideration of the change in the policy the Deputy Managing Director sent the memorandum to the Managing Director and the Chairman. The Chairman and the Managing Director agreed that the memorandum be put to the Central Board at its meeting to be held on 7th March, 1989. By that time the usual agenda items fixed earlier for the Central Board meeting had already been circulated. It was in these circumstances that the item was placed as a table item at the Central Board meeting held on 7th March, 1989 with the consent of the Chairman and

A the Directors who were present at the meeting. It was also denied that the policy had been modified with a view to help respondents 4 and 5. Allegations of *mala fides* were denied.

In view of the aforesaid explanation of the respondent bank, which we see no reason to disbelieve, it is clear that the petitioners have made
B baseless and reckless allegations of *mala fide*. Respondents 4 and 5 obviously had no direct or indirect role to play either in the formulation of the policy or in the memorandum being placed as a table item to be taken up for consideration in the meeting held on 7th March, 1989. The modification was approved by the Chairman and all the Directors who were present
C in the meeting of the Board. For an allegation of *mala fide* to succeed it must be conclusively shown that respondents 4 and 5 wielded influence over all the members of the Board who were present in the said meeting. No such allegation has been made. The decision to modify the promotion policy was taken by a competent authority, namely, the Central Board in a
D duly constituted meeting held on 7th March, 1989 and we are unable to accept that this charge in the policy was brought about solely with a view to help respondents 4 and 5.

There is yet another reason why this contention of the petitioners must fail. It is now settled law that the person against whom *mala fides* are
E alleged must be made a party to the proceeding. The allegation that the policy was amended with a view to benefit respondents 4 and 5 would amount to the petitioners contending that the Board of Directors of the Bank sought to favour respondents 4 and 5 and, therefore, agreed to the proposal put before it. Neither the Chairman nor the Directors, who
F present in the said meeting, have been impleaded as respondents. This being so the petitioners cannot be allowed to raise the allegations of *mala fide*, which allegations, in fact, are without merit.

It was also submitted that the change in the Policy was completely arbitrary and without any reason. We are unable to accept this contention.
G The respondent bank is a business organisation and it must identify the best available talent in the organisation for holding challenging assignments in the top executive grades. There is nothing wrong if the bank devised a policy defining the eligibility norms on a realistic basis and devised a system whereby the best available talent would be chosen to man the critical
H positions. Keeping this objective in view the changes in the promotion

policy have been made. It is always for the employer to see how to promote and utilise the best talent available in the organisation. The promotion policy originally framed in the year 1975 has been amended from time to time. The changes have now been made in 1989 keeping in mind the requirement of the bank and based on the experience of the bank in regard to making selection for promotion. The changes so made cannot be regarded as arbitrary and the Court cannot sit in appeal and decide as to what is good for the institution. Under, the new policy the petitioners are also eligible for consideration and they cannot have any grievance because certain persons who were eligible under the old policy, but in practice were not considered for promotion, are now considered under the new policy. The object of the new policy seems to be not only to redress the injustice to those officers resulting on account of the difference between the rules and the practice but also with the object of selecting the best talent for the top executive posts.

It was next contended that a uniform system of appraising the work was not followed which has caused prejudice to a section of the employees of the bank. Prior to April 1986 appraisal used to be on the basis of the annual confidential reports. With effect from April, 1986 a new system known as annual appraisal system was introduced. Under the new system the appraisal report states with the writing by an employee himself, which is called self appraisal. It is then forwarded to the superior authorities who record their own remarks on the performance of the employee concerned. At already noticed this self appraisal system was not applicable in respect of all the candidates. The comparative merit was assessed by taking into consideration the annual confidential reports in the case of some employees and the new performance appraisal reports in the case of others. Alleging that this has caused prejudice to those employees whose annual confidential reports were considered the submission made was that the procedure so adopted was discriminating.

It is no doubt true that in the case of some employees annual confidential reports were considered and in the case of other employees assignment appraisal reports were considered. In our opinion, however, this cannot be a good ground for holding that the selection is vitiated. Firstly, no particulars have been given is the writ petition in order to show that officers in whose case the annual confidential reports were considered and suffered a disadvantage. If the petitioners were serious in raising this

A contention they would have given particulars as to how many of the 58 officers who were selected were those in whose case annual confidential reports were considered and how many were those in whose case the assignment appraisal reports were considered. In the absence of this basic fact it cannot be presumed that the section of the employees whose annual confidential reports were considered had suffered a disadvantage. Furthermore confronted with the situation whether the performance of the officer was recorded in two different types of reports the managements had, as of necessity, to consider the same and evaluate them. Even though the assignment appraisal reporting system may be an improvement in the existing system of writing annual confidential reports, the performance of the officer concerned could have been determined from the annual confidential reports. In fact this was being done before the gradual introduction of appraisal reporting system. Each report of an officer, whether an annual confidential report or assignment appraisal report, had to be considered on its own and the performance assessed. It is only if they received 70 per cent marks on the basis of this assessment that they were eligible for being called for the interview. There is nothing to suggest that such assessment, and assignment of marks, on the basis of the annual confidential report on the assignment appraisal report could not have been given. It is, therefore, not possible to hold that the consideration of two types of reports had resulted in any discrimination.

It was then submitted that under the existing policy the performance appraisal comprised of self appraisal and annual confidential reports for six years. With the change in the eligibility norm to four years instead of the actual five/six years service, it was submitted, there was a need for reducing the consideration of period of appraisal from six years to four years. As this has not been done the junior officers who were considered were at an advantageous position because their performance in Scale V as well as in the lower Scale IV was considered whereas in the case of senior officers their performance in Scale V alone was considered because they had rendered more than five to six years service in that grade.

In reply the respondent bank in its affidavit has explained as follows:

> "So far as assignment appraisal are concerned the assignment in respect of positions held during the past 6 years are assessed irrespective of the posts held. This has been followed even under

the pre-revised promotion policy, i.e., when eligibility criterion was 2 years of same continued even when officers were considered after 5/6 years. For the impugned promotion as well the same thing has been followed. There was no need to reduce the period of assignment. Appraisal to be considered from 6 years to 4 years. It is reiterated that the Annual Confidential reports for 5 years and Assignment Appraisal for 6 years irrespective of the assignment held have been uniformly assessed in respect of officers. Since 5 years Annual Confidential Reports were to be considered, reports starting from as on 31.12.84 to 31.12.88 on thereafter were considered in respect of all officers. As such, even in respect of an officer in Senior Management Grade Scale V of 1.8.84 batch reports as Scale V have only been assessed. So far as the Assignment Appraisal Reports are concerned, it is submitted that, an assignment covers generally a period of two to three years. Since the last 6 years assignment appraisal is taken into consideration, the oldest assignment will relate to the year 1983 assignment would normally cover a period commencing from 1980-81. Thus even in respect of a 1.8.82 batch Scale V officer, assignment could and would cover a portion of his assignment as Scale IV officer. Thus the contention that respondent Nos. 4 and 5 (or other Scale V officers of 1.8.83 and 1.8.84 batches) have got any special advantages are not well founded."

The aforesaid explanation clearly shows that the procedure of considering the assignments in respect of the positions held during the past six years was in vogue even when the eligibility criteria was two years which has now been revised to four years. Furthermore even in the case of some senior officers the assignments would cover a portion of their tenure as Scale IV officers. In considering such reports what has to be seen is whether the assignment targets which are set have been satisfactorily met or not. It would not be very material as to in which scale the officer was while adjudging this aspect. It was submitted by Mr. Shanti Bhushan, learned senior counsel appearing for the respondents that each assignment covers two years. Normally in order to assess the merit of an officer a period covering three assignments was considered to be necessary. This being so six years annual assignment reports had to be considered and we do not find that such consideration could have caused any prejudice to any officer. This contention, therefore, is without any substance.

A It was also contended that prescribing of 60 per cent marks for the interview as an eligibility criteria was arbitrary, unfair and unjust. It was further submitted that the percentage of marks in *viva voce* examination should not have been more than 15 per cent.

B We do not find any merit in this contention. There can be no rigid or hard and fast rule that the interview marks can only be 15 per cent and no more. The percentage of marks for *viva voce* or interview which can be regarded as unreasonable will depend on the facts of each case. Decisions of this Court show that no rigid rule, relating to percentage of marks for interview of general universal application can or has been laid down. What C the interview on *viva voce* marks should be may vary from service to service and the office or position or the purpose for which the interview is to be held. But the interview marks should not be so high as to give an authority unchecked scope to manipulate or act in an arbitrary manner while making selection. Where merit can be best judged by holding an interview there D such marks may be high but each case will have to be judged on its own facts. Interview marks may be the minimal in such cases as relating to admission to a college as held by this Court in *Periakarupan* v. *State of Tamil Nadu,* [1971] 1 SCC 38 and *Ajay Hasia* v. *Khalid Mujib Sehrawardi,* [1981] 1 SCC 722. In *Lila Dhar* v. *State of Rajasthan,* [1981] 4 SCC 159 this Court, on the other hand, held that in some cases relating to recruitment E from amongst persons of matured personality holding of an interview may be the only way subject to basic and essential requirements being satisfied. The following observations in this regard made in *Lila Dhar's* case are very apposite:

F "There are of course, many services to which recruitment is made from younger candidates whose personalities are on the threshold of development and who show signs of great promise, and the discerning may in an interview test, catch a glimse of the future personality. It the case of such services, where sound selection must combine academic ability with personality promise, some weight G has to be given, though not much too great a weight, to the interview test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service to service according to the requirements of the service, the minimum qualifications prescribed, the age group from which the selection H is to be made, the body to which the task of holding the interview

test is proposed to be entrusted and a host of other factors. It is a matter for determination by experts. It is a matter for research. It is not for courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives. The Kothari Committee also suggested that in view of the obvious importance of the subject, it may be examined in detail by the Research Unit of the Union Public Service Commission. (emphasis supplied)"

Again in the *State of U.P.* v. *Rafiquddin Ors.*, [1987] Supp. SCC 401 dealing with a case relating to U.P. Civil Service (Judicial Branch) Rules, 1951 the prescription of 35 per cent qualifying minimum marks for *viva voce* test was upheld. In this connection it was observed that if any minimum marks either in the written test or in *viva voce* test are fixed by the Public Service Commission so as to determine the suitability of a candidate the same has to be respected.

It is not necessary to multiply the number of cases in this regard except to notice the decision of this Court in *Mehmood Alam Tariq and Ors.* v. *State of Rajasthan and Ors.*, [1988] 3 SCC 241. This case related to recruitment by the Public Service Commission to certain branches of service under the State by a scheme of competitive examination. The Division Bench of the Rajasthan High Court had declared the rules which required that a candidate must secure a minimum of 33 per cent of the marks prescribed for the *viva voce* examination as being unconstitutional. While allowing the appeal arising from the said judgment this Court held that considering the nature of the services for which the recruitment was to be made the provision in the rules requiring the candidate to obtain a minimum of 33 per cent of marks in *viva voce* test could not be regarded as bad in law.

Applying the ratio of the aforesaid decisions in this case we find that the interview marks represent only 25 per cent of the aggregate, i.e., 200 marks. In order to be eligible a candidate is required to obtain 60 per cent of these fifty marks. Considering the fact that the selection has to be made for appointment to the top executive cadre and keeping in view the job requirements and the nature of responsibility the bank has raised the minimum qualifying percentage from 50 per cent to 60 per cent. At the same time the total number of interview marks have been reduced from 100 to 50. Under the circumstances it cannot be contended that exag-

A gerated weight has been given to the marks to be obtained in the interview.

As already noticed the process of selection contemplates the assessment of the annual reports. In the rejoinded affidavit filed by one Sh. Umed Singh, the then President of the petitioner Federation, it was conteded as follows :

B

> "In fact in the impugned promotions only one person Shri V.K. Mehrotra, General Manager has allotted marks on the individual promotion appraisal forms. A list of candidates was prepared and the marks allotted by Shri Mehrotra were copied and then the list
> C was got signed by the three Deputy Managing Directors. This can be ascertained form the records itself."

In view of the aforesaid averment this Court in its order dated 27th July, 1990 noted that this was a very serious allegation and as the Court did not find from the affidavit the basis on which this allegation was made,
D it directed Sh. Umed Singh "to verify on affidavit this allegation and to state specifically whether the allegations have been made on his personal knowledge or on the basis of information believed to be true and the preuse (sic) source of the information from whom the information was derived will have to be specifically stated as otherwise credence whatever can be given
E to allegation of this type. If the allegation is to be found false that also will have its own consequences." By this order the Court also required that the file containing the photo copies of the appraisal records of all the persons promoted should be tendered in the Registry and the same was required to be kept by the Registrar in a sealed cover.

F Pursuant to the aforesaid order a further affidavit dated 10th August, 1990 was filed in this Court by Sh. Umed Singh. In paragraph 2 of this affidavit he stated that the averments made by him in his rejoinder affidavit were based on the information derived by him from Sh. V.K. Mehrotra and one Sh. R.P. Rastogi, the then Deputy General Manager, Central Office, Bombay. Elaborating this it was stated that the deponent had met Sh. V.K.
G Mehrotra in the room of the P.A. to the General Manager (Planning), State Bank of India, New Delhi on or around 28th April, 1989. It is at that time Sh. V.K. Mehrotra is alleged to have informed Sh. Umed Sing that he had been called by the Central Office in connection with the awarding of marks for promotion appraisals. It was further stated in this affidavit of Sh. Umed
H Singh that Sh. R.P. Rastogi had told him that marks on the individual

promotion appraisal forms were awarded by Sh. V.K. Mehrotra and the statement of marks in respect of various candidates was signed by the Screening Committee comprising of the three Deputy Managing Directors.

In response to the aforesaid additional affidavit of Sh. Umed Singh a counter affidavit dated 12th October, 1990 of Sh. M.N. Sheorey, Chief General Manager (Personnel) of the respondent bank was filed. In this affidavit Sh. Sheorey stated that Sh. Umed Singh was incorrect in stating that Sh. V.K. Mehrotra had allotted marks on individual appraisal forms. Explaining the procedure which was actually followed Sh. Sheorey, in paragraphs 4 and 5 of this affidavit observed as follows :

> "That in March 1989 an office order to the following effect had been issued by the Chairman of the State Bank of India which is being set out hereunder :
>
> > "As per the extant procedure, the recommendations received from the Circles and Central Office departments, for promotion to Top Executive Grade Scale, VI and VII are processed by Personnel Department, as per the laid down norms. Thereafter, the officers who fulfil the norms are called for interview. From the current year, it is proposed to have a second stage screening of all these reports after they are processed by the Personnel Department. The list of the officials to be interviewed will be finalised thereafter. The committee comprising Shri B. Gupta, Deputy Managing Director (OSD), Shri M.C. Sharma, Dy. Managing Director (Agriculture & Rural Banking), and Shri B.K. Mazmudar, Deputy Managing Director (Personnel & Systems) will be the members of the Screening Committee. The necessary secretarial support will be provided by the Chief General Manager (Personnel & HRD)."
>
> Each and every promotion appraisal form was scrutinised by the Screening Committee consisting of 3 Deputy Managing Directors and it was the Screening Committee which used to finally determine the marks to be given to different officers in respect of each promotion appraisal form. What the deponent as Chief General Manager (Personnel and HRD), since redesignated as Chief General Manager (Personnel), did was to provide assistance to the

A deliberations of the Screening Committee. The final marksheet was accordingly signed by all the 3 members of the Screening Committee.

It is submited that, I, as Chief General Manager, Personnel and HRD, in view of about 500 candidates' appraisal forms being B involved, had taken assistance in arranging/processing the papers from Shri R.P. Rastogi who was the Dy. General Manager (Personnel Administration) as also Shri V.K. Mehrotra who had earlier been the Chief Officer (presently known as Dy. General Manager) of Personnel Administration Dept. before putting them up to the C Screening Committee."

Along with this an, affidavit of Sh. V.K. Mehrotra was also filed where, while referring to the earlier statement of Sh. Umed Singh alleging that Sh. V.K. Mehrotra had allotted marks on the individual promotion appraisal forms, it was categorically stated that the said statement was absolutely D false. Sh. R.P. Rastogi, another officer mentioned in the affidavit of Sh. Umed Singh, has also filed an affidavit in this connection in which he has stated as follows :

"Mr. Umed Singh never asked me at any time any question relating E to the processing of the promotion papers nor told me anything as to what Mehrotra told him. These allegations are pure figments of deponent's imagination. With regard to further allegation that I told the deponent that while marks on the individual promotion forms were awarded by Shri V.K. Mehrotra these were copied in a separate paper and signed by three Deputy Managing Directors, F firstly. I never told anything to Mr. Umed Singh and secondly the second fact itself is not true."

The photo copies of the documents including the appraisal forms which have been filed in Court have also been examined by us. No document in these two volumes which have been filed has been shown to us to G be in the handwriting of Sh. V.K. Mehrotra. In other words the documents so filed do not show that Sh. V.K. Mehrotra had any role, as alleged, to play in awarding marks on the individual appraisal forms. Furthermore the affidavits filed by Mr. Sheorey, Sh. Mehrotra and Sh. Rastogi clearly belie the allegations made by Sh. Umed Singh in his rejoinder affidavit. There H is no reason as to why the affidavits filed by these senior officers of the

bank should be disbelieved. This is more so when we find that the allegation with regard to Sh. Mehrotra has been made at a late stage. The writ petition was filed in this Court on 21st April, 1989. The alleged conversation between Sh. Umed Singh and Sh. V.K. Mehrotra is stated to have taken place on or about 28th April, 1989. It is not till the filing of the rejoinder affidavit on 23rd October, 1989 that an allegation regarding alleged conversation with Sh. V.K. Mehrotra was made in this Court. If such a conversation, as alleged, had taken place one would have expected the petitioners to approach the Court at the earliest either with a view to amend the writ petition or to file an additional affidavit making allegations raised in the rejoinder affidavit and thereby giving an opportunity to the respondents to file the reply. This conduct of Sh. Umed Singh shows that the bald allegation regarding Sh. V.K. Mehrotra assigning the marks, as contained in the rejoinder affidavit, is an afterthought. We have, therefore, no hesitation in coming to the conclusion that the averments made by Sh. Umed Singh in his rejoinder affidavit of 23rd October, 1989 and the further affidavit of 10th August 1990 with regard to Sh. V.K. Mehrotra are absolutely false. While on this subject it will be pertinent to note that the respondents in their counter affidavit had taken an objection to the effect that the writ petition should be dismissed because the petitioners had suppressed certain material facts from this Court and had also tried to abuse the process of the Court, attention of the Bench of this Court was drawn to the affidavits of Sh. Umed Singh which had been filed in this case. In the order dated 16th April, 1990, the Bench went into the question as to whether some of the statements made in the writ petition as well as in the affidavit are correct or not. It also took note of an affidavit filed by Sh. Umed Singh in which he had purported to "tender an unqualified appology." for some mis-statements made in an earlier affidavit. Ultimately the Bench came to the conclusion that "apart from mis-statements in the affidavit filed before this Court, the petitioner Federation has clearly resorted to tactics which can only be described as abuse of the process of the Court." The Bench also further expressed its anguish in the following words :

> "We have set out the facts in this case at some length and passed a detailed order because we are deeply grieved to come across such conduct on the part of an association, which claims to represent high placed officers of a premier bank of this country. One expects such officers to fight their battles fairly and squarely and not to stoop low to gain, what can only be, temporary victories by

A keeping away material facts from the Court. It is common knowledge that, of late, statements are being made in petitions and affidavits recklessly and without proper verification not to speak of dishonest and deliberate mis-statements. We, therefore, take this opportunity to record our strong and emphatic disapproval of the conduct of the petitioners in this case and hope that this will B be a lesson to the present petitioner as well as to other litigants and that atleast in future people will act more truthfully and with a greater sense of responsibility."

The petition was not dismissed on account of mis-statements and suppression of material facts because of the concession made by the counsel for C the bank that he was appearing for a public sector undertaking and was prepared to contest the petition on merits and that the preliminary objection was primarily intended to bring to the notice of the court the conduct of the petitioners in this regard.

D It is indeed unfortunate that despite the aforesaid observations made by the Bench in its order dated 16th April, 1990, Sh. Umed Singh has not batted an eye lid and has, once again made false statements in his affidavit dated 10th August, 1990. Normally we would have ordered the prosecution of Sh. Umed Singh for having committed perjury. We are, however, in- E formed that he is no longer the President of the Federation and considering that prosecution may take further time, it will not be practical to initiate such proceedings in this connection at this stage.

For the aforesaid reasons this writ petition is dismissed with costs which are quantified at Rs. 20,000 of which Rs. 10,000 will be paid by Sh. F Umed Singh personally.

Writ Petition No. 1260 of 1989

For the reasons stated in the judgment in writ petition No. 507 of G 1989, this writ petition is also dismissed.

V.S.S. Petitions dismissed.

KESHUB MAHINDRA

v.

STATE OF M.P.

SEPTEMBER 13, 1996

[A.M. AHMADI, CJ. AND S.B. MAJMUDAR, J.]

Criminal Law :

Criminal Procedure Code, 1973 : Sections 227, 228, 397 and 482.

Criminal Proceedings—Quashing of—Bhopal Gas Tragedy—Leakage of highly toxic MIC gas from storage tank of plant resulting in huge loss of human lives—Permanent/temporary injuries or total/partial disablement and loss of cattle lives—Charges framed against personnel who handle plant substantively under Sec. 304 Part II, 326, 324 and 429 IPC r/w. S. 35 IPC—According to Expert Committee Report escape of gas on account of defective plant and lack and supervision by accused led to accident—Held : material available on record prima facie did not connect accused with offences with which they were charged—Hence, these charges quashed and set aside—However, prima facie charge under S. 304-A IPC made out—Since originally case registered under S. 304-A, charges could be framed thereunder—Trial Court, could also consider on material led by prosecution whether charges could be framed under Ss. 336, 337 and 338 IPC.

Penal Code, 1860 :

Sections 299 and 304 Part II—Ingredients of—Accused must have done an act which caused death of a person with knowledge that by such act he was likely to cause death.

Sections 324 and 326—Ingredients and applicability of—Accused must commit act with knowledge that by such act he was likely to cause hurt or grievous hurt to victim.

Sections 425 and 429—Ingredients and applicability of S. 429—If commission of 'mischief' as defined in S. 425 by accused was not made out S. 429 could not be invoked.

Constitution of India, 1950 : Article 142.

A *Criminal Proceedings—Quashing of—Charges framed against accused quashed by Supreme Court as offences alleged not prima facie made out—However, Supreme Court in exercise of power under Article 142 could direct framing of charge for another offence under which case was initially registered and as regards to which counsel for parties addressed the Court with* B *view to avoiding multiplicity of proceedings.*

A grim tragedy of unprecedented nature occurred on the fateful night when a highly dangerous and toxic gas called MIC escaped from a tank from the factory belonging to accused No. 12—Union Carbide India Limited resulting in huge loss of human lives, permanent/temporary injuries or C *total/partial disablement and loss of cattle lives.*

This ghastly tragedy had come to be known as 'Bhopal Gas Tragedy'. According to the Expert Committee Report the lethal gas MIC escaped both on account of defective plant which was operated under the control of the D *appellants—Accused and their lack of supervision which led to the accident. Charges were framed against the appellants—Accused who were actually handling the Plant (accused Nos. 2 to 9), substantively under Section 304 Part II, 324, 326 and 429 read with Section 35 of the Indian Penal Code, 1860. Aggrieved by the aforesaid charges the appellant-accused moved Criminal Revision Applications before the High Court under Sections 397 and 382 of* E *the Criminal Procedure Code, 1973, which was dismissed. Hence this appeal.*

On behalf of the appellants-accused it was contended that as per the chargesheet and supporting material there was no *prima facie* case that the accused were guilty of the offence under Sections 304-A, 324, 326 and F **429 read with Section 35 of the IPC; that there was no proximate act of the negligence on the part of the accused which had resulted in the accidental tragedy; that none of the accused could be held criminally liable for the accident; and that the charges framed against the accused were required to be quashed.**

G **On behalf of the respondent-State it was contended that there was ample material produced by the prosecution in support of the chargesheet; that the Expert Committee Report had clearly indicated the causes of the accident and the defects found in the running of the plant at the relevant time; and that there was sufficient material to *prima facie* indicate that** H **the accused were liable to be prosecuted.**

Allowing the appeal in part, this Court A

HELD : 1. It is clear from Sections 227 and 228 of the Criminal Procedure Code, 1973 that while exercising jurisdiction under Section 482 Cr.P.C. when the High Court is called upon to quash the charge pursuant to which proceedings at the stage of trial are pending, and even when the B High Court is called upon to quash proceedings pursuant to complaint, only a *prima facie* appraisal of the allegations made in the complaint and the material in support thereof has to be done and the Court has no jurisdiction to go into the merits of the allegations as that stage would come when the trial proceeds. It is, therefore, necessary to keep in view the limited jurisdiction available to the Court regarding the *permissible* C scrutiny of the prosecution case as revealed from the chargesheet and material supporting the same framing charges against the present accused. [302-A; B; C; G]

Niranjan Singh Karam Singh Punjabi v. *Jitendra Bhimraj Bijja & Ors.,* D AIR (1990) SC 1962 and *State of U.P.* v. *O.P. Sharma,* (1996) 2 SCALE 356, relied on.

2. Before any charge under Section 304 Part II of the India Penal Code, 1860 can be framed, the material on record must at least *prima facie* show that the accused is guilty of culpable homicide and the act allegedly E committed by him must amount to culpable homicide. In view of Section 229 of the IPC the material relied upon by the prosecution for framing a charge under Section 304 Part II must at least *prima facie* indicate that the accused had done an act which had caused death with at least such a knowledge that he was by such act likely to cause death. The entire material F which the prosecution relied upon before the Trial Court for framing the charge cannot support such a charge unless it indicates *prima facie* that on that fateful night the plant was run by the concerned accused with the knowledge that such running of the plant was likely to cause deaths of human beings. Mere act of running a plant as per the permission granted G by the authorities would not be a criminal act. Even assuming that it was a defective plant and it was dealing with a very toxic and hazardous substance like MIC the mere act of storing such a material by the accused in tank could not even *prima facie* suggest that the concerned accused thereby had knowledge that they were likely to cause death of human beings. In fairness to prosecution it was not suggested and could not be H

A suggested that the accused had an intention to kill any human being while operating the plant. Taking the entire material on its face value and assuming it to represent correct factual position in connection with the operation of the plant on that fateful night it could not be said that the said material even *prima facie* called for framing of a charge against the
B concerned accused under Section 304 Part II, IPC on the spacious plea that the said act of the accused amounted to culpable homicide because the operation of the plant on that night ultimately resulted in deaths of number of human beings and cattle. When on the material produced by the prosecution no charge could be framed against any of the accused under Section 304 Part II there would remain no occasion to press in
C service the applicability of Section 35, IPC in support of such a charge for those accused who were not actually concerned with the running of the plant, namely accused Nos. 2, 3, 4, and 12. [323-E]

Adam Ali Taluqdar & Ors. v. *King-Emperor,* AIR (1927) Cal. 324, held
D inapplicable.

3.1. For applicability of Sections 324 and 326 of the IPC the material relied upon by the prosecution in support of such charges must show that the concerned accused had committed the act complained of at least with the knowledge that by such act he was likely to cause hurt or grievous hurt
E to the victim. The material pressed in service by the prosecution for framing such charges against the accused falls short of indicating that the act of running the plant on that fateful night which in its turn involved storing and utilising highly dangerous and volatile substance like MIC in this storage tank could not even *prima facie* be said to have been done with the knowledge that by such act itself simple hurt or grievous hurt was likely to
F be caused to any one. Consequently on such material even charge under Sections 324 and 326, IPC could not have been framed against the concerned accused. Once this conclusion is reached there would also remain no occasion to press in service against the accused Nos. 2, 3, 4 as well as 12, the charge under Section 35 IPC which the prosecution sought to press
G in service along with substantive Sections 324 and 326 IPC. In fact on the material as placed by the prosecution in support of these charges if a charge under Section 304 Part II cannot be framed then on the parity of reasoning no charge under Sections 324 and 326 could also be framed.

[324-A-E]

H 3.2. Before Section 429 IPC is pressed in service the material relied

upon by the prosecution must indicate even *prima facie* that the concerned accused by running the plant on that fateful night had knowledge that by running such plant they were likely to cause wrongful loss or damage to the public or to any person. The material produced by the prosecution does not even *prima facie* indicate how by running such a plant wherein highly dangerous and volatile substance like MIC was stored in tank the accused had the knowledge that by that act alone they were likely to destroy anybody's property or cause wrongful loss or damage to any person. Once the applicability of Section 425, IPC dealing with 'mischief' is ruled out on such material there would remain no occasion to invoke Section 429 which for its applicability requires the prosecution to show in the first instance any material against the concerned accused indicating the commission of mischief by the accused. Therefore, on the material pressed in service by the prosecution for framing charges against the accused no charge could have been framed against the concerned accused either under Section 304 Part II or under Section 324, 326 or 429, IPC with or without the aid of Section 35, IPC. On these findings all the charges will have to be quashed. [325-A-C]

3.3. On the finding that the material pressed in service by the prosecution does not indicate even *prima facie* that the accused were guilty of an offence of culpable homicide and, therefore, Section 304 Part II was out of picture, Section 304-A on this very finding can straightaway get attracted at least *prima facie*. Because of the operation of the defective plant on that fateful night a highly dangerous and volatile substance like MIC got converted into poisonous gas which snuffed off the lives of thousands of human beings and maimed other thousands and killed number of animals and that all happened, as seen at least *prima facie* the material led by the prosecution on record, because of rash and negligent act on the part of the accused who were in-charge of the plant. The material led by the prosecution shows that there were not only structural defects but even operational defects in the working of the plant on that fateful night which resulted into this grim tragedy. Even though, therefore, these accused cannot be charged for offences under Section 304 Part II, the material led against them by the prosecution at least *prima facie* showed that the accused were guilty of rash or negligent acts not amounting to culpable homicide and by that act caused death of large number of persons.

3.4. It is true that though originally the criminal case was registered

A for an offence under Section 304-A of the IPC the Central Bureau of Investigation which took up the investigation thought it proper to press in service Section 304 Part II and Sections 324, 326 and 429 of the IPC. Charges under these Sections have been found to be unsustainable on the material produced by the prosecution on record in support of these charges. However that does not mean that on the material as it stands on record B the accused cannot even *prima facie* be alleged to have committed any criminal offence for which they can be called upon to face the trial and that they should get a clean chit and clear walk-over. On the question whether on this material Section 304-A could be invoked or not, counsel for the appellants as well as Addl. Solicitor General for the respondent-State did C address this Court, therefore, the Court can and should, with a view to avoid multiplicity of proceedings, exercise its powers under Article 142 of the Constitution and decide whether the material led by the prosecution can *prima facie* support charges under Section 304-A against the concerned accused. Question of proof of rashness and negligence will arise at the stage of trial after full evidence is led by the prosecution and even by the accused D side if at all they choose to do so and in the light of that evidence the question would arise whether the charge as framed is made out by the prosecution against the concerned accused. The aforesaid conclusion, therefore, would make out a *prima facie* case against accused Nos. 5, 6, 7, 8 and 9 who were in actual charge of running of the plant and would require E them to face the trial for charge under Section 304-A of the IPC. [329-E]

State of Gujarat v. *Haidarali Kalubai,* [1976] 1 SCC 889; *Ambalal D. Bhatt* v. *State of Gujarat,* [1972] 3 SCC 525; *Suleman Rehiman Mulani & Anr.* v. *State of Maharashtra,* [1968] 2 SCR 515 and *Kurban Hussain Mohammedali Rangwalla* v. *State of Maharashtra,* [1965] 2 SCR 622, held F inapplicable.

4.1. So far as the remaining accused Nos. 2, 3, 4 and 12 are concerned the material produced on record clearly indicates at least *prima facie* that they being at the helm of affairs have to face this charge for the alleged G negligence and rashness of their subordinates who actually operated the plant on that fateful night and for that purpose Section 35 of the IPC would also *prima facie* get attracted against them. A mere look at that Section shows that if the act alleged against these accused becomes criminal on account of their sharing common knowledge about the defective running of plant by the remaining accused who represented them on spot and who had H to carry out their directions from them and who were otherwise required to

supervise their activity. Section 35 of the IPC could at least *prima facie* be invoked against accused 2, 3, 4, and 12 to be read with Section 304-A, IPC. Consequently on the material led by the prosecution against the accused at this stage a *prima facie* case was made out by the prosecution for framing charges against accused Nos. 2, 3, 4 and 12 under Section 304-A read with Section 35 IPC while substantive charges under Section 304-A could be framed against accused Nos. 5, 6, 7, 8 and 9. [329-F; G]

Esso Standard Inc. v. *Udharam Bhagwandas Japanwalla,* (1973) 45 Comp. Cas. 16, held inapplicable.

4.2. However, from the material which is produced on record there is a possibility of considering a further question whether charges under Sections 336, 337 and 338 of the IPC with or without the aid of Section 35 can be framed against the concerned accused. As none of the parties have addressed this Court on these aspects this question is left open for consideration of the Trial Judge who may after hearing the parties decide whether on the material as led by prosecution on record at this stage, charges, if any, can also be framed under Sections 336, 337 and 338of the IPC with or without the aid of Section 35 of the IPC. [331-C; 332-A]

4.3. On the material led by the prosecution appropriate charges which are required to be framed against the concerned accused are under Section 304-A, IPC so far as the accused Nos. 5, 6, 7, 8 and 9 are concerned while so far as accused Nos. 2, 3, 4 and 12 are concerned charges under Section 304-A read with Section 35 IPC will have to be framed. As these offences are triable by the court of Judicial Magistrate 1st Class, the Sessions Case shall be transferred to the Court of the Chief Judicial Magistrate, 1st Class who will proceed with the trial in accordance with law and frame appropriate charges under Section 304-A with or without the aid of Section 35, as the case may be, against the concerned accused. [332-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1672 of 1996 Etc. Etc.

From the Judgment and Order dated 1.8.95 of the Madhya Pradesh High Court in Crl. R. No. 237 of 1993.

Asok H. Desai and K.K. Desai, A.K. Desai, K.J. John and Palkar for the Appellant in Crl.A. No.1672/96.

A Prasad Dakephalkar, P.H. Parekh and Ms. Bina Madhavan for the Appellant in Crl.A. Nos. 1673, 1675 and 1674/96.

Altaf Ahmad, Additional Solicitor General, P. Parmeswaran and S.A. Matto for the Respondent.

B The Judgment of the Court was delivered by

S.B. MAJMUDAR, J. Leave granted in all these Special Leave Petitions. In these appeals the concerned appellant-accused have brought in challenge the order dated 8th April 1993 passed by the Court of 9th C Additional Sessions Judge, Bhopal in Sessions Trial No. 257 of 1992 whereby the learned Sessions Judge framed charges against the appellants in appeals arising out of S.L.P. (Crl.) Nos. 3900 of 1995, 3901 of 1995 and 3953 of 1995 under Sections 304 Part II, 326, 324 and 429 read with Section 35 of the Indian Penal Code (for short 'IPC') and framed charges under D Sections 304 Part II, 326, 324 and 309 against the appellants in appeal arising out of S.L.P. (Crl.) No. 3932 of 1995. They had also challenged the orders of the High Court of Madhya Pradesh at Jabalpur in Criminal Revision Application Nos. 237/93, 238/93, 312/93 and 311/93 whereby these charges were sustained. Appeal arising out of S.L.P. (Crl.) No. 3900 of 1995 is moved by Shri Keshub Mahindra who is accused No. 2 before the E Sessions Court. Appeal arising out of S.L.P. (Crl.) No. 3901 of 1995 is moved by Shri V.P. Gokhale who is accused No. 3 in the same case. Appeal arising out of S.L.P. (Crl.) No. 3953 of 1995 is moved by Kishore Kamdar who is accused No. 4 in the said case while the last appeal arising out of S.L.P. (Crl.) No. 3932 of 1995 is moved by six accused being Shri J. Mukund F accused No. 5, Dr. R.B. Roy Choudhary accused No. 6, Shri S.P. Chaudhary accused No. 7, Shri K.V. Setty accused No. 8, Shri S.I. Qureshi accused No. 9 and Union Carbide India Limited ('UCTL' for short) accused No. 12 in the same case pending before the Sessions Court at Bhopal. The concerned appellants had moved the High Court of Madhya Pradesh at Jabalpur under Sections 397 and 482 of the Code of Criminal G Procedure (Cr.P.C.) for quashing the aforesaid charges.

With a view to highlighting the grievances of the appellants a few relevant facts deserve to be noted at the outset.

H *Introductory Facts*

A grim tragedy of unprecedented nature occurred at Bhopal on the night intervening 2nd December 1984 and 3rd December 1984 wherein between 0030 hours and 0045 hours a highly dangerous and toxic gas called MIC escaped from tank No. E610 from the Bhopal factory belonging to accused No. 12 UCIL. As a result of this leakage 3828 human beings lost their lives while permanent injuries were caused to 18922 human beings, temporary disablement was suffered by 7172 human beings, temporary disablement caused by permanent injury was suffered by 1313 persons while permanent partial disablement was suffered by 2680 persons, While 40 human beings suffered from permanent total disablement and the death toll of animals amounted to 2544. This ghastly tragedy has come to be known as 'Bhopal Gas Tragedy'. After the gas leakage Criminal Case No. 1104 of 1984 was registered at the Police Station Hanumanganj, Bhopal on 3rd December 1984 by the Station House Officer *sou motu*. This case was registered under Section 304-A, IPC. In the said case 12 accused were indicted. Accused No. 1 was Shri Warren Anderson who was the Chairman of Union Carbide Corporation. The said concern was also indicted as accused No. 10. Accused No. 2 Keshub Mahindra was the Chairman of UCIL which in its turn was shown as accused No. 12. Accused No. 3 V.P. Gokhale was shown as an accused in his capacity as Managing Director of UCIL. Kishore Kamdar who was the Vice President and Incharge of A.P. Division of UCIL was shown as accused No. 4. Shri J. Mukund the Works Manager of the Bhopal Plant was joined as accused No. 5. Dr. R.B. Roy Choudhary who was Assistant Works Manager, A.P. Division, UCIL at Bhopal was joined as accused No. 6. Accused No. 7. was Shri S.P. Choudhary, Production Manager of the Bhopal Plant. Shri K.V. Shetty, Plant Superintendent of the said Bhopal plant was accused No. 8. Shri S.I. Qureshi was shown as accused No. 9. He was Production Assistant at the said Bhopal plant. Out of the above accused persons accused Nos. 5, 6, 7, 8 and 9 were stationed at Bhopal and were incharge of the Bhopal Plant itself.

On the registration of the aforesaid Crime Case the Station House Officer, Bhopal, arrested five employees of the factory, namely, accused Nos. 5 to 9 and they were kept in police custody. Accused Nos. 1, 2 and 3 were arrested on 7th December 1984. Out of them accused No. 1 Shri Warren Anderson was released on bail the same day. On 6th of December

A 1984 the case was handed over to the CBI. On completion of investigation the chargesheet was presented by the CBI in the Court of CJM, Bhopal on 1st December 1987.

In the present proceedings we are not concerned with the question
B of compensation payable to the gas-disaster victims at Bhopal and the various steps taken by the Government of India in this connection. We, therefore, do not dilate on these aspects. Suffice it is to state that by earlier orders of this Court dated 14th February 1989 and 15th February 1989 all criminal proceedings relating to and arising out of the Bhopal Gas Disaster were quashed by this Court. As a result the proceedings in the present case
C which were then pending in the Committal Court stood terminated. However the said order was reviewed by this Court on 3rd October 1991 and the above criminal proceedings were restored. After their restoration the case was committed to the Court of Sessions. Commitment was made by order dated 30th April 1992. On the case being committed to the Court of
D Sessions it was registered as Sessions Trial Case No. 237 of 1992 as aforesaid. It appears that trial of the criminal case against accused No. 1 Warren Anderson, accused no. 10 UCC and accused No. 11 Union Carbide (Eastern) Inc., Hongkong had to be segregated and split up as the concerned accused were absconding. The trial proceeded against remaining accused Nos. 2 to 9 and 12. In the light of the supporting material
E produced by the prosecution before the Sessions Court along with the chargesheet and its contents the Sessions Court was requested by the prosecution to frame appropriate charges against the concerned accused against whom the trial had to proceed. After hearing the prosecution as well as the learned counsel for the concerned accused the learned 9th
F Additional Sessions Judge, Bhopal passed order dated 8th April 1993 framing charges against the concerned accused. As these charges have been seriously brought into challenge it would be apposite to reproduce the charges as framed by the learned Trial Judge against the concerned accused. So far as accused No. 2 Keshub Mahindra is concerned four charges were framed against him as under :

G

> "*Firstly* : That on or about the night intervening 2nd and 3rd December, 1984 at Bhopal, the Capital of M.P. co-accused persons S/Shri Kishore Kamdar/J. Mukund/R.B. Roy Choudhary/S.B. Choudhary/K.V. Setty and S.I. Qureshi committed culpable
H homicide not amounting to murder by causing death of 3828 or

more human beings by allowing the highly toxic gas known by the name of MIC to escape from tank No. 610 of A.P. Division plant of UCIL knowing that it was likely to cause deaths and you sharing this common knowlege with them did not do anything to avoid the said escape of gas thus you thereby committed on each courts an offence punishable under Sec. 304 (II) R/W Sec. 35 of the IPC and within the cognizance of the Court of Session.

Secondly : That on the above date and at the above place, above co-accused persons by allowing to escape from the above tank the corrosive substance known by the name of MIC gas, knowing that it was likely to cause grevious hurts, thus voluntarily (as defined U/S 39 IPC) caused grevious hurts to 21694 or more human beings and you sharing this common knowledge with them did not do anything to avoid the said escape of gas thus you thereby committed on each count an offence punishable under section 326 R/W Sec. 35 IPC and within the cognizance of the Court of Sessions.

Thirdly : That on the above date and at the above place, co-accused persons by allowing to escape from the above tank the corrosive substance known by the name of MIC gas knowing that it was likely to cause hurts, thus voluntarily (as defined Under Sec. 39 IPC) caused hurts to 8485 or more human beings and you sharing this common knowledge with them did not do anything to avoid the said escape of gas, thus you thereby committed on each count an offence punishable U/S 324 R/W Sec. 35 IPC and within the cognizance of the Court of Sessions.

Fourthly : That on the above date and at the above place the above accused persons by allowing MIC gas to escape from the above tank knowing that it was likely to cause death of animals, committed mischief by killing thereby 2544 or more animals of various descriptions each valuing more than Rs. 50 and you sharing this common knowledge with them did not do anything to avoid the said escape of gas, thus you thereby committed on each count an offence punishable U/S 429 R/W Sec. 35 IPC and within the cognizance of the Court of Sessions."

Charges framed against accused No. 3 V.P. Gokhale were identical with the charges framed against accused No. 2.

A Charges framed against accused No. 4 Kishore Kamdar ran as under:

"*Firstly* : That on or about the night intervening 2nd and 3rd December, 1984 at Bhopal, the Capital of M.P. co-accused persons S/Shri Kishore Kamdar/J. Mukund/R.B. Roy Choudhary/S.P. Choudhary/K.V. Shetty and S.I. Qureshi committed culpable
B homicide not amounting to murder by causing death of 3828 or more human beings by allowing the highly toxic gas known by the name of MIC to escape from tank No. 610 of A.P. Division Plant of UCIL knowing that this common knowledge with them did not do any thing to avoid escape of gas thus you thereby committed
C on each count an offence punishable U/S 304(II) R/W Sec. 35 of the I.P.C. and within the cognizance of the court of Sessions.

Secondly : That on the above date and at the above place, above co-accused persons by allowing to escape from the above tank the corrosive substance known by the name of MIC gas, knowing that
D it was likely to cause grevious hurts, thus voluntarily (as defined U/S 39 IPC) caused grevious hurts to 21694 or more human beings and you sharing this common knowledge with them did not do anything to avoid the said escape of gas, thus you thereby committed on each count an offence punishable U/S 326 R/W Sec. 35
E IPC and within the cognizance of the Court of Sessions.

Thirdly : That on the above date and at the above place, above co-accused persons by allowing to escape from the above tank the corrosive substance known by the name of MIC gas, knowing that it was likely to cause hurts, thus voluntarily (as defined U/S. 39
F IPC) caused hurts to 8485 or more human beings and you sharing this common knowledge with them did not do anything to avoid the said escape of gas, thus you thereby committed on each count an offence punishable U/S. 324 R/W Sec. 35 IPC and within the cognizance of the Court of Sessions.

G *Fourthly* : That on the above date and at the above place, the above co-accused persons by allowing MIC gas to escape from the above tank knowing that it was likely to cause death of animals, committed mischief by killing thereby 2544 or more animals of various descriptions each valuing more than Rs. 50 and you sharing this
H common knowledge with them did not do any thing to avoid the

said escape of gas, thus you thereby committed on each count an offence punishable U/S. 429 R/W Sec. 35 IPC and within the cognizance of the Court of Sessions." A

Charges framed against accused No 5 J. Mukund were as under :

"*Firstly* : That you on or about the night intervening 2nd and 3rd December, 1984 at Bhopal, the capital of M.P. committed culpable homicide not amounting to murder by causing death of 3828 or more human beings by allowing the highly toxic gas known by the name of MIC to escape from tank No. 610 of A.P. Division Plant of UCIL, knowing that it was likely to cause deaths and you thereby committed on each count an offence punishable U/S 304(II) I.P.C. and within the cognizance of the court of Sessions. B C

Secondly : That you on the above date and at the above place by allowing to escape from tank No. 610 of the A.P. Division Plant of UCIL, a corrosive substance known by the name of MIC gas, knowing that it was likely to cause grevious hurts, thus voluntarily (as defined U/S. 39 IPC) caused grevious hurts to 21694 or more human beings and, thereby committed on each count an offence punishable U/S. 326 IPC and within the cognizance of the Court of Sessions. D E

Thirdly : That on the above date and at the above place by allowing to escape from tank No. 610 of A.P. Division Plant of UCIL, a corrosive substance known by the name of MIC gas, knowing that it was likely to cause hurts, thus voluntarily (as defined U/S. 39 IPC) caused hurts to 8485 or more human beings and thereby committed on each count an offence punishable U/S. 324 I.P.C. and within the cognizance of the Court of Sessions. F

Fourthly : That on the above date and at the place by allowing to escape from tank No. 610 of the A.P. Division Plant of UCIL, knowing that it was likely to cause death of animals, committed mischief by killing thereby 2544 or more animals of various descriptions each valuing more than Rs. 50 and thereby committed on each count an offence punishable U/S. 429 IPC and within the cognizance of the Court of Sessions." G H

A Identical charges were framed against accused No. 6 R.B. Roy Choudhary, accused No. 7 S.P. Choudhary, accused No. 8 K.V. Shetty and accused No. 9 S.I. Qureshi while UCIL, Calcutta accused No. 12 had to face the following charges :

B "*Firstly* : That on or about the night intervening 2nd and 3rd December, 1984 at Bhopal, the Capital of M.P. co-accused persons S/Shri Kishore Kamdar/J. Mukund/R.B. Roy Choudhary/S.P. Choudhary/K.V. Shetty and S.I. Qureshi committed culpable homicide not amounting to murder by causing death of 3828 or more human beings by allowing the highly toxic gas known by the C name of MIC to escape from tank No. 610 of A.P. Division Plant of UCIL knowing that it was likely to cause deaths and you sharing this common knowledge with them did not do any thing to avoid the said escape of gas thus you thereby committed on each count an offence punishable U/S 304(II) R/W Sec. 35 of the I.P.C. and within the cognizance of the court of Sessions.

D

Secondly : That on the above date and at the above place, above co-accused persons by allowing to escape from the above tank the corrosive substance known by the name or MIC gas, knowing that it was likely to cause grevious hurts, thus voluntarily (as defined E U/S 39 IPC) caused grevious hurts to 21694 or more human beings and you sharing this common knowledge with them did not do anything to avoid the said escape of gas, thus you thereby committed on each count an offence punishable U/S. 326 R/W Sec. 35 IPC and within the cognizance of Court of Sessions.

F *Thirdly* : That on the above date and at the above place, above co-accused persons by allowing to escape from the above tank the corrosive substance known by the name of MIC gas, knowing that it was likely to cause hurts, thus voluntarily (as defined U/S. 39 IPC) caused hurts to 8485 or more human beings and you sharing G this common knowledge with them did not do anything to avoid the said escape of gas, thus you thereby committed on each count an offence punishable U/S. 324 R/W Sec. 35 IPC and within the cognizance of the Court of Sessions.

Fourthly : That on the above date and at the above place, the above H co-accused persons by allowing MIC gas to escape from the above

tank knowing that it was likely to cause death of animals, committed mischief by killing thereby 2544 or more animals of various descriptions each valuing more than Rs. 50 and you sharing this common knowledge with them did not do any thing to avoid the said escape of gas, thus you thereby committed on each count an offence punishable U/S. 429 R/W. Sec. 35 IPC and within the cognizance of the Court of Sessions."

All these accused being aggrieved by the aforesaid charges framed by the learned Sessions Judge approached the High Court of Madhya Pradesh at Jabalpur in Criminal Revision Applications moved under Sections 397 and 482 of the Cr.P.C. as noted earlier. The High Court of Madhya Pradesh by common judgment in three Criminal Revising Applications Nos. 237/93, 238/93 and 312/93 moved by accused Nos. 2, 3 and 4 respectively, was pleased to dismiss the same by upholding the charges framed against these accused. Similarly Criminal Revision Application No. 311/93 moved by accused No. 5 J. Mukund, accused No. 6 R.B. Roy Choudhary, accused No. 7 S.P. Choudhary, accused No. 8 K.V. Shetty, accused No. 9 S.I. Qureshi and accused No. 12 UCIL was also dismissed by a separate order of even date. It is under these circumstances that the concerned accused are in appeal before us on special leave.

Learned senior counsel Shri Ashok Desai appearing for accused No. 2 Keshub Mahindra, learned senior counsel Shri Nariman, appearing for accused No. 3 V.P. Gokhale and learned senior counsel Shri Rajendra Singh, appearing for the remaining accused vehemently contended that taking the case of the prosecution at the highest as reflected by the contents of the chargesheet and the supporting material it could not be even *prima facie* said that the concerned accused were guilty of offence of culpable homicide not amounting to murder as envisaged by Section 304 Part II, IPC with which they are charged. That there was no question of the concerned accused having done any act on that fateful night at Bhopal which was done with the knowledge that they were likely by such act to cause death and consequently they could not have been charged on the material produced by the prosecution before the Trial Court at this stage of the trial for the offence of culpable homicide not amounting to murder. It was also submitted that on the same reasoning they could not have been charged for offence under Section 326 IPC for voluntarily causing grievous hurt or for that matter for the offence under Section 324 for voluntarily

A causing hurt by dangerous means. It was also contended that on the same parity of reasoning no case is made out against the concerned accused under Section 429 IPC for having committed mischief by killing, poisoning or maiming any animals. It was also submitted that so far as accused Nos. 2, 3 and 4 were concerned they were stationed at Bombay and they were not concerned with the day to day working of the Plant at Bhopal. Consequently there was no question of framing any charge against them for the aforesaid offences read with Section 35 of IPC as there was no evidence whatsoever for even alleging against these accused that they had any criminal knowledge in connection with the misshap that occurred on that fateful night at Bhopal. It was also contended by the aforesaid learned C senior counsel that even lesser charge under Section 304-A, IPC also could not have been framed on this material as nothing was alleged by the prosecution at this stage about any proximate act of the negligence on the part of the concerned accused which had resulted into this accidental tragedy. That if at all it was an unfortunate accident which had taken heavy D toll of human lives and cattle wealth, however, none of the accused could be held criminally liable for the said accident. It was, therefore, contended that the charges as framed against the concerned accused are required to be quashed and the High Court had erred in not exercising its jurisdiction in that behalf.

E On the other hand learned Additional Solicitor General Shri Altaf Ahmed submitted that there was ample material produced by the prosecution in support of the chargesheet which clearly indicated that all the concerned accused shared common criminal knowledge about the potential danger of escape of the lethal gas MIC both on account of defective plant F which was operated under their control and supervision at Bhopal and also on account of the operational shortcomings detected by the Expert Committee which had gone into the causes of this unfortunate accident, namely, Vardarajan Committee which was constituted by the Government of India for that purpose. That the report of the Scientific and Industrial Research team had clearly indicated the causes of this tragedy and the defects found G in the running of the Plant at the relevant time. That this material indicated that all the accused were properly charged for the offences alleged against them and that the court at this stage was not concerned with the truth or falsity of the allegations with which the prosecution has charged them. That at this stage only enquiry into the *prima facie* nature of the allegations H supporting these charges has to be made and if there is any material to

prima facie indicate that the concerned accused were liable to be prosecuted for the charges with which they are indicated the trial is required to be permitted to proceed further and should not be nipped in the bud as the appellants would like to have it. In support of the respective contentions learned senior counsel for the appellants as well as learned Additional Solicitor General relied upon various decisions of this Court to which we will make a reference at appropriate stage in latter part of this judgment.

Before we deal with the nature of the material produced by the prosecution before the Trial Court for framing the charges against the concerned accused it will be necessary to keep in view the limited nature of the jurisdiction available to the court for deciding whether the charges framed are legally sustainable on the basis of the material available at this stage. Section 227 of the Cr.P.C. lays down that, 'if, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing'. On the other hand as enjoined by Section 228, if after such consideration and hearing as aforesaid the Judge is of opinion that there is ground for presuming that the accused has committed an offence, then subject to the procedure laid down by sub-sections (a) and (b) of the said Section the charge shall be framed in writing against the accused. In the case of *Niranjan Singh Karam Singh Punjabi* v. *Jitendra Bhimraj Bijja & Ors.*, AIR (1990) SC 1962, one of us A.M. Ahmadi, J. (as His Lordship then was) speaking for the Division Bench of this Court in this connection observed as under :

> "It seems well settled that at the Ss. 227-228 stage i.e., stage of framing the charge, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case."

A It is also well settled that while exercising jurisdiction under Section 482 Cr.P.C. when the High Court is called upon to quash the charge pursuant to which proceedings at the stage of trial are pending, and even when the High Court is called upon to quash proceedings pursuant to complaint, only a *prima facie* appraisal of the allegations made in the complaint and the material in support thereof has to be done and the Court has jurisdiction to go into the merits of the allegations as that stage would come when the trial proceeds. In this connection we may usefully refer to a judgment rendered by a Bench of three learned Judges of this Court in the case of *State of U.P.* v. *O.P. Sharma,* (1996) 2 SCALE 356. Relying on earlier decisions of this Court the Bench in the aforesaid case made the following C pertinent observations in paragraphs 11 and 12 of the Report :

> "The question then is : whether the High Court is right in its exercise of inherent power under Section 482 Cr.P.C.? This Court in *State of Himachal Pradesh* v. *Pirthi Chand & Anr.,* (Crl. A. 1752 of 1995) decided on November 30, 1995 held as under :
>
> 'It is thus settled law that the exercise of inherent power of the High Court is an exceptional one. Great care should be taken by the High Court before embarking to scrutinise the FIR/charge-sheet/complaint. In deciding whether the case is rarest of rare cases to scuttle the prosecution in its inception, it first has to get into the grip of the matter whether the allegations constitute the offence. It must be remembered that FIR is only an initiation to move the machinery and to investigate into cognisable offence. After the investigation is conducted and the charge-sheet is laid the prosecution produces the statements of the witnesses recorded under Section 161 of the Code in support of the charge-sheet. At that stage it is not the function of the court to weigh the pros and cons of the prosecution case or to consider necessity of strict compliance of the provisions which are considered mandatory and its effect of non-compliance. It would be done after the trial is concluded. The Court has to *prima facie* consider from the averments in the charge-sheet and the statements of witnesses on the record in support thereof whether court could take cognizance of the offence, on that evidence and proceed further with the trial. If it reaches a

conclusion that no cognisable offence is made out no further act could be done except to quash the charge sheet. But only in exceptional cases. i.e. in rarest of rare cases of *mala fide* initiation of the proceedings to wreak private vengeance process of criminal is availed of in laying a complaint or FIR itself does not disclose at all any cognisable offence - the court may embark upon the consideration thereof and exercise the power.

....

In *State of Bihar* v. *Rajendra Agrawalla,* (Crl.A. No. 66 of 1996) decided on January 18, 1996, this Court observed as under :

'It has been held by this Court in several cases that the inherent power of the court under Section 482 of the Code of Criminal Procedure should be very sparingly and cautiously used only when the court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent power can be exercised when the allegations in the First Information Report or the complaint together with the other materials collected during investigation taken at their face value, do not constitute the offence alleged. At that stage it is not open for the court either to shift the evidence or appreciate the evidence and come to the conclusion that no *prima facie* case is made out.'"

Keeping in view the aforesaid well settled limited jurisdiction regarding the permissible scrutiny of the prosecution case as revealed from the chargesheet and the material supporting the same for framing charges against the present accused we will now proceed to examine the available material on record of the case which has resulted into the framing of the impugned charges against the appellant-accused.

Material in Support of the prosecution case

In the first place we may glance through the relevant recitals in the chargesheet presented by the agency before the court which has resulted

into the framing of the impugned charges. The said chargesheet is found at page 1 of the compilation in appeal arising out of S.L.P. (Crl.) No. 3900/95. As noted earlier the chargesheet indicts 12 accused out of which the present 9 appellants in these four appeals are accused Nos. 2 to 9 and 12 respectively. In column 5 of the chargesheet are found listed main findings of the investigating agency in connection with this unfortunate tragedy. The relevant recitals therein read as under :

"Union Carbide India Ltd., the majority share holding in which is held by U.C.C., USA, was running a factory at Bhopal for the manufacture of pesticides. The main chemical from which the pesticide Sevin was manufactured was Methyl Isocynate (CII3N = C-O) which was also being manufactured in the same factory and was being stored in underground tanks. The factory is presently not functioning.

2. On the night of 2nd/3rd December, 1984 from about 0034 to 0045 hrs. (on 3rd December, 1984) onwards, MIC started to escape from tank No. 610 in the factory in large quantities causing the death of thousands of human beings and animals .... and injuring also the health of many thousands of human beings and animals.

3. Crime No. 1104/84 was registered at Police Station, Hanumanganj, Bhopal, on 3rd December, 1984, by the S.H.O., Shri Surinder Singh Thakur. Inspector who observed people dying around the factory of Union Carbide India Ltd. Bhopal (UCIL) due to escape of some gas from the factory. He registered the case *suo moto* under Section 304A IPC. There was no information available at that stage from anyone in the factory. Based on enquiries made by him during the course of the day, five employees of the factory (A5 to A9) were arrested and kept in police custody. Accused No. 1 Shri Warren Anderson was arrested alongwith accused No. 2 & 3 on 7th December, 1984. Shri Warren Anderson was released on bail the same day by the I.O. After completing the required legal formalities, C.B.I. (D.P.S.E.) registered a case on 6th December, 1984 as RC-3/84-CIU(I) U/S 304A IPC and received the records of the case from the local police on 9th December, 1984 alongwith A2, A3 and A5 to A9 in police custody from the Madhya Pradesh Police.

4. Investigation has revealed that the Union Carbide Corporation is a company with headquarters in U.S.A. having affiliate and subsidiary companies throughout the world. There subsidiaries were supervised by four regional offices which were controlled by UCC, USA. UCIL is a subsidiary of UCC, USA. Union Carbide Eastern Inc. with its office in Hongkong is the regional office of UCC, USA which controlled UCIL, India besides others. UCC, USA get incorporated in India on 20th June, 1934, a Company known as the Eveready Company (India) Ltd. under the Indian Companies Act (Act VII) of 1913 with the Registrar of Joint Stock Companies, Bengal. The Name of the Company was further changed w.e.f. 24th December. 1959 into Union Carbide India Ltd. under the Indian Companies, 1956. The UCC was a majority shareholder (50.9%) in UCIL. UCC was nominating its own Directors to the Board of Directors of the UCIL and was exercising strict financial, administrative and technical control on the Union Carbide India Limited. Thus, all major decisions were taken under the orders of the Union Carbide Corporation to America. The evidence collected during the investigation proves that UCC was in total control of all the activities of UCIL.

5. The investigation of this case was dependent on highly scientific and technical evaluation of the events which led to the escape of MIC gas from the UCIL plant at Bhopal. The Government of India therefore constituted, immediately after the incident, a team headed by Dr. S. Varadarjan, then D.G./C.S.I.R. to study all the scientific and technical aspects and submit their report. Dr. M. Sriram, Chief Research and Development Manager, Hindustan Organic Chemicals, Rasayani, District Ralgad (Maharashtra), was member as well as the co-ordinator of the Scientific Team. Dr. Varadarajan submitted the report in December, 1985. A further back up report was submitted by the C.S.I.R. in May, 1987. These reports furnish, *inter alia,* the causes that led to the incident.

6. Investigation has revealed that UCIL started importing Sevin from the UCC, USA in December, 1960. They were marketing this Sevin after adding dilutants etc. Subsequently, they decided to manufacture Sevin in their plant at Bhopal itself and accordingly created necessary facilities for production of Sevin MIC as the

basic raw material. To start with, they were importing MIC in 200 litres capacity stainless steel drums from the UCC Plant in West Virginia, USA. Subsequently UCC and UCIL decided to manufacture MIC in their factory at Bhopal itself.

7. At that stage on 13th November, 1973, UCC and UCIL entered into an agreement entitled Foreign Collaboration Agreement according to which the best manufacturing information then available from or to Union Carbide had to be provided for the factory in India. This necessitated UCC supplying the design, knowhow and safety measures for the production, storage and use of MIC which ought to have been an improvement on the factory of UCC at West Virginia based on the experience gained there. Investigation has however disclosed that the factory at Bhopal was deficient in many safety aspects. The design, know-how and safety measures were provided by the Union Carbide Corporation, USA and the erection and commissioning of the plant was done under the strict control of the experts of UCC. The Indians in this plant were only working under their directions.

8. After an initial period of profits, the UCIL factory was running in loss. The loss for the first 10 months of 1984 amounted to Rs. 5,03,39,000. Due to this, U.C.E. Hongkong directed UCIL vide their letter dated 26 October, 1984 that the factory at Bhopal should be closed down and sold to any available buyer. As no buyer became available in India, UCE, Hongkong directed UCIL to prepare an estimate for dismantling the factory and shipping it to Indonesia or Brazil where they probably had some buyers. These estimates were completed towards the end of November, 1984.

9. The investigation conducted by the C.B.I., the report of the scientific team established by Government of India and in particular the literature and manuals etc. regarding MIC of Union Carbide Corporation itself prove that MIC is reactive, toxic, volatile and flammable. It is a highly hazardous and lethal material by all means of contact and is a poison. Skin contact with MIC can cause severe burns. MIC can also seriously injure the eyes even in its concentrations. Exposure to MIC is extremely irritating and would cause chest pain, coughing, choking and even pulmonary

edema. On thermal composition, MIC would produce hydrogen cyanide, nitrogen oxide, carbon monoxide and/or carbon dioxide. A

10. MIC has to be stored and handled in stainless steel of types 304 or 316, namely, good quality stainless steel. Using any other material could be dangerous. In particular, iron or steel, aluminium, zinc or galvanized iron, copper or tin or their alloys could not be used for purposes of storage, transfer/transmission of MIC. This would mean that even the pipes and valves carrying MIC had also got to be of the prescribed stainless steel. In other words, at no stage should MIC be allowed to come into contact with any of the metals mentioned above. B C

11. The tanks storing MIC, have to be, for reasons of safety, twice the volume of the MIC to be stored. It was also advised by UCC itself that an empty tank should also be kept available at all times for transferring MIC from its storage tank to the stand by tank on occasions of emergency. MIC has to be stored in the tanks under pressure by using nitrogen which does not react with MIC. The temperature of the tank with MIC has to be maintained below 15 degree celsius and preferably at about 0 degree celsius. The storage system and the transfer lines have to be free of any contaminants as even trace quantities of contaminants are sufficient to initiate reaction which could become runaway reaction. On reaction setting in, there could be dangerous and rapid trimerization. The induction period could vary from several hours to several days. The heat generated could cause reaction of explosive violence. In particular, water reacts exothermically to produce heat and carbon dioxide. Consequently, the pressure in the tank will rise rapidly if MIC is contaminated with water. The reaction may begin slowly, especially if there is no agitation, but it will become violent. UCC itself states that with bulk systems contamination is more likely than with tightly sealed drums. All these properties of MIC show that despite all the safety precautions that could be taken, storage of large quantities of MIC in big tanks was fraught with considerable risk. D E F G

12. Investigation has disclosed that at the time when the incident took place there were thee partially buried tanks in the factory at H

Bhopal. These were numbered E 610. E 611 and E 619. MIC was being stored generally in the tanks E 610 and E 611. E 619 was supposed to be the stand by tank. In the normal running of the factory, MIC from E 610 and E 611 was being transferred to the Sevin plant through stainless steel pipe lines. MIC is kept under pressure by nitrogen which is supplied by a carbon steel header common to all the storage tanks. There is a strainer in the nitrogen line. Subsequent to the strainer the pipe is of carbon steel and leads to make up control valve (DMV) which also has a body of carbon steel. These carbon steel parts could get exposed to MIC vapours and get corroded, providing a source of contaminant which could enter the MIC storage tank and cause dangerous reactions in the MIC. During the normal working of the factory, MIC fumes and other gases that escape pass first through a pipe line called Process Vent Header (PVH) of 2" diameter. The escaping gases were carried by the PVH line to a Vent Gas Scrubber (VGS) containing alkali solution which would neutralize the escaping gases and release them into the atmosphere. Another escape line of such gases that was provided from the tanks was the Relief Valve Vent Header (RVVH) of 4"diameter. Normal pressure of the MIC tank is shown by a pressure indicator. When the pressure in the tank exceeded 40 psig, a rupture disc (RD) leading to a safety relief valve (SRV) had to break and the said SRV in the RVVH line open automatically to allow the escaping gas to travel through the RVVH line to the VGS for neutralization.

13. Investigation has shown that the PVH and RVVH pipe lines as well as the valves therein were of carbon steel. Besides, on account of design defect these lines also allowed back flow of the alkali solution from the VGS to travel upto the MIC tanks.

14. A very essential requirement was that the MIC tanks in the factory had to be kept under pressure of the order of 1 Kg./cm2g by using nitrogen, a gas that does not react with MIC. However, MIC in tank No. 610 was stored under nearly atmospheric pressure from 22nd October, 1984 and attempts to pressurize it on 30th November and 1st December, 1984 failed. The design of the plant ought not have allowed such a contingency to happen at all. The tank being under nearly atmospheric pressure, free passage was

available for the entry of back flow of the solution from the VGS into the tank. According to the report of Dr. Varadarajan Committee, about 500 Kgs. water with contaminants could enter tank 610 through RVVH/PVH lines. The water that entered RVVH at the time of water flushing along with backed up alkali solution from the VGS already present could find its way into the tank 610 through the RVVH/PVH lines via the blow down DMV or through the SRV and RD.

15. The first indication of any reaction in the tanks comes through the pressure and temperature indicators. The thermowell and temperature transmitting lines were out of order throughout and no temperature was being recorded for quite sometime. Pressure was also being recorded at the end of each shift of 8 hours duration instead every 2 hours as was being done earlier.

16. ... ...

17. On 2nd December, 1984 before 10.45 PM no deviation was noticed in the pressure of tank No. 610. Soon thereafter, in the night shift, some operators noticed leakage of water and gases and gases from the MIC structure and they informed the Control Room. The Control Room operator saw that the pressure had suddenlly gone up in tank No. 610. Some staff in the IIIrd shift including S/Shri R.K. Kamparia, C.N. Sen and Saumen Dey checked the pressure indicator on the tank E 610 and found that the pressure had gone out of range. The factory staff tried to control the situation but they failed. Even tank E 619 which had to be kept empty for emergency transfers was found to contain MIC and therefore when the reaction started, transfer thereto from tank 610 was not possible. The staff on duty immediately informed senior officials of UCIL at Bhopal about the escape of MIC. During all these developments and even thereafter the Union Carbide officials at Bhopal did not give any information to the residents or any local authority about the serious dangers to which the people were exposed and regarding which the said officials had full knowledge. On the other hand, what was initially mentioned was ammonia gas had escaped."

Thereafter are listed the findings of the Scientific Team made by Dr.

A Vardarajan indicating the causes that had resulted in the toxic gas leakage causing its heavy toll. In para 20 of the chargesheet the following findings of the investigation conducted by the C.B.I. have been noted :

"20. The investigation conducted by the C.B.I. has proved the following aspects :

B

(i) MIC is a highly dangerous and toxic poison.

(ii) Storing huge quantity of MIC in large tanks was undesirable and dangerous as the capacity and actual production in the Sevin
C plant did not require such a huge quantity to be stored. Only adequate quantity of MIC should have been stored, that too in small separate stainless steel drums.

(iii) The VGS that had been provided in the design was capable of neutralising only 13 tonnes of MIC per hour and proved to be
D totally inadequate to neutralise the large quantities of MIC that escaped from tank No. E 610. When the two tanks (610 and 611) themselves had been designed for storing a total of about 90 tonnes of MIC, proportionately large capacity VGS should have been furnished in the design and erected rather than VGS that was
E actually provided.

(iv) Due to the design defect, there was back flow of alkali solution from the VGS to the tanks which had been drained in the past by the staff of UCIL. Infact, even after the incident, such draining was done from the PVH and RVVH lines.

F

(v) Whereas the MIC tanks had to be constantly kept under pressure using nitrogen, the design permitted the MIC tanks not being under pressure in certain contingencies.

G (vi) The refrigeration system that had been provided was inadequate and inefficient. No alternate stand by system was provided.

(vii) Neither the UCC nor the UCIL took any steps to apprise the local administration authorities or the local public about the consequences of exposure of MIC or the gases produced by its
H reaction and the medical steps to be taken immediately.

21. Apart from these design defects, the further lapses that were committed were :

(a) Invariable storing MIC in the tanks which was much more than the 50% capacity of the tanks which had been prescribed.

(b) Not taking any adequate remedial action to prevent back flow of solution from VGS into the RVVH and PVH lines. This alkali solution/water, therefore, used to be drained.

(c) Not maintaining the temperature of the MIC tanks at the preferred temperature of 0 degree celsius but at ambient temperatures which were much higher.

(d) Putting a slip blind in the PVH line and connecting the PVH line with a jumper line to the RVVH line.

(e) Not taking any immediate remedial action when tank No. E 610 did not maintain pressure from 22nd October, 1984 onwards.

(f) When the gas escaped in such large quantities, not setting out an immediate alarm to warn the public and publicise the medical treatment that had to be given immediately."

It was also recited that if these lapses had not occurred, still the incident would have taken place due to the basic defects in the design supplied by the UCC whose experts supervised the erection and commissioning of the plant itself. The lapses only helped to aggravate the consequences of the incident. Thereafter referring to the indications obtainable from the evidence collected during the investigation regarding the knowledge of the accused about the defective functioning of the plant the following pertinent recitals are found in paragraph 23 and 24 of the chargesheet :

"23. The evidence collected during the investigation proves that the accused persons had the knowledge that by the various acts of commission and omission in the design and running of the MIC based plant, death and injury of various degrees could be caused to a large number of human beings and animals. All the accused persons joined in such acts of omission and commission with such common knowledge. This resulted in the incident on the night of 2nd/3rd December, 1984 which caused the death immediately and

till date of about 2850 human beings and about 3000 animals. The number of affected persons is more than 5,00,000. The ailments damaged respirator tract function, gastro intestinal functions, mascular weakness, forgetfulness etc.

24. The investigation has established that S/Shri Warren Anderson, then Chairman, Union Carbide Corporation, USA: Keshub Mahindra, then Chairman, UCIL Bombay; Vijay Gokhle, then Managing Director and presently Chairman-cum-Managing Director, UCIL, Bombay; Kishore Kamdar, then Vice President Incharge, A.P. Division, UCIL, Bombay; J. Mukund, then Works Manager, A.P. Division, UCIL, Bhopal, Dr. R.B. Roy Choudhary, then Asstt. Works Manager, A.P. Division, UCIL, Bhopal, S.P. Choudhary, then Production Manager, A.P. Division, UCIL, Bhopal; K.V. Setty, Plant Superintendent, A.P. Division, Bhopal; S.I. Qureshi, Production Assistant, A.P. Division, UCIL, Bhopal; the Union Carbide Corporation. U.S.A.; Union Carbide Eastern Inc. Hongkong and Union Carbide India Limited, Calcutta have committed offences punishable Under Sections 304, 326, 324, 429 IPC r/w Section 35 IPC."

Along with this chargesheet a detailed abstract was filed supported by documentary evidence to show how the conclusions reached by the investigating agency were supported by this documentary evidence. In this abstract it was recited that in that plant there were no facilities for collecting MIC produced separately in each shift and the material is directly laid into the storage tanks without batchwise analysis. It was also found that there are no on-line analysers. Similarly, nitrogen from a neighbouring factory is fed directly into the storage tanks, without full intermediate storage and quality determination. Carbon steel sections are used in the connectors to the storage tanks. Copper tubes are used in connectors to the level instruments of the tank. The system of instruments for alarm to indicate sudden increase in temperature are not suited to the conditions of operation. Only a single refrigeration system for cooling of MIC in two tanks was installed and it had not been operated for some considerable time. MIC has the combination of properties of very high reactivity with minimum contaminants, ready volatility to become gas and very high inhalation toxicity. The installed facilities provided for disposal of unstable

liquid MIC in alkali or for the neutralisation of gaseous emissions from violent reaction, on examination are found to be not capable of meeting the objectives of such disposal in a very short time of two hours. The abstract also recited that the ingress of about 500 kg. of water alone, was not the sole cause of the escape of a huge quantity of toxic gas. In this connection the following averments found in the abstract were relied upon by the prosecution. :

> "The ingress of about 500 kg. of water alone, without metallic contaminants, would have led to a reaction with three to four tonnes of MIC and gradual rise in temperature to 70 degree celsius, below the boiling point of MIC at the safety valve pressure. The very rapid explosive rise in temperature and pressure in the tank 610, implies conditions for a run-away trimerisation reaction already existed. Ingress of water and reaction with MIC would generate carbondioxide evolution and cause mixing. The storage tank conditions would then equal those in a well mixed reactor, supplied with heat. Once initiated, the trimerisation reaction had features of auto-catalytic and auto- thermal reactions and temperatures increased rapidly to 250 degree celsius. The relief valve design could not permit free flow of large quantities of gases at the level at which they were generated and therefore further reactions continued.
>
> The presence of sodium at levels of 50 to 90 ppm in the samples from residues of tank 610 indicates ingress of some alkali, possibly derived from the Vent Gas Scrubber Accumulator. It is known that the tank 610 could not be pressured with nitrogen at any time after 22 October, 1984. The contents of tank 610 were virtually at atmospheric pressure from that date providing opportunities for entry of metal contaminants. From a perusal of the reports of the events of the night of 2/3 December, 1984, it appears during the cleaning of choked filters with water in the Relief Valve Vent Header, such water perhaps mixed with alkali from Vent Gas Scrubber Accumulator, could have entered the non pressurised tank and may have carried some metallic contaminants from the carbon steel portions of header pipelines. The rapid rise in temperature necessitates onset of metal catalysed polymerisation and could not result from water alone. The presence of

A choloroform has no influence whatsoever in initiating or accelerating the run-away reactions. The quantum of leakage is related not to the quantum of water but to the amount of MIC stored in a single container. If 42 tonnes of MIC had been stored in 210 stainless steel drums instead of a single tank, leakage by reactions or spillage would be no more than one fifth of tonne."

B

Reliance was also placed on the brochure for showing that for manufacture of Sevin, a very volatile and dangerous raw material, MIC had to be stored in large quantities and that raw material was not properly kept under cooling conditions and if coming in contact with water or any other C pollutant had a tendency to create extremely toxic gas which once it escapes would necessarily create disaster to the human beings and even cattle which come in its contact. It has to be stated in fairness to learned senior counsel for the appellants that they also did not challenge the fact that MIC was a very highly volatile and dangerous material which had to be properly kept so that it may not spell disaster once it gets converted D into poisonous gas and if such gas escapes from the factory. However their only contention was whether there was any *prima facie* evidence to show that the appellants or any one of them was in any way responsible for this unfortunate accident, which in their view was an act of God for which no human being was responsible.

E

The learned Addl. Solicitor General Shri Altaf Ahmed has also invited our attention to document D-159 a brochure of UCC, USA which stated that if MIC is contaminated with water it may become violent. He also invited our attention to D-195 which is a circular giving company F information about definitions of 'subsidiary and associate companies'. This was relied upon to show that UCIL was a subsidiary company of UCC, USA. Additional D-9 was relied upon which was a copy of the application for grant of industrial licence for manufacture of MIC based pesticides with foreign collaboration of UCC, USA, to show that UCL authorities were well aware regarding the hazardous nature of MIC which they were G handling in collaboration with UCC, USA and the safety measures which were required to be undertaken. Letter D-191 dated 26.10.1984 written by R. Nagarajan of UCEI to Shri K.S. Kamdar was relied upon to show that Shri Kamdar was requested to give feasibility report for dismantling of the MIC Plant, Bhopal and the shipment thereof abroad and the cost estimate H involved in such an undertaking. Reply of Shri Kamdar at D-19 dated

29.11.1984 was also relied upon to show the cost estimate prepared for dismantling and shipping of the Sevin/MIC Unit from Bhopal. These documents were relied upon to indicate that by the closing months of 1984 this plant had become useless and had to be scrapped and shifted and that showed lack of interest of the management and those operating the plant in the safe working of the plant which was no longer profit making and was almost a dead burden to them and this had resulted, according to the prosecution, in illegal omission on their part in taking necessary safety measures for containing the hazardous MIC within the confines of factory premises. D-216 was a statement showing loss to MIC Unit from 1981 to 1984 which showed huge financial loss suffered by the company in running the said plant. Thereafter the learned Additional Solicitor General placed strong reliance on document D-205 which was Operational Safety Survey Report conducted by team of experts of UCC. This document showed that a number of deficiencies in the maintenance of MIC Unit were pointed out by experts as early as in 1982. The said report is styled as Operational Safety Survey Co, MIC and SEVIN Units Union Carbide India Limited, Bhopal Plant. It is dated 28th July 1982. The covering letter addressed to Shri J. Mukund accused No. 5, the then Works Manager of the Bhopal Plant recites that the team was very impressed with the quality of operating and work procedures developed over the past few years. However it sought to bring to the attention of the addressee in connection with the equipment and mechanical deficiencies described in the report and suggested that continued efforts in the area of procedures, training and enforcement were necessary for contributing substantially to the on-going safety efforts at the Bhopal Plant. It was indicated that there were potentials for release of toxic materials in the phosgene/MIC unit and storage areas, either due to equipment failure, operating problems or maintenance problems. There were potentials for contaminations, overpressure, or overfilling of the SEVIN MIC feed tank. At M.2.1. were noted several conditions for operation of the unit that presented serious potential for sizeable releases of toxic materials. They were listed us under :

"(a) Leakage of phosgene and choloroform from the PSS feed and quench feed filter head assemblies.

(b) Breakage of small lines or connections, either because of inadequate line strength, installation of long unsupported nipples, or corrosion. Examples cited included quench pump

drain and vent connections, HCI Scrubber pump drains, and MRS and pyrolyzer tails pump drains and vents. (It should be noted that several of these lines were originally schedule 10 nickel piping, and have been replaced, for the most part.)

(c) Possible failure of the pyrolyzer calandria vapor line due to erosion/corrosion.

(d) Mechanical pump seal failures, caused by improper seal design (on the Glit pumps, for instance) or inadequate control of replacement materials.

(e) Release of material at unexpected places due to improper evacuation jet operation or open evacuation drops."

Regarding the operation of MIC Feed Tank at Sevin which was the basic source of the Bhopal Gas tragedy the Expert Committee Report indicated the dismal situation then existing even in 1982 in paragraph M.4.2. of the Report as under :

"(a) It appears that it would be possible to contaminate the tank with material from the vent gas scrubber. Although the arrangement of lines connecting the tank and vent scrubber appears to be adequate to prevent back flow of liquid, it appears possible to back reactive quantities of water vapors and other gases from the scrubber to the feed tank when it is depressurized.

(b) Location of the tank inside a room and lack of water spray protection facilities create a situation where a toxic and flammable vapor cloud could be formed and confined without provision for knockdown or dispersal. There is mechanical ventilation in the room, but the same circumstances that could result in a leak or overfill (power failure, for instance) could result in the ventilation being inoperative. Also, it appears that a sizeable spill would not be readily dispersed by the system.

(c) There is some question about the adequacy of the tank relief valve to relieve a runaway reaction or fire exposure, particularly since the tank has been enlarged.

(d) Manual control of filling of the tank, with no instrumentation backup, creates a possibility of accidental overfilling." A

Even that apart after the Bhopal Gas tragedy as stated earlier a scientific team of experts headed by Dr. Vardarajan inspected the plant on spot and tried to find out the reasons for this tragedy. At page 81 of the Report after listing various defects in the working of the plant especially with reference to storage tank and the instrumentation and control system the committee in paragraph 4.3 of the Report which is D-164 on the record of the Trial Court observed as under : B

"MIC is kept under a pressure of nitrogen which is supplied by a carbon steel header common to all the storage tanks. There is a strainer in the nitrogen line. Subsequent to the strainer the pipe is of carbon steel and leads to make-up DMV which also has as body of carbon steel. Similarly, the blowdown DMV is also of carbon steel body. These carbon steel parts may be exposed to MIC vapours and get corroded, providing a source of contaminant which can enter the MIC storage tank." C D

At paragraph 4.4 dealing with 'Instrumentation and Control System' it was observed in the Report of the Vardarajan Committee as under :

"4.4. *Instrumentation and Control System* : E

The pressure in the MIC tank increases rapidly if MIC is contaminated with water. There is no high pressure alarm to alert the operator about the build-up of pressure.

There is a graphite rupture disc between the tank and the safety valve. This graphite rupture disc may break because of pressure surges even under normal conditions. There is no provision for an alarm to bring such a breakage of rupture disc to the attention of the operator. F

For the storage of a lethal chemical such as MIC, two instruments in parallel (one for control/indication and another for alarm) are normally provided. No such provision is made. For example, quite often the level readings have not been recorded, reportedly because the level system used to be out of order very often due to choking problems. In fact, after the event, since the only level monitoring system provided for tank 611 was not functioning, it was not possible to ascertain the exact quantity of MIC in that G H

tank. An additional level measuring system would have helped in such a situation.

Ingress of contaminants or water can start a reaction with MIC which begin slowly and produce a rise in temperature of the tank contents. However, the range of the temperature transmitter provided was only -25 degree celsius to +25 degree celsius, with a high alarm setting at +11 degree celsius. The contents of the tank were being stored at ambient temperature, which varies approximately from +15 degree celsius to +40 degree celsius at Bhopal. The temperature of MIC in the storage tanks for most part of the year was higher than the high temperature alaram setting. i.e. +11 degree celsius. Indeed the temperature of material in the tank was higher than the maximum of the range of the temperature transmitter, i.e. +25 decree celsius. In such circumstances the actual temperature was not known and the transmitter was of no value. Further, provision of "rate of rise in temperature" alarm would have invited the operator's attention to the start of such a reaction. No such provision was made."

In connection with refrigeration the Committee observed in paragraph 4.5 of the Report as under :

4.5 *Refrigeration* :

There is only one common compressor and chiller system for all the three MIC storage tanks. For such a hazardous material as MIC, where maintaining it at a low temperature is considered very important, a spare compressor and chiller system would have ensured proper chilling even when the main compressor and chiller system is under repairs or maintenance. This provision of spare compressor and chiller has not been made."

At paragraph 5 of the Report is found an analysis of the events which led to the disaster out of the gas escape on that fateful night and the summary of the conclusion is found in the last sub-paragraph of para 5. It reads as under :

"In retrospect, it appears the factors that led to the toxic gas leakage and its heavy toll existed in the unique properties of very high reactivity, volatility and inhalation toxicity of MIC. The needless storage of large quantities of the material in very large size

containers for inordinately long periods as well as insufficient caution in design, in choice of materials of construction and in provision of measuring and alarm instruments, together with the inadequate controls on systems of storage and on quality of stored materials as well as lack of necessary facilities for quick effective disposal of material exhibiting instability, led to the accident. These factors contributed to guidelines and practices in operations and maintenance. Thus the combination of conditions for the accident were inherent and extant. A small input of integrated scientific analysis of the chemistry, design and controls relevant to the manufacture would have had an enormously beneficial influence in altering this combination of conditions, and in avoiding or lessening considerably the extent of damage of December, 1984 at Bhopal."

In addition to the aforesaid documentary evidence the learned Additional Solicitor General also relied upon D-157 being Memorandum of Association and Articles of Association of M/s Ever Ready Company (India) Private Limited subsequently changed to M/s Union Carbide India Limited showing accused No. 2 Keshub Mahindra as the Chairman. Various annual reports were pressed in service to show how accused No. 2 Keshub Mahindra presided over the meetings and how accused No. 3, V.P. Gokhale worked as whole-time Director. This was relied upon to show that these accused even though stationed at Bombay shared the criminal knowledge of the other personnel of the company who were actually handling the Bhopal plant being accused Nos. 5 to 9. It was submitted relying on aforesaid material and also the statements of Arjun Singh, Mohan Singh and Ram Lal and other statements of persons working in the plant which were recorded during investigation that all the accused had criminal knowledge regarding the defective working of the plant at Bhopal and as the Plant was to be dismantled and shifted out of India the powers that monitored the plant were no longer interested in its safe keeping and by their illegal omissions to take appropriate steps for safe working of the plant and for the safe keeping of such dangerous material like MIC which they were handling at Bhopal, they were rightly charged for the concerned offences by the learned Trial Judge and that the High Court was right in refusing to interfere with the framing of these charges. In this connection it was pointed that as the material showed no transfer of MIC from the strorage tanks to the production line could take place since November 22, 1984 due to the defective system. Still no remedial measures were taken.

A That the report of Vardarajan Committee showed that a relief valve vent header and process valve header were joined together by putting a 'U' type flexible hose jumber line. Therefore, according to him, this resulted in back flow of alkalin solution from the VGS to the storage tanks leading to a chain of reactions.

B It was next submitted that despite the recommendations in the report of the operational Safety Survey conducted at Bhopal Plant by experts from United States during May 1982 and despite various deficiencies of serious and minor nature being pointed out no remedial steps were taken. Even during the Safety Survey leakages from MIC plant area had been C noticed. Deficiency in safety valve and absence of fixed water sprayers in the MIC Plant area had been particularly pointed out. Thus the gas had leaked from the storage tank due to a chain chemical reaction. That the material led before the Trial Court at the stage of framing of charge clearly indicated that there was possibility of ingress of water and other contaminants from the RVVH or during cleaning of the valve due to rupturing D the disc valve which had resulted into this grim tragedy. It was next contended that the material led by the prosecution at this stage at least *prima facie* showed that all the accused were fully responsible for the conduct of the plant and they shared the criminal knowledge about the acts of commission and omission on the part of those of the accused who were actually handling the plant and supervising its working on that fateful night E at Bhopal. That accused R. Choudhary, J. Mukund, S.P. Choudhary, K.V. Shetty and S.I. Qureshi who were actively associated with the working of the plant at Bhopal were directly concerned with the incident as they were in full knowledge of the deficiencies in the plant. Similarly accused Keshub, Mahindra, V.P. Gokhale and Kishore Kamdar too had full knowledge of F the defects in the plant at Bhopal and therefore, they also shared the criminal liability based on criminal knowledge about the acts of commission and omission in connection with the operation of the said plant at Bhopal. That all the accused had full knowledge of the hazardous nature of the MIC manufactured as an intermediate product in Bhopal plant, defects in the design of the plant lack of safety measures, but still they had taken to G precautionary steps to avoid this unfortunate accident.

Learned senior counsel for the appellant-accused on the other hand submitted that even if taking the material available on record at this stage on its face value the short question is whether any charge could have been H framed against the accused under Section 304 Part II, IPC with or without

the aid of Section 35, IPC and even for that matter any charges could have been framed under Sections 326, 324 or 429 with or without the aid of Section 35 of IPC. We may at once state that both the learned Sessions Judge as well as the High Court have taken the view on the aforesaid material that a *prima facie* case has been made out by the prosecution requiring accused to face the aforesaid charges and the trial of the accused on these charges cannot be cut short or nipped in the bud in the light of the aforesaid material which has to be accepted as *prima facie* true and reliable at this preliminary stage of framing of charges.

It, therefore, become necessary for us now to address ourselves on this moot question. As noted earlier the main charge framed against all these accused is under Section 304 Part II, IPC. So far as accused Nos. 2, 3, 4 and 12 are concerned they are also charged with offences under Sections 326, 324, IPC and 429 IPC read with Section 35 IPC while accused 5 to 9 are charged substantially with these offences also. We shall first deal with the charges framed against the concerned accused under the main provisions of Section 304 Part II, IPC. A look at Section 304 Part II shows that the concerned accused can be charged under that provision for an offence of culpable homicide not amounting to murder and when being so charged if it is alleged that the act to the concerned accused is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death the charge offences would fall under Section 304 Part II. However before any charge under Section 304 Part II can be framed, the material on record must at least *prima facie* show that the accused is guilty of culpable homicide and the act allegedly committed by him must amount to culpable homicide. However, if the material relied upon for framing such a charge against the concerned accused falls short of even *prima facie* indicating that the accused appeared to be guilty of an offence of culpable homicide Section 304 Part I or Part II would get out of the picture. In this connection we have to keep in view Section 299 of the Indian Penal Code which defines culpable homicide. It lays down that, 'whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide'. Consequently the material relied upon by the prosecution for framing a charge under Section 304 Part II must at least *prima facie* indicate that the accused had done an act which had caused death with at

A least such a knowledge that he was by such act likely to cause death. The entire material which the prosecution relied upon before the Trial Court for framing the charge and to which we have made a detailed reference earlier, in our view, cannot support such a charge unless it indicates *prima facie* that on that fateful night when the plant was run at Bhopal it was run B by the concerned accused with the knowledge that such running of the plant was likely to cause deaths of human beings. It cannot be disputed that mere act of running a plant as per the permission granted by the authorities would not be a criminal act. Even assuming that it was a defective plant and it was dealing with a very toxic and hazardous substance like MIC the mere act of storing such a material by the accused in tank C No. 610 could not even *prima facie* suggest that the concerned accused thereby had knowledge that they were likely to cause death of human beings. In fairness to prosecution it was not suggested and could not be suggested that the accused had an intention to kill any human being while operating the plant. Similarly on the aforesaid material placed on record D it could not be even *prima facie* suggested by the prosecution that any of the accused had a knowledge that by operating the plant on that fateful night whereat such dangerous and highly volatile substance like MIC was stored they had the knowledge that by this very act itself they were likely to cause death of any human being. Consequently in our view taking the E entire material as aforesaid on its face value and assuming it to represent correct factual position in connection with the operation of the plant at Bhopal on that fateful night it could not be said that the said material even *prima facie* called for framing of a charge against the concerned accused under Section 304 Part II, IPC on the spacious plea the said act of the accused amounted to culpable homicide only because the operation of the F plant on that night ultimately resulted in deaths of number of human beings and cattle. It is also pertinent to note that when the complaint was originally filed *suo motu* by the police authorities at Bhopal and the criminal case was registered at the police station Hanumanganj, Bhopal as case No. 1104/84 it was registered under Section 304-A of the IPC. We will come to G that provision a little later. Suffice it to say at this stage that on the entire material produced by the prosecution in support of the charge it could not be said even *prima facie* that it made the accused liable to face the charge under Section 304 Part II. In this connection we may refer to a decision of the Calcutta High Court to which our attention was drawn by learned H senior counsel Shri Rajendra Singh for the appellants. In the case of *Adam*

Ali Taluqdar and Ors. v. *King-Emperor,* AIR (1927) Calcutta 324 a Division Bench of the Calcutta High Court made the following pertinent observations while interpreting Section 304 Part II read with Section 34 IPC :

> "Although to constitute an offence under S. 304, Part 2, there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act, they are jointly doing, is one that is likely to cause death but have no intention of causing death, yet they may certainly have the common intention to do that act and therefore S. 34 can apply to a case under S. 304, Part 2."

Once we reach the conclusion that the material produced by the prosecution before the Trial Court at the stage of framing of charges did not even *prima facie* connect the accused with any act done with the knowledge that by that act itself deaths of human beings would be caused the accused could not be even charged for culpable homicide and consequently there would be no question of attracting Section 304 Part II against the concerned accused on such material. When on the material produced by the prosecution no charge could be framed against any of the accused under Section 304 Part II there would remain no occasion to press in service the applicability of Section 35, IPC in support of such a charge for those accused who were not actually concerned with the running of the plant at Bhopal, namely, accused Nos. 2, 3, 4 and 12.

We may now turn to the charges framed against the concerned accused- appellanty under Sections 324 and 326 of the IPC. Section 324 deals with 'voluntarily causing hurt by dangerous weapons or means' while Section 326 deals with 'voluntarily causing grievous hurt by dangerous weapons or means". Both these sections for their application require material against the accused on the basis of which it could be said that the accused had voluntarily caused such hurt or grievous hurt, as the case may be. Section 321 defines 'voluntarily causing hurt' and provides that, 'whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt". Similarly Section 322 deals with 'voluntarily causing grievous hurt' and lays down that, 'whoever voluntarily causes hurt, if the hurt which

A he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt". For applicability of these Sections the material relied upon by the prosecution in support of such charges must show that the concerned accused had committed the act complained of at least with the B knowledge that by such act he was likely to cause hurt or grievous hurt to the victim. We have already indicated hereinabove that the material pressed in service by the prosecution for framing such charges against the accused falls short of indicating that the act of running the plant on that fateful night at Bhopal which in its turn involved storing and utilising highly dangerous and volatile substance like MIC in their storage tank No. 610 C could not even *prima facie* be said to have been done with the knowledge that by such act itself simple hurt or grievous hurt was likely to be caused to any one. Consequently on such material even charge under Sections 324 and 326, IPC could not have been framed against the concerned accused. Once this conclusion is reached there would also remain no occasion to D press in service against the absentee accused Nos. 2, 3, 4 as well as 12 Section 35 IPC which the prosecution sought to press in service along with substantive Sections 324 and 326 IPC. In fact on the material as placed by the prosecution in support of these charges if a charge under Section 304 Part II cannot be framed then on the parity of reasoning no charge under E Sections 324 and 326 could also be framed. That takes us to Section 429, IPC which deals with 'mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees'. For application of this Section the material must indicate that the concerned accused had committed mischief in the first place. The term 'mischief' is defined by Section 425 IPC. It lays down that, 'whoever, with intent to cause, or knowing that F he is likely to cause, wrongful loss or damage to the public or to any person, or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief"'. Before the said Section is pressed in service the material relied upon by the prosecution must indicate even *prima facie* that the concerned accused by running the plant at Bhopal on G that fateful night had knowledge that by running such plant they were likely to cause wrongful loss or damage to the public or to any person. It is difficult to appreciate how said provision can be pressed in service on the basis of the material referred to hereinabove which does not whisper or even *prima facie* indicate how by running such a plant wherein highly dangerous and volatile substance like MIC was stored in tank No. 610 the H

accused had the knowledge that by that act alone they were likely to destroy anybody's property or cause wrongful loss or damage to any person. Once the applicability of Section 425, IPC dealing with 'mischief' is ruled out on such material there would remain no occasion to invoke Section 429 which for its applicability requires the prosecution to show in the first instance any material against the concerned accused indicating the commission of mischief by the accused. In our view, therefore, on the material pressed in service by the prosecution for framing charges against the accused no charge could have been framed against the concerned accused either under Section 304 Part II or under Section 324, 326 or 429, IPC with or without the aid of Section 35, IPC. On these findings of ours the appeals will be required to be allowed and all these charges will have to be quashed.

However this is not the end of the matter. There still remains the question as to whether any other charge can be framed against the concerned accused for any of the offences under the Indian Penal Code on the basis of the very same material relied upon by the prosecution for framing appropriate charges against the accused. It is true that though originally the criminal case was registered for an offence under Section 304-A of the IPC the Central Bureau of Investigation which took up the investigation thought it proper to press in service Section 304 Part II and Sections 324, 326 and 429 of the IPC. Charges under these Sections have been found by us to be unsustainable on the material produced by the prosecution on record in support of these charges. However that does not mean that on the material as it stands on record the accused cannot even *prima facie* be alleged to have committed any criminal offence for which they can be called upon to face the trial and that they should get a clean chit and clear walk-over. In our view the prosecution on the material as aforesaid had made out a *prima facie* case against the accused for being tried under Section 304-A of the IPC which reads as under :

> "304-A. Causing death by negligence. - Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for the term which may extend to two years, or fine, or with both".

On our finding that the material pressed in service by the prosecution does

A not indicate even *prima facie* that the accused were guilty of an offence of culpable homicide and, therefore, Section 304 Part II was out of picture, Section 304-A on this very finding can straightaway get attracted at least *prima facie*. It cannot be disputed that because of the operation of the defective plant at Bhopal on that fateful night a highly dangerous and volatile substance like MIC got converted into poisonous gas which snuffed B off the lives of thousands of human beings and maimed other thousands and killed number of animals and that all happened, as seen at least *prima facie* the material led by the prosecution on record, because of rash and negligent act on the part of the accused who were in-charge of the plant at Bhopal. Even though, therefore, these accused cannot be charged for C offences under Section 304 Part II the material led against them by the prosecution at least *prima facie* showed that the accused were guilty of rash or negligent acts not amounting to culpable homicide and by that act caused death of large number of persons. We may mention that on the question whether on this material Section 304-A could be invoked or not, D learned senior counsel for the appellants as well as learned Addl. Solicitor General for the respondent-State did address us and, therefore, we can and should, with a view to avoid multiplicity of proceedings, exercise our powers under Article 142 of the Constitution and decide whether the material led by the prosecution can *prima facie support charges under Section 304-A against concerned accused. In the case of State of Gujarat* v. E *Haidarali Kalubhai,* [1976] 1 SCC 889 it was laid down by this Court as under :

> "Section 304-A by its own definition totally excludes the ingredients of Section 299 or Section 300 I.P.C. Doing an act with the intent F to kill a person or knowledge that doing of an act was likely to cause a person's death are ingredients of the offence of culpable homicide. When intent or knowledge as described above is the direct motivating force of the act complained of, Section 304-A has to make room for the graver and more serious charge of culpable homicide."

G

On the facts found in that case it was held that the prosecution evidence did not make out a case of any wilful or deliberate act on the part of the accused in order to cause the death of the deceased by driving the truck in the way he did. Whether the prosecution brings home the charge under H Section 304- A or not will, of course, have to be decided in the light of the

evidence that may be led in the trial against the accused who is required to face the charge under Section 304-A. But for framing such a charge the material on record must at this stage be assumed to be representing a true version of the event. For repelling the applicability of Section 304-A, learned senior counsel for the appellants pressed in service decision in the case of *Ambalal D. Bhatt* v. *The State of Gujarat,* [1972] 3 SCC 525. The following observations in the aforesaid judgment were pressed in service :

> "(i) In a prosecution for an offence under Section 304- A of I.P.C., the court has to examine whether the alleged act of the accused is the direct result of a rash and negligent act and that act was the proximate and efficient cause of the death without intervention of other's negligence. The mere fact that an accused contravenes certain rules or regulations in doing of an act does not establish an offence under Section 304-A, I.P.C.
>
> The act causing deaths must be the causa causans; it is not enough that it may have been the causa sine qua. non. The court has to determine whether the act of the accused is the causa causans or has there been a cause intervening which has broken the chain of causation so as to make the act of the accused, though a negligent one, not the immediate cause or whether it amounts to an act or gross negligence or recklessly negligent conduct. The fact that twelve lives have been lost, however shocking and regrettable it may be, ought not to allow the mind boggle while appreciating the evidence."

It was submitted that the material must *prima facie* show that the alleged act of the accused was the direct result of rash and negligent act. In this connection we must observe that the material led by the prosecution to which we have made a detailed reference earlier *prima facie* shows that there were not only structural defects but even operational defects in the working of the plant on that fateful night which resulted into this grim tragedy. Consequently a prima facie case is made out for framing charges under Section 304-A against the concerned accused. If ultimately on the evidence led by the prosecution and even by the defence if at all they choose to led evidence in rebuttal, it is found that that act complained of was not the proximate and efficient cause of death and intervention of other's negligence had taken place the accused may get acquittal after

A facing the full fledged trial. But that stage has yet not come. It would, therefore, be premature at this stage to say as to what would be the ultimate result of the trial once the accused are made to face such a trial. But it cannot be said that on the material led by the prosecution at this stage even the case of culpable negligence of rashness is also not made out at least
B *prima facie* against the concerned accused and the trial should be nipped in the bud even for such a charge. Our attention was also invited by learned senior counsel for the appellants in support of their contention that the material on record does not *prima facie* make out a case for framing a charge under Section 304-A, IPC. The following observations of Hegde, J. speaking for a Bench of three learned Judges in the case of *Suleman*
C *Rehiman Mulani & Ors.* v. *State of Maharashtra,* [1968] 2 SCR 515, were pressed in service:

> "The requirements of s. 304-A I.P.C. are that the death of any person must have been caused by the accused by doing any rash or negligent act. In other words, there must be proof that the rash
D or negligent act of the accused was the proximate cause of the death. There must be direct nexus between the death of a person and the rash or negligent act of the accused. There is no presumption in law that a person who possesses only a learner's licence or possesses no licence at all does not know driving. For various
E reasons, not excluding sheer indifference, he might not have taken a regular licence. The prosecution evidence that first appellant had driven the jeep to various places on the day previous to the occurrence was a proof of the fact that he knew driving."

Even that decision cannot be of any avail to the appellants for the simple
F reason that question of proof of rashness and negligence will arise at the stage of trial after full evidence is led by the prosecution and even by the accused side if at all they choose to do so and in the light of that evidence the question would arise whether the charge as framed is made out by the prosecution against the concerned accused. At present we are concerned
G with the short question as to whether on the material led by the prosecution at this stage a case is made out for framing under Section 304-A, IPC or not? It cannot be gainsaid that the voluminous evidence led by the prosecution in this connection at least *prima facie* shows that the concerned accused who operated the plant on that fateful night at Bhopal could be alleged to be at least guilty of rash and negligent act in the way this highly
H volatile substance MIC was handled by them and which ultimately escaped

in vapourous form and extinguished the lives of thousands of human beings and animals apart from causing serious bodily injuries to thousands of others. Our attention in this connection was also invited by learned senior counsel for the appellants to the case of *Kurban Hussein Mohammedali Rangwalla* v. *State of Maharashtra,* [1965] 2 SCR 622. It was submitted relying on the said decision that for punishing an accused under Sections 304-A and 285 of the IPC it was required to be shown that because of the alleged rash and negligent act death must result and death must be the direct and proximate result. It that case on evidence led at the full fledged trial the question arose whether the charge was made out. All these judgments on which learned senior counsel for the appellants placed reliance, therefore, could have applicability for judging the culpability of the concerned accused after they face the trial and entire evidence is led in the case against them. However for framing charge under Section 304-A on the aforesaid material it cannot be said that the said material even *prima facie* did not point out the culpability of the concerned accused in running a defective plant having number of operational defects and in being *prima facie* guilty of illegal omissions to take safety measures in running such a limping plant on that fateful night which resulted into this colossal tragedy. The aforesaid conclusion of ours, therefore, would make out a *prima facie* case against accused nos. 5, 6, 7, 8 and 9 who were in actual charge of running of the Bhopal plant and would require them to face the trial for charge under Section 304-A of the IPC.

So far as the remaining accused nos. 2, 3, 4 and 12 are concerned the material produced on record clearly indicates at least *prima facie* that they being at the helm of affairs have to face this charge for the alleged negligence and rashness of their subordinates who actually operated the plant on that fateful night at Bhopal and for that purpose Section 35 of the IPC would also *prima facie* get attracted against them. A mere look at that Section shows that if the act alleged against these accused becomes criminal on account of their sharing common knowledge about the defective running of plant at Bhopal by the remaining accused who represented them on spot and who had to carry out their directions from them and who were otherwise required to supervise their activity, Section 35 of the IPC could at least *prima facie* be invoked against accused 2, 3, 4 and 12 to be read with Section 304-A, IPC. Consequently we find that on the material led by the prosecution against the accused at this stage a *prima facie* case was made out by the prosecution for framing charges against accused Nos.

A 2, 3, 4 and 12 under Section 304-A read with Section 35 IPC while substantive charges under Section 304-A could be framed against accused Nos. 5, 6, 7, 8 and 9. In this connection Shri Desai, learned senior counsel for the appellants vehemently submitted that the High Court was in error in invoking Section 35 against the concerned accused. Placing reliance on
B *Esso Standard Inc.* v. *Udharam Bhagwandas Japanwalla,* [1975] 45 Comp. Cas. 16 he submitted that, that was a case in which for the individual acts of the directors of the company the company was sought to be made liable by invoking the principle of corporate liability based on the doctrine of directing mind and will. Shri Desai submitted that this was a converse case where for the act of the company which is a corporate body being accused
C No. 12 the individual directors are sought to be roped in. The aforesaid contention of Shri Desai cannot be of any avail at this stage for the simple reason that whether on facts such converse case is made out or not in the light of aforesaid decision will depend upon the evidence that may be led at the stage of trial. But this would not rule out framing of appropriate
D charge against the appellants if there is *prima facie* material against them which in our view has been made available by the prosecution before the Trial Court for framing such a charge against the concerned accused.

Shri Ashok Desai, learned senior counsel then submitted that the material led by the prosecution does not even remotely indicate that
E accused no. 2 who was at Bombay could have shared any knowledge with persons at Bhopal who were actually operating the plant. When from the documentary evidence produced by the prosecution it is *prima facie* indicated that the accused at the helm of affairs was in the apex position enabling him to know the shortcomings of the working of the plant at
F Bhopal. Whether he actually shared knowledge or not will be a question of evidence and proof to be resolved at the stage of trial. However from the material available on record it cannot be said that the prosecution had not *prima facie* made out a case for attracting Section 35, IPC so far as the present accused are concerned. However we must add a caution. We must note that whatever we have observed at this stage in connection with the
G material produced by the prosecution for framing charges against the accused is strictly confined to this limited question. Whether the accused are found actually guilty of the charges framed against them or not will strictly depend upon the evidence that may be led at the stage of trial and the court will have to decide the culpability of the concerned accused, if
H any, strictly confined to the evidence that may be led at the stage of trial.

Our present observations, therefore, should not be treated to have even remotely suggested that in fact the accused are guilty of the offences with which they are liable to be charged pursuant to our present order. Consequently on the material as produced by the prosecution on record charges under Section 304-A read with Section 35 IPC can be framed against accused nos. 2, 3, 4 and 12. We direct the appropriate Trial Court to frame charges as aforesaid against the concerned accused.

However in our view from the material which is produced on record there is a possibility of considering a further question whether charges under Sections 336, 337 and 338 of the IPC with or without the aid of Section 35 can be framed against the concerned accused. They read as under :

> "336. Act endangering life or personal safety of others. - Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.
>
> 337. Causing hurt by act endangering life or personal safety of others. - Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.
>
> 338. Causing grievous hurt by act endangering life or personal safety of others. - Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both."

As none of the parties have addressed us on these aspects we leave this question for consideration of the learned Trial Judge who may after hearing the parties decide whether on the material as led by the prosecution on record at this stage charges, if any, can also be framed under

A Sections 336, 337 and 338 of the IPC with or without the aid of Section 35 of the IPC. We express no opinion on this aspect and leave it open to the Trial Court to address itself on this question.

As a result of the aforesaid discussion it is held that on the material led by the prosecution appropriate charges which are required to be
B framed against the concerned accused are under Section 304-A, IPC so far as the accused Nos. 5, 6, 7, 8 and 9 concerned while so far as accused nos. 2, 3, 4 and 12 are concerned charges under Section 304-A read with Section 35 IPC will have to be framed. As these offences are triable by the court of Judicial Magistrate 1st Class, Bhopal the Sessions Case shall be trans-
C ferred to the Court of the Chief Judicial Magistrate, 1st Class, Bhopal who will proceed with the trial in accordance with law and frame appropriate charges under Section 304-A with or without the aid of Section 35, as the case may be, against the concerned accused as indicated hereinabove.

In the result the appeals filed by the concerned accused partially
D succeed to the aforesaid extent. Charges framed against them under Sections 304 Part II, 324, 326 and 429, IPC with or without the aid of Section 35, as the case may be, are quashed and set aside. Instead it is directed that the appropriate Trial Court shall frame charges against these accused as indicated in the judgment. The appropriate Trial Court to which the
E case will stand transferred is also directed to consider the further question whether charges should be framed under Sections 336, 337 and 338 of the IPC with or without taking the aid of Section 35, IPC after hearing the concerned parties. On that aspect we express no opinion. Orders accordingly.

V.S.S. Appeal allowed.

SANKALCHAN JAYCHANDBHAI PATEL AND ORS. A

v.

VITHALBHAI JAYCHANDBHAI PATEL AND ORS.

SEPTEMBER 13, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.] B

Bombay Revenue Jurisdiction Act :

Section 11—Whether a bar to entertaining a civil suit—Held, there is a prohibition on the Civil Court to entertain any suit against the Government on account of any act or omission of any Revenue Officer—But there is no prohibition on private parties inter se to avail of the remedy of the suit provided under CPC—Hence Civil Suit is maintainable—Code of Civil Procedure—Section 9. C

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 12808-09 D of 1996.

From the Judgment and order dated 30.6.95 of the Gujarat High Court in M.C.A. No. 656 of 1995.

Yashank Adharya, Braj K. Misra and Ejaz Maqbool for the Appel- E lants.

The following Order of the Court was delivered :

Leave granted.

F

These appeals by special leave arise from the order of the learned single Judge of the High Court of Gujarat, originally made on March 23, 1995 in Order No. 40/95 and in MCA No. 656/95 on June 30, 1995.

The facts are fairly not in dispute. The admitted position is that the G appellant and the respondent had jointly purchased the suit schedule property. It would appear that there was a partition between them as co-owners on March 20, 1982. Subsequently, it would appear that mutation was effected in the revenue record on July 21, 1982 to the extent of the property that had fallen to the share of the appellant who claims to have a further effected partition between the appellant and his children on July H

A 24, 1986. It is the case of the appellant that the respondent filed an appeal under Section 11 of the Bombay Revenue Jurisdiction Act which was dismissed by the appellate Court on March 9, 1994. Without availing of the further right of revision as provided thereunder, he filed the civil suit in the Court seeking declaration of his title to the property and perpetual injunction. Initially, the trial Court refused to grant injunction. But, on B appeal, the District Judge had granted injunction pending the suit restraining the appellant from alienating the property. The revision was dismissed by the High Court. Review petition was also dismissed. Thus, these appeals by special leave.

C The primary question raised by Mr. Yashank Adharyu, learned counsel for the appellant, is that Section 11 is a bar on entertaining the suit. The High Court, therefore, was not right in restraining the appellant from alienating the property without deciding jurisdiction issue, i.e., whether the suit itself is maintainable. In support thereof, he placed strong reliance on a judgment of a single Judge of the Gujarat High Court in D *Rukmanibai* v. *The State of Gujarat,* (1960) 1 GLR 1791. The question, therefore, is : whether Section 11 is a bar for maintainability of the suit? It is seen that the bar of Section 37 of the Bombay Land Revenue Code would be only as against the lands vesting in or belonging to the State. Therefore, it has not relevance to the *inter se* claims of the private parties. The High E Court, therefore, was not right in relying on Section 37.

Section 11 of the Bombay Revenue Jurisdiction Act reads as under:

> "11. Suits not to be entertained unless plaintiff has exhausted right of appeal. - No Civil Court shall entertain any suit (against the F Government) on account of any act or omission of any Revenue Officer Unless the plaintiff first proves that previously to bring his suits he has presented all such appeals allowed by the law for the time being in force, a within the period of limitation allowed for bringing such suits it was possible to present."

G A reading of the section would clearly indicate that there is a prohibition on the civil Court to entertain any suit against the Government, no account of any act or omission of any Revenue Officer, unless the plaintiff first proves that he previously brought it by way of an appeal before the competent authority and within the time prescribed. Without H availing of that remedy, he cannot present the suit against the State. The

question is : whether Section 11 applies to the *inter se* claim of the private parties? It would be seen that learned single Judge has construed Section 11 of the Bombay Revenue Jurisdiction Act, and concluded that Section 11 prohibits entertainment of the suit between private parties unless the plaintiff has exhausted right of appeal or revision prescribed therein and available to him before he resorts to the suit challenging the order passed by the Revenue Officer. A reading of Section 11 does not indicate any prohibition on private parties *inter se* to avail of the remedy of a suit provided under the Code of Civil Procedure, 1908 (CPC). Section 9 or CPC does not expressly or by necessary implication, prohibits the jurisdiction of the civil Court to entertain the suit based on title.

It is settled law that mutation entries are only to enable the State to collect revenues from the persons in possession and enjoyment of property and that the right, title and interest as to the property should be established *de horse* the entries. Entries are only one of the modes of proof of the enjoyment of the property. Mutation entries do not create any title or interest therein. Therefore, the view taken by the learned Single Judge, with due respect, is not correct in law. The civil suit is clearly maintainable. The High Court rightly granted injunction restraining the appellants from alienating the land. Even otherwise, Section 52 of the Transfer of Property Act *lis pendense* always stands in the way of purchaser of the land subject to the result in revision.

Under these circumstances, we do not find any illegality in the order of the high Court warranting interference.

The appeals accordingly dismissed. No costs.

G.N. Appeals dismissed.

A JUDHISTIR MOHANTY

v.

STATE OF ORISSA AND ORS.

SEPTEMBER 13, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Service Law :

Scale of pay—Entitlement of higher scale of pay—Employee working as
C *jail Superintendent in leave reserve—Making representation for transfer to a particular place—Grant of the request—Though he was holding a Class II post he was adjusted against a Class-I post—Claim for higher scale of pay—Held not justified since it was a request transfer and he was accommodated in a higher post, he is not entitled to higher scale of pay than the scale of pay attached to his post.*

D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12858 of 1996.

From the Judgment and Order dated 26.4.88 of the Orissa Ad-
E ministrative Tribunal in M.P. No. 281/1988 in T.A. No. 29/87 (OJC No. 2540 of 1984.

Mr. Y.P. Rao for the Appellant.

Mr. P.N. Misra for the Respondents.

F

The following Order of the Court was delivered :

Delay condoned.

Leave granted.

G

We have heard learned counsel on both sides.

This appeal by special leave arises from the two orders dated April 26, 1988 of the Administrative Tribunal at Bhubaneswar made in T.A. No. 29/87 (OJC No. 2540/84) transferred from the High Court and M.P. No.
H 281/88.

The admitted position is that the appellant, while working as Superintendent of Jail in leave reserve in the Head Officer of I.G. (prisons) made a representation on February 5, 1978 to the Chief Minister stating that he had no house of his own and had recently secured a site at Behrampur. He wanted to settle down at Behrampur. He had served the Department for more than 37 years. His children were prosecuting studies hear Behrampur. if he is transferred to Behrampur or near about Behrampur, he would be able to construct the house and settle him down after retirement at Behrampur. Taking that representation into consideration, the Government granted sanction on January 27, 1978 directing that he was transferred and posted as Superintendent of Jail at Circle Jail at Behrampur. By proceedings dated January 27, 1978, the Government have sanctioned two posts of Superintendent of Jail for Circle Jail at Behrampur in the pay scale of Rs: 850-1450 with D.A. In one of the above sanctioned posted, the appellant came to be adjusted by proceedings dated March 28, 1978 and it is not in dispute that he worked during the period from April 1, 1978 to October 31, 1978 the date on which he attained superannuation and retired from service. The writ petition filed in the High Court was subsequently transferred to the Tribunal. Though there is no mention as regards his entitlement to the payment of the salary in the post of Superintendent referred to hereinbefore, the same was not paid to him for the reason that he was transferred and posted to the said post at his request. It is the contention of Shri Y. Prabhakara Rao, learned counsel for the appellant, that since he was asked to discharge that duty for the said period, he is entitled to the payment of the salary. *Prima facie*, we are impressed with the arguments addressed by Shri Y.P. Rao, but it is pointed by Shri Misra, learned counsel appearing for the State, that the Superintendent leave reserve is only Class II post whereas the Superintendent of the Circle is Class I post. Since the appellant made a request for adjustment of him at Behrampur and since there was no other post equivalent to Class II available, he came to be adjusted in that post at request. Therefore, he was not eligible to the scale of pay attached to the post. We are in agreement with Shri Misra, learned counsel for the State. It is a settled position that if the Government, for want of candidate, directs an officer in the lower cadre to perform the duties of the post in the higher cadre, during that period, necessary incumbent would be entitled to the payment of salary attached to the post if the incumbent performed the duties in that post. Similarly where concerned officer is on promotion from lower cadre to the

A higher cadre, though on *ad hoc* or even temporary basis, the incumbent would be entitled to the payment of the salary attached to the post for the period of his discharging the duty in that post. In this case, neither would be is applicable. At request, he was transferred and thought order dos not speak of, but the fact remains and is not disputed that the order came to
B be passed pursuant to a representation made by the appellant to the Chief Minister. It was obviously on that basis that direction was issued by the Chief Minister's Office and the transfer order came to be made to accommodate him, before his retirement, at Behrampur where he had proposed to construct the house. Since there was no equivalent post of Grade II category, necessarily he was accommodated in that post. Consequently he
C is not entitled to the higher scale of pay than to which he was entitled as Superintendent Leave Reserve on which post he would otherwise have retired.

The appeal is accordingly dismissed, but in the circumstances,
D without costs.

G.N. Appeal dismissed.

KULDIP SINGH

v.

STATE OF PUNJAB AND OTHERS

SEPTEMBER 16, 1996

[B.P. JEEVAN REDDY AND K.S. PARIPOORANAN, JJ.]

Service Law—Punjab Police Act 1861 :

Punjab Police Rules, 1934—Section 7—Rules 16.1 and 16.24—Power of dismissal and enquiry.

Constitution of India, 1950—Article 311(2)(b)(3)—Condition precedent to dispensing with the enquiry—Satisfaction of the disciplinary authority recorded on proper assessment of facts and circumstances—The decision of the disciplinary authority is final but subject to judicial review—The decision of the disciplinary authority, confirmed by the appellate authority not to hold enquiry against the appellant, helping the terrorists—High Court satisfied with the view—Supreme Court would not interfere and take a different view.

Evidence Act, 1872—Sections 25 and 26—Confessions made to the police officer—Relevancy in departmental enquiry—If accepted as voluntary and true by disciplinary authority and the appellate authority—Supreme Court would not go into the question—Strict rules of evidence not applicable to departmental enquiry—Principles of natural justice and rules governing the enquiry must be followed.

The Senior Superintendent of Police, invoking proviso(b) of Article 311(2) of the Constitution and the Punjab Police Rule 16.1 read with Section 7 of the Punjab Police Act, 1861, dismissed the appellant, a Head Constable, who was helping the terrorists. The satisfaction of the Senior Superintendent of Police for not holding the enquiry was that the circumstances were such that it was not reasonably practicable to hold an enquiry against the appellant, as no witness was likely to depose against him due to fear of life. The appeal preferred by the appellant was rejected by the Inspector General of Police. The High Court also rejected his appeal holding that there were sufficient materials before the disciplinary authority for not holding the enquiry. The appellant moved this court

A challenging that except the confession made to the police during interrogation, there was no other material against him warranting his dismissal and that he was acquitted by the Designated Court.

Dismissing the appeal, this Court

B HELD : 1. Though according to sections 25 and 26 of the Evidence Act, the confession made before or while in custody of a police officer is not admissible, it is well-settled that these rules do not apply to departmental enquiry. Even the evidence recovered or discovered as a result of illegal search is relevant in India departing from the law of United C States. The fact that the confession was made to the police, may not be of much consequence for the reason that strict rules of evidence do not apply to the departmental enquiry and as such the appellant's confession is relevant. In departmental enquiry, it would perhaps be permissible for the authorities to prove that the appellant did make such a confession during the course of interrogation and it would be for the disciplinary authority D to decide whether it was voluntary or not. The disciplinary authority is entitled to act upon such statement if it is voluntary and true. Once the disciplinary authority as well as the appellate authority conclude that the confession made by the appellant is voluntary, this court would not go into the question of its being voluntary or not. [345-H]

E

2. Undoubtedly, there is no other material except the confesion of the appellant. There is also the fact that the appellant was acquitted by the designated court, however, the High Court has opined that there were enough materials before the appropriate authority upon which it could come to a reasonable conclusion that it was not reasonable practicable to F hold an enquiry as contemplated by clause (2) of Article 311 of the constitution. Nothing has been shown to justify the taking of a contrary view at this stage. Once proviso(b) of Article 311(2) is held to have been validly invoked, the only ground left with the concerned Govt. servant is to impugn the punishment actually awarded as being unwarranted. In the G instant case, the punishment awarded to the appellant cannot be said to be excessive. [346-B-E]

Kuruma v. *The Queen*, (1955) A.C. 197, referred to.

Union of India v. *Tulsi Ram Patel*, [1985] Suppl. 2 SCR 131; *Pooran* H *Mal v. Director of Inspection*, [1974] 1 SCC 345; *State of Mysore* v. *S.S.*

Makapur, **AIR (1963) SC 375 and** *The State of Assam* **v.** *S.K. Dass,* **AIR (1970) SC 255, relied on.** A

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12313 of 1996.

From the Judgment and Order dated 10.12.93 of the Punjab & Haryana High Court in C.W.P. No. 14895 of 1993. B

R.S. Sodhi for the Appellant.

Manoj Swarup for the Respondents.

C

The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. Leave granted.

This appeal arises from the judgment of the Punjab and Haryana High Court dismissing the writ petition filed by the appellant. The appellant was a Head Constable of Police in the service of the Punjab Government. He has been dismissed from service without holding an enquiry as contemplated by clause (2) of Article 311 of the Constitution of India. The Senior Superintendent of Police (S.S.P.), Tarn Taran has invoked proviso (b) appended to the said clause (2), dispensing with the enquiry on the ground that it is not reasonably practicable to hold such an enquiry in the case of the appellant. The order of dismissal is dated February 21, 1992. The appeal preferred by the appellant was dismissed by the Inspector General of Police, Border Range, Amritsar on June 22, 1993. The order or dismissal and the appellate order affirming it were questioned by the appellant by way of a writ petition in the punjab and Haryana High Court which too has failed, as stated above. The order of dismissal passed by the S.S.P., Tarn Taran, reads: D E F

> "Whereas Head Constable Kuldip Singh No. 2874/TT of this district has been found indulging in activities prejudicial to the efficient functioning of the Police force. He has very close links with extremists and helping them by providing information of the Police Department. G
>
> And whereas it is established that Head Constable Kuldip Singh No. 2874/TT is mixed up with the extremists and had been H

found responsible for supplying information relating to the Police Department.

And whereas in the interest of maintenance of law and general administration and retention of Head Constable Kuldip Singh No. 2874/TT of Police District Tarn Taran is considered undesirable.

And whereas I am satisfied that the circumstances of the case such that if is not reasonably practicable to hold an enquiry in the manner provided in Punjab Police Rules 16.24 because no witness is likely to depose against him due to fear of injury of his life.

Now, therefore, I Ajit Singh, Senior Superintendent of Police, Tarn in exercise of the powers vested in me by virtue of the provisions of the Punjab Police Rules 16.1 read with Section 7 of the Police Act, 1861 and Article 311(2) of the Constitution of India, do hereby dismiss from service the Head Constable Kuldip Singh No. 2874/TT with effect from 21.2.1992."

On Appeal, the appellate authority found that the appellant did have links with the terrorists and was mixed up with them and he was supplying secret information of the police department to terrorists which was creating hindrance in the smooth functioning of the police department. The appellate authority also found that it was impossible to conduct an enquiry against the appellant because nobody would come forward to depose against such "militant police official". The appellate authority also referred to the fact that the appellant was interrogated in a case, FIR No. 210/90, and that during interrogation he admitted that he was having links with Major Singh Shahid and Sital Singh Jakhar and was working for them. It further stated in its order that the appellant was preparing to murder some senior police officers while taking advantage of his position.

The High Court found that the reasons given by the S.S.P. for dispensing with the enquiry were acceptable and that the satisfaction recorded by him cannot be said to be unjustified or unwarranted. The High Court was also of the opinion that there was sufficient material before the disciplinary authority to conclude that it was not expedient to hold a regular enquiry against the appellant.

In this appeal, it is contended by Sri R.S. Sodhi, learned counsel for the

appellant, that except the alleged admission/confession of the appellant made before the police officers during interrogation in FIR No. 219/90, there is no other material upon which the disciplinary authority could have concluded that the dismissal of the appellant was warranted. He submitted that such an admission/confession is inadmissible in law and, therefore, cannot constitute the basis of an order of dismissal. The learned counsel also submitted that no material has been placed by the disciplinary authority before the court upon which it was satisfied that it was not expedient to hold a disciplinary enquiry against the appellant as contemplated by clause (2) of Article 311. The learned counsel also brought to our notice that though the appellant was prosecuted and tried before the designated court, Amritsar under Terrorists and Disruptive Activities Act in connection with the crime in FIR No. 219/90, he has been acquitted by the said court.

On the other hand, the learned counsel for respondents supported the reasoning and conclusion of the High Court as also the action of the authorities.

At our direction made on April 22, 1996 in this matter, the learned counsel for the State has produced the original record relating to the appellant's dismissal along with translated copies of the relevant document. The first document placed before us by the learned counsel for the State is the copy of the FIR No. 219/90 dated November 24, 1990. It is based upon the statement of Head constable Hardev Singh, who was posted as gunman with Sri Harjit Singh, Superintendent of Police (S.P.) (Operations). The F.I.R. speaks of the jeep (in which the said S.P. was travelling along with certain police personnel) being blown up killing the said S.P. and few other police officials. The next document placed before us is the case diary pertaining to the said crime containing the statement of the appellant, Kuldip Singh. In his statement, Kuldip Singh, did clearly state about his association with certain named militants, the plot laid by them to kill Sri Harjit Singh, Superintendent of Police, Tarn Taran by placing a bomb and the manner in which they carried out the said plot. He also stated that he and his militant companions planned to plant a bomb in the office of S.S.P, Tarn Taran but that the police officers came to know of the said plan, thus foiling their plan. The learned counsel for the State of Punjab did concede that except the aforesaid statement of admission/confession of the appellant, there was no other material on which the appellant could be held guilty of conduct warranting dismissal from service.

A Proviso (b) to Article 311(2) says that the enquiry contemplated by clause (2) need not be held "where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry". Clause (3) of Article 311 expressly provides that "if, in respect B of any such person as aforesaid, the question arises whether it is reasonably practicable to hold such enquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final". These provisions have been the subject-matter of consideration by a Constitution Bench of this Court in *Union of India* v. *Tulsi Ram Patel,* [1985] Suppl. 2 S.C.R 131. It would be appropriate C to notice a few relevant holdings in the said judgment:

> "Before denying a government servant his constitutional right to an enquiry, the first consideration would be whether the conduct of the concerned government servant is such as justifies the penalty D of dismissal, removal or reduction in rank. Once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an enquiry (p.205)..... It would also not be reasonably practicable to hold the enquiry where an atmosphere of violence or of general indiscipline and insubor- E dination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere..... The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happen- F ing. It is because the disciplinary authority is the best Judge of this That clause (3) of Article 311 makes the decision of the disciplinary authority on this question final..... The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned (p.270)..... Where a government servant is dismissed, removed or G reduced in rank by applying clause (b) or an analogous provision of the service rules and he approaches either the High Court under Article 226 or this Court under Article 32, the court will interfere on grounds well established in law for the exercise of power of judicial review in matters where administrative discretion is exer- H cised. It will consider whether clause (b) or an analogous provision in the service rules was properly applied or not..... In examining

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> the relevancy of the reasons, the court will consider the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry..... In considering the relevancy of the reasons given by the disciplinary authority, the court will not, however, sit in judgment over them like a court of first appeal; (p.273-274)."

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The judgment also stresses that very often a person dealt with under any of the three clauses in the second proviso to Article 311(2) has a right of appeal where the correctness of the decision taken by the appropriate authority will be subject to review - apart, of course, from the remedy of judicial review provided in the Constitution.

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Now coming to the main contention of the learned counsel for the appellant, it is true that a confession or admission of guilt made by a person accused of an offence before, or while in the custody of, a police officer is not admissible in a court of law according to Sections 25 and 26 of Evidence Act but it is equally well settled that these rules of evidence do not apply to departmental enquiries - See *State of Mysore* v. *S.S. Makapur,* A.I.R. (1963) S.C. 375 and *State of Assam* v. *S.K. Das,* A.I.R. (1970) S.C. 1255 - wherein the only test is compliance with the principles of natural justice - and, of course, compliance with the rules governing the enquiries, if any. In this context, it is well to remember that in India, evidence recovered or discovered as a result of an illegal search is held relevant departing from the law in the United States. We may refer to the following observations of the Judicial Committee of the Privy Council in *Kuruma* v. *The Queen,* (1955) A.C. 197, quoted approvingly by the Constitution Bench of this Court in *Pooran Mal* v. *Director of Inspection,* [1974] 1 S.C.C. 345 at 256 :

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> "The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible *is whether it is relevant* to the matters in issue. If it is, it admissible, *and the Court is not concerned with how it was obtained.*"

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In this sense, if the appellant's confession is relevant, the fact that it was made to the police or while in the custody of the police may not be of much consequence for the reason that strict rules of Evidence Act do not apply to departmental/disciplinary enquiries. In a departmental enquiry, it would perhaps be permissible for the authorities to prove that the appellant did make such a confession admission during the course of interrogation

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A and it would be for the disciplinary authority to decide whether it is a voluntary confession/admission or not. If the disciplinary authority comes to the conclusion that the statement was indeed voluntary and true, he may well be entitled to act upon the said statement. Here, the authorities say that they were satisfied about the truth of the appellant's confession. There is undoubtedly no other material. There is also the fact that the appellant
B has been acquitted by the designated court. We must say that the facts of this case did present us with a difficult choice. The fact, however, remains that the High Court has opined that there was enough material before the appropriate authority upon which it could come to a reasonable conclusion that it was not reasonably practicable to hold an enquiry as contemplated
C by clause (2) of Article 311. Nothing has been brought to our notice to persuade us not to accept the said finding of the High Court. Even a copy of the counter filed by the respondents in the High Court is not placed before us. Once proviso (b) is held to have been validly invoked, the government servant concerned is left with no legitimate ground to impugn the action except perhaps to say that the facts said to have been found
D against him do not warrant the punishment actually awarded. So far as the present case is concerned, if one believes that the confession made by the appellant was voluntary and true, the punishment awarded cannot be said to be excessive. The appellant along with some others caused the death of the Superintendent of Police and a few other police officials. It must be remembered that we are dealing with a situation obtaining in Punjab during
E the years 1990-91. Moreover, the appellate authority has also agreed with the disciplinary authority that there were good grounds for coming to the conclusion that it was not reasonably practicable to hold a disciplinary enquiry against the appellant and that the appellant was guilty of the crime confessed by him. There is no allegation of *malafides* levelled against the
F appellate authority. The disciplinary and the appellate authorities are the men on the spot and we have no reason to believe that their decision has not been arrived at fairly. The High Court is also satisfied with the reasons for which the disiciplinary enquiry was dispensed with. In the face of all these circumstances, it is not possible for us to take a different view at this stage. It is not permissible for us to go into the question whether the
G confession made by the appellant is voluntary or not, once it has been accepted as voluntary by the disciplinary authority and the appellate authority.

The appeal accordingly fails and is dismissed. No costs.

H H.K. Appeal dismissed.

THE PATIALA CENTRAL COOPERATIVE BANK LTD. A

v.

THE PATIALA CENTRAL COOPERATIVE
BANK EMPLOYEES UNION AND ANR. ETC.

SEPTEMBER 16, 1996 B

[B.P. JEEVAN REDDY, S.C. SEN AND S.B. MAJMUDAR, JJ.]

Labour Law—Industrial Disputes Act, 1947—Section 19—Agreement—Termination of—Agreement Validly terminated Under Section 19(2)—Effect and Scope—Terms of the agreement can not be enforced after the agreement is validly terminated under Section 19(2). C

Punjab Co-operative Societies Act 1961—Section 84-B—Bar on payment of Dearness Allowance at a higher rate than the rate admissible to the Government employees drawing the same pay—Validity—Not ultravires the State Legislature—It is a valid legislation. D

On the basis of a charter of demands of the respondents, a Union of the petitioner Bank, a comprehensive agreement dated May 28, 1973 was executed *inter alia* providing the fixation of pay scales after classifying the various categories of staff, Fixation Formula providing for pay rise, provision for dearness allowances, travel allowance, house rent allowance, city compensation allowance and various other allowances. As a matter of fact, the agreement embraced all aspects of the service condition. The agreement dated May 28, 1973 was valid for a period of four years and came to end on 31st March, 1977. On the expiry of the agreement, a dispute arose between the parties interalia about the payment of Dearness Allowance in terms of the agreement dated 28th May, 1973. The Union asserted that the aforesaid agreement is binding even after the period mentioned in the agreement and the agreement can not be unilaterally repudiated as per the provisions of S.19(2) of the Industrial Disputes Act, 1947. The respondent Union also claimed that as no notice terminating the agreement had been given by the petitioner bank, the agreement continued to be in force and was binding upon the petitioner and the payment of Dearness Allowance specified in the agreement can not be avoided by the petitioner. The respondent Union also contended that the introduction of Section 84-B by amending Act, 1981, in the Punjab Co-Operative Societies E F G H

A Act, 1961, *inter alia* providing that the Dearness Allowance at a higher rate than admissible to the Government Employee with the same pay rate shall not be admissible to an employee of the co-operative society, can not in any way abrogate an agreement protected by the provisions of the Industrial Disputes Act.

B The respondent Union filed a Writ Petition in the High Court and besides reiterating their earlier stands, challenged the virus of Section 84-B of the Punjab Co-operative Societies Act, 1961 as being violative of Section 19 of the Industrial Disputes Act, for the reason that the Punjab Cooperative Societies Act is a general Act and it can not curtail or control C the specific provisions of the Industrial Disputes Act, in any manner whatsoever. The High Court held that Section 84-B of the Punjab Cooperative Societies Act was violative of the Industrial Disputes Act and also ultravires the State Legislature of Punjab. The amended Section 84-B could not take away the effect of settlement dated 28th May, 1973 and the agreement/settlement could continue to be subsisting, and binding between D the parties and class III and IV employees of the petitioner bank were held entitled to claim Dearness Pay in terms of the 1973 agreement. The High Court further held that service condition of an employee can not be changed in any of the matter mentioned in Fourth Schedule without giving notice under Section 19(2) of the Industrial Dispute Act and this being so, E the unilateral withdrawal of city compensatory allowance and dearness allowance by the Bank affected the service condition of the respondent and attracted the mandatory condition of Section 9-A of the Industrial Dispute Act.

In appeal to this Court, the respondent in their counter affidavit did F not dispute the factual aspect of the case including the issuance of notice dated 25.2.1978 terminating the agreement dated 28th May, 1973 issued by the petitioner.

Allowing the appeal, this Court

G HELD : (Per Sen, J.) 1. It is not in dispute that notice was given on 25th Feb. 1978, terminating the agreement dt. 28th May, 1973 and the agreement was validly terminated by the Management and the same ceased to operate from that date. [362-C]

H 2. In view of the admitted fact that the pay scales and other benefits

of the employees had been drastically revised upwards at all levels than what was given by the agreement dated 28.5.1973, the employees can not claim that Dearness Allowance formula of the agreement must remain intact, but at the same time the drastic changes in every other part of the agreement dated 28.5.1973 will continue in force for the benefit of the employees. [358-D]

3. Section 84-B of the Punjab Co-Operative Societies Act, 1961 (inserted by Amendment Act 26 of 1981) places a bar on payment of Dearness Allowance at a rate higher than the rate admissible to the employees of the Government drawing the same pay. This provision is made applicable to all the employees of the Co-operative societies in Punjab. It specifically states that inspite of any statutory provisions to the contrary, or any agreement Dearness Allowance can be paid upto the rate fixed by the Government for corresponding pay of the Government Servant. [362-D]

4. Section 19(2) of the Industrial Dispute Act, merely provides even if the period of agreement has expired the terms of agreement will continue to be in force unless determined in the manner laid down in Section 19(2) of the Act. The provisions of Section 19(2) make an agreement between the employer and the employees binding. It also lays down the period during which it shall be binding. It also provides the manner in which the agreement can be terminated inter parties. It does not follow from this provision that a competent legislature can not legislate on any matter which forms part of the agreement. Nor does Section 19 have the effect of validating any infirmity in the agreement. If the agreement is contrary to any law or if the agreement can not be implemented without violating any provision of law, than the agreement can not be enforced at all. There is nothing in sub-section (2) of Section 19 to suggest that even such agreement will continue to be binding upon the employers and the employees and enforceable against express provision of law. If after the agreement has been entered into, any law is passed and the agreement can not be enforced without violating that law, then clearly the agreement can not be enforced. The law will prevail. Sub Section (2) of Section 19 merely extends the period during which the agreement will be enforced, but it does not provide that the agreement will be valid and binding notwithstanding any law to the contrary. [360-F-H; 361-A-B]

A *Per JEEVAN REDDY, J.* (Concurring) :

So far as the validity of Section 84-B of the Punjab Co-operative Societies Act, 1961 is concerned, it is enough to say that once the settlement between the parties was held to have been validly terminated by the management, there was no occasion for the High Court to have con-
B sidered the validity of the said section and/or to have declared it void. The judgment of the High Court declaring section 84-B as void and illegal is accordingly set aside. [361-E]

Per MAJMUDAR, J. (partly concurring) :

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1.1. In view of the finding that the agreement dated 28th May, 1973 was validly terminated by the Management on 25.2.1978 and the same had ceased to operate from that day, no further question survives for consideration, namely whether section 84-B of the Punjab Co-operative Societies Act, 1961 is repugnant to the provisions of Sections 9A and 19(2)
D of the Industrial Disputes Act, which is a central legislation. The High Court has taken the view ignoring the factual position that the agreement in question had stood terminated with effect from 25th Feb. 1978. It was not open to the High Court to consider the validity of Section 84-B on the admitted facts of the case. The finding of the High Court declaring Section
E 84-B as *ultravires* of the State Legislature on account of its repugnancy to Sections 9A and 19(2) of the Industrial Disputes Act is set aside. No occasion arises for this Court, nor did it arise for the High Court to go into the Legislative competence of the State Legislature in enacting Section 84-B and to examine and pronounce upon the said question. The question of virus of Section 84-B is kept open for consideration in an appropriate
F case. [363-A-B]

1.2. The view that Section 84-B will operate even *de- hors* the binding agreement under section 19(2) of the Industrial Disputes Act, is not concurred with. No opinion is expressed on this question, as it does not
G arise for consideration in the present case. [363-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4390 of 1988 Etc.

From the Judgment and Order dated 28.4.88 of the Punjab &
H Haryana High Court in C.W.P. No. 2193 of 1983.

G.K. Chatrath, Advocate General, S.S. Kang, Dy. Adv. General, (Punjab) H.S. Munjral, G.K. Bansal, Arvind Kumar, Ms. Laxmi Arvind and T.S. Arora for the Appellant. A

A.K. Sen and Rajinder Sachar and P.P. Singh for the Respondents.

The following Judgment/Orders of the Court were delivered by B

SEN, J. The Patiala Central Cooperative Bank Ltd., the appellant herein, is a Cooperative Bank registered under the provisions of Punjab Cooperative Societies Act, 1961. The Patiala Central Cooperative Bank Employees Union, the respondent No. 1 herein, is a Union of the employees of the appellant-Bank working at various places in different C branches of the Bank. On 13.11.1972, the Union submitted a charter of demands culminating in an agreement between the Bank and the Union on 28.5.1973. This agreement was to be in force upto 31st March 1977.

The agreement reached on 28.5.1973 provided for a number of things D like fixation of pay-scales after classifying the various categories of staff. It also provided for Fixation Formula providing for pay rise in the revised pay scales. There was also a provision for payment of dearness allowance, travel allowance, house rent allowance, city compensatory allowance and various other allowances. Provisions have been made for cycle and car allowance, children allowance and special allowances, if any. Provisions E were also made for uniforms, provident fund, gratuity, over time allowance and also fixation of strength and rules providing quota for promotion to various posts in the future. The agreement also provided for loans to be given for purchase of scooter/motor cycle/cycle upto a ceiling of Rs. 15,000 for Central Cooperative Banks and Rs. 30,000 for Apex Cooperative Banks F per annum. The agreement concluded with General Conditions which were as under :

"GENERAL CONDITIONS

(i) The existing facilities given to employees on the Punjab State Cooperative Bank may continue. G

(ii) This settlement will remain in force for a period of four years, i.e., upto 31.3.1977.

(iii) A copy of this settlement may be sent to the Labour Commissioner, Punjab for necessary confirmation. H

(iv) Anomalies, if any, shall be discussed in the joint meeting of the signatories."

In order to appreciate the argument advanced in this case, it is necessary to set out the pay scales and the provisions relating to dearness allowance as agreed upon in the settlement :-

Category of Staff	Present grades after merger of grades DP w.e.f. 1.2.1968	Revised Grades	Revised grades after merger of D.P.
a. Subordinate Staff Peons and Chowkidar in all the C.Bs.	75-140	75-165	122-5-162-6 216-7-258
Daftri	95-160	100-170	147-6-195-7 230-8-270
Drivers	120-170	120-170	190-7-267-8
b. Clerical Jr. Staff Clerks A Class Banks	140-315	150-350	240-10-300- 425-15-470
B Class Banks	130-270	140-315	210-10-300- 400-15-430
C Class Banks	115-265	140-315	
Senior Clerks A Class Banks	170-360	190-385	280-12½-380- 16-485-20-505
B Class Banks C Class Baks	155-335} 149-315}	170-360	260-10-280-12½ 380-15-485
c. Supervisory staff Junior Accountant	245-480	245-510	365-15-490-20- 590-25-640
Junior Accountant B Class Banks	220-420} 190-380}	245-480	365-12½-380- 15-500-20-620

Regarding the staff in the Common Cadre also, new grades will be

framed after merging D.P., in their present pays. The new grades will be as under :

Senior Accountants	275-530	385-15-480-20-590-25-665
Assistant Managers	375-690	485-20-525-25-725-30-815
Managers	475-930	595-30-745-35-955-40-1075

Fixation Formula

All employees may be given a pay rise of 5% of their pay in the revised scales mentioned above and may be fixed at the next higher stages after adding 5% to their present basic pay including Dearness Pay. In the case of subordinate staff, however, one additional increment may also be given over and above the above mentioned benefits.

Dearness Allowance.

As mentioned above, the D.P. is to be merged in the revised grades. The D.A. and interim relief which the employees are getting at present will together form the D.A. This D.A. may be linked with the All India Consumers Price Index number (Base Year 1960 : 100) in such a way that any further rise in the Index number may be reflected to D.A. to the extent of 100% in the case of subordinate staff and 75% in case of the other staff. No additional D.A. will be made unless the Index number increases by at least four points (quarterly average).

The rate of D.A. being paid at present will be converted into percentage rates mentioned below for various categories of staff. This percentage has been worked out on the basis of the current D.A. plus relief, rates, rounded off in such a way that the rate can be divided by four in the case of subordinate staff and by three in the case of others :

Category of Staff	*Percentage rate of D.A.*
Peons and Chowkidars	56
Drivers	40
Daftry	44
Clerk	33
Senior Clerk-I	27
Senior Clerk-II	30

Junior Accountants and Senior Accountants	24
Assistant Managers and Managers	18

It is certified that any increase/decrease in the Index number after 31.3.1973 shall be added/reduced in the percentage rate mentioned above at the rate of 100% in the case of subordinate staff and 75% in the case of others.

T.A. and D.A.

T.A. and D.A. rules as applicable at present to common cadre employees be applied to all the employees.

This was a comprehensive agreement reached between the Employees' Union and the management. It is not an agreement relating to payment of Dearness Allowance only. The agreement was valid for a period of four years and came to be end on 31st March, 1977. After the agreement came to an end, disputes and differences cropped up between the employees and the management *inter alia* about the payment of Dearness Allowance in terms of the aforesaid agreement. The case of the employees is that the agreement cannot be repudiated unilaterally even though the period of four years mentioned in the agreement expired on 31st March, 1977. It has been contended that the agreement will continue to be binding even after the expiry of the period mentioned in the agreement expired on 31st March, 1977, by virtue of the provisions of sub-section (2) of Section 19 of the Industrial Disputes Act, 1947. Section 19 lays down that a settlement shall come into operation on such date as is agreed upon by the parties to the dispute, and if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute. Sub-section (2) of Section 19 provides that if any settlement has been reached between the workers and the management, that shall be binding not only for the agreed period, but also shall continue to be binding on the parties after the expiry of the period mentioned in the agreement "until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement."

The case of the employees is that no such notice was given, and, therefore, the agreement continues to be force and binding upon the

management. The duty to pay Dearness Allowance at the rate specified in the agreement cannot be avoided by the management by any device.

It has been further contended that Section 84-B, which was introduced in the Punjab Cooperative Societies Act, 1961 by which it was laid down that "no employee of a cooperative society shall be paid dearness allowance at a rate higher than that admissible to the employees of the Government drawing pay at the same rate", cannot in any way abrogate an agreement protected by the provisions of the Industrial Disputes Act.

On behalf of the employees, a writ petition was filed in the High Court under Article 226 challenging the validity of Section 84-B. The case of the employees is that by virtue of Section 19 of the Industrial Disputes Act, the agreement between the management and the employees cannot be altered except in the manner laid down in the Act. Such agreements have been given statutory force and they cannot be altered by the management on its own without following the procedure of law. Similarly, the State Government cannot give any directions as to the manner of working out of the agreement or abridge or modify the contents of the agreement in any manner whatever. Industrial Disputes Act being a special Act relating to industrial disputes and, in particular, about the relationship between the management and the employees, the agreement reached under that Act cannot be varied or abrogated by the management unilaterally. It was further contended that the Punjab Cooperative Societies Act, 1961 is a general Act relating to Cooperative Societies and it cannot curtail or control the specific provisions of Industrial Disputes Act which is a special Act, in any manner whatever.

It was held by the Division Bench of the Punjab High Court that Section 84-B of the Punjab Cooperative Societies Act, 1961, which was introduced by the Amending Act of 1981, could not take away the effect of the settlement dated 28th May, 1973 which was subsisting and binding on the date of Amendment Act came into force. Section 84-B of the Punjab Cooperative Societies Act was violative of the provisions of Section 19 of the Industrial Disputes Act, 1947. It was further held by the High Court that change in condition of service of the employees could not be made in respect of any of the matters mentioned in the Fourth Schedule, without giving a prior notice in the manner prescribed by Section 19(2) of the Act. It was held that unilateral withdrawal of the city compensatory allowance

A by the employer of the workmen affected their conditions of service and attracted mandatory provisions of Section 9-A. On the same analogy unilateral withdrawal of dearness pay from the workmen affected the condition of service of Class III and Class IV employees of the Co-operative Banks. Since the provisions of Section 9-A of the Industrial Disputes
B Act, 1947 had not been complied with, the changes brought about in the service conditions of the employees were of no consequence. It was, therefore, held that the respondents would continue to be benefited by the terms of the settlement dated 28th May, 1973 as before. Section 84-B of the Punjab Cooperative Societies Act, 1961 was held to be *ultra vires* of the State Legislature of Punjab and quashed. It was further held that the
C settlement dated 28th May, 1973 would continue to be valid and binding between the parties and Class III and Class IV employees of the Cooperative Banks were held entitled to claim dearness pay in terms of the aforesaid settlement.

D On behalf of the appellant, it has been contended that an important factual aspect has been totally ignored by the High Court in this case. It was contended on behalf of the appellant before the High Court that a notice under Section Section 19(2) of the Industrial Disputes Act (p.4 of the Writ Petition) was duly issued by the appellant and served upon the employees. The High Court has failed to deal with this aspect of the case
E altogether. It has been stated in paragraph 2 of the Special Leave Petition that it was specifically stipulated in the agreement that the agreement was valid for a period of four years and would cease to be effective after the expiry of 31st March, 1977. As there was no Board of Directors and the administration was being run by the Administrator, as per provisions of
F Section 27 of the Punjab Cooperative Societies Act, the Administrator issued a notice under Section 19(2) of the Industrial Disputes Act for terminating the agreement dated 28.5.1973 which had expired on 31.3.1977. The notice was issued on 25.2.1978. It has been alleged after this, the Board of Directors of the Bank had ratified the notice by Resolution No. 7 at its meeting held on 9.4.1978.

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In the counter affidavit filed on behalf of the Employees' Union, affirmed by Malinderjit Singh, General Secretary of the Employees' Union, it has been stated that since the facts of the case as pleaded in the Special Leave Petition are not disputed and the whole matter relates to pure
H questions of law for decision, it is not necessary for the deponent to answer

parawise the petition. In view of the submissions made above and the two decisions of this Hon'ble Court referred to in the affidavit, the appeals may be dismissed with costs.

In other words, the fact that notice was given on 25.2.1978 terminating the agreement dated 28.5.1973 is not in dispute.

However, the case need not be decided on the technicality of the pleadings only. After expiration of the term of the agreement dated 28.5.1973 on 31.3.1977, the agreement has not been continued unaltered. If the legal contention on behalf of the petitioner is upheld and if it be held that the agreement dated 28.5.1973 is still continuing by virtue of the provisions of sub-section (2) of Section 19, then the entire agreement including the clause relating to the Dearness Allowance will have to be treated as still in force. The pay scales and other terms and conditions relating to employment have been drastically revised upwards after the expiration of the agreement dated 28.5.1973. From the chart of salaries, furnished by the appellants, it appears that the pay scales have been revised upward in the following manner :

Category of Post	Position as on 4.6.81	Position as on 1.10.81	Position as on 1.1.86
	Rs.	Rs.	Rs.
PEON	525.32	605.84	1144.60
JR. CLERK	820.95	917.30	1838.34
SR. CLERK	943.68	1109.32	2117.69

NOTE : No minimum benefit and Interim Relief has been included while fixing pay as on 1.10.1981 and 1.1.1986.

There is some dispute as to the exact quantum of the enhancement but there is no dispute that the salaries payable under the agreement dated 28.5.1973 have been drastically revised upwards at all levels thereafter.

Another point that has been made on behalf of the appellants which is of substance is that in fixing pay of the Bank employees consequent upon the revision of pay scales, the same formula which was applied for fixation of pay scales of Punjab Government employees has been adopted. The Bank employees have been given the benefits of proficiency step-up, master

A scales and stepping up of pay of senior equivalent to the junior as allowed by the Punjab Government to its employees. All these changes have brought about substantial benefits to the employees of the Bank. In the background of these facts, the employees cannot claim dearness allowance in terms of the agreement dated 28.5.1973. That agreement has been given up for much better terms and conditions and also subsequent revision of pay. The employees cannot be heard to say that they will enjoy all the subsequent benefits given by the revision of pay scales, but dearness allowance must be given in accordance with the formula contained in the agreement dated 28.5.1973. It is not the case of the employees that the agreement dated 28.5.1973 will have to be enforced in full.

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There is some dispute as to the exact amount of the benefit conferred by the various revisions in pay scales but there is no dispute that the pay scales and other benefits now given are much better and higher than what was given by the agreement dated 28.5.1973. No one wants to go back to that agreement so far as the pay scales are concerned. I fail to see how in the context of these facts, the employees can urge that Dearness Allowance formula of that agreement must remain in tact but at the same time the drastic changes in every other part of the agreement dated 28.5.1973 will continue in force for the benefit of the employees.

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E In view of the aforesaid, it is unnecessary to go into other questions raised in this case. But since the question of validity and scope of Section 84-B of the Punjab Cooperative Societies Act, 1961 has been raised that question will have to be examined. Section 84-B was inserted by Amendment Act 26 of 1981. The section is as under :

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> "84-B. Dearness Allowance - Notwithstanding anything in this Act or any other law for the time being in force, or any agreement, settlement or award, no employee of a Co-operative Society shall be paid dearness allowance at a rate higher than that admissible to the employees of the Government drawing pay at the same rate."

G This section places a bar on payment of Dearness Allowance at a rate higher than the rate admissible to the employees of the Government drawing the same pay. This provision will apply to all the employees of all the Cooperative Societies in the State of Punjab. This provision has been specifically made applicable notwithstanding, *inter alia* any other law for the time being in force or any agreement, settlement or award.

H

Prima facie, there is no reason to hold that this provision will not apply to the agreement dated 28.5.1973 assuming that that agreement was still in force on the date Section 84-B was introduced in the statute. It has been contended that Industrial Disputes Act is a complete Code relating to industrial disputes and, therefore, by the general provisions of the Punjab Cooperative Societies Act, 1961, the applicability and scope of the provisions of Industrial Disputes Act cannot be whittled down.

I am unable to uphold this contention because sub-section (2) of Section 19 of the Industrial Disputes Act merely provides that even if the period of the agreement has expired, the terms of the agreement will continue to be in force unless determined in the manner laid down in sub-section (2) of Section 19. It does not have the effect of invalidating any legislation altering the terms of the agreement after the period of agreement comes to an end. The agreement provided for payment of Dearness Allowance higher than what was provided by the Government to its employees. Section 84-B specifically stated that in spite of any statutory provision to the contrary, or any agreement, Dearness Allowance can only be paid upto the rate fixed by the Government for corresponding pay of the Government Servants.

There is nothing in the wording of Section 19 of the Industrial Disputes Act which supports this contention of the employees. Section 19 reads as under :

"19. Period of operation of settlements and awards. -

(1) A settlement shall come into operation on such date and is agreed upon by the parties to the dispute, and if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute.

(2) Such settlement shall be binding for such period as is agreed upon by the parties, and if no such period is agreed upon, for a period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute, and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice is writing of an intention to terminate the settlement is given by one of the

A parties to the other party or parties to the settlement."

'Settlement' has been defined in Section 2(p) as under :

"2(p) 'settlement' means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between
B the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorised in this behalf by the appropriate Government and the conciliation officer."

C A written agreement between the employer and workmen may constitute a settlement in the circumstances mentioned in Section 2(p). But Section 19 lays down that such agreement shall come into operation on the agreed date between the parties to the settlement or if the date is not agree upon, on the date on which the settlement is signed by the parties. That is
D the starting point. Sub-section (2) provides for the period during which the settlement will be in force. It shall be binding during the period agreed upon by the parties. If no such period is agreed upon, then the settlement will be valid for a period of six months from the date on which the settlement was signed by the parties and shall continue to be binding after
E the expiry of the aforesaid period. The settlement can be brought to an end by serving a notice in writing by one of the parties to the other party of its intention to terminate the settlement. If such a notice is given, the settlement will remain in force for two months from the date on which the notice of termination is given.

F The provisions of Section 19(2) make an agreement between the employers and the employees binding. It also lays down the period during which it shall be binding. It also provides the manner in which the agreement can be terminated inter parties. It does not follow from this provision that a competent legislature cannot legislate on any matter which forms
G part of the agreement. Nor does Section 19 have the effect of validating any infirmity in the agreement. If the agreement is contrary to any law or if the agreement cannot be implemented without violating any provision of law, then the agreement cannot be enforced at all. There is nothing in sub-section (2) of Section 19 to suggest that even such an agreement will continue to be binding upon the employers and the employees and enfor-
H ceable against express provision of law. If after the agreement has been

entered into, any law is passed and the agreement cannot be enforced without violating that law, then clearly the agreement cannot be enforced. The law will prevail. A

Sub-section (2) of Section 19 merely extends that period during which the agreement will be enforced, but it does not provide that the agreement will be valid and binding notwithstanding any law to the contrary. B

For all these reasons, this appeal is allowed. The order under appeal is set aside. There will be no order at to costs.

Civil Appeal No. 4074 of 1988 and Civil Appeal Nos. 4075-76 of 1988. C

In view of the judgment in Civil Appeal No. 4390 of 1988, the above appeals are also allowed. There will be no order as to costs.

I respectfully agree with the conclusions arrived at by my learned brother Sen, J. D

So far as the validity of Section 84-B of the Punjab Cooperative Societies Act, 1961 is concerned, it is enough to say that once the settlement between the parties was held to have been validly terminated by the management, there was no occasion for the High Court to have considered the validity of the said section and/or to have declared it void. The judgment of the High Court declaring Section 84-B as void and illegal is accordingly set aside herewith. E

Accordingly, I agree with the final orders proposed by learned brothers Sen and Majmudar, JJ. F

S.B. MAJMUDAR, J. I have gone through the judgment prepared by my esteemed learned brother Sen, J. I am in entire agreement with the finding reached by learned brother Sen, J., that the Agreement governed by the provisions of Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') dated 28th May 1973 which had a life of four years, expired on 31st March 1977 and thereafter even though its effects continued as per Section 19 sub-Section (2) of the Act and were binding on the parties, the entire agreement including the clause relating to dearness allowance was terminated by one of the parties to the Agreement, namely, the Central Cooperative Bank when the administrator appointed under Section 28 of G H

A the Punjab Cooperative Societies Act, 1961 issued a notice dated 25th February 1978 under Section 19(2) of the Act for terminating the said Agreement and when the said termination was ratified by the Directors of the Bank by Resolution No. 7 at the meeting of the Board of Directors held on 9th April 1978. Consequently that agreement ceased to operate
B thereafter. I also respectfully agree with the finding of my learned brother that this aspect of the case was not disputed on behalf of the Employees' union in the counter affidavit affirmed by Maninderjit Singh, Joint Secretary of the Employees Union and consequently the fact that notice was given on 25th February 1978 terminating the Agreement dated 28th May 1973 is not in dispute.

C

However on the aforesaid finding reached by my learned brother on the facts of this case and to which I respectfully agree, in my view, no further question survives for consideration in the present litigation between the parties, namely, whether Section 84-B of the Punjab Cooperative
D Societies Act, 1961 inserted by Punjab Legislature by Amending Act 26 of 1981 was repugnant to the provisions of Sections 9A and 19(2) of the Industrial Disputes Act which was a Central Legislation. The High Court has taken the view, ignoring the factual position that the Agreement in question had stood terminated with effect from 25th February 1978, that Section 84-B was repugnant to the aforesaid provisions of the Act and as
E the enactment of the said Section was covered by Entry 22 of the Concurrent List III of Schedule VII of the Constitution of India dealing with 'Trade Unions, Industrial and Labour Disputes', the said provision to the extent of repugnancy became void as per Article 251 read with Article 254 of the Constitution of India as admittedly the said provision inserted by
F Amending 26 of 1981 was not reserved by the State Legislature for consideration of the President and had not received his assent as required by Article 254 sub-Article (2) of the Constitution. In my opinion the said exercise was not open to the High Court on the admitted facts of the present case. That even under Section 19(2) of the Act the said Agreement had ceased to operate from 25th February 1978 and consequently there
G remained no question of any repugnancy of Section 84-B on the one hand and Sections 9A and 19(2) of the Industrial Disputes Act on the other. In short that question did not arise for consideration of the High Court on the aforesaid well established facts on record. In my view once this factual conclusion is arrived at as rightly arrived at by my learned brother Sen, J.,
H no occasion arises for this Court nor did it arise for the High Court to go

into the legislative competence of the State Legislature in enacting Section 84-B and to examine and pronounce upon the said question. On this short ground, therefore, I would set aside the decision of the High Court declaring Section 84-B as *ultra vires* the State Legislature on account of repugnancy of Section 84-B with the provisions of Sections 9A and 19(2) of the Industrial Disputes Act. The appeal of the bank is required to be allowed on this short ground keeping the question of vires of Section 84-B open for consideration in an appropriate case. However, with great respect I do not concur with the view of my learned brother Sen, J., that the said Section will operate even *de hors* the binding agreement under Section 19(2) of the Act. On this aspect I would express no opinion as that question, in my view, does not arise for consideration on the facts of the present case. I, however, agree with the final conclusion to which my learned brother Sen, J., has reached that appeals are required to be allowed, but on the aforesaid different reasoning.

In view of the opinions delivered today, the appeals are allowed and the judgment of the High Court is set aside subject to the observations made in our opinions. No orders as to costs.

H.K. Appeals allowed.

A DELHI DEVELOPMENT AUTHORITY

v.

KANWAR KUMAR MEHTA AND ORS. ETC.

SEPTEMBER 16, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Urban Development :

Land allotted by Delhi Development Authority—Delay in developing
C *the lands due to High Court's stay order on the land acquisition—On equity DDA charging escalation at 16.62% per annum—High Court ordering escalation to be charged at the same 7% p.a. the rate of interest which DDA pays to unsuccessful applicants—On appeal, held, escalation charged at 16.62% per annum justified, DDA to adjust the 7% p.a. interest on the deposits from*
D *the date of original draw till the communication of letters of allotment.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 13053 of 1996 Etc.

From the Judgment and order dated 26.5.95 of the Delhi High Court
E in C.W.P. No. 5329 of 1993.

Arun Jately and V.B. Saharya for the Appellant.

M. Shekhar, Bimal Roy Jad, Devendra Singh, S.M. Garg, N. Shekhar,
F Ms. Amita Gupta and Ms. Chandra Kumari for the Respondents.

The following Order of the Court was delivered :

Delay condoned..

G Leave granted.

We have heard learned counsel of both sides.

The question of law that arises for consideration in these appeals is: whether the High Court was right in directing calculation of interest @ 7%
H of the escalation charges on the principle of equity?

The facts of the case are not in dispute. On March 27, 1991 draw of plots was made for allotment of 5000 plots in Sectors 23 and 24 of Rohini Scheme in Delhi. Between 6th April, 1991 and March 27, 1991, around 3000 orders of allotment came to be issued. Only 2000 persons are yet to be issued of the allotment letters. It is settled law that the rate of plot is as is prevailing on the date of communication of the allotment letter. Before the letters of allotment was communicated to the rest of the successful applicant, the owners of the lands acquired under the notification issued under Section 4(1) had approached the High Court and had stay of further proceedings. Consequently, the issuance of the letters of allotment was stopped. Subsequently, the stay was vacated on August 4, 1992 and it is stated in the counter-affidavit that the owners had approached this Court by way of appeal and in September 1992 this Court had dismissed the special leave petitions. In the meanwhile, the Government of India have pre-determined the cost of the land for allotment of the acquired land for the year 1993-94 effective from April 1, 1993 to March 31, 1994 at Rs. 2675.29 per square mtr. The DDA evolved the principle of calculating the cost of developmental charges at par with cost of living index rate which admittedly worked out to 16.62% per annum. On that basis, it had worked out the cost of plot at the rate of Rs. 1579.71 per square mtr. On the basis thereof, they recalculated the cost of allotment and issued letter of allotment to the respondents. The respondents came to challenge that order in the High Court. The impugned judgment made on August 11, 1995 in C.W.P. No. 196/94 was declared invalid. The Division Bench of the High Court has ultimately held that when the DDA seeks equity, it must also do equity. When the claimants have been directed to bear interest only at the rate of 7% per annum on the amount deposited by them towards advance payment deposited adjustable of the successful bidders and refund is made to the unsuccessful applicants with the same rate of interest, the DDA should equally charge the escalation charges at the rate of 7% per annum. Therefore, directions to deposit the costs of plot at 16.62% per annum as escalation cost is unjust in law.

Mr. Arun Jaitley, learned senior counsel appearing for DDA, has contended that the DDA, with a view to do justice to the claimants, have not demanded the rate of charges prevailing as on the date of allotment as determined by the Government of India namely, Rs. 2675.79 per square

A metre and instead worked out special equity by enhancing the cost of escalation charges at 16.62% per annum as per the cost of living index. The High Court was not justified in giving the direction to charge the escalation only at the rate of 7% per annum. We find force in the contention. Though Shri M. Shekhar and Shri Bimal Roy Jad, learned counsel appearing for B the respondents, have contended that the DDA has not produced any material to show that the escalation cost would be at the rate of 16.62 and that there is no evidence to show that between the date of the stay by the High Court and the date of the demand, this amount has been expended for developmental charges by the DDA. That point was not raised before the High Court, the appellant is not entitled to raise the contention. We C find no force in the contention. It is the very basis on which the appellant has justified their demand in the High Court which was also accepted by the High Court, on the basis of which, it proceeded that due to grant of stay by the High Court the escalation charges have increased for improvements effected. Consequently they worked out the escalation charges ap- D plying the special equity namely, the basis of living costs of index which admittedly was 16.62% per annum.

Under those circumstances, we are of the view that the basis on which all parties have proceeded and the High Court has accepted was E that the escalation charges for improvements have been worked out at 16.2% per annum. On that basis re-calculation came to be made and the pre-determined rate value was determined at the rate of Rs. 1579.71 per square yard. The direction of the High Court, that they have to pay, while working out equity at 7%, is not based on any rational principle. The High Court lost sight of the fact that the appellant had spent money for develop- F ment of the plots and to meet the cost demand in allotment letters was made at reduced rate. It is also stated that the two allottees who were in the low priority list in 1991 had same benefit of pre 1991 rates and the same be extended to the respondents. Though this contention was not raised in the High Court, nor the High Court had advantage of it, we are G of the view that it has no legal foundation is a mistaken allotment to them in 1991 is no ground to allot to respondent at the same rate.

The appellants are, however, directed to charge the rate of interest at 7% on the deposits made by the respondents till the date of the letter H of allotment. Time for payment of the amount at the rate of Rs. 1579.71

per square metre is extended for six months and the appellant is directed to deduct the difference of the rate of interest on the deposit amount at 7% from the date of the original draw till the date of communication of the letters of allotment.

The appeals are accordingly allowed. The order of the High Court is set aside, but in the circumstances, without costs.

G.N. Appeals allowed.

A RAJASTHAN CO-OPERATIVE DIARY FEDERATION LTD.

v.

SH. MAHA LAXMI MINGRATE MARKETING SERVICE PVT. LTD. AND ORS.

B SEPTEMBER 17, 1996

[M.M. PUNCHHI AND SUJATA V. MANOHAR, JJ.]

Constitution of India, 1950 : Articles 226, 136—Writ Petition—Disputed questions of fact—Maintainability of—Government Contract—Letter of Intent C *issued in favour of contractor—Contractor did not fulfil conditions stipulated in Letter of Intent—Subsequently, Letter of Intent cancelled—Contractor incurred heavy expenses in anticipation of contract—Held: whether contractor incurred heavy expenses in anticipation of contract and was entitled to recover the same were disputed questions of fact—Such disputed questions of fact* D *could neither be examined by High Court in writ petition nor by Supreme Court in appeal.*

Administrative Law :

Natural justice—Pre-decisional hearing—Government Contract—Letter E *of Intent issued in favour of contractor—Letter of Intent specified submission of irrevocable bank guarantee of Rs. 15 lakhs within a stipulated date, execution of agreement within that date and submission of profit and loss account and balance sheet for the past year before execution of agreement—Contractor did not fulfil conditions but issued advertisement incorrectly describing itself as sole selling agent Letter of Intent cancelled without giving* F *opportunity of hearing to contractor—Held : cancellation of letter of Intent not arbitrary—Reasons being germane to the decision to cancel Letter of Intent, extraneous circumstances could not be relied upon to hold decision mala fide—In the circumstances of the case, pre-decisional hearing was not required to be given.*

G **A Letter of Intent was issued by the appellant in favour of respondent No. 1 for appointment as selling agent of appellant's products. The conditions stipulated in the Letter of Intent were submission of an irrevocable bank guarantee of Rs. 15 lakhs within a specified date, execution of an agreement within that date, submission of profit and loss account** H **and balance sheet for the past year before execution of the agreement.**

However, respondent No. 1 did not fulfil the conditions of the Letter of Intent but issued an advertisement in which respondent No. 1 incorrectly described itself as the sole selling agent of the appellant. For these reasons the appellant cancelled the Letter of Intent.

Respondent No. 1 filed a writ petition before the High Court challenging the revocation of the Letter of Intent. The High Court allowed the petition on the ground that the appellant had acted arbitrarily with *mala fide* intention and had violated the principles of natural justice in not giving a hearing to respondent No. 1 before cancelling the Letter of Intent. Being aggrieved the appellant preferred the present appeal.

On behalf of respondent No. 1 it was contended that in anticipation of entering into a contact with the appellant, respondent No. 1 incurred heavy expenses and that respondent No. 1 was entitled to recover them from the appellant.

Allowing the appeal, this Court

HELD 1.1. The appellant, as a prudent businessman is entitled to satisfy itself about the financial position of the party whom the appellant is appointing as its selling agent. If respondent No. 1 has not submitted the requisite documents in this connection and has held itself out as the sole selling agent when to its knowledge, there was no intention of appointing respondent No. 1 as the sole selling agent, these are valid circumstances which the appellant can take into account in deciding whether to enter into a contract and bind itself legally with respondent No. 1 or not. In these circumstances, if the letter of intent has been cancelled it cannot be considered as arbitrary action on the part of the appellant violative of any Fundamental Rights of respondent No. 1. [373-A-C]

1.2. When the reasons for cancellation are clearly set out in the cancellation letter and are germane to the decision not to enter into a contract with respondent No.1, the extraneous circumstances relied on by respondent No. 1 cannot make the decision *mala fide*. [373-D]

1.3. The doctrine of *audi alteram partem* cannot also be imported in these circumstances. If the conduct of respondent No. 1 was such that it did not inspire any confidence in the appellant, the appellant was entitled to decline entering into any legal relationship with respondent No. 1 as its

selling agent. The Letter of Intent merely expressed an intention to enter into a contract. If the conditions stipulated in the Letter of Intent were not fulfilled by respondent No.1, and if the conduct of respondent No.1 was otherwise not such as would generate confidence, the appellant was entitled to withdraw the Letter of Intent. There was no biding legal relationship between the appellant and respondent No. 1 at this stage and the appellant was entitled to look at the totality of circumstances in deciding whether to enter into a binding contract with respondent No. 1 or not. [373-E-F-G]

2. The statement of respondent No. 1 that it incurred heavy expenses in anticipation of entering into a contract with the appellant has to be established on evidence. A writ petition is not an appropriate proceeding if any claim for damages based on disputed facts is required to be established. This Court would also not pronounce on the question whether, in anticipation of entering into a contract, a party which incurs expenses, can recover them from the other party if that other party ultimately, rightly declines to enter into a contract. [373-H; 374-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2679 of 1992.

From the Judgment and Order dated 7.8.91 of the Rajasthan High Court in D.V.C.S.A. No. 169 of 1991.

Sudhir Gupta, Shahil Rezvi and Aruneshwar Gupta for the Appellant.

H.N. Salve and S.V. Deshpande for Respondents.

The Judgment of the Court was delivered by

MRS. SUJATA V. MANOHAR, J. The appellant, Rajasthan Cooperative Dairy Federation Ltd., issued an advertisement inviting applications for selling agents for its various products for the territories of Rajasthan, Punjab, Haryana, Himachal Pradesh and Delhi, on or about 19th of November, 1988. Seventy applications were received by the appellant. Ultimately, on 1st June, 1990, a letter of Intent was issued by the appellant in favour of respondent No. 1 for appointing respondent No. 1 as the selling agent of the appellant for marketing of Saras Brand Dairy Products, *inter alia*, on the following terms.

"(1) that you will sign an agreement on non-judicial stamp paper of Rs. 5 with RCDF and this arrangement will be enforceable from the date legally executed contract has come into being.

(2) .....

(3) ..... The goods will be issued to you against irrevocable bank guarantee on furnishing from schedule bank on 15 days credit basis .....(sic).

You are requested to submit irrevocable bank guarantee for an amount of Rs. 15 lacs in favour of RCDF, Jaipur.

This letter duly signed by you must reach GM(M&P) by 5th of June, 1990 and call on us for execution of the agreement on 12.6.1990 (sic).

You are also requested to take preparatory action for starting work within effect from 21st June, 1990 and also submit us immediately the market plan for taking further action at your end."

Respondent No. 1, by its letter of 1st of June, 1990, acknowledged receipt of the Letter of Intent. The letter also noted that the agreement was to be signed on 12th of June, 1990 and that respondent No. 1 was going ahead, inter alia, with arranging an irrevocable bank guarantee from a scheduled bank. The letter contained a request to the appellant to release an advertisement announcing the appointment of respondent No.1 as the selling agent. The appellant, however, did not release any such an advertisement. Respondent No. 1, however, issued an advertisement in which respondent No.1 incorrectly described itself as the *sole* selling agent and further wrongly indicated that it was also the sole selling agent for Polypack Milk. The appellant protested against wrong statement in the advertisement.

The contract was not signed on 12th of June, 1990. The respondent did not attend on that date and asked for some time. The irrevocable bank guarantee for Rs. 15 lacs was also not submitted by respondent No. 1. The appellant, by its letter of 16th July, 1990, cancelled the Letter of Intent. In the letter, the appellant pointed out that the Letter of Intent issued to respondent No. 1 was conditional on his fulfilling certain obligation as a condition precedent to entering into a contract. The conditions, *inter alia*,

were , (1) submission of an irrevocable bank guarantee of Rs. 15 lacs by 12th of June, 1990; and (2) execution of an agreement with the appellant by 12th of june, 1990. Beside these two conditions, respondent No. 1 had also promised to submit to the appellant its profit & loss account and balance-sheet for the past year before the execution of the agreement. Respondent No. 1 had not done so. The letter also referred to the un-authorised advertisement issued by respondent No. 1 wrongly describing itself as the sole selling agent of the appellant and stated that in these circumstances, since respondent No. 1 had failed to fulfil its obligations within the stipulated period, the Letter of Intent was revoked. A telegram of the same date to the same effect was also sent to respondent No. 1.

Respondent No.1 filed a writ petition challenging the revocation of the Letter of Intent. The writ petition was allowed. The High Court upheld the contention of respondent No. 1 that the reasons given by the appellant for cancellation of the Letter of Intent were not valid. The cancellation of the Letter of Intent was *mala fide* inasmuch as there were questions asked in the Legislative Assembly about the appointment of respondent No. 1 as a selling agent of the appellant because respondent No. 1 was the brother-in-law of the then Chief Minister. The High Court further said that the appellant had acted arbitrarily in cancelling the Letter of Intent and had violated the principles of natural justice in not giving a hearing to respondent No. 1 before cancelling the Letter of Intent. An Appeal filed by the appellant before the Division Bench of the High Court also failed. Hence the appellant has come before this court by way of present appeal.

In its letter of 16th of July, 1990 cancelling the Letter of Intent issued in favour of respondent No. 1, the appellant had given several reasons for cancelling the Letter of Intent. Respondent No. 1 had not submitted to the appellant its profit and loss account and balance-sheet for the previous year as requested by the appellant. Respondent No. 1 had wrongly held itself out as the sole selling agent of the appellant. These are clearly circumstances which are relevant to the cancellation of the Letter of Intent. Also the Letter of Intent clearly set out the conditions which respondent No. 1 had to fulfil. One such condition was submitting an irrevocable bank guarantee for Rs. 15 lacs. This was also not done. Respondent No. 1 contends that it had informed the appellant that it would submit the bank guarantee within three days of the signing of the contract. The appellant, however, is within

its rights in insisting that the bank guarantee should be submitted before the contract is signed. The appellant, as a prudent businessman is entitled to satisfy itself about the financial position of the party whom the appellant is appointing as its selling agent. If respondent No. 1 has not submitted the requisite documents in this connection and has held itself out as the sole selling agent when to its knowledge, there was no intention of appointing respondent No. 1 as the sole selling agent, these are valid circumstances which the appellant can take into account in deciding whether to enter into a contract and bind itself legally with respondent No.1 or not. In these circumstances, if the contact has been cancelled it cannot be considered as arbitrary action on the part of the appellant violative of any Fundamental Rights of respondent No. 1.

Respondent No. 1 has tried to rely upon certain extraneous circumstances to allege *mala fides* on the part of the appellant in cancelling the Letter of Intent. When the reasons for cancellation are clearly set out in the cancellation letter and are germane to the decision not to enter into a contract with respondent No. 1 we fail to see how thee extraneous circumstances can make the decision *mala fide*.

The High Court was also not right in importing the doctrine of *audi alteram partem* in these circumstances. If the conduct of respondent No. 1 was such that it did not inspire any confidence in the appellant, the appellant was entitled to decline entering into any legal relationship with respondent No. 1 as its selling agent. The Letter of Intent merely expressed an intention to enter into a contact. If the conditions stipulated in the Latter of Intent were not fulfilled by respondent No. 1 and if the conduct of respondent No.1 was otherwise not such as would generate confidence, the appellant was entitled to withdraw the Letter of Intent. There was no binding legal relationship between the appellant and respondent No. 1 at this stage and the appellant was entitled to look at the totality of circumstance in deciding whether to enter into a binding contact with respondent No. 1 or not.

Respondent No. 1 contends that in anticipation of entering into a contract with the appellant, respondent No.1 incurred heavy expenses. This statement of respondent No.1 has to be established on evidence. A writ petition is not an appropriate proceeding if any claim for damages based

A on disputed facts is required to be established. We do not wish to pronounce on the question whether, in anticipation of entering into a contract, a party which incurs expenses, can recover them from the other party if that other party ultimately, rightly declines to enter into a contract.

B The appeal is, therefore, allowed. The judgment and order of the High Court is set aside and the writ petition is dismissed. In the circumstances, there will be no order as to costs.

V.S.S. Appeal allowed.

STATE OF PUNJAB

v.

M/S. YOGINDER SHARMA ONKAR RAI & CO. AND ORS.

SEPTEMBER 17, 1996

[S.P. BHARUCHA AND K. VENKATASWAMI, JJ.]

Constitution of India, 1950: Article 226—Administrative Law—Auction of liquor vends—High Court reversing order of Financial Commissioner rejecting the allegedly unsuccessful bidder's representation—Held, Financial Commissioner's conclusion were reasonable and he was not biased; the High Court was in error and its judgment was based on conjectures impermissible where the fact-finding authority's conclusion is neither perverse nor unreasonable—Administrative Law—Constitution of India, Article 14.

Practice and Procedure—Writ petition challenging public auction of liquor vends—Held, petitioner must prove bonafides by depositing a substantial portion of what he says he will bid; only if such deposit is made should the auction be set side and re-auction ordered—Constitution of India, Article 226.

On March 11, 1996 a public auction of liquor vends of Group Nos. 108 to 111 in Khanna Circle, District Ludhiana, Punjab for the year 1996-97 took place. The respondent challenged the auction in a writ petition which was disposed of by the High Court with a direction to the Financial Commissioner to treat the writ petition as a representation and give the respondent an opportunity of being heard before passing appropriate orders.

The Financial Commissioner while rejecting the representation of the respondent concluded that the respondent had not given a bid of Rs. 4.21 crores for Group No. 108 or a bid of Rs. 3.50 crores for Group No. 111 as alleged by him; that it was next to impossible that 34 bank drafts could have been prepared on the day of the auction in banks at Khanna and Mandi Gobind Garh situated 40-50 kms. away from the site of the auction; that bid of the respondent for Group No. 108 being Rs. 50 lakhs more than the successful bid and that for Group No. 111 being Rs. 45 lakhs more than the successful bid, it was hard to believe that the Collector who was present at the site did not intervene; that the independent observers had in their

A reports made no mention of the alleged higher bids and had stated that the auctions were fair and without favouritism; that there was no evidence that the auction had been stage-managed.

While the writ petition by another petitioner challenging the Financial Commissioner's order was dismissed by one Division bench stating
B that there was no infirmity therein, the respondent's writ petition challenging the same order was allowed by another Division Bench of the High Court. The Division Bench here held that the respondent being the highest bidder was wrongly shown to have not participated in the bid. It held that the Financial Commissioner's conclusions were based on conjectures and
C it passed strictures on his conduct. All the four groups were directed to be re-auctioned. In case the writ petitioner did not participate in the re-auction and there was no other bidder making the same offer as that of the successful bidders, the writ petitions would be deemed to be dismissed.

The State of Punjab and the successful bidders appeal to this Court.

D

Allowing the appeals, this Court

HELD : 1.1. The Division Bench of the High Court was in error in reaching the conclusion that the auction was not properly and fairly held. The Financial Commissioner's conclusion in his report were reasonable.
E The remarks made by the Division Bench about him are not justified. There was nothing in his order to indicate that he was in any way biased.

[389-H; 390-A]

1.2. The judgment of the Division Bench was based upon conjectures and surmises and inferences more tenuous than those it found the Finan-
F cial Commissioner guilty of. Such conjectures and surmises were impermissible in a judgment upon a writ petition under Article 226 where the fact-finding authority had arrived at a conclusion which was not perverse or so unreasonable that, upon the record, it could not have been reached.

[388-H; 389-A]

G 2.1. The respondent's story did not ring true. Of the twelve to thirteen hundred persons present in the pandal, not one independent observer had stated on affidavit that the respondent had made bids far larger than the successful bids but they had been ignored. [389-F]

2.2. The order of the High Court was not a workable or well thought
H out one. The finality of auctions must also be recognised to be in the interest

of the exchequer. If auctions are set aside and re-auctions ordered on less than satisfactory material, the loss of the exchequer would be far greater. [390-B] A

M/s. Rajshila v. *State of U.P.*, **[1993] Supp 1 SCC 477, referred to.**

2.3. In cases where there was real need to set aside an auction, he who challenged it must be required to prove his *bonafides* before the auction is set aside by depositing a substantial portion of what he said he would bid. It was only if the deposit was made that the auction should be set aside and a re-auction ordered. [390-G] B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7992 of 1996 Etc. C

From the Judgment and Order dated 8.5.96 of the Punjab & Haryana High Court in C.W.P. No. 5007 of 1996.

M.L. Sarin , Advocate General, Punjab, Soli J. Sorabjee, Dushyant D. Dave, D.P.. Gupta, S. Bhoumik, Atul Sharma, Manoj Swarup, P.H. Parekh, Amit Dhingra, E.R. Kumar, G.K. Benerji, Mohan Jain, Ms. Nandini Gore, Pradeep Mishra, V.C. Rishi, Ms. Mukta Sharma and Goodwill Indeevar for the appearing parties. D

The Judgment of the Court was delivered by E

BHARUCHA, J. These are appeals against the judgment and order dated 8th May, 1996, of a Division Bench of the High Court of Punjab & Haryana, passed upon a writ petition filed by the first respondent, M/s. Yoginder Sharma Onkar Rai & Co. The subject matter of the writ petition was the auction of liquor vends of Group Nos. 108 to 111 in Khanna Circle, District Ludhiana, State of Punjab for the year 1996-97. The First appeal is by the State of Punjab. The other appeals are by the successful bidders. F

The auction took place on 11th March, 1996. On 18th March, 1996, the first respondent filed an earlier writ petition (Writ Petition no. 4047/1996) before the High Court challenging the auction. Thereon the Division bench ordered : G

> "After hearing the learned counsel for the parties and perusing the record we are of the opinion that the points raised by the petitioners do require a consideration by the competent authority H

A authorised a reject the higher bid offered and the auction held. The disputed questions of facts raised in this litigation can also better be appreciated by such authority.

xxx xxx xxx

B In view of the facts and circumstances of the case, this petition is disposed of with the following directions:

(i) That Shri Y.S. Ratra, Financial Commissioner, Taxation shall treat this writ petition as representation/revision in terms of Rule 36(18) of the Rules filed before him to determine the legality of
C the bids in auction held in favour of the private respondents.

(ii) The parties shall be given an opportunity of being heard before passing the appropriate orders."

D Consequential directions were also given.

The Financial Commissioner heard the parties as directed by the High Court and rejected the representation/revision filed by the first respondent. He noted various circumstances on the basis of which he came to the conclusion that the first respondent had not given a bid of Rs. 4.21
E crores for Group no. 108 or a bid of Rs. 3.50 crores for Group no.111. The Financial Commissioner found that the possession of a receipt for entry into the auction pandal did not mean that the first respondent had made a bid unless it was shown from the bid sheet that its name was recorded thereon. Being a sitting licensee for the last 4 or 5 years did not give the
F licensee any right to get the vend again unless he bid for it in open auction. Not much reliance could be placed on newspaper report, as the Supreme Court had held that newspaper reports had no evidentiary value but were only hearsay evidence. That a bank counter had been opened in the pandal did not bar the successful bidders from depositing the requisite amount of 15% of the bid money in the Government Treasury at Khanna in the stated
G time. In the pandal there was 1200-1300 persons. They were not all bidders. Being the first auction of liquor vends in the State for the given year, licensees from other districts had come to see the trends and make a market survey. That only 2 or 3 bidders had given bids for a particular vend was, therefore, not noteworthy. Though the partners of S.P. Kalia and Co.
H and Puneet Kalia and Co. were relations there was no reason why they

should not bid against each other. It was next to impossible that 34 drafts could have been prepared on the day of the auction in banks at Khanna and Mandi Gobind Garh which would reach the pandal by 11 a.m. considering the fact that the banks opened at 10 a.m. at Khanna and Mandi Gobid Garh, which was approximately 40-50 kms. from the site of the auction at Ludhiana. It was more likely that all this would take 2 hours. This indicated that the first respondent did not have adequate funds to deposit 15% of the bid money at the fall of the hammer and, therefore, did not bid at all. Note was taken of the pattern of bidding. For Group no. 108 the initial bid was for Rs. 3.55 crores, the next was Rs. 3.65 crores, then 3.68 crores, then Rs. 3.70 and the successful bid was of Rs. 3.71 crores. Thus the tend of the rise was Rs. 10 lacs in the first instance, then Rs. 3 lacs, then Rs. 2 lacs and, lastly, Rs. 1 lac. The case of the first respondent was that it bid Rs. 4.21 crores, that is to say, there was a rise of Rs. 50 lacs over the last bid. Substantially similar was the position in regard to Group No. 111 where there was allegedly a rise of Rs. 45 lacs. It was hard to believe that the Collector, who was present at the auction, would not have intervened in these circumstances. No evidence was forthcoming that anything spectacular had happened in the pandal. The first respondent had not approached any of the senior officers who were in the city in connection with the auction. The mere mention during the argument that it had approached the Excise and Taxation Commissioner and told him its case and that he said he would look into the matter was an after -thought. If the difference between the successful bids and the allegedly higher bids was really of Rs. 50 lacs and Rs. 45 lacs respectively, the first respondent should have put it in writing and the Excise and Taxation Commissioner would have taken cognizance. The telegram sent by the first respondent was 4 days after the auction. There were telegrams under different names but they were all similarly worded and no mention was made therein of the amounts of the allegedly higher bids, but merely that a lower bid had been accepted despite a higher bid. Due credence had to be given to the reports of the two independent observers nominated by the Excise and Taxation Commissioner and the Deputy Commissioner of the District who were present at the pandal. No mention had been made of the alleged higher bids in the observers' reports, which stated that the auctions were fair and there was no favouritism. The decision of the State Government not to allow S.K. Ralhan, Deputy Excise and Taxation Commissioner, Patiala Division, to conduct auctions in other districts of Patiala Division was

A B C D E F G H

based on administrative grounds and the matter was under consideration. There was no evidence that the auction had been stage-managed. The claim of the first respondent was, therefore, without any basis, an after-thought and not based on any concrete evidence.

The order of the Financial Commissioner was passed consequent upon three writ petitions. The petitioner in one of three writ petitions did not carry the matter to the High Court. The writ petitioner in another writ petition filed a second writ petition challenging the order; it came up before another Division Bench which, on 9th April, 1996, passed the following order :

> "We find no infirmity in the detailed order, Annexure P-9, passed by the Financial Commissioner, (Taxation), Punjab. All the points raised before us have been dealt with in detail by the Financial Commissioner and we concur with the findings recorded by him.
>
> Dismissed."

The writ petitioner in the third writ petition was the first respondent and it filed the present writ petition (No. 5007/96) impugning the Financial Commissioner's order on 6th April, 1996. This writ petition was disposed of by the judgment and order under appeal.

The Division Bench noted therein the case of the first respondent that it had offered Rs. 4.21 crores for Group no. 108 as against the successful bid of Rs. 3.71 crores which had been wrongly accepted, thereby putting the public exchequer to loss of Rs. 50 lacs. Similarly, for Group no. 111, the first respondent had offered Rs. 3.5 crores but the bid of Rs. 3.05 crores was accepted, thus putting the exchequer to a loss of Rs. 45 lacs. Though the representatives of the first respondent were present at the time of the auction, their presence and the bids offered by them were not recorded. It was the said S.K. Ralhan who had not accepted the higher bids offered by the firs respondent without any basis or assigning any valid reason. The first respondent had raised a hue and cry, which met with deaf ears. The first respondent, through its partner, Yoginder Sharma, had approached the Excise and Taxation Commissioner and brought to his notice the arbitrary, capricious, illegal and unconstitutional auction on the part of the said S.K. Ralhan, but no action was taken. The denials of the respondents before the High Court were noted, including those of the said

S.K. Ralhan. The order on the earlier writ petition (No. 4872/96) was set out in extenso. The Division Bench then enumerated the circumstances which had led the Financial Commissioner to reject the representation or revision of the first respondent (as set out above). The validity of the auction was challenged by the first respondent on three grounds. The first and second grounds related to the provisions of the Punjab Excise Act and the Punjab Liquor Licence Rules and the term and conditions of the Auction notice. (These grounds were rejected and need not detain us.) The third ground, which was accepted, was set out thus :

> "(iii) The petitioner, despite being the highest bidder, was wrongly shown to have not participated in the bid. The learned counsel has referred to various circumstances, which, according to him, show the *bonafides* of the petitioner in bidding in the auction and having been present on the spot".

The Division Bench stated that, in support of his submission that the first respondent had offered a higher bid, its counsel had referred to various circumstances and submitted that the cumulative effect thereof proved the presence and participation of the first respondent in the auction, which had not been taken note of. The circumstances enumerated by the first respondent and "probabilised to have been proved" were set out by the Division Bench. The first circumstance was the receipt for entry into the auction pandal; this, according to the Division Bench, established that the first respondent had decided to participate in the auction. The second circumstances was that the representatives of the first respondent were in possession of bank drafts worth Rs. 1.90 crores besides cash in the sum of Rs. 10 lacs on the date of the auction "for the purpose of bidding in the auction". The factum of bank drafts was not disputed. The Financial Commissioner' observations in regard to the bank drafts were then set out and the Division Bench observe :

> "The conclusions arrived at by the Financial Commissioner, Taxation, are based upon conjecturers nd apparently observed with pale eyes. It is not improbable to obtain 34 drafts prepared from a bank at Khanna and Mandi Govindgarh on the same day and before the time of auction. It is not uncommon that the banks have been providing special services to their customers particularly having huge monetary dealings. The Financial Commissioner, Taxation,

A has not referred to any special knowledge of banking system and has arrived at the aforesaid conclusion without ascertaining the true position from the concerned bank."

According to the Division Bench, if drafts for such a huge amount had B been issued, the same demonstrated the *bona fide* intention of the first respondent to participate in the auction. Again, it was "fully established" that the first respondents' representatives were in possession of the bank drafts on the relevant date, which showed their intention to participate in the auction. The provisions of Rule 36 (17), though they could not be made the basis for quashing the auction proceedings, were relevant to show the C biased treatment given to the first respondent. Whether the first respondent had raised the plea or not, it was for the authorities to explain the omission in not mentioning the pre-determined license fee, which might have become the basis for accepting or rejecting the bid offered by a particular bidder. It was intriguing and not explained as to why such an D omission was allowed in the case of Group No. 108 and 11 only and not in the case of any other group auctioned on the same day or thereafter. The first respondent had taken steps for participation in the auction by obtaining an entry slip and by procuring bank drafts, which led to the irresistible conclusion that it was not only a spectator. The affidavits of the partners of the first respondent showed that they were present at the time E of the auction and had participated in it, but their presence was not taken note of. Press report also suggested that the auction was not free from suspicion. Some extracts of these press reports were set out. It was then said by the Division Bench that it was true that press reports could not be made the basis for holding the auction illegal or contrary to the law; F however, "in drawing inferences, the circumstances of the press reports cannot be completely ignored, ...". The telegrams aforementioned also could not be completely ignored. The mere omission of details therein could not be made the basis for rejecting them. It was not a coincidence that immediately after the auction was concluded on 11th March, 1996, the said S.K. Ralhan had been transferred. His transfer suggested, prima facie, G the satisfaction of the authorities that he had not been fair in holding the auction. It was worth mentioning that the successful bidders had not denied the allegations made against them and it was, therefore, proved that the persons participating in the auction were hand in glove with each other with the object of putting the State exchequer to loss. "The cumulative H effect", the High Court held, "of the aforesaid discussion clearly and

unequivocally leads to the conclusion that the auction with respect to groups No. 108 and 11 held on 11th March, 1996, was neither fair, nor proper. The petitioners were wrongly deprived of their right of participation in the bid and the State exchequer was subjected to huge loss, which in no case is lesser then Rs. 95 lacs." A

As far as the Financial Commissioner was concerned, the High Court said : E

> "Least we say about Shri Ratra, better it would be. We were interested in the job of adjudication of the rival claims of the parties, presuming him to be an independent and impartial person, keeping in view the status of the post he is holding. During arguments, a reference has been made to Annexure PS2, a press report dated 12th March, 1996, which shows that Shri Ratra had gone to the press with the claim that outcome of the auction had allegedly been better than the expected rise of 12 to 13 per cent. At that time, it was not brought to our notice that Shri Ratra had already taken a stand with respect to the matter in dispute and, presumably, could not have given any other finding than the one, which is incorporated in Annexure P 66. Omission on the part of the parties to bring to our notice the commitments made by Shri Ratra has resulted in the reference being made to him." C D E

Ultimately, in the High Court's view, the substance of the circumstances in the context of the allegations made, clearly suggested that the auction was not fairly and properly held, with the result that the State exchequer had been subjected to a huge loss. The High Court thereupon passed the following order, which must be quoted in extenso : F

> "Under the circumstances, the writ petition is allowed and the auction held on March 11, 1996, with respect to group Nos. 108 and 111 vide annexures P 44 and P 47 is quashed. Consequently, the auction of group Nos. 109, 110 and protection vend of Kotla Azner (Fatehgarh Sahib) in favour of the successful bidders of group Nos. 108 and 111 shall also stand quashed. This judgment would become effective from May 16, 1996, and the private respondents are allowed to continue their business until the mid-night of May 15, 1996. G H

A In view of the detailed discussion made above, the order of the Financial Commissioner, Taxation, Punjab (Annexure P.66) is quashed for the remaining period of 10 and a half month commencing with effect from 16.5.1996 to 31.3.1977. All the four groups, i.e., Nos. 108 to 111 and protection vend of Kotla Azner (Fatehgarh Sahib), are directed to be re-auctioned positively before May 15, 1996, at the cost of the petitioners, after due publicity and advertisement. The petitioners, private respondents and all other shall be permitted to participate in the bid, which shall be strictly held in accordance with the provisions of Rules 36 of the Punjab Liquor Licence Rules. All such persons, who enter the venue for the purpose of bid, shall be directed to sign a separate paper sheet, recording their attendance and the bid shall be supervised by an officer, not below the rank of Financial Commissioner.

After pre-determining the licence-fee, first bid for group No. 108 shall be deemed to be Rs. 4.21 crores offered by the petitioners and for group No. 111, the first bid shall be deemed to be of Rs. 3.50 crores, offered by the petitioners.

After deducting the proportionate fee for the period commencing from 1.4.1996 to 15.5.1996, the balance amount of fee, if deposited by the respondent/successful bidders, shall be refunded to them after May 15, 1996.

The petitioners shall deposit a sum of Rs. one lac within two days, out of which the expenditure for re-holding of the auction shall be adjusted and the balance amount paid back to them after completion of the process of auction.

In the new auction, Shri S.K. Ralhan Deputy Excise and Taxation Commissioner and Shri Y.S. Ratra, Financial Commissioner, Taxation shall not be associated in any manner.

In case, the petitioners, opt not to participate in the new auction bid and no other bidder offers the bid for the amount already offered by the private respondents-successful bidders, this petition shall be deemed to have been dismissed with costs of rupees one lac to be paid to the private respondents. However, on the com-

pletion of the fresh process of auction, the private respondents shall be liable to pay a sum of Rs. 10,000 as costs which shall be deposited in the State Treasury." A

Learned counsel for the appellants submitted that questions of fact were involved. At the hearing of the earlier writ petition this had been recognised by the Division Bench and the first respondent had been reference to the Financial Commissioner treating the writ petition as a representation or revision under the statutory provision. The order of the Financial Commissioner was reasonable in its appreciation of the facts. The Division Bench had not found it to be perverse. The Division Bench, therefore, was not entitled to reverse it. In any event, the judgment of the Division Bench was based upon conjectures and the order that was passed by it was erroneous and unworkable. B C

Learned counsel for the first respondents drew our attention to its case that in the auction pandal itself its partners had met the Excise and Taxation Commissioner and told him their grievance and the Excise and Taxation Commissioner had assured them that the matter would be looked into. Learned counsel referred to the press reports which stated that the Excise and Taxation Minister of Punjab had said that while there was no report with the State Government on the alleged irregularities during the auction of liquor vends, it had come to the notice of the State Government that the auction of some liquor vends in Ludhiana were conducted in a manner contrary to the interests of the revenue and that, on the basis of a representation, the State Government had relieved the Deputy Excise and Taxation Commissioner in charge of the Patiala Division of the responsibility of conducting auctions for the remaining districts of the Division. A copy of the order relieving the said S.K. Ralhan was pointed out. Learned counsel submitted that, even so, the Financial Commissioner in his report had stated that the decision of the State Government not to allow the said S.K. Ralhan to conduct auctions in the remaining districts of Patiala Division was based on administrative grounds. Learned counsel submitted that there was, thus evidence to show that the auction had not been conducted fairly and in the prescribed manner. The Financial Commissioner in his report had stated that it was hard to believe that the Collector would not have intervened when bids of R. 50 and 45 lacs respectively over the next highest bids had been made. Learned counsel submitted that the Financial Commissioner himself should have accepted D E F G H

A the higher bids of the first respondent. The first respondent was even now prepared to deposit 15% of the required deposit for the remaining hall of the term and secure the balance. Learned counsel relied upon the judgment of this Court in *M/s. Rajshila* v. *State of U.P. and Ors.*, [1993] Supp. 1 S.C.C. 477. This was a case where the appellant could not participate in
B the auction of the exclusive right to collect tolls on a bridge owing to a strike in Government offices. The appellant had to run from pillar to post to fulfil the precondition of a security deposit which, in view of the involved procedure, was rendered impossible of fulfilment. The appellant had tendered cash security of Rs. 7 lacs on the date of the auction and sought permission to participate, but the request had been turned down. Upon
C this, the appellant had given an application signifying its willingness to offer Rs. 86 lakhs per year as against the accepted bid of Rs. 75 lacs per year. After hearing counsel, this Court was persuaded to take the view that the ends of justice would be met by an order directing a re-auction subject to certain conditions, the first being that the appellant should, with a view to
D establishing its readiness and willingness to stand by the offer of Rs. 86 lacs per year, deposit a sum of Rs. 25 lacs on or before the stated date. If the sum of Rs. 25 lacs was deposited, the contract in favour of the successful bidder would stand set aside. Learned counsel submitted that the present was a case where the ends of justice required that the judgment and order under appeal be maintained subject to such conditions as this Court might
E deem fit to impose.

The question that goes to the root of these appeals is : did the first respondent make bids at the auction of Rs. 50 and Rs. 45 lacs respectively over the successful bids for Group nos. 108 and 111?

F

This is a question of fact. It was rightly referred to the Financial Commissioner under the statutory provision by the Division Bench in its order on the earlier writ petition. On the order passed by the Financial Commissioner the High Court could interfere in a writ petition under Article 226 only if it found it to be perverse, that is to say, if it found its
G conclusions such as could not reasonably have been arrived at upon the record. The Division Bench in the order under appeal has not so held, specifically or impliedly.

The order of the Financial Commissioner is not perverse or un-
H reasonable. He was right in concluding that the fact that the first respon-

dent had entered the auction pandal did not established that it had made a bid. His views about the drafts procured by the first respondent from the banks at Khanna and Mandi Gobindgarh ar not unreasonable, for, ordinarily, a prospective bidder would not cut it so fine. He would ordinarily obtain the required bank drafts before the auction date and not wait to do so with only an hour or so to spare. No extraordinary circumstances have been adverted to by the first respondent which required it to obtain the drafts only on the morning of the auction from banks which were a sizeable distance from its site. The pattern of bidding referred to by the Financial Commissioner is very telling. It is unlikely that when the bid is rising by Rs. 10 lacs, Rs. 3 lacs, Rs. 2 lacs and Rs. 1 lac, it should suddenly rise by Rs. 50 lacs and Rs. 45 lacs respectively. The Financial Commissioner was justified in rejecting the case of the first respondent that it had approached the Excise and Taxation Commissioner and spoken to him about what had happened for this was mentioned only in the course of the argument before him. It also germane for the Financial Commissioner to observe that no higher revenue officials had been approached by the first respondent, as also to point out that the observers' reports did not speak of any irregularity. They would certainly have done so had a bid which was Rs. 50 lacs more than the successful bid been ignored; there would have been a conmotion in the auction pandal and this would have been mentioned in the reports. The Financial Commissioner pointed out, and rightly, that the telegram sent by the first respondent was four days after the auction. There were other telegrams, similarly worded but under different names. In all the telegrams no mention had been made of the quantum of the higher bid but merely that a lower bid had been accepted against a higher bid. The Financial Commissioner noted that two partnerships had bid against each other but commented, with some justification, that the mere fact that their partners were relations did not make for a rigged auction.

The Division Bench castigated the Financial Commissioner for his report and stated that his conclusions were "based upon conjectures and apparently observed with pale eyes". It said that "it is not improbable" to obtain 34 drafts prepared from a bank at Khanna and Mandi Gobindgarh on the same day and before the time of auction. It is "not uncommon" that banks provide special services to their customers, particularly if they have huge monetary dealings. The Financial Commissioner had not referred to any special knowledge of the banking system and had arrived at his conclusions without ascertaining the true position from the concerned

A bank. The Division Bench did not state its authority for its statements about banking practice.

The Division Bench found that "it was fully established" that first respondent's representatives were in possession of the bank drafts, "which showed petitioners' intention of participation in the auction". The Division B Bench took the view that the revenue authorities were obliged to explain why the pre-determined license fee had not been mentioned and that it was intriguing "why such an omission was allowed in case of Group No. 108 and 111 only and not with respect to any other group auction on the same day or thereafter". In fact, it appears that this omission took place not only C with regard to Group nos. 108 and 111 but with regard to all auctions in Ludhiana-I. The fact that first respondent had taken steps for participation the auction by obtaining an entry slip and by procuring bank drafts led the Division Bench "to the irresistible conclusion that they were not only spectators". The affidavits of the partners of the first respondent also showed that they were present at the time of the auction and had par- D ticipated in it but their presence had not been taken note of. Extracts of press reports were set out in the judgment and the Division Bench noted that while they could not be made a basis for holding an auction illegal or contrary to the law, "in drawing inferences" the press reports could not be ignored. The mere omission of giving details in the telegrams was not a E reason to reject them. It was not a coincidence that the said S.K. Ralhan had been transferred after the auction on 11th March, 1996, was concluded and it suggested, *prima facie*, that the authorities had been satisfied that he had not been fair in holding auction. The Division Bench found that the successful bidders had not specifically denied the allegations of relation- F ship between their partners and their inter-action in the auction; it was, therefore, proved that they "were hands in glove with each other with the object of putting the State exchequer to loss". As a matter of fact, the allegations are denied by the successful bidders in their affidavits. The cumulative effect clearly and unequivocally led the Division Bench to the conclusion that the auction with respect to Group nos. 108 and 111 was G neither fair nor proper, the first respondent had been wrongly deprived or its right of participation therein and the State exchequer had been subjected to a loss of not less than Rs. 95 lacs.

We are constrained to observe that the judgment of the Division H Bench is based upon conjectures and inferences more tenuous than those

it found the Financial Commissioner guilty of. Such conjectures and inferences are impermissible in a judgment upon a writ petition under Article 226 where the fact-finding authority has arrived at a conclusion which is not perverse or so unreasonable that, upon the record, it could not have been reached. A

The basic question which cannot be lost sight of is : did the first respondent make bids at the auction of Rs. 50 and Rs. 45 lacs respectively over the successful bids for Group nos. 108 and 111? Securing Group no. 108 and 111 was so important for the first respondent, it would have us believe, that it raised the bids by the staggering sums of Rs. 50 and Rs. 45 lakhs respectively. If it did, the previous rises having been of the order of Rs. 10 lacs, Rs. 3 lacs, Rs. 2 lacs and Rs. 1 lac, it would have attracted the attention of some, if not most, of the twelve to thirteen hundred persons in the auction pandal. It would be a brave auctioneer indeed who would, in the circumstances, ignore such bids. The partners of the first respondent would not in the ordinary course of human conduct have let it pass without stout, long and loud protests. They would have attracted notice, and support. But, according to the oral submissions of the first respondent's counsel before the Financial Commissioner, the first respondent's partners were satisfied with an oral complaint to the Excise and Taxation Commissioner and his assurance that he would look into the matter. In the ordinary course of events, one would have expected a bidder making such large bids which are ignored to shoot off notices in all directions. All we have are telegrams sent four days after the auction which do not mention the enormous difference between the bids. Of the twelve to thirteen hundred persons present in the pandal, not one independent observer has stated on affidavit that the first respondent had made bids far larger than the successful bids but they had been ignored. To our ears the first respondent's story does not ring true. B C D E F

As we have already held, the Financial Commissioner's conclusions in his report were reasonable. The remarks made by the Division Bench about him were not justified. As Financial Commissioner, he spoke to the Press about the outcome of the auctions generally. This was in the performance of his duties. In any event, we do not see in his orders anything that indicates that he was in any way biased. G

The Division Bench was, in the circumstances, in error in reaching H

A the conclusion that the auction was not fairly and properly held with the result that the State exchequer had been subjected to a huge loss. In any event, loss to the exchequer is a factor which may be taken into account in genuine cases, as it was in the case of M/s. Rajshila cited by learned counsel for the first respondent. At the same time, the finality of auctions must also be recognised to be in the interests of the exchequer. If auctions are set aside and re-auctions ordered on less than satisfactory material, the loss of the exchequer would be far greater.

This brings us to the form of the order that the Division Bench passed. We have quoted it above in extenso. It quashes the auction. It directs re-auction for the balance of the term. It directs that for Group no. 108 the first bid "shall be deemed to be Rs. 4.21 crores" as offered by the first respondent, and for Group no. 111 the first bid "shall be deemed to be of Rs. 3.50 crores" as offered by it. The order then directs that in case the first respondent opts not to participate in the fresh auction and no other bidder offers a bid of the amount equivalent to the earlier successful bid, "this petition shall be deemed to have been dismissed".

It is a very difficult order to appreciate. If at the fresh auction the first respondent does not bid and no other bidder offers a bid equivalent to the earlier successful bid and the writ petition is to stand dismissed, what is the State Government's authority for holding the fresh auction? Whether or not the first respondent bids or somebody else bids an amount equivalent to the earlier successful bid can be known only after the fresh auction is held. If at that stage the petition is to stand dismissed, there is no authority for holding the fresh auction. Secondly, if at the fresh auction the first respondent does not bid and no other bidder offers a bid equivalent to the earlier successful bid, it must mean that the earlier successful bidder is no longer interested; but, by reason of the dismissal of the writ petition, he remains bound by his earlier bid. This is not a workable or well thought out order.

In cases were there is real need to set aside an auction, he who challenges it must be required to prove his *bona fides* before the auction is set aside by depositing a substantial portion of what he says he will bid. It is only if the deposit is made that the auction should be set aside and a re-auction ordered.

The Division Bench would have done well to follow the order

(quoted above) already passed by another Division Bench upon a writ petition impugning the same order of the Financial Commissioner. A

The appeals are allowed. The judgment and order under appeal is set aside. The writ petition filed by the first respondent is dismissed. The first respondent shall pay to the appellant in each of the three appeals the costs of the appeal, quantified in the sum of Rs. 25,000. B

S.M. Appeals allowed.

A UNIVERSITY GRANTS COMMISSION ETC.

v.

SADHANA CHAUDHARY AND ORS.

SEPTEMBER 17, 1996

B [S.C. AGRAWAL AND G.T. NANAVATI, JJ.]

University Grants Commission Act, 1956.

University Grants Commission (Qualifications Required of a Person to
C *be Appointed to the Teaching Staff of a University and Institutions Affiliated to it) Regulations 1991.*

Appointment of Lecturers—Exemption granted to various categories of candidates from appearing in the Nation vide eligibility test by circulars dated Feb. 10, 1993, June 15, 1993 and notification dated June 21, 95 issued by
D *UGC—Validity of.*

Constitution of India—Article 14—Right to equality—Cut off dates as prescribed by circulars dated Feb 10, 93 June 15, 1993 and notification dated June 21, 1995 issued by UGC granting exemption to various categories of
E *candidates from appearing in the eligibility test for appointment to the post of lecturers—Held, not violative of right to equality as such.*

UGC framed University Grants Commission (Qualification required of a person to be appointed to the teaching staff of a university
F **and institutions affiliated to it) Regulations 1982 in exercise of powers conferred by S. 26(1)(e) of the Act laying down the minimum qualifications for the purpose of appointment as university lecturer and college lecturer.**

On recommendations of Mehrotra committee and the Vice Chan-
G **cellors Conference, UGC framed (Qualification required of a person to be appointed to the teaching staff of a university and Institutions affiliated to it) Regulations. The 1991 regulations laid down that for the purpose of appointment to the post of lecturers in University & colleges a candidate should have good academic record with at least 55% marks**
H **or an equivalent grade at master's level in the relevant subject from an**

Indian University or an equivalent degree from a foreign University. Candidates besides fulfilling the above qualifications should have cleared the eligibility test for lecturers conducted by UGC, CSIR or similar test accredited by the UGC. The rational of the eligibility test prescribed by 1991 Regulations was upheld by this Court in *University of Delhi* v. *Raj Singh and Ors.,* [1994] Supp. 3 SCC 516.

UGC issued circulars on 15.2.93 and June 15, 1993 by which exemption was granted to 4 categories of candidates from appearing in the eligibility test viz. - candidates who have passed UGC/CSIR J.R.F. examination, candidates who have already been awarded Ph. D. Degree, candidates who have already been awarded M.Phil degree upto 31st, December 1992, and those who will submit their Ph.D. thesis upto 31st December 1993. The 1991 Regulations were further amended on 21.6.95 stipulating that candidates who have submitted thesis or passed M.Phil. examination by 31st December 1993 are exempted from the eligibility test for lecturer conducted by UGC, CSIR or similar test accredited by the UGC.

Haryana Public Service Commission issued advertisement on Jan. 23, 1995 inviting applications for 200 temporary posts of lecturers (College Cadre) in Haryana Educational Services (Group B) prescribing that along with the essential qualifications the candidates should have cleared the eligibility test for lectureship conducted by UGC, CSIR or similar test accredited by the UGC. However the said condition was not applicable to the candidates who had been awarded M.Phil degree upto 31st December 1992 and who have submitted Ph.D. thesis upto December 31, 1993.

The candidates who were awarded M.Phil degree in December 1993 approached High Court by way of a writ petition assailing the cut off dates fixed by the advertisement dated January 23, 1995. Allowing the writ petition High Court held that the cut off dates fixed by the advertisement were unjust and not based on any rationale in as much as it amounts to creation of an artificial class amongst the eligible candidates though similarly situated, as the cut off dates fixed are far earlier to the date of the advertisement dated January 23, 1995. The High

A Court directed the Haryana Public Service Commission to issue a corrigendum extending the dates as prescribed in advertisement dated January 23, 1995 upto December 31, 1994. It further directed HPSC to ensure in future that as and when any such advertisement is issued that should bear in mind that the eligibility dates be not far off from the B date of advertisement.

Bihar State University Service Commission on Nov. 22, 1993 issued advertisement inviting applications for appointment to the post of lecturers in various Universities of Bihar. However the said advertisement did not prescribe that the candidates should have cleared the C national eligibility test conducted by UGC.

Candidates from State of Bihar who had cleared the eligibility test as prescribed by UGC filed Writ Petition challenging the Advertisement issued by Bihar State University Commission on the ground that the D qualifications prescribed in the advertisement were not in consonance with the qualifications prescribed by UGC.

High Court allowed the writ Petition and held that only the candidates who had passed national eligibility test in terms of the UGC E regulations could be considered by the Bihar State University Commission.

Bihar State University (Second amendment) Ordinance 1994 and Patna University (Third amendment) Ordinance, 1994 were promulgated which laid down that a candidate who has submitted Ph.D. thesis by F December 31, 1993 or has got a degree of M.Phil before December 31, 1992 will be exempted from appearing in the eligibility test of lecturers/Junior Research fellow conducted by UGC/CSIR.

Consequently the Bihar State University Commission issued a G corrigendum dated December 25, 1994 to the advertisement dated Nov. 22, 1993 to this effect. The said ordinances as well as the circulars dated Feb. 10, 1993 and June 15, 1993 issued by the UGC were challenged by way of Writ petition. The High Court held that UGC was within its jurisdiction in issuing guidelines for the appointment of lecturers in H Universities & colleges & Chancellor was also within his Jurisdiction in

promulgating the ordinance. Hence this appeal by Special Leave. A

The questions before this Court were;-

(i) whether the cut off dates fixed under the circular & notification wer valid.

B

(ii) whether the exemption from clearing eligibility test or equivalent examination under the said circular and notification is valid.

It was contended by UGC that the circulars were in the nature of transitional provisions.

C

Disposing of the appeals, this court

HELD : 1.1. Exemption granted by the amendment introduced in the 1991 Regulations by circulars dated February 10, 1993, June 15, 1993 and by notification dated June 21, 1995 is not violative of the right to equality D guaranteed under article 14 of the Constitution as such candidates constitute a distinct class who could be treated separately in so far as the requirements of clearing the eligibility test is concerned. Such a classification of candidates for the purpose of applicability of the requirement of clearing the eligibility test has a rational basis which has a reasonable nexus with the object sought to be achieved by the 1991 Regulations, i.e. E clearing of National Eligibility test for appointment to post of lecturers in various universities so as to remove disparties in the standards of examination at the Masters level between different universities. [408-F-G]

1.2. It is settled law that the choice of date as a basis for classification F cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless it can G be said that it is very wide of the reasonable mark. [406-C-D]

1.3. In the instant cases the cut off dates fixed cannot be held to be carpicious or whimsical or wide of the reasonable mark. [406-C-D]

Union of India & Anr. v. *M/s. Parameshwaran Match Works Ltd.,* H

A **[1975] 2 SCR 573 and** *Dr. (Mrs. Sushma Sharma Etc. Etc.* **v.** *State of Rajasthan & Ors.,* **[1985] 3 SCR 243, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12284 of 1996 etc.

B From the Judgment and Order dated the 21st March, 1995 of the High Court of Punjab and Haryana in Civil Writ Petition No. 2252 of 1995.

M.K. Banerjee, S.B. Sanyal, Gaurav Banerjee, Navin Prakash, A.K. Pandey, B.B. Singh, A.D. Sikri, Ashok K. Mahajan and R.S. Suri for the C appearing parties.

The Judgment of the Court was delivered by

S.C. AGARWAL, J. Special leave granted in both the special leave petitions.

D

These appeals raise questions relating to grant of exemption from the provisions contained in the University Grants Commission (Qualifications Required of a Person to be Appointed to the Teaching Staff of a University and Institutions Affiliated to it) Regulations, 1991 (hereinafter referred to as 'the 1991 Regulations') which require that for appointment E on the post of lecturer in universities and colleges the candidate should have cleared the eligibility test for lecturers conducted by the University Grants Commission (hereinafter referred to as 'the UGC'), Council of Scientific and Industrial Research (for short 'CSIR') or similar test accredited by the UGC.

F

The UGC has been established under the University Grants Commission Act, 1956 (hereinafter referred to as 'the Act) which was enacted by Parliament to make provisions for the co- ordination and determination of standards in Universities. One of the functions entrusted to the UGC under the Act is to recommend to any University the measures necessary G for the improvement of University education and advise the University upon the action to be taken for the purpose of implementing such recommendation (Section 12(d)). The UGC has been empowered to make regulations consistent with the Act and the rules made thereunder defining the qualifications that should ordinarily be required of any person to be H appointed to the teaching staff of the University, having regard to the

branch of education in which he is expected to give instruction. [Section 26(1)(e)]. In exercise of the powers conferred by Section 26(1)(e), the UGC made the University Grants Commission (Qualifications Required of a Person to be Appointed to the Teaching Staff of a University and Institutions Affiliated to it Regulations, 1982 (hereinafter referred to as 'the 1982 Regulations') whereby qualifications were prescribed for appointment to a teaching post in the University or in any of the institutions including constituent or affiliated colleges recognised under clause (f) of Section 2 of the Act or in an institution deemed to be a University under Section 3 of the Act. Under the 1982 Regulations the minimum qualifications prescribed for appointment to the post of University lecturers were (i) a Doctorate's Degree or Research work of equally high standard; and (ii) a good academic record with at least second class (C in the seven point scale) Master's degree in a relevant subject from an Indian University or an equivalent degree from a foreign University. For college lecturers the minimum qualifications prescribed were (i) an M.Phil degree or a recognised degree beyond the Master's level or published work indicating the capacity of a candidate for independent research work; and (ii) good academic record with at least second class (C in the seven point scale) Master's degree in a relevant subject from an Indian University or an equivalent degree from a foreign university.

In its report dated March 23, 1985, the National Commission on Teachers II, after observing that standards of performance varied from university to university, expressed the view that it must be ensured that every citizen aspiring to be a teacher at the tertiary level, i.e., a lecturer, qualified in terms of a national yardstick. The Commission recommended that the UGC should incorporate the passing of one of the national tests at least in grade B+ on a seven point scale in its regulations laying down the minimum qualifications of teachers and that this should come into force within two years. Thereafter, in 1986, the UGC appointed a Committee under the Chairmanship of Prof. R.C. Mehrotra (for short 'the Mehrotra Committee') to examine the structure of emoluments and conditions of service of University and college teachers and to make recommendations in this behalf having regard to the necessity of attracting and retaining talented persons in the teaching profession and providing advancement and opportunities to teachers of Universities and colleges. The Mehrotra Committee was of the view that, in order to ensure quality of new entrants to the teaching profession, all aspirants for the post of lecturer in a University

A or college should have passed a national qualifying examination since such a test would have the merit of removing disparities in standards of examination at the Master's level between different Universities and, as a result, local influence would be minimised and the eligibility zone for recruitment would become wider. The Mehrotra Committee recommended the following minimum qualifications for appointment to the post of Lecturer :

B

> "(i) Qualifying at the National Test conducted for the purpose by the UGC or any other agency approved by the UGC.
>
> (ii) Master's degree with at least fifty-five percent marks or its equivalent grade and good academic record.
>
> C
>
> The minimum qualifications mentioned above should not be relaxed even for candidates possession M.Phil, Ph.D qualification at the time of recruitment."

D After examining the various recommendations contained in the report of the Mehrotra Committee and the recommendations made by the UGC, the Government of India prepared a scheme for revision of pay scales of Teachers in the Universities and Colleges and other measures for maintenance of standards in higher education and, by letter dated June 17, 1987, the Government of India forwarded the said scheme to the Education E Secretaries of all the State and Union Territories with a request to formulate detailed proposals for the implementation of the scheme on the lines indicated in the said letter. The said scheme was revised by the Central Government in 1988. The original scheme as well as the revised scheme required that only those candidates who, besides fulfilling the minimum F academic qualifications prescribed for the post of Lecturer, have qualified in a comprehensive test, to be specially conducted for the purpose, will be eligible for appointment as Lecturers.

In 1989 a conference of Vice-Chancellors was held under the auspices of the UGC and one of the major recommendations made in the G said conference was :

> "The National level test to determine the eligibility for lecturers be conducted. When the State Government conducts such tests, while accrediting them caution be exercised."

H Keeping in view the said recommendations the UGC made the 1991

Regulations which were notified vide notification dated September 19, 1991. The 1991 Regulations superseded the 1982 Regulations and prescribed the following minimum qualifications for the post of lecturers in universities and colleges :

> "Good academic record with at least 55% marks or an equivalent grade at Master's level in the relevant subject from an India University or an equivalent degree from a foreign University.
>
> Candidates besides fulfilling the above qualifications should have cleared the eligibility test for lecturers conducted by UGC, CSIR or similar test accredited by the UGC."

By Circular dated February 10, 1993 the UGC granted exemption from appearing in the eligibility test to following categories :

1. All candidates who have passed UGC/CSIR J.R.F. Examination.
2. All candidates who have already been awarded Ph.D degree.
3. All candidates who have already been awarded M.Phil degree upto 31st March, 1991.
4. All candidates who will submit their Ph.D thesis upto 31st December, 1993.

By circular dated June 15, 1993 in respect of candidates falling in category (3) exemption from appearing in the eligibility test was extended to candidates who had been awarded M.Phil degree upto December 31, 1992. By a notification dated June 21, 1995 the 1991 Regulations have been amended and the following proviso has been added below the requirement regarding clearing the eligibility test for appointment on the post of Lecturer :

> "Provided that candidates who have submitted Ph.D thesis or passed the M.Phil examination by 31st December, 1993 are exempted from the eligibility test for lecturers conduct by UGC, CSIR or similar test accredited by the UGC."

The requirement regarding clearing the eligibility test for appoint-

A ment on the post of Lecturer as prescribed by the UGC under the 1991 Regulations came up for consideration before this Court in *University of Delhi* v. *Raj Singh and Ors.*, [1994] Supp. 3 SCC 516. After taking note of the report of the National Commission on Teachers II, the Mehrotra Committee report and the recommendations of the Vice-Chancellors' conference held in 1989, the Court has observed :

B

> "It is very important to note that a duty is cast upon the Commission (the UGC) to take 'all such steps as it may think fit for the determination and maintenance of standards of teaching'. These are very wide-ranging powers. Such powers, in our view, would
> C comprehend the power to require those who possess the educational qualifications required for holding the post of lecturer in Universities and colleges to appear for a written test, the passing of which would establish that they possess the minimal proficiency for holding such post. The need for such test is demonstrated by the reports of the commissions and committees of educationists
> D referred to above which take note of the disparities in the standards of education in the various Universities in the country. It is patent that the holder of a postgraduate degree from one University is not necessarily of the same standard as the holder of the same postgraduate degree from another University. That is the rational
> E of the test prescribed by the said Regulations."

(pp. 532, 533)

We may now briefly refer to the facts of these two cases.

F *Civil Appeal No. of 1996 (@ S.L.P. (C) No. 16220/1995)*

On January 23, 1995, the Haryana Public Service Commission issued an advertisement inviting applications for 200 temporary posts of Lecturers (College cadre) in various subjects in Haryana Educational Service (Group
G 'B). In the said advertisement it was prescribed that candidates besides fulfilling the essential qualifications mentioned therein in the respective subjects should have cleared the eligibility test for lectureship conducted by the UGC, CSIR or similar test accredited by the UGC. The said condition was, however, not applicable to candidates mentioned in clauses (a) to (d) of paragraph 5. Clause (b) covered those who had been awarded
H M.Phil degree upto December 31, 1992 and clause (c) covered candidates

who had submitted their Ph.D thesis upto December 31, 1993. A

Sadhana Chaudhary and Aarti Ahluwalia, respondents Nos. 1 and 2, had joined M. Phil course of Punjab University for the session 1991-92. Sadhana Chaudhary submitted her thesis on January 25, 1993, the *viva voice* test was held some time in November, 1993 and the M. Phil degree was awarded to her on December 14, 1993. Aarti Ahluwalia submitted her thesis on October 7, 1992, the *viva voice* test was held in December, 1993 and she was awarded M.Phil degree on December 14, 1993. Since they had been awarded the M.Phil degree after December 31, 1992, they were not given exemption from clearing the eligibility test as per the requirement of the advertisement. They approached the High Court of Punjab and Haryana by filing a writ petition (Civil Writ Petition No. 2252 of 1995) wherein they assailed the cut off dated, i.e., December 31, 1992, as fixed in paragraph 5(b) of the advertisement regarding exemption given to candidates who have been awarded M.Phil degrees from the eligibility test. B C D

The grievance of both the writ petitioners was that for the purpose of giving exemption from eligibility test for candidates who had obtained M.Phil degrees the cut off date, i.e., December 31, 1992, has been fixed arbitrarily and that there is no rational basis in confining the exemption to candidates who had been awarded M.Phil degrees upto December 31, 1992 in an advertisement issued in January 1995 because as between December 31, 1992 to December 1994 many candidates might have obtained M.Phil degrees. E

The exemption for clearing the eligibility test under clauses (a) to (d) of paragraph 5 of the advertisement was based on the Circulars of the UGC dated February 10, 1993 and June 15, 1993 referred to earlier. It appears that the UGC did not appear in response to the notice issued by the High Court on the writ petition filed by respondents Nos. 1 and 2 and the State of Haryana and the Haryana Public Service Commission, who contested the said writ petition, could not offer any explanation for the said provision in the advertisement. In the absence of any explanation having been offered for fixing December 31, 1992 as the cut off date for grant of exemption to candidates having M.Phil degree, the High Court, by its judgment dated March 21, 1995, allowed the writ petition of respondents Nos. 1 and 2 on the view that cut off dates prescribed in paragraph 5(b) and (c) of the advertisement in respect of candidates who had acquired F G H

A M.Phil degree or submitted the Ph.D thesis are totally unjust and based on no rationale inasmuch as it amounts to creation of an artificial class amongst the eligible candidates though similarly situated, i.e., having obtained M.Phil degree after December 31, 1992, or having submitted Ph.D thesis after December 31, 1993 respectively and that cut off dates, i.e., B December 31, 1992 for M.Phil degree and December 31, 1993 in case of submission of Ph.D thesis, are far earlier to the date of the advertisement dated January 23, 1995. According to the High Court, it would not be necessary to appear in the eligibility test for the candidates who have applied or/are applying for the Lecturers' post pursuant to the advertisement dated January 23, 1995 if they have obtained M.Phil degrees or C submitted Ph.D thesis before December 31, 1994, i.e., prior to the date of the publication of advertisement dated January 23, 1995. On that view the High Court directed the Haryana Public Service Commission and State of Haryana to issue a corrigendum extending the dates in paragraph 5(b) and (c) of the advertisement dated January 23, 1995 upto December 31, 1994 D and further directed that in future also they should ensure that as and when any such advertisement is issued, they will bear in mind that the eligibility dates be not far off from the date of advertisement.

Civil Appeal No. of 1996 (@ S.L.P. (C) No. 27375/1995)

E

On November 22, 1993, the Bihar State University Service Commission issued an advertisement inviting application is for appointment on the post of Lecturers in various universities in Bihar. The said advertisement did not prescribe that the candidates should have cleared the national F eligibility test conducted by the UGC. Some of the candidates who had qualified in the national eligibility test filed a writ petition (C.W.J.C. No. 321 of 1994) in the Patna High Court wherein it was alleged that the qualifications that were prescribed in the advertisement were not in consonance with the qualifications prescribed by the UGC whereunder it is necessary that the candidates should have passed the eligibility test. The G said writ petition was allowed by the High Court by judgment dated March 9, 1994 whereby it was held that the applications of only those candidates who had passed national eligibility examination in terms of the regulations framed by the UGC could be considered by the Bihar State University Service Commission. A Review Petition was filed against the said judgment H by the Bihar State University Service Commission and by order dated April

27, 1994 the High Court clarified that the Bihar State University Service Commission should consider the candidature of such persons who were eligible to be considered in terms of regulations framed by the UGC. Thereafter the Governor of Bihar promulgated Bihar State University (Second Amendment) Ordinance, 1994 and Patna university (Third Amendment) Ordinance, 1994 on December 8, 1994 where by provisions was made regarding relaxation of the minimum qualification for appointment on the post of Lecturer in university/constituent colleges and a candidate who has got a degree of Ph.D in the concerned subject and/or has submitted his thesis for Ph.D by December 31, 1993 and/or has got a degree of M.Phil before December 31, 1992 has been made eligible for appointment as Lecturer without having passed the Bihar Eligibility Test or the Eligibility Test of Lecturer/Junior Research Fellow (JRF) conducted by the UGC/CSIR. Thereafter the Bihar State University Service Commission issued a Corrigendum dated December 25, 1994 in the advertisement dated November 22, 1993 whereby it was indicated that all candidates who have already done M.Phil upto December 31, 1992 or who have done or submitted the Ph.D thesis upto December 31, 1993 or have qualified the National Eligibility Test (NET)/JRF Test of UGC/CSIR would be exempted from appearing at the Bihar Eligibility Test to be conducted by Bihar State University Service Commission.

Thereupon the writ petition (C.W.J.C. No. 744 of 1995) which has given rise to this appeal was filed in the Patna High Court by the appellants herein. In the said writ petition the validity of the provisions contained in the aforementioned Ordinances dated December 8, 1994 promulgated by the Governor of Bihar regarding relaxation of the minimum qualification for appointment on the post of lecturer as well as the Corrigendum dated December 25, 1994 issued by the Bihar State University Service Commission and the Circulars dated February 10, 1993 and June 15, 1993 issued by the UGC were challenged. The appellants sought a direction that the post of Lecturers be filled by only those persons who have cleared the National Eligibility Test or its equivalent examination. During the Pendency of the said writ petition in the High Court, the Bihar State University Service Commission conducted the Bihar Eligibility Test on June 18, 1995. On June 21, 1995, the UGC issued a notification amending the 1991 Regulations to which reference has already been made earlier. By the impugned judgment dated June 27, 1995 the High Court has held that

A UGC was within its jurisdiction in issuing guidelines for the appointment of Lecturers in the Universities and colleges in the State of Bihar and the Chancellor was also within his jurisdiction in promulgating the Ordinances in consonance thereto. Feeling aggrieved by the said judgment of the High Court the appellants have filed this appeal.

B During the course of arguments it was pointed out that both the Ordinances referred to above which were promulgated by the Governor of Bihar on December 8, 1994 have since been replaced by enactments of the State Legislature, viz., Bihar Acts Nos. 12 and 13 of 1995. It has also been pointed out that the Bihar Eligibility Test for Lecturership that was con-
C ducted by the Bihar State University Service Commission on June 18, 1995 has been granted accreditation by the UGC on February 12, 1996 and future tests to be held in the period 1995-97 have also been accredited by the UGC with certain recommendations.

D Both these appeals raise questions regarding validity of the circulars of the UGC dated February 10, 1993 and June 15, 1993 as well as the notification dated June 21, 1995 amending the 1991 Regulations. In Civil Appeal arising out of Special Leave Petition (C) No. 16220 of 1995 the question is whether the cut off dates fixed under the said Circulars and notification in respect of candidates who have obtained M.Phil degree or
E have submitted their Ph.D thesis were valid. In Civil Appeal arising out of Special Leave Petition (C) No. 27375 of 1995 the question is whether the exemption from clearing the eligibility test or equivalent examination under the said Circulars and notification is valid. This appeal also involves the question regarding validity of the two Ordinances that were promul-
F gated by the Governor of Bihar on December 8, 1994 and the legislative enactment replacing the Ordinances.

Shri Milon K. Banerjee, the learned senior counsel appearing for the UGC, has submitted that the Circulars dated February 10, 1993 and June 15, 1993 were in the nature of transitional provisions which became neces-
G sary as a result of imposing the requirement regarding clearing the eligibility test by a candidate for appointment on the post of Lecturer under the 1991 Regulations. The learned counsel has pointed out that under the 1982 Regulations, which were superseded by the 1991 Regulations, a person possessing Ph.D degree was eligible for appointment on the post of
H Lecturer in the University and a person possessing M.Phil degree was

eligible for appointment on the post of Lecturer in the college. This position was altered by the 1991 Regulations and candidates having good academic record with it least 55% marks or an equivalent grade at Master's degree level in the relevant subject became eligible for appointment on the post of Lecturers in universities or colleges provided they had cleared the eligibility test for Lecturers conducted by the UGC, CSIR or similar test accredited by the UGC. A Ph.D or M.Phil degree is no longer an essential qualification for such appointments. There were a number of persons who had obtained Ph.D and M.Phil degrees or had joined the Ph.D or M.Phil degree courses prior to the issuance of the 1991 Regulations in the light of the minimum qualifications that were prescribed in the 1982 Regulations. The Circulars dated February 10, 1993 and June 21, 1993 were issued to mitigate the resultant hardship to such persons on account of the introduction of the requirement of clearing the eligibility test in the 1991 Regulations. By Circular dated February 10, 1993 exemption from this requirement was granted to candidates who had already been awarded the Ph.D degree as well as to candidates who would submit their Ph.D thesis upto December 31, 1993. As regards candidates having obtained M.Phil degree, by Circular dated February 10, 1993, the exemption was initially confined to those who had already been awarded M.Phil degree upto March 31, 1991. Subsequently it was felt that there were candidates who had joined the M.Phil course prior to issuance of the 1991 Regulations but had not obtained the M.Phil degree till then and, therefore, by Circular dated June 15, 1993, the date of obtaining the M.Phil degree was extended from march 31, 1991 to December 31, 1992 under the expectation that by that date those persons would be able to complete the M.Phil course and obtain M.Phil degree. Shri Banerjee has contended that both these Circulars dated February 10, 1993 and June 21, 1993 have now ceased to have any significance in view of the notification dated June 21, 1995 wereby the 1991 Regulations have been amended and it has been prescribed that candidates who have submitted Ph.D. thesis or passed the M.Phil examination by December 31, 1993 are exempted from eligibility test for Lecturers conducted by UGC/CSIR or similar test accredited by the UGC. The submission is that after the aforesaid amendment in the 1991 Regulations the only question that is left for consideration is whether the cut off date (December 31, 1993) prescribed in the 1991 Regulations, as amended, can be held to be arbitrary. Shri Banerjee has urged that having regard to the time that is normally taken by a candidate who had registered for the Ph.D

A B C D E F G H

A degree or had joined M.Phil course prior to the making of the 1991 Regulations, the fixation of December 31, 1993 as the cut off date cannot be held to be arbitrary or unreasonable. Shri Banerjee, in this context, has placed reliance on the decision of this Court in *Union of India & Anr.* v. *M/s. Parameshwaran Match Works Ltd.*, [1975] 2 SCR 573; and *Dr. (Mrs.)* B *Sushma Sharma Etc. Etc.* v. *State of Rajasthan & Ors.*, [1985] 3 SCR 243.

We find considerable force in the aforesaid submissions of Shri Banerjee. It is settled law that the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forth coming for the choice unless it is shown to be capricious or whimsical C in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless it can be said that it is very wide of the reasonable mark. (See : *Union of India & Anr.* v. *M/s. Parameshwaran Match Works Ltd.*, [1975] 2 SCR 573, at p. 579; D and *Dr. (Mrs.) Sushma Sharma Etc. Etc.* v. *State of Rajasthan & Ors.*, [1985] 3 SCR 243, at p. 269. In the present case, the date, December 31, 1993, as fixed by notification dated June 21, 1995, in the matter of grant of exemption from the eligibility test for appointment on the post of lecturer has a reasonable basis keeping in view the time taken in submitting the Ph.D E thesis or obtaining M.Phil degree by candidates who had undertaken the study for Ph.D or M.Phil degree prior to the issuance of the 1991 Regulations and the date, December 31, 1993 cannot be held to be capricious or whimsical or wide of the reasonable mark. The High Court of Punjab and Haryana has proceeded on the basis that the cut off date for the purpose of granting exemption from eligibility test should have nexus with the date F of the advertisement inviting applications for appointment on the post of Lecturers. The High Court was in error in taking this view. The exemption from eligibility test that has been granted under paragraph 5 of the advertisement dated January 23, 1995 is relatable to the introduction of the requirement of eligibility test in the 1991 Regulations. The object underly- G ing the grant of exemption is to mitigate the resultant hardship to candidates who had registered for Ph.D degree or had joined the course for M.Phil degree on the basis of the minimum qualifications prescribed under the 1982 Regulations. The validity of the fixation of cut off date for the purpose of grant of exemption from the eligibility test has to be considered H with reference to the date of issuance of the 1991 regulations and not with

reference to the date of advertisement inviting applications for appointment on the post of Lecturers. We are, therefore, unable to uphold the direction of the High Court that it would not be necessary to appear in the eligibility test for candidates who have applied or/are applying for the Lecturers posts pursuant to the advertisement dated January 23, 1995 if they have obtained M.Phil degrees or submitted Ph.D thesis before December 31, 1994, i.e., prior to the date of the publication or advertisement dated January 23, 1995 and the further direction to the Haryana Public Service Commission and State of Haryana to ensure that as and when any such advertisement is issued, they would bear in mind that the eligibility dates be not far off from the date of advertisement. The exemption from the requirement regarding clearing the eligibility test has to be confined within the limits indicated in the amendment introduced in the 1991 Regulations by notification dated June 21, 1995. Respondents Nos. 1 and 2 who had moved the High Court by filing the writ petition obtained their M.Phil degrees prior to December 31, 1993. They would be entitled to exemption from clearing the eligibility test under the terms of the notification dated June 15, 1995. The decision of the High Court, in so far as it relates to the said respondents, is not required to be disturbed and is, therefore, maintained.

We may now come to the validity of the exemption from the requirement regarding clearing the eligibility test that has been granted under the Circulars dated February 10, 1993 and June 15, 1995 and the notification dated June 21, 1995. Shri S.B. Sanyal, the learned senior counsel appearing for the appellants in Civil Appeal arising out of S.L.P. (C) No. 27375 of 1995, has submitted that having regard to the report of the National Commission on Teachers II and the report of the Mehrotra Committee, which form the basis for introducing this requirement by the UGC in the 1991 Regulations, there is no rational basis for granting exemption from the eligibility test to candidate who had submitted Ph.D thesis or passed the M.Phil examination by December 31, 1993. We find no merit in this contention. Prior to the making of the 1991 Regulations there was no statutory requirement regarding clearing the eligibility test for the purpose of appointment on the post of Lecturer. Such a requirement was introduced for the first time by the 1991 Regulations. At the time when the 1991 Regulations were made the provisions contained in the 1982 Regulations had given rise to a legitimate expectation that a person having a Ph.D or

A M.Phil degree and having good academic record as prescribed under the 1982 Regulations would be eligible for appointment on the post of Lecturer without anything more. While introducing the requirement of clearing the eligibility test in the 1991 Regulations, the UGC did not intend to deprive the persons who had obtained M.Phil degree or Ph.D degree prior to the B making of the 1991 Regulations of their legitimate expectation in the matter of appointment on the post of Lecturer in universities or colleges. It was also felt that the said requirement in the 1991 Regulations should not operate to the prejudice of persons who, having regard to the qualifications prescribed in the 1982 Regulations, had registered for the Ph.D degree or had joined study for M.Phil degree course prior to making of the 1991 C Regulations and, therefore, provision was made for granting exemption to such candidates with the condition that they should have passed M.Phil examination or should have submitted Ph.D thesis by a particular date. In so far as the date of submission of Ph.D thesis is concerned, the said date, i.e., December 31, 1993, has remained unchanged in the Circulars dated D February 10, 1993 and June 15, 1993 and the notification dated June 21, 1995. For M.Phil degree the date was, however, changed from March 31, 1991 to December 31, 1992 by Circular dated June 15, 1993 and from December 31, 1992 to December 31, 1993 by notification dated June 21, 1995. The amendment in the 1991 Regulations that has been made by the E notification dated June 21, 1995, in substances, postpones the date of applicability of the requirement regarding clearing the eligibility test in the 1991 Regulations till December 31, 1993 in respect of candidates who had joined the M.Phil course or registered for Ph.D degree. Such candidates constitute a distinct class who could be treated separately in so far as the requirement of clearing the eligibility test was concerned. Such a classifica- F tion of the candidates for the purpose of applicability of the requirement of clearing the eligibility test has a rational basis which has a reasonable nexus with the object sought to be achieved by the 1991 Regulations. We are, therefore, unable to hold that the exemption that has been granted by the amendment introduced in the 1991 regulations by notification dated G June 21, 1995 is violative of the right to equality guaranteed under Article 14 of the Constitution.

Shri Sanyal has also raised the question regarding the validity of the two Ordinances promulgated by the Governor of Bihar on December 8, 1994 and the legislative enactments which have now replaced the Ordinan-

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ces and has urged that since the 1991 Regulations that have been made by the UGC in exercise of the power conferred under Section 26 of the Act which has been enacted by Parliament under Entry 66 of List I (Union List) of the Seventh Schedule to the Constitution, the Bihar State Legislature was not competent to legislate in this field and the legislation enacted by the Bihar State Legislature is *ultra vires* the legislative powers conferred on the Bihar State Legislature under the Constitution and that the Patna High Court was in error in upholding the validity of the Ordinances. We do not consider it necessary to go into this question. The grievance of the appellants in their writ petition before the High Court was against the corrigendum dated December 25, 1994 issued by Bihar State University Service Commission whereby it was prescribed as under :

> "The candidates who have already done M.Phil upto 31st december, 1992 or who have done or submitted Ph.D thesis upto 31st December, 1993 or have qualified in the NET/JRF Tests of UGC/CSIR are exempted from appearing at the BET to be conducted by Bihar State University Service Commission."

This grant of exemption was in accord with the Circulars dated February 10, 1993 and June 15, 1993 that had been issued by the UGC. As noticed earlier Bihar Eligibility Test that was conducted by Bihar State University Service Commission on June 18, 1995 has been accredited by the UGC on February 12, 1996 and further tests to be held in the period 1995-1997 have also been accredited with certain recommendations. The grant of exemption from the eligibility test in the Corrigendum, therefore, does not run contrary to the requirement prescribed by the UGC in the 1991 Regulations read with Circulars dated February 10, 1993 and June 15, 1993 which were applicable at that time. The question regarding validity of the two Ordinances and the legislative enactments replacing them is, therefore, left open.

In the result, Civil Appeal arising out of S.L.P.(C) No. 27375 of 1995 is dismissed. Civil Appeal arising out of S.L.P. (C) No. 16220 of 1995 is partly allowed to the extent that the direction given by the High Court of Punjab and Haryana that it would not be necessary to appear in the eligibility test for candidates who have applied or/are applying for the lecturers' posts pursuant to the advertisement dated January 23, 1995, if

A they have obtained M.Phil degrees or submitted Ph.D thesis before December 31, 1994, i.e., prior to the date of the publication of advertisement, and further directing the Haryana Public Service Commission and State of Haryana to ensure that as and when any such advertisement is issued, they would bear in mind that the eligibility dates be not far off from the date
B of advertisement, are set aside and it is declared that the exemption from eligibility test for the purpose of appointment on the post Lecturer will have to be confined to candidates fulfilling the requirements in the 1991 Regulations as amended by notification dated June 21, 1995. The direction given by the High Court of Punjab and Haryana in so far as respondents
C Nos. 1 and 2 are concerned is not disturbed.

No orders as to costs.

S.S. C.A. No. 12308/96 dismissed.
C.A. No. 12284/96 partly allowed.

IN RE : HARIJAI SINGH AND ANR.
IN RE : VIJAY KUMAR

SEPTEMBER 17, 1996

[KULDEEP SINGH AND FAIZAN UDDIN, JJ.]

Constitution of India : Article 19(1)(a).

Freedom of press part of freedom of speech and expression—Mother of all liberties in a democratic society—Freedom of press is not absolutely unlimited and unfettered—Element of responsibility must be present in the conscience of the Journalists—Rights of press to be recognised with its duties and responsibilities towards the society—Newspaper publishing improper and false news must be punished by court of law.

Common cause a regd. society filed a writ petition against alleged misuse and arbitrary exercise of discretionary power by the Petroleum and Natural Gas Ministry in relation to allotment of retail outlets for petroleum products and LPG Dealership from discretionary quota.

During the pendency of writ petition a Box news under caption "pumps for all" was published in the Sunday Tribune on March 10, 1996 stating that Petroleum Minister has made 17 allotments of petrol pumps and gas agencies to relatives of the then Prime Minister Narasimha Rao out of his discretionary quota though the allotment under this can only be made to the weaker section of the society and war-widows. It also stated that two children of Lok Sabha Speaker Shiv Raj Patil and two sons of a Senior Judge of Supreme Court have also been favoured.

Similar News item was also published in Hindi Newspaper Punjab Kesari dated March 10, 1996 which stated that 17 relatives of the Prime Minister Narasimha Rao have been allotted petrol pumps or gas agencies out of the discretionary quota. Then it went on to add that the list includes names of two sons of Mr. Ahmadi, Chief Justice of India.

Notice was issued by the Supreme Court to the Secretary, Ministry of Petroleum and Natural Gas. In his affidavit dated March 20, 1996 he stated that since the allegations regarding allotment under the discretionary quota in favour of two sons of senior Judge of Supreme Court are vague and in the absence of specific names it is difficult to deal with the same. On

A the request of Additional Solicitor General time was granted to file further affidavit of a responsible officer and it was further directed that relevant files be produced in Court.

Joint Secretary in the Ministry of Petroleum and Natural Gas, Govt. of India in his affidavit dated March 28, 1996 categorically stated that there B was no allotment in favour of son/sons of any Supreme Court Judge.

Since the allegations were completely false, contempt proceedings were initiated against the Editors and Publishers of the Sunday Tribune, Chandigarh and the Punjab Kesari, Jalandhar and show cause notices were issued to them. C

Editor of "The Sunday Tribune" Hari Jai Singh filed affidavit admitting that the news item published in Sunday Tribune dated March 10, 1996 with regard to the allotment of petrol outlets to the sons of Senior Judge of the Supreme Court was not correct and therefore tendered unqualified D apology and prayed for mercy and pardon.

He further stated that it was an inadvertent publication as the news item was supplied by an experienced journalist Dina Nath Misra who is a journalist of 30 years standing. He submitted that he has the highest respect for the Judiciary in general and to this Court in particular and E tendered his unqualified apology with a feeling of remorse. It was further submitted that an apology was already published in the Tribune dated May 10, 1996. Similarly affidavit was also filed by Publisher of the Tribune Lt. Col. S.L. Dheer, tendering his apology and prayed for mercy and pardon due to *Bonafide* Mistake.

F Vijay Kumar Chopra, Editor and Publisher of Punjab Kesari, Jalandhar also filed his affidavit and stated that news item was published on the basis of report sent by a senior Journalist which due to inadvertence escaped the attention of the Editor. And an apology was carried out prominently in the Newspaper on April 7, 1996. He also tendered his un- G conditional and unqualified apology.

Thereafter a contempt notice was issued to Dina Nath Misra and he filed an affidavit on August 1, 1996 and admitted that a capsule item about the allotment of Petrol Pumps to the sons of senior Judge of the Supreme Court was not factually correct and he tendered his unqualified apology for H the lapse that he had committed.

He filed additional affidavit on Aug. 29, 1996 and admitted that he has committed a grievous error in writing news items which have no basis and again offered his unconditional apology. Disposing of the contempt petitions, this Court

HELD : 1. Freedom of press is an essential pre-requisite of a democratic form of Govt. The freedom of press is a part of the freedom of the speech and expression as envisaged in Article 19 (1)(a) of the Constitution of India. The freedom of press is regarded as the mother of all liberties in a democratic society. [419-G, 420-A]

Indian Express Newspaper v. *Union of India*, [1985] 1 SCR 641 and *Indian Express Newspaper* v. *Union of India*, AIR (1986) SC 872, relied upon.

2. In a democratic set up there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. The primary function of the press is to provide comprehensive and objective information of all aspects of country's political, social, economic and cultural life. It has an educative and mobilising role to play. It plays an important role in moulding public opinion and can be an instrument of social change. [420-D, 420-F]

3. But it has to be remembered that freedom of press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of speech and expression would amount to an uncontrolled licence. If it were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be responsible. In fact the element of responsibility must be present in the conscience of the journalists. In an organised society, the rights of the press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and absues its liberty it must be punished by Court of law.

[420-H, 421-A-B]

4. Editors of a Newspaper or a Journal have a greater responsibility to guard against untruthful news and publications. Certain restrictions

A are essential for preservation of the freedom of the press itself. [421-B-D]

5. It is the duty of true and responsible Journalist to inform people with accurate and impartial news after dispassionate evaluation of facts and information received by them. [421-D-E]

B 6. In the instant case neither the printer, nor the editor and reporter took necessary care in publishing the news item of an allegation of a serious nature having great repercussion causing embarrassment to this Court. Such an irresponsible conduct of Editor, Publisher and Reporter is distinctly opposed to the high professional standards. Even the ordinary C care was not resorted to by the contemners in publishing such a false news item. This cannot be regarded as a public service but a disservice to the public by misguiding them with a false news. [421-G-H, 422-A]

7. This Court is not hypersensitive in matters relating to contempt of courts and has always shown magnanimity in accepting apology. Fair D criticism within the parameters of law is always welcome in democratic system. But the news item in the present case is neither fair nor made in good faith but wholly false and explanation given is far from satisfactory. However the written unconditional apology tendered by Hari Jai Singh, Editor of Sunday Tribune, Ft. Col. H.L. Dheer, Publisher and Editor of E the Sunday Tribune and Vijay Kumar Chopra, Editor and Publisher of Punjab Kesari is accepted with the warning that they should be careful in future. [422-B-D, 422-G]

8. As for Dina Nath Mishra, he being a very experienced Journalist, F should have taken extra care to verify the correctness and if he had done so there would not have been any difficulty in coming to know that information supplied to him had absolutely no legs to stand and was patently false and the publication would have been avoided which not only caused embarrassment to this Court but conveyed a wrong message to the public at large jeopardizing the faith of the illiterate masses in our G judiciary. He committed a serious mistake but, his sincere repentence and unconditional apology are accepted. [422-G, H, 423-A]

9. The contemners will publish in the front page of their respective newspaper in a box, their respective apologies, specifically mentioning that H the said news item were absolutely incorrect and false. [423-C]

CIVIL ORIGINAL JURISDICTION : Contempt Petition Nos. 206-207 of 1996. A

IN

Writ Petition (C) No. 26 of 1995.

B

(Under Article 32 of the Constitution of India.)

In-Person for Petitioner.

K.T.S. Tulsi, Additional Solicitor General, Ram Jethmalani and Ashwini Kumar, Prashant Bhushan, P.H. Parekh, Arvind Sharma, Sameer Parekh, Ms. Bina Madhavan and K.S. Chauhan for the appearing parties. C

The Judgment of the Court was delivered by

FAIZAN UDDIN, J. When this Court was seized of, Writ Petition filed by the "Common Cause, A Registered Society" with regard to the alleged misuse and arbitrary exercise of discretionary power by the Petroleum and Natural Gas Ministry in relation to the allotment of retail outlets for Petroleum products and L.P.G. Dealership, from discretionary quota, a *news item in box with a caption "Pumps for all" was published in the daily newspaper "The Sunday Tribune" dated March 10, 1996 which is reproduced hereunder :* D E

> *"Pumps for all!*
>
> Believe it or not, Petroleum Minister Satish Sharma has made 17 allotments of petrol pumps and gas agencies to relatives of Prime Minister Narasimha Rao out of his discretionary quota. Allotments in this category can only be made to members of the weaker sections of society and war widows, yet five of the Prime Minister's grandchildren have been favoured as have been five of his nephews from the family of V. Rajeshwar Rao, MP. Besides, three wards of his brother Manohar Rao, two relatives of P. Venkata Rao and the son of AVR Krishnamurthy whose family lives with the Prime Minister have been allocated petrol pumps and gas agencies. Similarly, Rao's daughter, Vani Devi, who is the official hostess has a petrol pump allotted in the name of her daughter Jyotiriyai. She was also favoured by the Airport Authority of India which F G H

A released a prime piece of land located in Begumpet area to her for just Rs. 3 lakh. The market value is stated to be over Rs. 1 crore. It has been registered in the name of Shri Jai Balaji Agency, However, the Prime Minister's kin are not the only ones who have benefited from these allotments. Two children of Lok Sabha Speaker Shivraj Patil have also been favoured as have the two sons of a senior judge of the Supreme Court. Interestingly; the Supreme Court had recently asked the government to supply a list of all discretionary allotments made by the ministry. However, the Minister has so far managed to withhold this crucial document. But it has hardly helped as the list has been leaked by Sharma's own men."

A similar news item was also published in the Hindi newspaper "Punjab Kesari" dated March 10, 1996; the English translation of which is as follows :

"17 Poor Members of the family of the Prime Minister

Out of the short out ways of becoming rich, one way is to obtain Petrol Pump or Gas Agency. But the power to allot the same lies with the Petroleum Minister. He has the discretionary powers to allot petrol pump or gas agencies in charity. This power of doing such charities has been entrusted in some special cases which include the people belonging to the poor, backward classes and the wives of those who were killed in the war. But all those persons to whom these agencies have been allotted by the Petroleum Minister Capt. Satish Sharma turned out to be a scam in itself. The matter was referred to the Supreme Court in which the Government was directed to submit a list. The Petroleum Minister suppressed the list. The list was demanded in the Parliament. But the list was not presented. Now the list has been leaked out from the Petroleum Ministry. Believe it, there are 17 relatives of the Prime Minister Narsimaha Rao in that list. Five persons are his grandsons and grand-daughters. Five others are the members of the family of V. Rajeshwar Rao. He is a Member of Parliament and the relative of the Prime Minister, Manohar Rao is the brother of Narasimha Rao. These agencies were also allotted to his three children. There is one more relative - P. Venkatrao. Two allottees

have been found in his family. One is A.V.R. Krishna Murty who resides in the residence of the Prime Minister. He has also been allotted the Agency at the Bolaram Road at Sikandrabad. But the most interested story is of Jyotiramal. Narasimha Rao is his real grand maternal father.

The authorised hostess of the Prime Minister's residence is Vani Devi who is the daughter of the Prime Minister and mother of Jyotirmal. Their agency is situated at Begumpet under the name and style "Shri Sai Balalji Agency". The land of 2000 Sq. M. of the Indian Aviation Authority was given to Sri Sai Balaji Agency merely for rupees three lakhs. Presently, the cost of this land is more than one crore. The Petroleum Minister also allotted the agencies to the two children of Shivraj Patil, Speaker of the Lok Sabha. You should not be astonished if you find the names of two sons of Mr. Ahmadi, Chief Justice of India in the list of the discretionary quota. Otherwise the names of such poor and backward person are also available in this list.

Since, the aforesaid news items contained an allegation that two sons of a senior Judge of the Supreme Court and two sons of the Chief Justice of India were also favoured with the allotment of petrol outlets from the discretionary quota of Ministry and therefore, by our Order dated March 13, 1996, we issued a notice to the Secretary, Ministry of Petroleum and Natural Gas to file an affidavit offering his comments and response to the facts stated in the aforesaid two news items. Pursuant to the said notice, Shri Vijay L. Kelkar, Secretary in the Ministry of Petroleum and Natural Gas, Government of India, filed his affidavit dated March 20, 1996 stating that since the allegation regarding allotment under the discretionary quota in favour of two sons of a senior judge of the Supreme Court are vague and in the absence of specific names, it is difficult to deal with the same. Thereafter when the matter again came up before this Court on March 21, 1996, Shri Altaf Ahmad, learned Additional Solicitor General stated that he would look into the records and file further affidavit of a responsible officer giving response to the other allegations regarding relationship of VIPs. We, therefore, granted time for the purpose and at the same time directed the relevant files to be produced in Court. It was thereafter that Shri Devi Dayal, Joint secretary in the Ministry of Petroleum and Natural Gas, Government of India filed his affidavit dated March 26, 1996. In

A paragraph 5 of his affidavit, he made a categorical statement that there is no allotment in favour of son/sons of any Supreme Court Judge. After verification at records and affidavits referred to above, we found that the news items referred to above were patently false and, therefore, by our Order dated March 27, 1996, we initiated contempt proceedings against the Editors and Publishers of the daily "The Sunday Tribune" Chandigarh B and "The Punjab Kesari", Jalandhar and issued notices to them to show cause why they may not be punished for the contempt of this Court.

In response to the contempt notice, Shri Hari Jaisingh, the Editor of "The Sunday Tribune" filed an affidavit dated June 24, 1996 admitting that C the news item published in "The Sunday tribune" dated March 10, 1996 with regard to the allotment of petrol outlets to the sons of a senior Judge of the Supreme Court was not correct and, therefore, tendered unqualified apology and has prayed for mercy and pardon. He has stated that it was an inadvertent publication made *bona fide* on the faith that the item supplied by an experienced journalist, Shri Dina Nath Misra, who is D generally reliable would not be factually incorrect. It has been stated that Dina Nath Misra is a journalist of standing for over 30 years and there have been no complaints about the correctness of the material contributed by him and believing the said item of news to be correct it was published without any further scrutiny in a good faith. He has submitted that he has E the highest respect for the judiciary in general and to this Court in particular and rendered his unqualified apology with a feeling of remorse. He has submitted that since it was noticed that the news item was not correct, an apology was already published by him in the Tribune dated May 10, 1996 and necessary instructions to all members of the editorial staff were issued to be careful and assuring the factual accuracy of all legal F reports.

Lt. Col. S.L. Dheer (Retd.), the Publisher of "The Tribune", in response to the contempt notice has also filed his affidavit dated June 27, 1996 more or less in the same terms as the one filed by Shri Hari Jaisingh G and has tendered his apology and prayed for mercy and pardon due to the *bonafide* mistake.

In response to the contempt notice, Shri Vijay Kumar Chopra, Editor and Publisher of daily "Punjab Kesari" Jalandhar has also filed affidavit H dated June 29, 1996 stating that the news item in the daily "Punjab Kesari"

referred to above was published on the basis of the news report sent by a senior journalist which due to inadvertence escaped the attention of the Editor. He has stated that immediately after the incorrectness of the news item was noticed a contradiction and apology was carried out prominently in the issue of the Paper dated April 7, 1996. He has stated that the said news item was not actuated by any malice towards the judiciary and that the mistake was *bonafide*. He has also tendered his unconditional and unqualified apology.

On being apprised that the news items referred to above found to be false which were published on the basis of the information and material supplied by the journalist/reporter Dina Nath Misra to "The Sunday Tribune" and "Punjab Kesari", we issued a similar contempt notice to Dina Nath Misra by our Order dated July 9, 1996. The journalist Dina Nath Misra in his affidavit dated August 1, 1996 admitted to have written a capsule item about the allotment of petrol pumps to the sons of a senior Judge of the Supreme Court which was not factually correct and he has, therefore, tendered his unqualified apology for the lapse that he had committed. He has stated that he has been a journalist for about 4 decades and is known for his integrity and commitment towards the professionalism. He has further stated that a highly reliable source who had earlier given many reliable informations to the deponent gave this information also which was believed by him to be true, but it turned out to be incorrect. He has stated various other facts to show that the mistake was *bonafide*, but we find the said excuses and explanations to be not acceptable at all. He has, however, expressed his deep repentance and tendered unqualified apology and seeks forgiveness for this honest and inadvertent blunder. In yet another additional affidavit dated August 29, 1996, he has reiterated the said facts and admitted that he has committed a grievous error in writing news items which have absolutely no basis, and has again offered unconditional apology to Hon'sble the Chief Justice as well as to this Court.

It may be relevant here to recall that the freedom of Press has always been regarded as an essential pre-requisite of a Democratic form of Government. It has been regarded as a necessity for the mental health and the well being of the society. It is also considered necessary for the full development of the personality of the individual. It is said that without the freedom of press truth cannot be attained. The freedom of press is a part of the freedom of the speech and expression as envisaged in Article

A 19(1)(a) of the Constitution of India. Thus, the freedom of the press is included in the fundamental right of freedom of expression. The freedom of Press is regarded as "the mother of all other liberties" in a democratic society. Further, the importance and the necessity of having a free press in a democratic Constitution like ours was immensely stressed in several
B landmark judgments of this Court. The case of *Indian Express Newspaper* v. *Union of India*, [1985] 1 SCR 641, is one of such judgments rendered by Venkataramiah, J. (as he then was). Again in another case of *Indian Express Newspaper* v. *Union of India*, AIR (1986) SC 872. A.P. Sen, J. (as he then was) described the right to freedom of the press as a pillar of individual liberty which has been unfailingly guarded by the Courts.

C

It is thus needless to emphasise that a free and healthy press is indispensable to the functioning of a true democracy. In a democratic set-up, there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social, economic and
D cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries. To achieve this objective the people need a clear and truthful account of events, so that they may form
E their own opinion and offer their own comments and view points on such matters and issues and select their further course of action. The primary function, therefore, of the press is to provide comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It has an educative and mobilising role to play. It plays an important role in moulding public opinion and can be an instrument of
F social change. It may be pointed out here that Mahatama Gandhi in his autobiography has stated that one of the objectives of the newspaper is to understand the proper feelings of the people and give expression to it; another is to arouse among the people certain desirable sentiments; and the third is to fearlessly express popular defects. It, therefore, turns out that the press should have the right to present anything which it thinks fit
G for publication.

But it has to be remembered that freedom of press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of the speech and expression would amount to an
H *uncontrolled licence. If it were wholly free even from reasonable restraints it*

would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be reasonable. In fact, the element of responsibility must be present in the conscience of the journalists. In an organised society, the rights of the press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by Court of Law. The Editor of a Newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact than the utterances or an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for preservation of the freedom of the press itself. *To quote from the report of Mons Lopez to the Economic and Social Council of the United Nations "if it is true that human progress is impossible without freedom, then it is no less true that ordinary human progress is impossible without a measure of regulation and discipline".* It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as a news item. The presentation of the news should be truthful, objective and comprehensive without any false and distorted expression.

In the present case, as we have noticed above, neither printer, published nor the editor and reporter took the necessary care in evaluating the correctness and credibility of the information published by them as the news items in the newspapers referred to above in respect of an allegation of a very serious nature having great repercussion causing an embarrassment to this Courts. An Editor is a person who controls the selection of the matter which is to be published in a particular issue of the newspaper. The Editor and Publisher are liable for illegal and false matter which is published in their newspaper. Such an irresponsible conduct and attitude on the part of the editor, publisher and the reporter cannot be said to be done in good faith, but distinctly opposed to the high professional standards as even a slightest enquiry or a simple verification of the alleged statement about grant of Petrol outlets to the two sons of a senior Judge of the Supreme Court, out of discretionary quota, which is found to be

A patently false would have revealed the truth. But it appears that even the ordinary care was not resorted to by the contemners in publishing such a false news items. This cannot be regarded as a public service, but a dis-service to the public by misguiding them with a false news. Obviously, this cannot be regarded as something done in good faith.

B

But it may be pointed out that various judgments and pronouncements of this Court, bear testimony to the fact that this Court is not hypersensitive in matters relating to contempt of Courts and has always shown magnanimity in accepting the apology on being satisfied that the error made in the publication was without any malice or without any C intention of dis-respect towards the Courts or towards any member of the judiciary. This Court has always entertained fair criticism of the judgments and orders or about the person of a Judge. Fair criticism within the parameters of law is always welcome in a democratic system. But the news items with which we are concerned can neither be said to be fair or made D in good faith but wholly false and the explanation given is far from satisfactory. Shri Hari Jaisingh, Editor of the Sunday Tribune and Lt. Col. H.L. Dheer, Publisher as well as Vijay Kumar Chopra. Editor and Publisher of daily Punjab Kesari have taken the stand that they had taken the news items to be correct on the basis of the information supplied by a very senior senior journalist of long standing Dina Nath Misra. But this cannot be E accepted as a valid excuse. It may be stated that at common Law, absence of intention or knowledge about the correctness of the contents of the matter published (for example as in the present case, on the basis of information received from the journalist / reporter) will be of no avail for the editors and publishers for contempt of Court but for determining the F quantum of punishment which may be awarded. Thus they cannot escape the responsibility for being careless in publishing it without caring to verify the correctness. However, since they have not only expressed repentance on the incident but have expressed their sincere written unconditional apology, we accept the same with the warning that they should be very careful in future. As regards the case of Dina Nath Misra, we find he acted G in gross carelessness. Being a very experienced journalist of long standing it was his duty while publishing the news item relating to the members of the apex Court, to have taken extra care to verify the correctness and if he had done so, we are sure there would not have been any difficulty in coming to know that the information supplied to him had absolutely no legs to H stand and was catently false and the publication would have been avoided

which not only caused great embarrassment to this Court but conveyed a wrong message to the public at large jeopardizing the faith of the illeterate masses in our judiciary. Shri Dina Nath Misra has no doubt committed a serious mistake but he has realised his mistake and expressed sincere repentance and has tendered unconditional apology for the same. He was present in the Court and virtually looked to be gloomy and felt repentant of what he had done. We think this sufferance itself is sufficient punishment for him. He being a senior journalist and an aged person and, therefore, taking a lenient view of the matter, we accept his apology also. We, however, direct that the contemners will publish in the front page of their respective newspapers within a box their respective apologies specifically mentioning that the said news items were absolutely incorrect and false. This may be done within two weeks. The Contempt Petition Nos. 206-207 of 1996 are disposed of accordingly.

A B C

S.S. Petitions disposed of.

A M/S. SHAPERS CONSTRUCTION (P) LTD. AND ANR.

v.

AIRPORT AUTHORITY OF INDIA AND ANR.

SEPTEMBER 17, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Tender Form—Condition envisaging completion of particular type of work on the date of application—Party had done major part of such work but not completed on the date of application—Hence tender form refused—Party
C *filing a writ petition and High Court ordering issue of tender form—On appeal held since on the date of application admittedly such work was not completed, the pre-condition is not satisfied—Hence the High Court was right in finally dismissing the writ petition.*

New Horizons Ltd. & Ors. v. *Union of India & Ors.*, **[1995] 1 SCC 478,**
D **distinguished.**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 18121-22 of 1996.

From the Judgment and Order dated 8.8.96 of the Madhya Pradesh
E High Court in W.P. No. 2164/96 and L.P.A. No. 138 of 1996.

G.C. Gupta and Shiv Sagar Tiwari for the Petitioners.

The following Order of the Court was delivered :

F The petitioners have filed these special leave petitions against the order of the Division Bench of the High Court of M.P. at Jabalpur made on August 14, 1996 in LPA No. 138/96. The learned single Judge as well as the Division Bench dismissed the writ petitions in which the petitioners had sought direction to the respondents to give the tender form on the
G ground that they had satisfied Condition No. 2 of the Tender Conditions. Pursuant to the interim order passed by the High Court, the petitioner submitted their tender forms. But, at the final hearing, the writ petitions came to be dismissed. Thus, these special leave petitions.

It is contended for the petitioners that they have past experience in
H execution of the national highway. They have two contracts of more than

required amount specified in the tender conditions, 42% of Rs. 4 crores and Rs. 6 crores respectively. The certificates issued by the competent engineers, namely Executive Engineer and the Superintending Engineer would show that the petitioners have been satisfactorily performing their duties in execution of the work. The petitioners, after securing the contracts, have executed major part of the work within the scheduled time granted under the contracts. Therefore, the failure to give tender form at the inception and consideration thereof after the interim direction is violative of their fundamental right to compete in the tender for the further contract. The question is : whether the view taken by the High Court is wrong in law? Tender Condition No. 2 envisages as under :

> "The tenderer who wish to apply shall have satisfactorily completed at least two runway/ National highway, preferably rigid pavement works involving considerable earth filling each of value Rs. 400 lakhs or one work of Rs. 600 lakhs during the last five years and have annual turn over of Rs. 500 lakhs in each (1992-93, 1993-94 & 1994-95) and should possess computerised hot mix plant and concrete batching plant for executing asphaltic and rigid pavement works."

A reading of this condition would clearly indicate that the tenderers who wish to apply shall have satisfactorily completed at least two runway/National highway, preferably rigid pavement works involving considerable earth filling, each valuing Rs. 400 lakhs and one work of Rs. 600 lakhs during the last five years and have annual turn over of Rs. 500 lakhs in each of the last three years (1992-93, 1993-94 and 1994-95). He should possess computerised hot mix plant and concrete batching plant for executing asphaltic and rigid pavement works.

It is true, as contended by the petitioners, that the Tender Condition would indicate that they had completed at least two runway/National highway, preferably rigid pavement works. He contends that the completion of the work is different from tendering the contracts for execution of the work. They had two contracts as envisaged thereunder; though they had not totally completed the same, major part of the work had been completed. Therefore, they have fulfilled the conditions prescribed thereunder. The petitioners, thereby, could not be denied of their right to compete in, apply for and be considered for assignment of the work under

A the tenders now in dispute. We find no force in the contention.

The condition envisages that he shall have satisfactorily completed. The word 'completed' would indicate that as on the date of application for the tenders, he should have completed at least two runway/National highway works, preferably rigid pavement works involving considerable earth
B filling. In other words, the completion of the work of at least two runway/National highway is a pre-condition. On their own admission, they had not completed, though the major part of the work as professed by them is completed. Under these circumstances, the view taken by the High Court cannot be said to be unwarranted.

C The learned counsel placed strong reliance on the judgment of this Court in *New Horizons Ltd. & Ors.* v. *Union of India & Ors.*, [1995] 1 SCC 478, in particular, paragraphs 21 and 22 in support thereof. This case relates to previous experience and the question therein was : whether the previous experience would be considered after submitting the tenders or
D before submitting the tenders? This Court had held that the question would arise only after the submission of the tender. In support of consideration of the tender thereof, the previous experience would play an important role for awarding the contract. In that case, this Court considered and held that at the inception, the tender forms cannot be refused on the ground that he
E had not proved the previous experience. That question has no relevance to the facts in these petitions. Under these circumstances, as stated earlier, the completion of the work of at least two runway/National highway works is a pre-condition for submitting the application. On their own admission, since the petitioners had not completed the works in hand, we cannot find any illegality in respondents not giving the tender forms nor in non-con-
F sideration of their cases pursuant to the interim direction given by the High Court.

The petitions are accordingly dismissed.

G.N. Petitions dismissed.

M/S. KALYANJI VITHALDAS AND SONS

v.

THE STATE OF M.P. AND ORS.

SEPTEMBER 17, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Agreement with Government for purchase of Tendu leaves in certain area for 3 years—One of the terms was that the lease was renewable every year—Appellant to opt for renewal within 15 days prior to the end of the year—Leases to be renewed within 15 days of the issue and to be accepted by the Department—Appellant's offer for renewal accepted by the Government and communication sent—Appellant refused to accept the communication and sent telegram withdrawing from the offer—Loss to the Government on account of non-execution of the renewal deed and due to non-collection of Tendu leaves for the period since it was not sold to any other agency—Government calling upon the appellant to make good the loss—High Court dismissing the writ petition and holding that the appellant was liable to pay the damages—On appeal held, acceptance of the offer communicated to the appellant by the Government within time—Appellant appears to have taken undue advantage of some typographical error in the name of the appellant-company and sought to resile from the offer accepted by the Government—Having allowed the contract to lapse resulting in loss caused to the State due to non-execution of the contract, the resultant loss has to be recovered from the appellant—Government is empowered to recover the arrears of the dues as land revenue from the appellant-contractor towards loss caused to the Government in not collecting the Tendu leaves under the contract—Land Revenue Code, S.155—Revenue Recovery Act, 1890, Ss.3 and 4(2).

Shiv Saran Lal **v.** *State of M.P. & Ors.*, **AIR (1980) M.P. 93, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 675 of 1980.

From the Judgment and Order dated 24.1.79 of the Madhya Pradesh High Court in M.P. No. 370 of 1971.

S.V. Deshpande for the Appellant.

A S.K. Agnihotri and Ashok Kr. Singh for the Respondents.

The following Order of the Court was delivered :

This appeal by special leave arises from the judgment of the Division Bench of the M.P. High Court at Jabalpur made on January 24, 1979 in B Miscellaneous Petition No. 370/71.

The admitted facts are that the appellant-firm had entered into an agreement with the Government for purchase of Tendu leaves in Unit No. 14, Chowki in South Division for three years ending on December 31, 1970 on the terms and conditions mentioned in the agreement dated November C 30, 1968. One of the terms was that the lease is renewable every year. The lease commences from February 1 of the year and end on January 31 of the next year. In this case, the agreement of the appellant commenced from March 2, 1968 and it was to end on January 31, 1968. As per the terms of the agreement, the appellant had to opt for renewal within 15 days prior D to December 31 and the leases were to be renewed within 15 days from the date of the issue and was to be accepted by the Department. The admitted position is that the appellant had offered for renewal on December 7, 1968. It is seen from the record that the Government had accepted the offer on January 31, 1969 and communication was sent to the appellant on February 7, 1969; but he refused to receive the same. On February 9, E 1969, the appellant had sent a telegram withdrawing from the offer of the renewal. Since the appellant had refused to accept the communication, it was sent by the Divisional Officer on February 12, 1969 and was received by the appellant on February 17, 1969. Consequently, a letter was sent on May 20, 1979 calling upon the appellant for payment of Rs. 93,821.23 F towards the loss caused by the appellant due to non-execution of the renewal deed and also for non-collection of the Tendu leaves for the period since it was not sold to any other agency. The appellant challenged it by filing a writ petition in the High Court. The High Court in the impugned order dismissed the same holding that before the appellant had withdrawn the offer, the Government had already accepted the offer of the appellant G and, therefore, he was liable to pay the damages.

Shri S.V. Deshpande, learned counsel for the appellant raised two-fold contentions. Firstly, since the communication was not sent to the appellant before 31st January, the deadline, the appellant was entitled to H withdraw from the offer. He had duly withdrawn it on February 9, 1969 by

issuing a telegram to all concerned. Therefore, the appellant cannot be saddled with the liability for the resultant loss. We find no force in the contention.

Clause (2) of the contract provides as under :

"This agreement shall commence from 2.3.1968 and shall remain in force upto 31.12.1968 unless earlier determined under the terms hereinafter appearing;

Provided that :

(1) Unless earlier determined under the terms of the Agreement there will be yearly renewal of Agreement by 31st January each year by issue of an order by Government in writing provided. Government are satisfied that purchaser has fulfilled the following conditions each year :

(a) the quality of leaves collected during the year has exceeded by 10 per cent or more over the quantity notified and also 10 per cent or more over the quantity collected in the unit during the preceding year.

(b) There was no serious breach of the Act and Rules made thereunder and the Agreement.

(c) The purchaser had paid all dues including penalty, fine, etc. promptly and in accordance with the provisions of the Agreement.

(2) Purchase rate per standard bag applicable for every renewed year shall be the rate calculated by increasing the purchase rate applicable to the preceding year by 5 per cent and adding to it the total increase in rates of all the following terms during the renewed year as compared to rates fixed for the same items in the preceding year :

(i) Purchase rate payable to grower,

(ii) remuneration payable to Agent,

(iii) handing charges payable to agent.

A (3) The purchaser shall, execute the fresh Agreement within 15 days from the date of the issue of the order granting renewal, after completing all formalities required under conditions of Tender Notice for executing Agreement failing which the Agreement shall be liable to be terminated by Government and all consequences of termination given in the Agreement shall be binding and applicable. Loss to Government if any in subsequent sale of leaves in the unit shall be recoverable from the previous purchaser."

B

C It is seen that the appellant had a contract for three years ending on December 31, 1970. He worked out the contract in the year 1968 ending on January 31, 1969. Under Clause (1) of the proviso, unless earlier determined under the terms of the agreement, there will be yearly renewal of agreement by 31st January each year by issue of an order by Government in writing provided Government is satisfied that purchaser had fulfilled the D conditions enumerated subsequently. It is true, as contended by Shri S.V. Deshpande, that the word 'issue' implies service of notice. Unless the contractor receives acceptance by the Government he will not be in a position to know whether or not his offer has been accepted by the Government. Therefore, the date of the receipt would be the date of issue. For this proposition, there would not be any controversy. The question is E : whether on expiry of 31st January of the year, the previous contractor is absolved of his liability for non-execution of the renewal date? It is seen that originally, the contract was for three years. Therefore, he is entitled for renewal unless it was either determined earlier and offer of renewal was rejected by the Government. Admittedly, the appellant had given his F offer for renewal before the expiry of the period and the Government also had accepted the offer before 31st January, 1969. Obviously, it would take time for communication thereof. It being a continuing contract which the appellant otherwise would have for three years, there is no hiatus in the continuity unless any step was taken by the Government in the interregnum G to have his lease terminated in terms of the contract. In this case, the contract has not been terminated. Resultantly, the acceptance of the offer communicated to the appellant by the Government having been made within time, namely, on January 31, 1969, what remained to be done was only execution of the renewal lease deed for a further period of one year in terms of the contract. The appellant had withdrawn his offer only after H the acceptance was communicated to him on February 7, 1969. No doubt,

there was a defect in communication of the order to the appellant but as regards the address furnished by the appellant and sent to the Government, there was no defect. There may be some typographical error in the name of the appellant-company. The appellant appears to have taken undue advantage of it and sought to resile from the offer accepted by the Government. Having allowed the contract to lapse resulting in loss caused to the State due to the non execution of the contract, the resultant loss has to be recovered from the appellant.

Shri S.V. Deshpande, learned counsel, has placed reliance on the judgment of the same Bench in another case in *Shiv Saran Lal* v. *State of M.P. & Ors.*, AIR (1980) M.P. 93. Therein, learned Judges have held that since the communication of acceptance was not made before the expiry of January 31 of the succeeding year, the contractor was not liable for the payment thereof. On the principle of the communication, as stated earlier, there is no quarrel but the learned Judges have not considered the further aspect, viz., whether in a case of continuing contract, is he absolved of the liability? In the view as we have stated earlier, the same Bench appears to have taken inconsistent view without reference to the judgment under appeal. Therefore, the later view expressed by the High Court on the liability is not correct in law.

The question then is : whether the arrears due from the lessee-contractor would be recovered as arrears of land revenue? Section 155 of the Land Revenue Code and Sections 3 and 4(2) of the Revenue Recovery Act of 1890 reads as under :

> "155. The following monies, may be recovered, as far as may be under the provisions of this chapter in the same manner as arrears of land revenue :
>
> (a) xxxx xxxx xxxx
>
> (b) all monies falling due to the State Government under any grant, lease or contract which provides that they shall be recoverable in the same manner as an arrears of land revenue."
>
> *Section 3 of the Revenue Recovery Act.*
>
> "3. Recovery of public demands by enforcement of process in other districts than those in which they become payable (1) where an

A arrear of land revenue, or a sum recoverable as an arrear of land-revenue is payable to a Collector by a defaulter being or having property in a district other than that in which the arrear accrued or the sum is payable, the Collector may send to the Collector of the other district a certificate in the form as nearly as may be of the Schedule, stating -

B

(a) the name of the defaulter and such other particulars as may be necessary for his identification, and

(b) the amount payable by him and the account on which it is due.

C (2) The certificate shall be signed by the Collector making it (or by any officer to whom such Collector may, by order in writing, delegate this duty) and, save as otherwise provided by this act, shall be conclusive proof of the matters therein stated.

D (3) The Collector of the other district shall, on receiving the certificate, proceed to recover the amount stated therein as if it were an arrear of land revenue which had accrued in his own district."

Section 4(1)

E

"4. Remedy available to person denying liability to pay amount recovered under last foregoing section (1) when proceedings are taken against a person under the last foregoing section for the recovery of an amount stated in a certificate that person may if he denies his liability to pay the amount or any part thereof and pays

F the same under protest made in writing at the time of paying and signed by him or his agent, institute a suit for the repayment of the amount or the part thereof so paid."

A reading of these provisions would clearly indicate that the recovery

G of public demands by enforcement of process is recoverable as arrears of land revenue, since all moneys fall due to the State Government, under any grant, lease or contract shall be recoverable in the same manner as arrears of land revenue. Therefore, the Government is clearly empowered to recover the arrears of the dues as land revenue from the appellant-contractor towards loss caused to the Government in not collecting the Tendu

H leaves under the contract.

We are informed that the appellant has already furnished the bank guarantee. The Government is at liberty to enforce the bank guarantee and recover the same. In case of any shortfall of the amount already given under the bank guarantee, the Government is at liberty to recover the same. A

The appeal is accordingly dismissed with the above directions but, in the circumstances, without costs. B

G.N. Appeal dismissed.

A JAYKUMAR GANPATI WAIKAR

v.

NIVRITTI SAKHARAM TITWE AND ORS.

SEPTEMBER 17, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Bombay Tenancy and Agricultural Lands Act, 1948 : Sections 31(3), 32 & 32F—Proceedings for ejectment of tenant—Initiated by appellant's mother on the ground that she was entitled to resume the land—Pending
C *proceedings she died, and her son the appellant who was a minor, was brought on record—Proceedings ending in dismissal of the suit—Appellant attained majority and the tenant issued notice opting to purchase the land—Tenant filing writ petition in High Court—High court held that the tenant entitled to purchase the land since as on April 1, 1957, the tillers' day, he was in pos-*
D *session but could not opt to purchase the property due to the disability of the widow which stood in his way—On appeal, held : It was the mandatory duty of the minor landlord, after attaining majority, to issue notice to the tenant calling upon him, whether he would exercise his option to purchase, as envisaged under Section 32F of the Act—Admittedly, he did not issue any such notice—On the other hand, the tenant himself, on becoming aware of the*
E *appellant's becoming major, issued the notice exercising the option to purchase the property under Section 32F of the Act—There is no illegality in the ultimate conclusion reached by the High Court though this consideration was not adverted to by the High Court.*

Harshavardhan Shrinivas Potnis **v.** *Mahadu Pundalik Gangurde*, **AIR**
F **(1980) Bom. 198, distinguished.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 688 of 1980.

From the Judgment and Order dated 23.11.78 of the Bombay High
G Court in Spl. C.A. No. 2589 of 1974.

Krishna Mahajan, P.H. Parekh for the Appellant.

V.N. Ganpule and V.B. Joshi for the Respondents.

H The following Order of the Court was delivered :

This appeal by special leave arises from the judgment dated November 23, 1978 of the High Court of Bombay in Special Civil Application No. 2589/74 filed under Article 227 of the Constitution. A

The admitted facts are that the appellant was a minor when his adoptive mother Guru Santabai Ganpati Waykar had initiated that proceedings under Section 31(3) of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short the "Act") for ejectment of the respondent-tenant on the ground that she was entitled to resume the land. Pending proceedings, she died and thereafter the appellant had come on record. Admittedly, as on the date of the death of his mother the appellant was a minor. The proceedings under Section 31(3) ultimately ended in dismissal of the suit on March 13, 1972. In the meanwhile, the appellant had attained majority on March 19, 1968. Resultantly, the tenant got issued notice on April 21, 1968 under Section 32F of the Act opting to purchase the land under Section 32. The application, appeal and the revision arising under the Act came to be dismissed. Thus the tenant-respondent filed writ petition in the High Court. The writ petition was allowed and it was held that the respondent was entitled to purchase the lands since as on April, 1, 1957, the tillers' day, he was in possession but he could not opt to purchase the property due to the disability of the widow, which stood in his way under Section 32F of the Act. Thus this appeal by special leave. B C D E

The question is : whether the respondent had exercised that right under Section 32F of the Act within one year? Section 32F of the Act envisages as under :

> "32F. (1) Notwithstanding anything contained in the preceding sections - F
>
> (a) where the landlord is a minor, or a widow, or a person subject to any mental or physical disability the tenant shall have the right to purchase such land under Section 32 within one year from the expiry of the period during which such landlord is entitled to terminate the tenancy under Section 31 and for enabling the tenant to exercise the right of purchase, the landlord shall send an intimation to the tenant of the fact that he has attained majority, before the expiry of the period during which such landlord is entitled to terminate the tenancy under Section 31." G H

A It is seen that the widow had already exercised the option to terminate the tenancy of the tenant and the proceedings were pending in the appropriate forum during the course of which the widow died. On her demise, the appellant, admittedly being a minor yet another disabled landlord, came on record as legal representative of the adoptive mother. It is also further seen that the proceedings under Section 31(3) came to be B terminated on March 13, 1972. A literal interpretation of Section 32F would indicate that widow, the minor or the disabled landlord, on minor's attaining majority i.e., is cessation of disability, shall be required to intimate to the tenant of his attaining majority before his exercising the option to terminate the tenancy under Section 31(3) of the Act. Admittedly, the C mother having already opted for termination of the tenancy for personal resumption and the appellant having been a minor, stepped into the shoes of his mother and continued the proceedings for resumption of the land; those proceedings, as stated earlier, came to be terminated on March 13, 1972. Resultantly, even before the proceedings came to be terminated, the D tenant had opted to purchase the property by issuing the notice on April 21, 1968. Admittedly, the appellant had attained majority on march 19, 1968 and the notice of option to purchase the property was exercised by the tenant within one month thereafter. Under these circumstances, the limitation of one year had not expired. Since the mother, disabled landlady, was continuing the proceedings and on her demise the appellant having got E substituted himself as landlord, but he being a further disabled landlord, the need to issue notice to the mother of the appellant did not arise because she had already exercised the option under Section 31(3) to resume the land by terminating the tenancy for personal cultivation and the proceedings therefor were initiated. Since she died pending proceedings F and in the meanwhile, the appellant had attained majority, the need to issue notice by the tenant opting to purchase the property arose only after the disability ceased. The disability ceased on March 19, 1968 and the notice of option was given by the tenant within one month thereafter, namely, on April 21, 1968.

G Shri Krishna Mahajan, learned counsel for the appellant, placed reliance on the judgment of the Division Bench of the Bombay High Court in Harshavardhan *Shrinivas Potnis* v. *Mahadu Pundalik Gangurde*, AIR (1980) Bom. 198 and contended that irrespective of his attaining majority or disability within one year from the date of the demise of his mother, the H respondent was to exercise the option and had not done so. Therefore, the

respondent is not entitled to the benefit. We find no force in the contention. In that case, the facts were that the mother who was widow had not exercised the option under Section 31(3) of the Act. On her demise, the minor who succeeded by virtue of bequeath made by the widow had exercised the option within one year from the date of the demise of the mother-donor. Therefore, it was interpreted that Sections 32F and 31(3) are to be read together and harmonious interpretation is required to be given. In this case that question does not arise for consideration.

It is also seen that the widow mother of the appellant had already exercised the option under Section 31(3) and continued the proceedings pending which she died. Subsequently, the appellant came on record as a legal representative and continued the proceedings. As held earlier, It was the mandatory duty of the minor landlord, after attaining majority, to issue notice to the tenant calling upon him, whether he would exercise his option to purchase, as envisaged under Section 32F of the Act Admittedly, he did not issue any such notice. On the other hand, the tenant himself, on becoming aware of the appellant's becoming major, issued the notice exercising the option to purchase the property under Section 32F of the Act. There is no illegality in the ultimate conclusion reached by the High Court though this consideration was not adverted to by the High Court.

The appeal is accordingly dismissed, but in the circumstances, without costs.

G.N. Appeal dismissed.

A D.K. CHHANGANI AND ORS.

v.

NITYA RANJAN MUKHERJEE AND ORS.

SEPTEMBER 17, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Central Civil Services (Recognition of Service Associations) Rules, 1993:

C *Rules 4 to 10—Rival Unions of Service employees—Recognition of—It is open to the Union concerned to approach the Government under the provisions of the Rules and to seek recognition in accordance with law—This would avoid future litigation in this behalf.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 490 of
D 1980.

From the Judgment and Order dated 14.9.79 of the Calcutta High Court in Civil Rule No. 13393 (W) of 1979.

A.K. Pandey, R.K. Khanna and R.P. Singh for the Appellants.

E

B. Sen and P.P. Malhotra, Dilip Sinha, D. Krishnan, K.R. Nambiar and C.V.S. Rao for the Respondents.

The following Order of the Court was delivered :

F This appeal by special leave arises from the order of the Calcutta High Court made on September 14, 1979 and December 17, 1979 in Civil Rule No. 13393 (W).

The claims relate to the recognition to the rival union of Geological Survey of India Employees' Association. The controversy is : as to whether
G the Calcutta High Court has jurisdiction over the adjudication made by the Industrial Tribunal in Maharashtra on the rival questions of the membership and recognition of an association based thereon? It is not necessary to go into the question, though it is open to grave and grim jurisdictional fault for two reasons. Firstly, since elections were held on September 12,
H 1975 and more than two decades have passed by since then, it is no longer

a live issue. Moreover, the President exercising the power under Proviso to Article 309 of the Constitution and clause (5) of Article 148, after consultation with the comptroller and Auditor General, had issued rules called the Central Civil Services (Recognition of Service Associations) Rules, 1993, which came into force w.e.f. November 5, 1993. Rule 4 deals with Service Associations registered or yet to be registered. They are required to make an application under Section 3. Clause (5) prescribes conditions for recognition of a Service Association and provides as under:

> "5. Conditions for recognition of Service Associations : A Service Association which fulfills the following conditions may be recognised by the Government, namely;
>
> (a) An application for recognition of Service Association has been made to the Government containing Memorandum of Association, Constitution, Bye-laws of the Association, Names of Office-Bearers, total membership and any other information as may be required by the Government;
>
> (b) the Service Association has been formed primarily with the object of promoting the common service interest of its members;
>
> (c) membership of the Service Association has been restricted to a distinct category of Government Servants having common interest all such Government servants' being eligible for membership of the Service Association;
>
> (d) (i) The Association represents minimum 35 per cent of total number of a category of employees provided that where there is only one Association with second highest membership, although less than 35 per cent may be recognised if it commands at least 15 per cent membership;
>
> (ii) The membership of the Government servant shall be automatically discontinued on his ceasing to belong to such category;
>
> (e) Government employees who are in service shall be members of office bearers of the Service Association;

A (f) the Service Association shall not be formed to represent the interests, or on the basis of any caste, tribe or religious denomination or of any group within or Section of such caste, tribe or religious denomination;

(g) the Executive of the Service Association has been appointed B from amongst the members only; and

(h) the lands of the Service Association consist exclusively of subscriptions from members and grants, if any, made by the Government, and are applied only for the furtherance of the objects of the Service Association."

C

Rule 6 deals with conditions subject to which recognition is continued to the Associations and Rule 7 gives power for verification of the membership. Rule 8 deals with withdrawal of recognition. Rule 9 gives power to the Government for relaxation. Rule 10 relates to interpretation D of the Rules.

It would, thus, be seen that if there are more than one rival unions of the Service employees, the Government of India have evolved a policy as to how the Service Associations required to be recognised by the appropriate authority should represent the interest of the members of the E respective unions. In this view, it would be open to the appropriate union to approach the Government in the light of the above rules and seek recognition in accordance with law to avoid any future litigation in this behalf.

The appeal is accordingly disposed of. No costs.

F

G.N. Appeal disposed.

GHEEVARGHESE MATHEW ETC. A

v.

STATE OF KERALA AND ANR. ETC.

SEPTEMBER 17, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.] B

Land Acquisition Act, 1894 :

Compensation—Award of—Appeal by claimants for enhancement—High Court granting compensation at Rs. 1000 per cent—On appeal by claimants for further enhancement held : Ten months prior to the date of Notification, claimants assessed the compensation at Rs. 350 per cent and offered to sell at that rate—High Court awarded compensation at Rs. 1000 per cent which is three times more than what was offered by the claimants themselves—No interference called for to increase further compensation. C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4123 of 1991.

From the Judgment and order dated 17.9.90 of the Kerala High Court in L.A.A. No. 270 of 1985. E

With Civil Appeal Nos. 4124/91 and 11812/95.

T.L. V. Iyer, Ramesh Babu, M.R. B.V. Deepak, M.T. George and Ms. Malini Poduval (NP) for the Appellants.

G. Viswanath Iyer, T.G.N. Nair and Shakil Ahmed Syed for the Respondents. F

The following Order of the Court was delivered :

Notification under Section 3(1) of the Kerala Land Acquisition Act, 1950 which is equivalent to Section 4(1) of the Land Acquisition Act, 1894 (1 of 1894) was published on July 8, 1980 acquiring an extent of 3.37 hectares of land for public purpose, namely, Greater Cochin Development Authority, for the purpose of the Site and Service Scheme at Alwaye. The land Acquisition Officer in his award dated March 19, 1982 determined compensation at Rs. 280 per cent as against Rs. 2000 per cent claimed by G H

A the appellants. On reference, the civil court enhanced the compensation to Rs. 1800 per cent by its award and decree dated August 7, 1984. On further appeal by the State, the High Court reduced the compensation to Rs. 1000 per cent. Thus, these appeals by special leave.

B Shri T.L.V. Iyer, learned senior counsel for the appellants, has contended that the lands under Exs. A-6 to A-B, of an extent ranging between 60 cents and 40 cents had been sold on March 31, 1976, April 13, 1976 and April 21, 1976 respectively at the rate of Rs. 800 per cent. Ex. A-3 to A-5 would indicate steep rise in the value till the date of the notification. That was spoken of even by RW 2, the executive Officer of C the Panchayat. The acquired lands are abutting the two roads on either side. The developed area is situated near the acquired lands. These facts had been duly taken note of by the reference Court in determining reference under Section 18. The High Court had not adverted to these relevant facts but considered Exs. A-6 to A-8 and held that the compensation at D Rs. 1000 would be the just compensation. Unless the findings of the reference Court were found to be perverse, the High Court would not have interfered with the award of the reference Court. Shri G. Viswanatha Iyer, learned senior counsel for the respondent, placed reliance on a document, a letter addressed by the claimants themselves wherein they have agreed as on October 15, 1979 to sell the property to GCDA @ Rs. 350 per cent. E In view of this circumstance, it does not warrant more compensation than has been awarded by the High Court.

Having regard to the respective contentions, the question that arises for consideration is: what would be the responsible compensation with the F acquired lands are capable to secure? It is seen that Exs. A-3 to A-5 offer no comparable value. As stated by Shri Viswanatha Iyer, that they offer only an evidence of rise in the price. It is seen that lands under Ex A-6 to A-8 also were purchased by common institution from the persons, brothers and sisters, which happened to be contiguous to their institution for better utilisation. Under those circumstances, they cannot be automatically of- G fered as comparable sales for the lands in question. Admittedly, the lands are situated outside Alwaye Municipal limits as on the date of notification. The High Court having considered the totality of the facts and circumstances reduced the compensation to Rs. 1000 per cent as against Rs. 2000 per cent as claimed by the appellants. It is more than 4-1/2 times than what H was granted by the Land Acquisition Officer. The State did not file any

appeal. A

It is seen from the letter addressed by the appellants themselves on October 15, 1979, i.e. 10 months prior to the date of the notification, that they had assessed the compensation at Rs. 350 per cent and offered to sell it at that rate. But for the fact that no agreement as contemplated under sub-section (2) of Section 11 has been executed, this admission stares at B their face to claim any further enhancement in the compensation. It was not necessary for the High Court, before reversing the judgment of the reference Court, to reach at a conclusion that the award and judgment of the reference Court was perverse or wholly unsustainable. It is the mandatory duty of the Court to consider the entire evidence by applying the C tests and principle of law as settled by this Court in assessing the compensation and to find out as to what would be the reasonable market value which the lands are capable to command in open market. It the estimate of the High Court, the reasonable compensation is Rs. 1000 per cent which is three times more than that was offered by the claimants themselves. Under these circumstances, we do not think that these cases warrant D interference to increase further compensation.

The appeals are dismissed, but without costs.

G.N. Appeals dismissed.

A M/S. ESTER INDUSTRIES LTD.

v.

U.P. STATE ELECTRICITY BOARD AND ORS.

SEPTEMBER 17, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Indian Electricity (Supply) Act, 1948 :

S.78-A—Grant of 10% development rebate in supply of electricity to C *newly set-up industries—Policy of State Government—High Court holding that the Electricity Board not automatically bound by the directions of State Government—On appeal held : So long as the policy direction issued by the Government is consistent with the provisions of the Act and the tariff policy laid down by the board, it may be open to the Board to either accept it or not to accept the directions as such—It is for the State Government to consider* D *whether the Board has laid down the policy or whether the direction issued by the State Government has not been properly implemented—Court cannot give a direction to implement the directions issued by the State Government exercising the power under Article 226 of the Constitution to direct the Board to exercise its power under Section 78A(1) of the Act—Sub-section (2) has* E *no application for the reason that if the Board feels any doubt as to whether the direction issued by the Government is in the realm of a policy or otherwise, then it shall be referred to the authority constituted under the Act whose decisions shall be final, i.e., de hors the question in this case—Doctrine of promissory estoppel—Held not applicable in the facts and circumstances of* F *the case.*

Real Food products Ltd. & Ors. **v.** *A.P. State Electricity Board & Ors.*, **AIR (1995) SC 2234, referred to.**

CIVIL APPELLATE JURISDICTION : Special Leaves Petition (C) G No. 18156 of 1996.

From the Judgment and Order dated 8.5.96 of the Allahabad High Court in W.P. 10195 of 1989.

R. Santhanam, Ashok Kumar Singh and Rajinder Singhvi for the H Appellants.

The following Order of the Court was delivered : A

This special leave petition arises from the judgment and order of the Division Bench of the Allahabad High Court at Lucknow made on May 8, 1996 in Writ Petition No. 10195/89.

The admitted position is that the Government of Uttar Pradesh had B laid down in sanction for grant of 10% developmental rebate in supply of electricity to the newly set up industries on July 16, 1986 and that was to be in vogue till 1990. It is the claim of the petitioner that pursuant to that policy, the petitioner had set up his industry in Nainital District. Consequently, he is entitled to the rebate. When the bill was issued, the Board C imposed its tariff rates contrary to the rebate. Resultantly, they filed the writ petition. The High Court in the impugned judgment had held that Section 78A of the Indian Electricity (Supply) Act, 1948 (Act 54 of 1948) (for short, the 'Act') being a legislative policy, the Board was not automatically bound by the directions issued by the State Government. The Board is entitled to revise tariff in accordance with its procedure. Therefore, writ D could not be issued compelling the Board to follow the directions issued by the State Government. Thus, this special leave petition.

It is contended for the petitioner that in view of the law laid down by this Court in *Real Food Products Ltd. & Ors.* v. *A.P. State Electricity* E *Board & Ors.*, AIR (1995) SC 2234 in particular paragraph 8, the Board is bound by the directions issued by the State Government. The view taken by the High Court is, therefore, not correct in law. We find no force in the contention. It is well settled legal position that the fixation of the tariff is a legislative policy and the Board is entitled to revise unilaterally the tariff from time to time. The consumer is bound by the revision of the tariff duly F notified in accordance with the procedure prescribed under the Act. The question is : whether contrary to the conditions of the tariff entered into by the parties, the policy direction issued by the State would be interposed and be revised by the Electricity Board in consonance with the directions issued by the State Government? In this regard, the observations of this G Court in paragraph 8 are worth recapitulation :

> "The only surviving question is with regard to the nature and effect of the direction given by the State Government under Section 78A of the Act. The question has to be examined in the context of the facts of the present case which is confined to the charging of a flat H

A rate per H.P. for agricultural pump sets. The nature of the function of the Board in the fixing the tariffs and the manner of its exercise has been considered at length in the earlier decisions of this Court and it does not require any further elaboration in the present case. Section 78 A uses the expression "the Board shall be guided by such directions on question of policy as may be given to it by the B State Government". It does appear that the view expressed by the State Government on a question of policy is in the nature of a direction to be followed by the Board in the area of the Policy to which it relates. In the context of the function of the Board of fixing the tariffs in accordance with Section 49 read with Section C 59 and other provisions of the Act, the Board is to be guided by any such direction of the State Government, as in the present case, was to fix a concessional tariff for agricultural pump sets at a flat rate per H.P., it does relate to a question of policy which the Board must follow. However, in indicating the specific rate in a given case, the action of the State Government may be in excess of the D power of giving a direction on the question of policy, which the Board, if its conclusion be different, may not be obliged to be bound by. But where the Board considers even the rate suggested by the State Government and finds it to be acceptable in the discharge of its function of fixing the tariffs, the ultimate decision E of the Board would not be vitiated merely because it has accepted the opinion of the State Government even about the specific rate, In such a case the Board accepts the suggested rates because that appears to be appropriate on its own view. If the view expressed by the State Government in its direction exceeds the State of policy, the Board may not be bound by it unless it takes the same view F on merits itself."

Section 78A(1) of the Act postulates that in the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government. In other words, the G Electricity Board has a statutory function to discharge in determination of the rates of tariff and terms and conditions subject to which the electrical energy be supplied to the consumers and enforcement thereof. This being a legislative policy, while exercising the power under Section 78A policy directions issued by the Government may also be taken into consideration H by the Electricity Board which has a statutory duty to perform. So long as

the policy direction issued by the Government is consistent with the provisions of the Act and the tariff policy laid down by the Board, it may be open to the Board to either accept it or not to accept the directions as such. It is for the State Government to consider whether the Board had laid down the policy or whether the direction issued by the State Government has not been properly implemented Court cannot give a direction to implement the directions issued by the State Government exercising the power under Article 226 of the Constitution to direct the Board to exercise its power under Section 78A (1) of the Act. sub-section (2) has no application for the reason that if the Board feels any doubt as to whether the direction issued by the Government is in the realm of a policy or otherwise, then it shall be referred to the authority constituted under the Act whose decision shall be final i.e., *de hors* the question in this case.

The learned counsel for the petitioner has brought to our notice that this Court has granted leave against the judgment of another Division Bench on the question of applicability of the promissory estoppel. In this case, that question does not arise for the reason that the promissory estoppel would apply only in a case where there was no contract executed between the parties. In this case, since there exists a contract duly executed under law between the petitioner and the Board which binds them, unless it is revised, the question of promissory estoppel does not arise. Considered from this perspective, we are of the view that the High Court has not committed any manifest error of law warranting interference.

The special leave petition is dismissed.

G.N. Petition dismissed.

A GHANTESHER GHOSH

v.

MADAN MOHAN GHOSH AND ORS.

SEPTEMBER 18, 1996

B [N.P. SINGH AND S.B. MAJMUDAR, JJ.]

Partition Act, 1893 : Section 4.

Dwelling house—Belonging to undivided family—Transfer of share to
C *stranger—Pursuant to final decree for partition—Such stranger—Transferee filed petition for execution of decree—During pendency of execution proceedings co-owner family member filed application before executing court for purchase or share of such stranger—transferee by enforcing his claim for pre-emption under S.4 of the Act—Executing court dismissed application on ground that said application not maintainable after passing of final decree in*
D *partition suit—However, High Court allowed said application—Applicability of S.4—Held : Words "such transferee sues for partition" and "Sues for partition" wider in scope than words "filling suit for partition"—Suit for partition included initiation of proceedings for execution of partition decree—S.4 operated at all stages of litigation in a partition suit—Right from*
E *its inception till its termination not only by final decree for partition but also by its complete satisfaction and discharge in execution proceedings—S.4 could be invoked by any co-owner family member for purchase of stranger-transferee's share—But once final decree for partition was completely satisfied and discharge in execution proceedings S.4 could not be invoked—Code of*
F *Civil Procedure, 1908, S.11. Expln. VII, O.22 Rr. 10 and 12—Transfer of Property Act, 1882, Ss. 44 and 52.*

Interpretation of Statutes :

Benevolent legislation—Interpretation which fructified beneficial pur-
G *pose of provision should be adopted.*

Words and Phrases :

"Sue", "Suit" and "Sue for partition"—Meaning of—In the context of Code of Civil Procedure, 1908, S.11 Expln. VII, 0.22 Rr. 10, 12 and Partition
H *Act, 1893 S.4.*

A residential house was owned by three brothers, each having 1/3rd share. After the death of one of the brothers his widow inherited 1/3rd undivided share of her husband in the said dwelling house and on coming into operation of the Hindu Succession Act, 1956 she became full owner of the 1/3rd share of her deceased husband in the said house. Thereafter, she filed suit for partition against the other two co-owners claiming separation of her 1/3rd share in the said house. She obtained a final decree in the suit. Thereafter, she executed and got registered a deed of gift in favour of her brother, the appellant, in respect of her 1/3rd undivided interest in the said dwelling house. Armed with that gift-deed, the appellant-donee, who was a stranger to the joint family, filed an execution petition for executing the final decree. Pending the execution proceedings one of the co-owner judgment-debtors died and the respondent No. 1 was brought on record as his legal heir in the execution proceedings. The respondent No. 1 filed an application before the executing court under Section 4 of the Partition Act, 1893 for enforcing his claim of pre-emption against the appellant stranger transferee of the 1/3rd undivided interest of the original title holder. The executing court dismissed the said application of respondent No. 1 on the ground that the said application was not maintainable after the final decree was passed in the partition suit. But the High Court took the view that the said partition suit under the Act was maintainable as still the final decree had not got fully executed and satisfied by actual division of the property by metes and bounds and delivery of actual possession to the stranger transferee who had taken out the execution proceedings. Being aggrieved the appellant-stranger transferee preferred the present appeal.

Disposing of the appeal, this Court

HELD : 1.1. Section 4 of the Partition Act, 1893 can validly be pressed in service by any of the co-owners of the dwelling house belonging to undivided family pending the suit for partition till final decree is passed and thereafter even at the stage of execution of the final decree for partition so long as the execution proceedings have not effectively ended and the decree for partition has not been fully executed and satisfied by putting the shareholders in actual possession of their respective shares. Beyond that stage, however, Section 4 of the Act will go out of commission. [469-E-G]

1.2. Amongst other conditions, Section 4 requires for its applicability

A that the stranger transferee must sue for partition and only in that eventually the right of pre-emption envisaged by Section 4 can be made available to the other contesting co-owners. This Section does not provide as a condition for its applicability that such stranger transferee must file a suit for partition. The words "transferee for partition" are wider than the B words "transferee filing a suit for partition". The terminology "suing for partition" would not necessarily mean filing of a suit in the first instance by the transferee. If a transferee seeks to execute any final decree for partition in favour of his transferor co-owner, he can be said to have initiated a legal action for redressal of his decretal right as a stranger C transferee. Any legal action taken by anyone for getting redressal from a law court and for vindicating his legal right on which such action is based can be said to have sued in a court of law. It cannot, therefore, be said that a purchaser of decretal rights flowing from a final decree for partition while initiating proceedings for execution of that decree against the judg- D ment- debtors who are co-sharers in the property sought to be partitioned by metes and bounds, is not suing for partition by getting the said decree executed through a court of law. Once the partition decree becomes final, it is the duty of the court which passes the decree to get it executed when called upon to do so with a view to seeing that the rights and obligations flowing from such decree get finally complied with and translated into E reality. Till that stage is reached the court which passes the decree does not become totally *functus officio* and the litigation between parties cannot be said to have ended finally. Under these circumstances, it cannot be said that a decree-holder in a partition suit or his transferee who is armed with the plaintiff's rights pending such suit or even after the passing of the final F decree as transferee of decretal rights when he seeks execution is not suing for partition or is not entreating the court for its assistance to get his right fully vindicated as per the claim in the suit and decree therein. The legislative intent underlying various provisions of the Code of Civil Procedure, 1908 viz., Explanation VII to Section 11, Order 22, Rules 10 and 12 G also show that in given circumstances the proceedings in the suit can be treated to include even execution proceedings. Section 52 of the Transfer of Property Act, 1882 is another illustration on the point dealing with the principle of *Lis pendens*. The legislature for different contingencies has thought it fit to extend the scope and ambit of the terminology "suit" even H for covering the execution proceedings in connection with decrees passed

in such suits. Section 4 of the act has also advisedly used the terminology "sues for partition" and has not confined it only to suits filed by stranger transferee for applicability of Section 4 of the Act. [461-E-H, 462-D-E] A

1.3. The court should lean in favour of that interpretation which fructifies the beneficial purpose for which the provision is enacted by the legislature and should not adopt an interpretation which frustrates or unnecessarily truncates it. On the express language of Section 4 of the Partition Act which is a benevolent provision enacted by the legislature for the welfare and tranquility of the members of a joint family occupying the dwelling house, the Court must so construe the provision as to make it available at all the relevant stages of the litigation between the contesting co-owners till the litigation reaches its terminus by way of full and final discharge and satisfaction of the final decree for partition. If a stranger transferee enters the arena of contest at any stage and seeks to get his share separated as far as the subject-matter of the litigation, namely, the dwelling house, is concerned, he can be said to be suing for partition and separate possession of his undivided share to which he had become entitled because of transfer by one of the co-owners. Such a transferee might come on the scene prior to the final decree via Order 22 Rule 10 or he may come on the arena of contest seeking redressal of his right of partition and separation of his undivided share even in execution proceedings as a transferee of the decretal right of erstwhile plaintiff under the final decree either by himself filing the execution proceedings as per order 21 Rule 16 or may subsequently step in the shoes of the decree-holder who has already filed the execution proceedings via Order 22 Rule 10 read with Order 22 Rule 12. In either eventuality, such a stranger transferee who emerges on the scene of litigation between the contesting co-owners which has not still reached its terminus and who seeks vindication of his transferee-rights in the dwelling house can certainly be said to be suing for partition even at the stage of execution of such final decree for partition. [464-A-D] B C D E F

Satya Narayan Chakravarty v. *Bishwanath Paul & Ors.*, [1974] Cal. WN 871; *Boto Krishna Ghose* v. *Akhoy Kumar Ghose & Ors.* AIR 37 Cal 111 and *Harendra Nath Mukharjee* v. *Shyam Sunder Kuer & Ors.* AIR (1973) Pat 142, approved. G

Abdul Sathar v. *A. Nawab*, AIR (1980) Mad. 235, overruled. H

A *Sheodhar Prasad Singh & Ors.* v. *Kishun Prasad Singh & Ors.*, **AIR (1941) Pat 4 and** *Brindera Nath Banerjee* **v.** *Smt. Snehalata Devi and Anr.* **AIR (1958) Cal 380, held inapplicable.**

Waman Vishnu Gokhale **v.** *Vasudeo Morbhat Kale*, **ILR 23 Bom. 73, cited.**

B

Maxwell : "The Interpretation of Statutes", **12th Edn. Chapter 4, p96;** *Black's law Dictionary*, **6th Edn, p 1432;** *Collins English Dictionary*, **(1979) Edn. p. 1452;** *Aiyar's Judicial Dictionary*, **10th Edn. (1988), p. 980;** *Concise Oxford, Dictionary*, **7th Edn. p. 1066 and** *Stroud's Judicial Dictionary*, **5th**

C **Edn. p. 2540, referred to.**

2. Section 4 in its applicability will cover all stages of litigation in a partition suit from its inception till its termination not only by the final decree for partition but also by its complete satisfaction and discharge through the assistance of the executing court; once that happens the court

D **itself becomes *functus officio* and the Litigation will come to an end and the concerned parties thereafter will occupy the respective portions of the erstwhile dwelling house as full owners of their portions. The separated part of the dwelling house in possession of such stranger transferee cannot then be treated as a part and parcel of the dwelling house belonging to an**

E **undivided family and at that stage the dwelling house qua such a stranger would cease to belong to any joint family and it would belong to different owners occupying their respective portions in a composite building. The moment the integrity of common dwelling house belonging to undivided family is broken by the execution of the final partition decree through the**

F **intervention of the court and the proceedings are ended, there would remain no scope for play of Section 4 of the Act as there would be no subject-matter of a common dwelling house belonging to an undivided family on which it could operate. [469-A-E]**

G CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3732 of 1991.

From the Judgment and Order dated 17.12.90 of the Calcutta High Court in Civil Rule No. 2250 of 1987.

H Dr. Shankar Ghosh and Somnath Mukherjee for the Appellant.

Haradhan Banarjee, Bijab Ghosh and R.P. Gupta for the Respondents. A

The Judgment of the Court was delivered by

MAJMUDAR, J. A short question falls for determination of this Court in this appeal by special leave against the decision of the Division Bench of the High Court of Calcutta in Civil Revision Application No. 2250 of 1987. The question is whether Section 4 of the Partition Act, 1893 (hereinafter referred to as 'the Act') can be pressed in service in execution proceedings arising out of a final decree for partition, by one of the co-owners of a dwelling house belonging to an undivided family against a stranger transferee of a share therein belonging to another erstwhile co-owner of the said dwelling house. The learned Second Assistant District Judge, Howrah, before whom the said application was moved took the view that Section 4 of the Partition Act could not be pressed in service against the stranger purchaser of such share. The said view was not accepted by the Division Bench of the High Court of Calcutta by the impugned judgment. B C D

In order to appreciate the correct contours of the controversy in respect of the aforesaid question, it is necessary to glance through a few background facts leading to the proceedings. The premises in question are a residential house situated at No. 6/1 Ghoshal Bagan Lane, Howrah. It was originally owned by one Kalipada Ghosh and on his death his three surviving sons, namely, Pran Krishna, Gour Mohan and Kamal Krishna became owners of 1/3rd share each. On 7.9.1948, Kamal Krishna died leaving behind him his widow Smt. Radha Rani. Thus, she inherited 1/3rd undivided share of her husband in the said dwelling house. On the coming into operation of the Hindu Succession Act, 1956, Smt. Radha Rani became full owner of 1/3rd share of her deceased husband in the said house. She filed a suit for partition on 5.9.1960 claiming separation of her 1/3rd share in the said house amongst other properties. In the present proceedings, we are concerned only with the aforesaid family dwelling house. The suit was filed against the other two co-owners, namely, Pran Krishn and Gaur Mohan. Ultimately, after the preliminary decree a final decree came to be passed in favour of Smt. Radha Rani on 31.8.1971. Accordingly, she became entitled to partition and separation of her 1/3rd share in the said dwelling house. She made an abortive attempt to get the final decree executed but therein she did not get any relief of actual E F G H

A possession for number of years. In the meanwhile, on 8.10.1979 she executed and got registered a deed of gift in favour of her brother, the present appellant, gifting her 1/3rd undivided interest in the said dwelling house as decreed to her pursuant to the final decree for partition. Armed with that gift deed, the appellant donee who obviously was a stranger to the joint family, filed execution petition on 14.12.1981 for executing the final decree obtained by his predecessor in interest, namely, the donor Smt. Radha Rani. Pending the execution proceedings taken out by the appellant donee, one of the judgment-debtors Pran Krishna, original first defendant, died in July 1983. In his place, his son present Respondent No. 1, Madan Mohan Ghosh was brought on record as his legal heir in the execution proceedings. The executing court by its order dated 17.1.1985 issued a writ of possession by appointing a Pleader Commissioner to undertake the task of suggesting partition of the suit house by metes and bounds. Then in September 1985, pending the execution proceedings original judgment debtor Defendant No. 2 Gaur Mohan also died. It appears that thereafter the real contest remained between the appellant on the one hand and Respondent No. 1 on the other. Respondent No. 1 filed an application on 12.12.1986 before the executing court under Section 4 of the Act for enforcing his claim of pre-emption against the appellant stranger transferee of 1/3rd undivided interest of the original title-holder Smt. Radh Rani. The executing court by its order dated 13.8.1987 dismissed the said application of respondent No. 1 on the ground that the said application was not maintainable after the final decree was passed in the partition suit. As stated earlier, the said view of the executing court was not approved by the Division Bench of the Calcutta High court in the revision application. It took the view the view that said petition under the Act was maintainable and still the final decree had not got fully executed and satisfied by actual division of the property by metes and bounds and delivery of actual possession to the stranger transferee who had taken out the execution proceedings. By its order dated 17.12.1990, the High Court directed the executing court to dispose of the application of Respondent No. 1 under Section 4 of the Act on merits with a further direction to complete the said proceedings within six months. It is the aforesaid order of the High Court which is challenged in the present appeal by special leave, as noted earlier.

RIVAL CONTENTIONS :

Dr. Ghosh, learned senior counsel for the appellant, vehemently

contended that on the express language of section 4 of the Act, the application moved by Respondent No.1 was not maintainable. Dr. Ghosh relied upon a number of decisions which had taken the view canvassed by him. His submission in short was that Section 4 of the Act can be availed of any of the parties to the litigation in the partition suit till its culmination into a final decree for partition. That even during the appeal against the final decree section 4 can be pressed in service. That once the final decree comes to be passed and gets finally confirmed by the ultimate court of appeal the suit comes to an end. Thereafter, when execution proceedings are taken out for execution such final decree, Section 4 of the Act would be out of picture and cannot be pressed in service against the stranger transferee of the decretal rights of one of the co-owners in the family dwelling house. Dr. Ghosh also vehemently tried to submit that the finding reached by both the courts below that the suit property consisted of a family dwelling house and was not an open land, was also not sustainable. On the other hand, learned counsel for the respondents submitted that Section 4 is a beneficial provision which seeks to avoid the interference by the stranger transferee of co-owners' right in a joint family dwelling house and it such strangers are permitted to come into possession of any part of such dwelling house, the peace and tranquility of the rest of the occupant members of the joint family would be affected and in order to avoid such a contingency and possible social strife the legislature in its wisdom and enacted this provision which has stood the test of time spread over more than a century and there was no reason to restrict the application of such a benevolent section only upto the stage of final decree and not during further proceedings in execution of such final decree. It was submitted that beneficial provision of Section 4 can rightly be made applicable during execution proceedings till the final decree gets fully satisfied by division of property by metes and bounds and by actual delivery of possession of respective portions of the joint family dwelling house to the concerned shares. It is only at that stage that the executing court would become *functus officio*. That till that stage is reached Section 4 of the Act can be legitimately pressed in service by any of the remaining co-owners claiming pre-emptive right to purchase the share of the stranger transferee from one of the co-owners. Learned counsel also in his turn relied upon a decision of the Division Bench of the Patna High Court in *Harendra Nath Mukharjee* v. *Shyam Sunder Kuer & Ors.*, A.I.R. (1973) Patna 142. He also submitted that in a partition suit till the decree gets fully satisfied and executed each

A B C D E F G H

A contesting party remains as god as a plaintiff and consequently the beneficial provision of Section 4 can be pressed in service by any of the contesting co-owners till the final decree in such a suit for partition gets fully executed and implemented and consequently curtain drops on the partition proceedings between the parties for ever.

B It is in the background of these rival contentions that we address ourselves to the consideration of this question. Before we refer to the cleavage of judicial opinion amongst different High Courts on the scope and ambit of Section 4 of the act, it would be profitable to have a look at the provision itself. The Statement of Objects and Reasons for enacting the C Partition Act, 1893 amongst others, provided as under :

> "It is also proposed in the Bill to give the Court the power of compelling a stranger, who has acquired by purchase a share in a family dwelling-house when he seeks for a partition, to sell his D share to the members of the family who are the owners of the rest of the house at a valuation to be determined by the Court. This provision is only an extension of the privilege given to such share holders by section 44, paragraph 2 of the Transfer of Property Act, and is an application of a well-known rule which obtains among Muhammadans everywhere and by custom also among Hindus in E some parts of the country."

It is obvious that the Act intended to extend the privilege already available to a co-sharer in a family dwelling house as per Section 44 of the Transfer of Property Act, 1882 (hereinafter referred to as the T.P. Act'). Section 44 F of the T.P. Act dealing with cases of transfer by one of the co-owners of immoveable property, reads as under :

> "44. Transfer by one co-owner - where one of two or more co-owners of the immovable property legally competent in that behalf transfers his share of such property or any interest therein, the G transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the H share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house". A

It is obvious that by the time the Act came to be enacted, the legislature had in view the aforesaid parent provision engrafted in section 44 of the T.P. Act to the effect that a stranger to the family who becomes the transferee of an undivided share of one of the co-owners in a dwelling house belonging to undivided family could not claim a right of joint possession or common or part enjoyment of the house with other co-owners of the dwelling house. Implicit in the provision was the legislative intent that such stranger should be kept away from the common dwelling house occupied by other co-sharers. It was enacted with the avowed object of ensuring peaceful enjoyment of the common dwelling house by the remaining co-owners being members of the same family sharing a common hearth and or home. It is in the light of the aforesaid pre-existing statutory background encompassing the subject that we have to see what Section 4 of the Act purports to do. Section 4 of the Act provides as under : B C D

"4. Partition suit by transferee of share in dwelling-house. - (1) where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf. E F

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section." G

A mere look at the aforesaid provision shows that for its applicability at any stage of the proceedings between the contesting parties, the following conditions must be satisfied :

(1) A co-owner having undivided share in the family dwelling house H

A should effect transfer of his undivided interest therein :

(2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;

(3) Such transferee must sue for partition and separate possession
B of the undivided share transferred to him by the concerned co-owners;

(4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should
C put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and

(5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transferred share belong-
D ing to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no
E more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house.

The aforesaid analysis of Section 4 of the act makes it clear that there is no express provision indicating the stage at which such application can
F be moved against the stranger transferee of the share of an erstwhile co-owner of dwelling house of undivided family. Consequently, on the language of Section 4, it cannot be urged that it cannot be pressed in service after the final decree for partition is passed and before such final decree is fully executed whereby the court becomes *functus officio*. It is trite to observe that in the present case out of the aforesaid conditions for
G applicability of Section 4, save and except the condition regarding the stranger transferee suing for partition which is the subject-matter of fierce controversy between the parties, all the remaining conditions are satisfied. In other words, there is well established on the record of the case that the suit house was a dwelling house belonging to undivided family of three
H erstwhile brothers and which later on came to belong to two undivided

brothers along with the widow of their deceased brother and thus the suit house was a dwelling house belonging to undivided family. Dr. Ghosh, learned senior counsel for the appellant, faintly tried to submit that both the courts below were in error in holding that the suit property consisted of a dwelling house and not open land. As both the courts concurrently found it to be a dwelling house belonging to undivided family, this contention is no longer open for adjudication at this stage. We, therefore, proceed on the basis that the suit house is a dwelling house belonging to undivided family. It is also not in dispute between the parties that 1/3rd interest of one of the co- owners, namely, Smt. Radha Rani, who had got final decree for partition in her favour, was transferred by gift in favour of the appellant after the final decree and that such donee-transferee was a stranger to the family as he was not a member of the said family. It is also not in dispute that Respondent No. 1 by way of application under Section 4 of the Act undertook to buy out the share of the appellant stranger transferee being 1/3rd undivided share which belonged to his predecessor in title decree-holder Smt. Radha Rani. However, the real controversy between the parties is whether the appellant who is a stranger transferee of 1/3rd undivided interest of Smt. Radha Rani in the suit property can be said to have sued for partition so as to satisfy the remaining condition of the said provision.

In order to answer this moot question, it has to be kept in view what the legislature intended while enacting the Act and specially Section 4 thereof. The legislative intent as reflected by the Statement of Objects and Reasons, as noted earlier, makes it clear that the restriction imposed on a stranger transferee of a share of one or more of the co-owners in a dwelling house by Section 44 of the T.P. Act is tried to be further extended by Section 4 of the Partition Act with a view to seeing that such transferee washes his hands off such a family dwelling house and gets satisfied with the proper valuation of his share which will be paid to him by the pre-empting co-sharer or co-sharers, as the case may be. This right of pre-emption available to other co- owners under Section 4 is obviously in further fructification of the restriction of such a transferee as imposed by Section 44 of the T.P. Act. It is true that amongst other conditions, Section 4 requires for its applicability that such stranger transferee must sue for partition and only in that eventuality the right of pre- emption envisaged by Section 4 can be made available to the other contesting co-owners. In this connection, great emphasis was placed by Dr. Ghosh on the words

A "such transferee sues for partition" as employed by Section 4. However, it has to be noted that this section does not provide as a condition for its applicability that such stranger transferee must file a suit for partition. The words "transferee sues for partition" are wider than the words "transferee filing a suit for partition". The latter phraseology is conspicuously absent in the section. the Partition Act does not define the words "suing for B partition". The connotation of the term "sue" can be better appreciated by looking at certain standard works defining such a phrase. In Black's Law Dictionary, Sixth Edition, at page 1432 the meaning of the word "sue" mentioned as under :

C "To commence or to continue legal proceedings for recovery of a right; to proceed with as an action, and follow it up to its proper termination; to gain by legal process".

In Collins English Dictionary, 1979 Edition, at page 1452, one of the meaning of the word "sue" has been shown as under :

D "to institute legal proceedings against".

In Aiyar's Judicial Dictionary, 10th Edition (1988), at page 980, the word "sue" is said to have the following meaning :–

E To take any legal proceedings against one".

It is further observed that the word is used most exclusively to prosecute a civil action against one.

In Concise Oxford Dictionary, Seventh Edition, at page 1066, the F following meanings are ascribed to the word "sue" :

"1. institute legal proceedings against (person); make application to or to law court for redress; make petition in law court for and obtain (writ, pardon etc.); 2. entreat (person); make entreaty to (person) for a favour".

G In Stroud's Judicial Dictionary, Fifth Edition, at page 2450, the words "to sue" is said to have the meaning generally speaking, of bringing action.

It is, therefore well-established that the terminology "suing for partition" would not necessarily mean filing of a suit in the first instance by the H transferee. If a transferee seeks to execute any final decree for partition in

favour of his transferor co-owner, he can be said to have initiated a legal action for redressal of his decretal right as a stranger transferee. Any legal action taken by anyone for getting redressal from a law court and for indicating his legal right on which such action is based can be said to have sued in a court of law. It cannot, therefore, be said that a purchaser of decretal rights flowing from a final decree for partition while initiating proceedings for execution of that decree against the judgment-debtors who are co-sharers in the property sought to be partitioned by metes and bounds, is not suing for partition by getting the said decree executed through a court of law. If the words "transferee suing for partition" are given a restrictive meaning, namely, that he can be said to be suing for partition only upto the stage of final decree in such a suit for partition then the wide phraseology advisedly employed by the legislature in the section would be deprived of its real laudable object and content. It is trite to observe that till the final decree for partition of a co-ownership property culminates into its full discharge and satisfaction, the lis between the contesting parties cannot be said to have come to a final end. It is also exiomatic that once the partition decree becomes final, the court which passed the decree does not become *functus officio* for all purpose. On the contrary, its role remains effective till the decree passed by it gets fully executed and implemented. It is for this very purpose that the legislature has provided as per Section 38 of the Civil procedure Code that a decree may be executed by the court which passed it, or by the court to which it is sent for execution. Therefore, it is the duty of the court which passes the decree to get it executed when called upon to do so with a view to seeing that the rights and obligations flowing from such decree get finally complied with and translated into reality. Till that stage is reached the court which passed the decree does not become totally *functus officio* and the litigation between parties cannot be said to have ended finally. Under these circumstances, it cannot be said that a decree-holder in a partition suit or his transferee who is armed with the plaintiff's rights pending such suit or even after the passing of the final decree as transferee of decretal rights when he seeks execution is not suing for partition or is not entreating the court for its assistance to get his right fully vindicated as per the claim in the suit and decree therein. In this connection, it is also profitable tc keep in view the legislative intent underlying various provisions of the Code of Civil Procedure which shows that in given circumstances the proceedings in the suit can be treated to include even execution proceedings. Explanation VII to Section 11 of the civil Procedure Code dealing with *res judicata* lays down as under :

A B C D E F G H

A "Explanation VII. - The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to proceeding for the execution of the decree, question arising in such proceedings and a former proceeding for the execution of that decree."

B

As per Order 22 Rule 10, in cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. As per Order 22 Rule 12, nothing in rules 3, 4 and
C 8 shall apply to proceedings in execution of a decree or order meaning thereby that Order 22 Rule 10 will apply to execution proceedings whereby the same scheme regarding devolution of interest of either party in the suit is made applicable even to execution proceedings.

D Section 52 of the Transfer of Property Act is another illustration on the point dealing with the principle of *lis pendens*. The explanation to the said section indicates that the pendency of a suit would encompass the stage after the final decree till complete satisfaction and discharge of such decree or order. It is, therefore, obvious that legislature for different contingencies has thought it fit to extend the scope and ambit of the
E terminology "suit" even for covering the execution proceedings in connection with decrees passed in such suits. As we have seen earlier, Section 4 of the Act has also advisedly used the terminology "sues for partition" and has not confined it only to suits filed by stranger transferee for applicability of Section 4 of the Act.

F

We have also to keep in view the avowed beneficial object underlying the said provision. Section 4 of the Partition Act read with Section 44 of the T.P. Act represents a well knit legislative scheme for insulating the domestic peace of members of undivided family occupying a common dwelling house from the encroachment of a stranger transferee of the share
G of one undivided co-owner as the remaining co-owners are presumed to follow similar tradition and mode of life and to be accustomed to identical likes and dislikes and identical family traditions. This legislative scheme seeks to protect them from the onslaught on their peaceful joint family life by stranger-outsider to the family who may obviously be having different
H outlook and mode of life including food habits and other social and

religious customs. Entry of such outsider in the joint family dwelling house is likely to create unnecessary disturbances not germane to the peace and tranquility not only of the occupants of the dwelling house but also of neighbours residing in the locality and in the near vicinity. With a view to seeing that such homogenious life of co-owners belonging to the same joint family and residing in the joint family dwelling house is not adversely affected by the entry of a stranger to the family, this statutory right of pre-emption is made available to the co-owners who undertake to buy out such undivided share of the stranger co-owner. If such a right flowing from Section 4 of the Act is restricted in its operation only upto the final decree for partition, the very benevolent object of the section would get frustrated as upto final decree stage, the court would only crystalise the shares of the contesting co-owners but the separation and partition of the shares of respective parties get really affected on spot only by actual division by metes and bounds and delivery of possession of respective shares to respective share-holders. This can be achieved only at the stage when the execution of the final decree takes place and the litigation reached its terminus for the contesting parties and the curtain drops on the litigation. Only then the court which passed the decree becomes finally *functus officio*. It is also well-settled rule of interpretation of statute that the court should lean in favour of that interpretation which fructifies the beneficial purpose for which the provision is enacted by the legislature and should not adopt an interpretation which frustrates or unnecessarily truncates it. Maxwell on the Interpretation of statutes, Twelfth Edition, has observed in Chapter 4 pertaining to beneficial construction as under :

> "The fact that a section is clearly designed to afford relief may incline the court to construe it more benevolently than it might a less obviously remedial enactment....."

Similarly, it has been observed at page 96 as under :

> "It is said to be the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy. To this end, a certain extension of the letter is not unknown, even in criminal statutes".

Consequently, on the express language of Section 4 of the Partition Act which is a benevolent provision enacted by the legislature for the welfare and tranquility of the members of a joint family occupying the dwelling

A house, we must so construe the provision as to make it available to all the relevant stages of the litigation between the contesting co-owners till the litigation reaches its terminus by way of full and final discharge and satisfaction of the final decree for partition. If a stranger transferee enters the arena of contest at any stage and seeks to get his share separated as far as the subject-matter of the litigation, namely, the dwelling house, is B concerned, he can be said to be suing for partition and separate possession of his undivided share to which he has become entitled because of transfer by one of the co-owners. Such a transferee might come on the scene prior to the final decree via order 22 rule 10 or he may come on the arena of contest seeking redressal of his right of partition and separation of his C undivided share even in execution proceedings as a transferee of the decretal right of erstwhile plaintiff under the final decree either by himself filing the execution proceedings as per Order 21 Rule 16 or may subsequently step in the shoes of the decree-holder who has already filed the execution proceedings via Order 22 Rule 10 read with Order 22 Rule 12. In either eventuality, such a stranger transferee who emerges on the scene D of litigation between the contesting co-owners which has not still reached its terminus and who seeks vindication of his transferee-rights in the dwelling house can certainly be said to be suing for partition even at the stage of execution of such final decree for partition.

E In our view, therefore, on the express language of Section 4 of the Partition Act, the Division Bench of the High Court reached a correct conclusion in the impugned judgment.

Now is time for us to have a quick look at the different decisions of F the High Courts on this question. Dr. Ghosh, learned senior counsel for the appellant, heavily relied upon some of the decisions of the Patna and the Calcutta High Courts as well as the decision of the Madras High Court in support of his contention that Section 4 cannot be applied at the stage of execution of a final decree for partition. On the other hand, learned counsel for the respondents, relied upon the latter decisions of the Patna G High Court as well as the Calcutta High Court in support of his rival contention seeking application of Section 4 of the Act even during execution proceedings and which contention, as we have seen above, meets our approval. We shall first deal with the decisions relied upon by Dr. Ghosh in support of his contention. In *Sheodhar Prasad Singh & Ors.* v. *Kishun* H *Prasad Singh & Ors.*, A.I.R. (1941) Patna 4, Dhavle, J. took the view that

an application under section 4 could be made in appeal against final decree. Now it must be kept in view that the learned Judge was not directly concerned with a situation which arises in the present case. In the case before the learned judge of the Patna High Court, the question of applicability of Section 4 of the Act fell for consideration at the stage when the final decree reached the second appellate stage before the High Court. According to the learned Single Judge, Section 4 could apply even at that stage. The learned Single Judge, therefore, had no occasion to consider the further question with which we are concerned. The view propounded by him cannot be said to have ruled out the applicability of Section 4 beyond the stage of final decree in a suit for partition. Dr. Ghosh invited our attention to a decision in *Birendra Nath Banerjee* v. *Smt. Snehalata Devi & Anr.*, A.I.R. (1968) Calcutta 380. Even in that case the Division Bench of the High Court was concerned with the applicability of Section 4 pending appeal against the final decree for partition. The Division Bench observed therein as under :

> "The right of pre-emption under Section 4 of the Partition Act is a right given by the statute and on its wording, it subsists so long as the suit remains pending, or, in other word, so long as the suit has not been concluded or terminated for an effective final decree for partition. Therefore, an application claiming pre-emption at a time when the appeal against final partition decree is pending cannot be held barred by limitation on the ground that it has been filed beyond three years of the passing of the preliminary partition decree."

The aforesaid observation makes it clear that the court was concerned with the question of limitation in connection with application under Section 4 of the Act pending the appeal against the final decree and whether it should be treated as time barred considering the starting point of preliminary decree. It is true that the Division Bench, in this connection, observed that the right of pre-emption under Section 4 subsists so long as the suit is pending or has not been concluded or terminated by the final decree for partition. But the said observation cannot be construed to have excluded the possibility of applicability of Section 4 to a post final decree stage as such a situation had not arisen for consideration of the court. However, the decision of the Madras High Court is on the point. Strong reliance was placed by Dr. Ghosh on the judgment of the Madras High

A Court in *Abdul Sathar* v. *A. Nawab*, A.I.R. (1980) Madras 235, In that case a learned Single Judge, Ratnam, J., took the view dissenting from the decisions of the Patna and the Calcutta High Courts to which we shall make a reference presently that Section 4 of the Act cannot be pressed in service after the final decree for partition is passed. In other words, in execution proceedings Section 4 of the Act cannot apply. As already B discussed by us earlier Section 4 on its express language cannot be read in such a truncated fashion. Therefore, the decision of the learned Single Judge cannot be considered to be lying down good law. On the other hand, the decisions of the Patna and the Calcutta High Courts to which we shall now make a reference.

C

In *Satya Narayan Chakravarty* v. *Biswanath Paul & Ors.*, (1974) Calcutta Weekly Notes 871, a Division Bench of the Calcutta High Court observed that so long as the stranger purchaser of decretal rights of one of the co-owners has not taken possession of his allotted share by execution D of the said decree, application under Section 4 of the Partition Act is maintainable. In this connection, it was observed by the Division Bench, speaking through Laik, J., as under :

"Having considered the scheme of the Partition Act including its object which is to prevent the introduction of any foreign E element into the group of family members and its aim which is to maintain homogeneity in respect of the entire family and particularly the provisions of section 4 thereof, which does not indicate a contrary intention and after giving anxious consideration to the principles laid down but following the principle that the residence F in a dwelling house of an undivided family should not, if possible (but not contrary to law), be thrown open to a stranger to the family and remembering that the terms of section 4 of the Act are quite general and distinct from a decree passed in a partition suit and holding further the rule that the executing court should not go behind the decree, is inapplicable in an application under G Section 4 of the Partition Act and not ignoring the provisions of section 44 of the Transfer of property Act and the rules of pre-emption governing the Muhammandans, Buddists, Jews, Romans and others and agreeing with respect to the dictum of the judicial committee in 42 IA 10-ILR 37 AM 129 (141) R.C. that the right H of pre-emption is a "valuable right" - the object of such a right

being the avoidance of a disagreeable stranger (though some may think it an archanism and a clog on freedom of contract) the court held that an application under Section 4 of the Partition Act is maintainable even after the final decree is passed....." A

In *Boto Krishna Ghose* v. *Akhoy Kumar Ghose & Ors.*, A.I.R. 37 (1950) Calcutta 111, it was held by another Division Bench of the Calcutta High Court that a dwelling house of an undivided family has a linkage with the dwelling house which belongs to the family and which is not divided and that such dwelling house may be owned by members of such family who need not be joint in mess and that house itself should be undivided amongst the members of the family who are its owners. The emphasis is really on the undivided character of the house, and it is this attributed of the house which imparts to the family its character of an undivided family. For the members of the family may have partitioned all their other joint properties and may have separated in mess and worship, but they would still be an undivided family in relation to the dwelling house so long as they have not divided it amongst themselves. In this connection, it has been further observed as follows :– B C D

"If in this state of things a member of the family transfers his share in the dwelling house to a stranger, the position that arises is that para 2 of section 44, T.P. Act comes into operation and the transferee does not become entitled to joint possession or other common or part enjoyment of the house, although he would have the right to enforce a partition of his share. The object of this provisions is to prevent the instruction of strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share to a stranger. The factual position then is that it is still an undivided dwelling house, the possession and enjoyment of which are confined to the members of the family, the stranger transferee being debarred by law from exercising his right to joint possession which is one of the main incidents of co-ownership of property. Such a dwelling house can in our opinion still be looked upon as a dwelling house belonging to an undivided family, because the members of the family have not divided it amongst themselves and are in sole enjoyment and possession of it to the exclusion of the stranger transferee who has only a right to partition. And so long as the E F G H

A dwelling house has not been completely alienated to strangers as was the case in *Vaman Vishnu* v. *Vasudeo Norbhat*, 23 Bom. 73, successive transfer by other co-sharer members of the family do not alter the factual position in this respect, because the remaining member or members of the family have the right to hold exclusive possession to the exclusion of the stranger alienees. So long as that situation lasts, the dwelling house, in our opinion, continues to be a dwelling house belonging to an undivided family."

B

The aforesaid decision also shows that so long as decree for partition of a family dwelling house does not get fully executed and the shares of co-owners do not get separated by metes and bounds and the co-owners are not put in actual possession of their respective shares, the dwelling house remains to be common dwelling house of joint family and so long as that attribute remains, Section 4 would continue to be attracted. We may now deal with the decision of the Division Bench of the Patna High Court which has also directly spoken on the point. In *Harendera Nath Mukherjee* v. *Shyam Sunder Kuer & Ors.* (Supra) Mukharji, J., speaking for the court had to consider this very question in the light of the scheme of Section 4 of the Partition Act. It was held that application under Section 4 could be made at any stage of the suit. Simply because an application had been filed after the passing of the final decree, it could not be said that it was not maintainable on the ground that the executing court could not go behind the decree. It was not a case of going behind the decree. It was further observed that family continued to be undivided qua dwelling house till possession was delivered to the members of the family in execution of the final decree for partition and as such, the application under Section 4 was maintainable after passing of the final decree and before the possession of the dwelling house in question was delivered to the stranger transferee. The aforesaid decisions of the Calcutta High Court in the cases of *Satya Narayan Chakravarty* (supra) and *Boto Krishna Ghose* (supra) as well as the decision of the Division Bench of the Patna High Court in the case of *Harendra Nath Mukherjee* (supra) lay down the correct legal position.

C D E F G

At this stage, we may note one apprehension voiced by Dr. Ghosh. It was submitted that if this view regarding applicability of Section 4 is upheld, then it may very well happen that even after the decree for partition is executed by one of the erstwhile co- owners and his transferee and the stranger transferee is actually put in possession of his share by division on

H

spot by metes and bounds, and thereafter if such a transferee transfers his separate share in the dwelling house which has been actually handed over to him, the co-owner may still file an application under Section 4 of the Act. This apprehension is totally misconceived. Section 4 in its applicability, as discussed above, will cover all stages of litigation in a partition suit from its inception till its termination not only by the final decree for partition but also by its complete satisfaction and discharge through the assistance of the executing court; once that happens the court itself becomes *functus officio* and the litigation will come to an end and the concerned parties thereafter will occupy the respective portions of the erstwhile dwelling house as full owners of their portions. The separated part of the dwelling house in possession of such stranger transferee cannot then be treated as a part and parcel of the dwelling house belonging to an undivided family and at that stage the dwelling house qua such a stranger would cease to belong to any joint family and it would belong to different owners occupying their respective portions in a composite building. Moment the integrity of common dwelling house belonging to undivided family is broken by the execution of the final partition decree through the intervention of the court and the proceedings are ended, there would remain no scope for play of Section 4 of the Act as there would be no subject-matter of a common dwelling house belonging to an undivided family on which it could operate.

As a result of the aforesaid discussion, it must be held that Section 4 of the Act can validly be pressed in service by any of the co-owner of the dwelling house belonging to undivided family pending the suit for partition till final decree is passed and thereafter even at the stage of execution of the final decree for partition so long as the execution proceedings have not effectively ended and the decree for partition has not been fully executed and satisfied by putting the share-holders in actual possession of their respective shares. Beyond that stage, however, Section 4 will go out of commission.

That leaves out the question as to what final order should be passed in these proceedings. As we have upheld the applicability of Section 4 to the present proceedings the application filed by Respondent No. 1 is held maintainable and is required to b e processed further. At this stage, on the aforesaid conclusion to which we have reached, it would be necessary, as directed by the High Court, to remand the proceedings under Section 4 of

A the Act for being processed further. However, as the proceedings are very old and are lingering on since so many years in the court, learned counsel for the respondents fairly suggested with a view to putting an end to this litigation that Respondent No. 1 who had moved the application under Section 4 of the Act in 1986, is prepared to pay Rs. four lakhs to the
B appellant in full and final satisfaction of his claim as a donee of the share belonging to Smt. Radha Rani. This amount was offered in the light of the valuation of the share of the appellant in the dwelling house as on 12.12.1986 when that application was moved. This offer was made by learned counsel for the respondents in consultation with Respondent No. 1 who was present in the Court. Dr. Ghosh, learned senior counsel for the
C appellant, was also agreeable to the said course being adopted. In our view this is a fair stand taken by both the parties to put an end to this litigation which was triggered off as early as on 5.9.1960. It is high time that it reaches its final terminus at least after 36 years we, therefore, grant application of Respondent No. 1 under Section 4 of the Partition Act and direct him to
D pay Rs. four lakhs to the appellant in full and final satisfaction of his claim and on payment of Rs. four lakhs by Respondent No. 1 to the appellant, the appellant shall convey his right, title and interest in the suit house to Respondent No. 1 as per Section 4 of the Partition Act. Rupees four lakhs shall be paid by Respondent No. 1 to the appellant by instalments as under:

E 1. Rupees two lakhs will be paid by Respondent No. 1 to the appellant on or before 31.12.1996.

2. The balance of Rupee two lakhs shall be paid by Respondent No. 1 to the appellant on or before 31.3.1997.

F

It is further directed that in case of default of any of these instalments, the amount remaining due on such default shall become payable by Respondent No. 1 to the appellant with 18% interest thereon from the date of this judgment till the payment of such defaulted amount. On payment of the aforesaid amount of Rs. four lakhs and also subject to payment of
G interest on the requisite amount, in case of default, if any, as aforesaid, the right, title and interest of the appellant in the suit dwelling house shall stand transferred in full ownership of Respondent No. 1, the applicant of Section 4 of the Act and such share shall be treated to have been sold by the appellant to respondent No. 1. On receipt of the aforesaid sale con-
H sideration, the appellant shall also execute necessary sale document in

favour of Respondent No. 1 The cost of registration of such sale document shall be borne by Respondent No. 1 Thereupon, the application for execution moved by the appellant shall be treated as closed and the decretal claim of the appellant qua the judgment-debtors will be treated as fully satisfied. It is further directed that the concerned parties shall not alienate or encumber in any manner their respective shares in the joint family dwelling house till the present order is fully complied with. The concerned parties are directed to carry out the aforesaid directions punctually. The appeal is accordingly disposed of with no order as to costs in the facts and circumstances of the case.

A

B

V.S.S. Appeal disposed of.

C

A SAROJINI AMMAL

v.

THE CONTROLLER OF ESTATE DUTY, MADRAS

SEPTEMBER 18, 1996

B [S.P. BHARUCHA AND K. VENKATASWAMI, JJ.]

Estate Duty Act, 1953 : Section 10.

Estate—Principal value of—Gifted amounts—Includibility in—Business
C *man made unconditional gifts to his daughters who accepted the same—Subsequently, as per request of daughters a partnership firm comprising donor-father and donee-daughters was formed—Amounts gifted retained in business and utilised as share capital of donee-daughters in partnership firm—Later donor-father died—Held : In the circumstances of the case, amounts of gift retained in business was not includible in the principle value of the estate of*
D *the deceased.*

The proprietor of a business concern made unconditional cash gifts to his daughters and they accepted the same. Subsequently, as per the request made by the said daughters a partnership firm comprising the
E **donor-father and the donee-daughters was formed and the amounts gifted to the donee- daughters were retained in the business and utilised as share capital of the donee-daughters in the partnership firm. Later the donor-father died. The Assistant Controller of Estate Duty held that the gifted amounts were liable to be included in the principal value of the estate of the deceased donor under Section 10 of the Estate Duty Act, 1953. The High**
F **Court confirmed this assessment. Being aggrieved the appellant preferred the present appeal.**

Allowing the appeal, this Court

G **HELD: 1. When the gift was made and accepted, it was unconditional. the donees requested that a partnership be formed and the amounts gifted be retained and utilised as share capital of the donees in the partnership firm to be formed. There is nothing, in this case, to suggest that parting with the enjoyment or benefit by the donee, or permitting the donor to share them out of the bundle of right gifted in the property is referable to the gift.**
H **Hence, the amounts of gift retained in business was not includible in the**

principal value of the estate of the deceased. [476-H, 477-A] A

Controller of Estate Duty, Kerala **v.** *R.V. Vishwanathan & Ors.*, **[1977] 1 SCC 90 , relied on.**

Controller of Estate Duty, Punjab & Haryana, Jammu & Kashmir, Himachal Pradesh and Chandigarh **v.** *Kamalavati*, **[1979] 4 SCC 265, held** B **inapplicable.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2513 of 1981.

From the Judgment and Order dated 23.1.79 of the Madras High C Court in T.C. No. 98 of 1975.

A.T.M. Sampath for the Appellant.

Dr. R.R. Misra, R.C. Ramesh and S.N. Terdol for the Respondent. D

The Judgment of the Court was delivered by

VENKATASWAMI, J. In this appeal by a certificate granted by the High Court of Madras under section 65 of the Estate Duty Act, 1953 (hereinafter referred to as "the Act"), the vexed question of applicability or otherwise of section 10 of the Act arises for decision of this Court. E

One Murugesa Mudaliar, the deceased, passed away on 15.10.1964. He was carrying on a business under the name and style of 'Newton & Company' a proprietory concern. On 20. 7.1962, the deceased made two cash gifts of Rs. 40,000 each to his two daughters, namely, Smt. Rajeswari F and Gnanambigai by debiting his capital account and crediting their accounts in his personal business book. On 20.7.62, both the donees wrote letters to the deceased accepting the gifts and thanking their father. Again on 27.7.62 each donee by separate letters thanking once again for the gifts requested the deceased to retain the same in the business and admit them as partners. Accordingly, a partnership was formed with effect from G 1.8.1962 in which the donees and also the donor were the partners. As noticed, the deceased passed away on 15.10.1964. A question arose, *inter alia*, whether on the facts and in the circumstances of the case, the gifts of Rs. 80,000 in all made by the deceased to his two daughters by debiting his capital account and crediting the accounts of the donees in his personal H

A business book could not be included in the principal value of the estate of the deceased under section 10 of the Estate Duty Act.

The Assistant Controller of Estate Duty overruling the objection of the accountable persons concluded that since the gifted amounts were not taken possession of and enjoyed by the donees to the entire exclusion of
B the donor, the gifted amounts were liable to be included in the principal value of the estate of the deceased under Section 10 of the Act. On appeal, the Appellate Controller confirmed the assessment. The accountable persons appealed to the Income Tax Appellate Tribunal ("Tribunal" for short) and the Tribunal found that the gifts in question did not fall within the
C ambit of section 10 of the Act and consequently they were not liable to estate duty. The Tribunal found as follows :

"These sequence of events clearly go to establish :–

(1) The two sums transferred by book entries were still available
D for purpose of the business carried on by the deceased.

(2) Under Section 122 of the Transfer of Property Act, the gift must be accepted by the donee and an offer without acceptance of the donee cannot complete the gift. While accepting the gift, the donees have stipulated for retention of the gifted amounts in
E the business of the deceased and admit them as partners. It, therefore, follows that the transfer of gifts were complete with the condition or understanding that the gifted amounts for the capital account of the donees and continue to be available for purposes of the business carried on by the deceased.

F (3) On making the gifts, the donees? assumed such possession and enjoyment of the subject matter of the gift as it was capable of at that time and that was also retained to the exclusion of the donor.

G (4) If the donor had some sort of control over the gifted amounts, it was not because of any reservation made by him while making the gifts, but the gift itself was made subject to the condition or understanding that the gifted amounts would be available for the continued use of the business carried by the deceased".

H The revenue aggrieved by the decision of the Tribunal moved the

High Court by way of reference. Before the High Court, on behalf of the accountable persons, a decision of the Court in *Controller of Estate Duty, Kerala* v. *R.V. Viswanathan & Others*, [1977] 1 SCC 90 was relied upon. However, the High Court distinguished that decision and ruled that on the facts of the case, Section 10 of the Act is attracted and consequently answered the question referred to it in favour of the Revenue and against the assessee.

Later at the instance of the accountable persons, the High Court granted a certificate of fitness for appeal to this Court in view of the later decision of this Court in *Controller Estate Duty, Punjab & Haryana, Jammu & Kashmir, Himachal Pradesh and Chandigarh* v. *Kamlavati*, [1979] 4 SCC 265.

Before us also learned counsel appearing for the appellant placing reliance on the decisions of this Court in *Vishwanathan's* case (supra) and *Kamlavati's* case (supra) contended that the facts of this case as well as the facts in *Vishwanathan's* case are identical and the High Court was not correct in stating that the facts were not identical and therefore, the appellant is entitled to succeed in this Appeal. The learned counsel appearing for the Revenue, however, submitted that in almost all the cases, the donor was already a partner in partnership firm and the donee/donees was/were taken as partner/partners subsequent to the gift and the principle or the ratio laid down in such cases cannot be pressed into service to the facts of this case where the donor was sole proprietor of the concern and subsequent to the gift, the donees were taken as partner's and the partnership came into existence. We do not think that the learned counsel for the Revenue is right in making this submission. In *Vishwanathan's* case, the donor was the sole proprietor when he gifted the total sum of Rs. 2,70,000 to his four major and two minor sons.

After going through various decisions of this Court, which have taken into account a number of English decisions, we find that the rigour with which Section 102 of the English Act corresponding to Section 10 of our Act was applied, has been mellowed down, if we may use that expression, and certain amount of leniency has definitely been shown in favour of the accountable persons. It is true that when the High Court rendered this decision, there were conflicting views of High Court and to a certain extent, misunderstanding of the decisions of this Court was prevailing. That was

A the reason for this Court in *Kamlavati's* case to observe as follows :

> "To avoid the conflict in the application of the ratio of the various Supreme Court cases as seems to have been done by some of the High Courts, we would like to clarify and elucidate some of the aspects and facts of the matter a bit further. When a property is
> B gifted by a donor the possession and enjoyment of which is allowed to a partnership firm in which the donor is a partner, then the mere fact of the donor sharing the enjoyment or the benefit in the property is not sufficient for the application of Section 10 of the Act until and unless such enjoyment or benefit is clearly referable
> C to the gift, i.e. to the parting with such enjoyment of benefit by the donee or permitting the donor to share them out of the bundle of rights gifted in the property. If the possession, enjoyment or benefit of the donor in the property is consistent with the other facts and circumstances of the case, other than those of the factum of gift, then it cannot be said that the donee had not retained the posses-
> D sion and enjoyment of the property to the entire exclusion of the donor, or, to the entire exclusion of the donor in any benefit to him by contract or otherwise. It makes no difference whether the donee is a partner in the firm from before or is taken as such at the time of the gift or he becomes a creditor of the partnership
> E firm by allowing it to make use of the gifted property for the purposes of the partnership."

After observing as above, this Court in the said case further observed as follows :

> F "But we want to emphasise that the principles of law laid down by this Court in several decisions which we have reviewed in this judgment with some further clarification and elucidation should be carefully and broadly applied to the facts of each case without doing too much of dichotomy and hair splitting of facts so as not
> G to easily apply or not to apply the provision of law contained in Section 10 of the Act."

We have already set out the facts as found by the Tribunal and from those, it is clear that when the gift was made and accepted, it was unconditional. A week later the donees requested that a partnership be formed
H and the amounts gifted be retained and utilised as share capital of the

donees in the partnership firm to be formed. In the light of the letters written by the donees, as noticed above, we are of the view that there is nothing to suggest that parting with the enjoyment or benefit by the donee, or permitting the donor to share them out of the bundle of rights gifted in the property is referable to the gift, we agree with the contention of the learned counsel for the appellant that the facts are more or less identical with the facts in *Vishwanathan's* case (supra) and the ratio laid down therein which has been consistently applied by this Court subsequently will apply to the facts of this case.

Accordingly, we allow the Appeal and answer the question referred to the High Court in the affirmative in favour of the accountable persons and against the revenue. However, there will be no order as to cost.

V.S.S. Appeal allowed.

A

UNITED BANK OF INDIA

v.

SH. NARESH KUMAR AND ORS.

SEPTEMBER 18, 1996

B

[J.S. VERMA AND B.N. KIRPAL, JJ.]

Code of Civil Procedure, 1908 : Order 6 Rule 14. Order 29 Rule 1 and Order 41 Rule 27(1)(b).

C

Pleadings—Suit by company—Plaint signed and verified by person duly authorised by company—However, suit was dismissed on ground that it was not duly signed and verified by a competent person—Held : Company could expressly authorise one of its officers to sign plaint or it could ratify, expressly or impliedly, act of signing—Court could render finding about ratification on basis of evidence on record and circumstances specially with regard to

D

conduct of trial—Even if trial court found plaint was not duly signed and verified by competent person, appellate court under 0.41 R. 27(1)(b) could direct power of attorney to be produced or order competent person of company to be examined as witness to prove ratification—In the circumstances of the case, plaint was duly signed and verified by a competent person.

E

Practice and Procedure :

Pleadings—Substantive rights should not be allowed to be defeated on account of procedural irregularity or mere technicality which is curable—Code of Civil Procedure, 1908, 06 R. 14.

F

The appellant-Bank instituted a suit for recovery of the loan advanced to respondent No. 1 together with interest thereon. One R had signed and filed the plaint on behalf of the appellant. The suit had been filed in the name of the appellant company; full amount of court fee had

G

been paid by the appellant bank; documentary as well as oral evidence had been led on behalf of the appellant and the trial of the suit had continued for about two years. The courts below came to a conclusion that money had been taken by respondent No. 1 and that respondent No. 2 and husband of respondent No. 3 had stood as gurantors and that claim of the appellant was justified. However, the suit was dismissed by the courts

H

below on the ground that the plaint was not duly signed and verified by a

competent person. The question for consideration before this Court was whether the plaint was duly signed and verified by a competent person. A

Allowing the appeal, this Court

HELD : 1.1. A company like the appellant can *sue* and be sued in its own name. Reading Order 6 Rule 14 together with Order 29 Rule 1 of the Code of Civil Procedure, 1908 it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the Corporation. In addition thereto an *de hors* Order 29 Rule 1 of the Code of Civil Procedure, as a company is Juristic entity, it can duly authories any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the company. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of its officer in signing the Pleadings. Such ratification can be express or implied. [483-D-F] B C D

2.1. The courts below could have held that R must have been empowered to sign the plaint on behalf of the appellant. In the alternative it would have been legitimate to hold that the manner in which the suit was conducted showed that the appellant- bank must have ratified the action of R in singing the plaint. If, for any reason whatsoever, the courts below were still unable to come to this conclusion, then either of the appellant courts ought to have exercised their jurisdiction under Order 41 Rule 27(1)(b) of the Code of Civil Procedure and should have directed a proper power of attorney to be produced or they could have ordered R or any other competent person to be examined as a witness in order to prove ratification or the authority of R to sign the plaint. Such a power should be exercised by a court in order to ensure that injustice is not done by rejection of a genuine claim. [483-H, 484-A-B] E F G

2.2. In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defect which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, H

to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable. [482-H, 483-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11884 of 1986.

From the Judgment and Order dated 30.8.93 of the Punjab & Haryana High Court in R.S.A. No. 869 of 1993.

Sunil Goyal for Ms. Mridula Ray Bhardwaj for the Appellant.

G.K. Bansal for the Respondent No. 1-2.

The Judgment of the Court was delivered by

KIRPAL, J. The main question which arises in this appeal by special leave is whether the suit for recovery of money filed by the appellant bank was properly instituted.

The appellant's branch at Ambala Cantt. had instituted a suit in the Court of Sub-ordinate Judge, Ambala Cantt. for recovery of Rs. 1,40,553.91 from the respondent. The case of the appellant was that on 12th April, 1984 a sum of Rs. 50,000 was advanced as loan to respondent No. 1 for the purposes of his business and on that date he had executed a demand promissory note, hypothecation of goods agreement and other documents. Respondent No. 2 and one Sh. Suresh Kumar, husband of respondent No. 3 had stood as guarantors for the repayment of the loan. The respondents were stated to have agreed to pay interest at the rate of 18 per cent per annum with quarterly rests. When default in payment of the money was committed the aforesaid suit was filed for the recovery of the principal amount and the interest thereon. The sum total came to Rs. 1,40,553.91.

In the written statement filed by respondent No. 1 the plea which was taken was that he had never taken loan as alleged by the appellant bank and respondent No. 2 and Sh. Suresh Kumar had not executed any guarantee deed. It was, however, admitted that certain blank documents had been got signed but it was denied that the respondents had agreed to pay interest at the rate of 18 per cent per annum. He also took an additional plea challenging the authority of Sh. L.K. Rohatgi to sign and file the plaint on behalf of the appellant. Respondent No. 2 filed a separate

written statement taking the pleas similar to the one which had been raised by respondent No. 1 in his written statement. A further plea which was taken by her was that her guarantee was limited to the extent of Rs. 50,000 and she was not liable to pay any more amount merely because additional credit facilities may have been allowed to respondent No. 1. As the other guarantor - Sh. Suresh Kumar had died his widow, namely respondent No. 3 was impleaded as one of the defendants but as she did not appear the case against her proceeded *ex parte*. The appellant bank filed its replication wherein it denied the allegations contained in the written statement filed by respondents 1 and 2.

On the pleadings of the parties the following issues were framed :

"1. Whether the plaint is duly signed and verified by a competent person? OPP

2. Whether the defendant No. 1 raised a loan of Rs. 50,000 from the plaintiff bank on 12.4.84 and executed a demand promissory note, hypothecation of goods agreement, letter of loan and other documents in favours of the plaintiff bank? OPP

3. Whether the defendants No. 2 and 3 stood as guarantors for the repayment of the loan and if so, what is the extent of their liability? OPP

4. What is the balance amount? OPP

5. Whether the plaintiff varied the terms of loan and if so, its effect qua the liabilities of defendants No. 2 and 3, Onus on Parties.

6. Whether the statement of account produced by the plaintiff is admissible in evidence? OPP

7. Whether the defendants agreed to pay interest if so, at what rate and to what amount? OPP

8. Whether the plaintiff has no cause of action? OPP

9. Relief."

The trial judge by his judgment dated 14th November, 1987 decided issue No. 1, 2 and 7 against the appellant. Issues 3, 4, 5 and 6 were held in

A the appellant's favour. The trial court, however, held, under issues 2 and 3, that respondent No. 3 was not liable to pay any amount and respondent No. 2 was liable to pay only a sum of Rs. 55,699.20 as the principal amount plus interest at the rate of 18 per cent per annum for the period 12th April, 1984 to 11th February, 1985. In view, however, of the decision against the B appellant of issue No. 1 the suit filed by the appellant was dismissed with costs.

The appellant then filed an appeal which was decided on 2nd November, 1992 by the Additional District Judge, Ambala. The Additional District Judge reversed the findings of the trial court in so far as issues 2 C and 7 were concerned and came to the conclusion that the appellant had been able to prove that respondent No. 1 had taken a loan of Rs. 50,000 and had also proved the execution of relevant documents by the respondents. The principal debtor and the guarantors were also held to have agreed to pay interest at the rate of 18 per cent per annum. It affirmed the decision of the trial court limiting respondent No. 2's liability to Rs. 50,000 D and interest thereon. With regard to the liability of respondent No. 3 the lower appellate court held that in the absence of any evidence to prove that she had inherited any estate from her deceased husband no liability could be fastened on her and the decision of the trial court, to that effect, was affirmed. The appeal was, however dismissed because the Additional E District Judge upheld the decision of the trial court with regard to issue No. 1. It was held that it has not been proved that Sh. L.K. Rohatgi had held any valid authority to file the suit on behalf of the appellant bank.

Against the aforesaid decision of the Additional District Judge the appellant filed a regular second appeal. By order dated 30th August, 1993 F a single judge of the Punjab and Haryana High Court dismissed the said appeal in limine by observing that there was no ground for interference with the concurrent findings of facts recorded by two courts below. Hence this appeal by special leave.

G In this appeal, therefore, the only question which arises for consideration is whether the plaint was duly signed and verified by a competent person.

In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to H be defeated on a mere technicality. Procedural defects which do not go to

the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case as for as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.

In cannot be disputed that a company like the appellant can sue and be sued in its in its own name. Under Order 6 Rule 14 of the Code of Civil Procedure a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the company. Order 29 Rule 1 of the Code of Civil Procedure, therefore, provides that in a suit by or against a corporation the secretary or any Director or other Principal Officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6 Rule 14 together with Order 29 Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto an *de hors* Order 29 Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can. on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer.

The courts below could have held that Sh. L.K. Rohatgi must have been empowered to sign the plaint on behalf of the appellant. In the alternative it would have been legitimate to hold that the manner in which the suit was conducted showed that the appellant bank must have ratified the action of Sh. L.K. Rohatgi in signing the plaint. If, for any reason

A whatsoever, the courts below were still unable to come to this conclusion, then either of the appellate courts ought to have exercised their jurisdiction under Order 41 Rule 27(1)(b) of the Code of Civil Procedure and should have directed a proper power of attorney to be produced or they could have ordered Sh. L.K. Rohatgi or any other competent person to be examined as a witness in order to prove ratification or the authority of Sh. L.K. Rohatgi to sign the plaint. Such a power should be exercised by a court in order to ensure that injustice in not done by rejection of a genuine claim.

The Courts below having come to a conclusion that money had been taken by respondent No. 1 and that respondent No. 2 and husband of respondent No. 3 had stood as guarantors and that the claim of the appellant was justified it will be a travesty of justice if the appellant is to be non suited for a technical reason which does not go to the root of the matter. The suit did not suffer from any jurisdictional infirmity and the only defect which was alleged on behalf of the respondents was one which was curable.

The court had to be satisfied that Sh. L.K. Rohatgi could sign the plaint on behalf of the appellant. The suit had been filed in the name of the appellant company; full amount of court fee had been paid by the appellant bank; documentary as well as oral evidence had been led on behalf of the appellant and the trial of the suit before the Sub Judge, Ambala, had continued for about two years. it is difficult, in these circumstances, even to presume that the suit had been filed and tried without the appellant having authorised the institution of the same. The only reasonable conclusion which we can come to is that Sh. L.K. Rohatgi must have been authorised to sign the plaint and, in any case, it must be held that the appellant had ratified the action of Sh. L.K. Rohatgi in signing the plaint and thereafter it continued with the suit

CONCLUSIONS :

The suit of the appellant had been dismissed because issue No. 1 had been decided against it. Counsel for the parties have not challenged the decision of the lower appellate court on the other issues, which decision was affirmed by the High Court when it dismissed the second appeal in limine. For the reasons stated hereinabove we hold that issue No. 1 was wrongly decided and this being so the appellant was entitled to a decree

in view of the decision of the lower appellate court on the other issues. A

The appeal of the appellant is, accordingly, allowed in the aforesaid terms. The effect of this would be that the suit of the appellant would be decreed in accordance with the decision of the lower appellate court on the other issues which that court had decided in favour of the appellant. The appellant will also be entitled to costs. B

V.S.S. Appeal allowed.

A UNION OF INDIA

v.

MHATHUNG KITHAN AND ORS.

SEPTEMBER 18, 1996

B [A.M. AHMADI, CJ. AND SUJATA V. MANOHAR, J.]

Service Law :

Indian Administrative Service (Cadre) Rules—Rule 5.

C *Cadre allocation—Insider vacancy—Non-availability of Insider—Carry-forward—Permissibility of—Policy dated 30.7.1984 required at least 66.2/3% of directly recruited Officers from outside State concerned—Held : did not impose ceiling of 66.2/3%—Hence, in absence of any rule, filling up of insider vacancy by outside due to non-availability of insider not a ground to accom-*
D *modate insider in outsider vacancy in subsequent year.*

Respondent No. 1 was appointed to the Indian Administrative Service and was allocated to a state different from his home State. There were two seats which were available for the home State of respondent No. 1. However, both these seats were earmarked for outsiders as per the 30 point
E **roster under a policy dated 30.7.1984 of the appellant-Union in which the "outsider" element in the direct recruitment quota was raised to 66.2/3%. Respondent No. 1 challenged his allocation before the Central Administrative Tribunal which directed the appellant to consider transfer of respondent No. 1 from his present State to his home State. Being aggrieved the**
F **appellant-Union preferred the present appeal.**

On behalf of respondent No. 1 it was contended that in the previous batch when the vacancy was for an insider since no insider was available, the vacancy was occupied by an outsider; and that respondent No. 1 should be considered for one of the roster points available for his batch in the
G **subsequent year.**

Allowing the appeal, this Court

HELD : 1.1. In the light of the Policy dated 30.7.1984 a continuous 30 point roster was provided. The roster follows the cycle, "outsider,
H **insider, outsider, outsider, insider, outsider .....". In any given year the**

roster starts with the point where the roster ended in the previous year. In the case of the State cadre for the home State of respondent No. 1 there were two vacancies for allocation to his batch. As per the 30 point roster, both these vacancies were for outsiders. Hence the first respondent, being an "insider", was not eligible for either of the two vacancies. He was, therefore, allotted to a different State. [489-B-D]

1.2. There is no rule which provides for a carry-over of "insider" vacancies if they are not filled due to non- availability of insider candidates. In the absence of any such rule for carry-forward of insider vacancies, is not possible to accommodate respondent No. 1 in the vacancies which are earmarked for outsiders as the relevant roster points. [489-E-F]

Union of India & Ors. **v.** *Rajiv Yadav, IAS & Ors.,* **[1994] 6 SCC 38, relied on.**

2. The roster is framed bearing in mind the requirement of increasing outsiders in the quota of Direct Recruits. The policy requires that at least 66.2/3% of the officers who are directly recruited are from outside the State concerned. It does not impose a ceiling of 66.2/3%. [489-H, 490-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12310 of 1996 Etc.

From the Judgment and Order dated 23.12.94 of the Central Administrative Tribunal, Chandigarh in O.A. No. 1064-CH of 1992.

V.R. Reddy, Additional Solicitor General, K.N. Shukla, (Ms. Shashi Kiran) for Ms. Anil Katiyar and C.V.S. Rao for the Appellant.

Pankaj Kalra and B.K. Sharma for the Respondent in C.A. No. 12310/96.

Rajeev K. Singh for the Respondent in C.A. No. 12325/96.

The Judgment of the Court was delivered by

MRS. SUJATA V. MANOHAR, J. Leave granted in both the special leave petitions.

Civil Appeal No 12310/96 (@ SLP(C) No. 13705/95.

A Respondent No. 1 appeared in the Civil Service Examination conducted by the Union Public Service Commission in the year 1985. He was selected for appointment to the Indian Administrative Service in the 1986 batch. The home State of respondent No. 1 is Nagaland and he gave his preference for allocation to his home State cadre. There were two seats which were available for allocation to Nagaland. Both these seats were B earmarked for outsiders as per the 30 point roster. Hence the first respondent was allocated to the State of Haryana. He challenge this allocation by filing an application before the Chandigarh Bench of the Central Administrative Tribunal. The Tribunal has allowed the application and directed the appellant-Union of India to consider the transfer of respon- C dent No. 1 from the Haryana cadre to the Nagaland cadre in the manner set out in the order. The present appeal is from the order of the Tribunal.

Under Rule 5 of the Cadre Rules it is provided as follows :

D "5. Allocation of members to various cadres 5(1). The allocation of cadre officers to the various cadres shall be made by the Central Government in consultation with the State Government or the State Government concerned.

E 5(2) - The Central Government may, with the concurrence of the State Government concerned transfer a cadre officer from one cadre to another cadre".

Rule 5 was construed by this Court in the case of *Union of India and Ors.* v. *Rajiv Yadav, IAS and Ors.,* [1994] 6 SCC 38. It has held that a F selected candidate has a right to be considered for appointment to the IAS but he has no such right to be allocated to a cadre of his choice or to his home State. Allotment of cadre is an incidence of service; and a member of an All-India service bears liability to serve in any part of India. Respondent No. 1, therefore, had no right to be allocated to a cadre of his choice.

G Under a policy decision conveyed by the Govt. of India, Department of Personnel & Training to the Chief Secretaries of all States by a letter dated 30th July,1984, it was decided that for various reasons set out therein, in order to have a proper balance in the State cadre, the "outsider" element in the direct recruitment quota was raised to 66.2/3% or in the ratio 2 : 1 H as between outsiders and insiders in place of 1 : 1. The letter states :

"It is proposed to give effect to this decision by ensuring henceforth at the time of allocating candidates appointed to I.A.S. and I.P.S on the basis of Civil Service Examination, that *at least* 66.2/3% of the officers are from outside the State concerned."

(underlining ours)

In the light of this policy a continuous 30 point roster was provided starting from the examination held in 1983. The roster follows the cycle, "outsider, insider, outsider, outsider, insider, outsider .....". In any given year the roster starts with the point where the roster ended in the previous year. In the case of the State cadre for the State of Nagaland there were two vacancies for allocation to the batch which had passed the examination in the year 1985. As per the 30 point roster, both these vacancies were for outsiders. Hence the first respondent, who belonged to the State of Nagaland, being an "insider", was not eligible for either of the two vacancies. he was, therefore, allotted to the State of Haryana.

The first respondent has contended that in the batch passing the examination in 1984, when the vacancy was for an insider, no insider was available and the vacancy had been occupied by an outsider. Hence he should be considered for one of the roster points available for the batch of 1985. We have, however, not been shown any rule which provides for a carry-over of "insider" vacancies if they are not filled due to non-availability of insider candidates. In the absence of any such rule for carry- forward of insider vacancies, we do not see how the first respondent can be accommodated in the vacancies which are earmarked for outsiders as per the relevant roster points.

In the policy statement of 30th July, 1984, a reference was made to the fact that State service officers who get promoted to I.A.S/I.P.S. are in the age group of 40 to 50 and at that late stage, their transfer to another State cadre may give rise to personnel and administrative problems of adjustment. Therefore, in order to restore the outsider-insider balance in a State cadre, it was proposed that the outsider element in the direct recruitment quota required to be increased. In this context it is difficult to accept the contention of the first respondent regarding carry-forward of "insider" vacancies. The roster is framed bearing in mind this requirement of increasing outsiders in the quota of Direct Recruits. The policy requires that *at least 66.2/3% of the officer who are directly recruited are from outside*

A *the State concerned. It does not impose a ceiling of 66.2/3%. The Tribunal was, therefore, not right in disturbing the implementation of this policy as per the roster.*

The appeal is, therefore, allowed with costs. The order of the Tribunal is set aside and the application of the first respondent is dis-
B missed.

In view of the above decision, Civil Appeal No. 12325/96 (@ SLP(C) No. 21429/93) is also allowed with costs since the facts are similar to the facts in the above Civil Appeal.

C V.S.S. Appeal allowed.

JAIPUR DEVELOPMENT AUTHORITY

v.

MAHAVIR HOUSING CO-OP., SOCIETY, JAIPUR ETC.

SEPTEMBER 18, 1996

[K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Land Acquisition Act, 1894 :

Compensation—Award of—In the given circumstances of the case two times more than what was granted by the Land Acquisition Officer would be the just compensation—Central Amendment Act applicable from August 1, 1987 to the acquisition in State of Rajasthan—Hence only 6% p.a. interest payable prior to 1.8.1987 and thereafter at 15% p.a. on the enhanced compensation till date of deposit in Court—Also entitled to solatium on the enhanced compensation at 30%—Not entitled to additional amount.

Umed Industries & Land Development Co. & Ors. **v.** *State of Rajasthan & Ors.,* **[1995] 2 SCC 563;** *Prem Nath Kapur and Anr.* **v.** *National Fertilizers Corpn. of India Ltd. and Ors.,* **[1996] 2 SCC 71;** *Union of India* **v.** *Raghubir Singh,* **[1989] 3 SCR 316 and** *Bai Shakriben* **v.** *Spl. L.A.O.,* **(1996) 4 SCALE 636, relied on.**

State of Punjab & Ors. **v.** *Mohinder Singh Randhawa & Anr.,* **[1993] Supp. 1 SCC 49, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12662 of 1996 Etc.

From the Judgment and Order dated 20.12.93 of the Rajasthan High Court in R.P. No. 1059 of 1993.

Dr. Shankar Ghose and A.K. Goel for the Appellant.

Tapas Ray, S.M. Jain, Sushil Kr. Jain, A.P. Dhamija, Mrs. Pratibha Jain and Prakash Shrivasatava for the Respondents.

The following Order of the Court was delivered :

A Leave granted.

Notification under Section 4(1) of the Rajasthan Land Acquisition Act, 1953 was published on August 21, 1969 acquiring a large extent of 484 bighas 11 biswas of land for Jaipur Urban Development Scheme by different notifications. An extent of 4 acres 5 biswas (9845 sq. yds.) relates to the acquisition in appeal arising out of SLP (C) No. 14811/94. In respect of the appeal rising out of SLP (C) No. 6519/94, an extent of 10 bighas 7 biswas was acquired. The Land Acquisition Officer determined the compensation by his award dated July 16, 1981 and October 12, 1981 respectively determining the compensation at the rate of Rs. 5,000 per bigha to the respondent - Jai Ambe Co-op. Housing Society and Rs 7,500 per bigha to the respondent - Mahavir Housing Co-op. Society. On reference, the civil Judge enhanced the compensation at the rate of Rs. 40,000 per bigha. As regards the award of the Civil Judge, an appeal was filed against the respondent - Jai Ambe Co-op. Society Ltd. The learned single Judge in appeal No. 142/92 has confirmed the same by judgment dated May 2, 1994. As regards the award in favour of Mahavir Housing Co-operative Society, no appeal was filed. But in execution an objection has been raised regarding additional amount award under Section 23(1-A) which was negatived. On revision, the High Court in Revision No. 1059/93 dated December 20, 1993 confirmed the same. Thus, these appeals by special leave.

When the matter relating to Mahavir Housing Co-operative Society initially came up, notice was confined in respect of Section 23(1-A), but later when it was brought to our notice of the fraud and collusion between the officers entrusted with the prosecution on behalf of the appellant and the claimants, we have indicated to the counsel that we would go into the question of determination of the compensation. Thus, these cases are heard together. It is seen that from the evidence adduced before the reference Court in respect of Jai Ambe Co-operative Housing Society except one claimant Mr. Garg, not documentary evidence has been adduced in support of the claimant for enhancement. Two awards under Section 26 came to be filed in which one award relating to the Mahavir Housing Co-operative Society and another award relating to the same notification but an amount of Rs. 24,000 per bigha was awarded. As regards the claim in Mahavir Housing Co-operative Society is concerned, they relied upon a judgment of the High Court in which the High Court has granted to some

lands at the rate of Rs. 12 per sq. yd. which relates to the acquisition of 1964 and also a certificate issued by Tehsildar relating to some other village, which worked out at the rate of Rs. 44,000 per acre and the sale deeds in support thereof. One curious fact in both the cases that cannot be lost sight of is that the claimants have purchased these properties after the notification under Section 4(1) was published and a reference came to be made at their instance to the civil Court. Though an opportunity was given to the appellant, for well over 11 years, no counter affidavit has been filed. As a result, they were set *ex-parte*. Yet another curious aspect that we cannot lose sight of is that the reference Judge has merely with parrot-like *but traditional* consideration swallowed what with witnesses has stated that the market value is Rs. 50 per sq. yd. without subjecting to any scrutiny as per the tests laid down by this Court. It is also to be noted that the same aspect was repeated by the learned Judge of the High Court in *Jai Ambe Co-operative Housing Society's* case.

The question, therefore, is : what would be the reasonable compensation to which the claimants are capable to get? In view of the settled legal position that the claimants being the subsequent purchasers cannot have a higher right than that the original owner himself had. They cannot set up any title to the property on the basis of sale deeds and *consideration* but may be entitled to the compensation obviously getting into the shoes of the claimant. We need not go into the question of correctness whether or not the reference is valid in this case, though open to doubt since that question was not raised at any stage much less in this Court. We proceed on the premise that the reference under Section 18 was valid.

As stated earlier, the entire process has gone on in collusion. When we have issued notice to the appellants as to what steps they have taken against the officers who are responsible even for not filing the appeals or not contesting the matter, an affidavit has been filed in which it was stated that disciplinary action against the Land Acquisition Officer was taken and even the counsel who appeared for the Jaipur Development Authority was in collusion and steps were taken by laying a complaint before the Bar Council for professional misconduct. We need not further dwell up on that fact but suffice it to state that the acquisition proceedings have proceeded in collusion and, therefore, they did not reflect the correct market value as is available in this case. As seen in *Jai Ambe Co-operative Housing Society's*

A case, even their own sale deeds under which they have purchased from one Bhagwan Singh, who was said to be the original owner, were not even filed. Under these circumstances, we thought over the matter as to what would be the appropriate course to be adopted in this case. We are of the view that instead of relegating the matter again, we can ourselves decide the B matter on the basis of the evidence on record. Accordingly, we have considered the case on merits.

It is seen that the Land Acquisition Officer has awarded compensation at the rate of Rs. 7,500 per bigha to the lands purchased by Mahavir Co-operative Housing Society and Rs. 5,000 per bigha to the lands pur- C chased by Jai Ambe Co-operative Housing Society Ltd. Having regard to the facts and circumstances, we are of the considered view that two times more than what was granted by the Land Acquisition Officer would be the Just compensation in the given circumstances of the case. Accordingly, we determine the compensation to Jai Ambe Co-operative Housing Society D Ltd. at the rate of Rs. 15,000 per bigha and to the lands of Mahavir housing Co-operative Society Rs. 22,000 per bigha.

As regards the State of Rajasthan the Land Acquisition (Amendment) Act, 68 of 1984 was extended w.e.f. April 30, 1987. But the State E legislature had amended the Rajasthan Urban Improvement Act, 1959 by Amendment Act 29 of 1987 w.e.f. August 1, 1987. In *Umed Industries & Land Development Co. & Ors.* v. *State of Rajasthan & Ors.,* [1995] 2 SCC 563, a Bench of two Judges had held that the Central Amendment Act 68 of 1984 would apply for August 1, 1987 to the acquisition in State of F Rajasthan. It is seen that in *Mahavir Housing Co-operative Society's* case, possession was delivered on May 24, 1984 after the stay was vacated by the civil Court since that civil Court granted stay of dispossession on October 23, 1983. Therefore, the respondent-Society is not entitled to the interest prior to May 25, 1984. Therefore, the decree as regards payment of interest from the date of the notification till May 24, 1984 is clearly illegal. It is seen G that since that award of the reference Court is dated June 15, 1990, the claimants will be entitled to interest from May 25, 1984 at the rate of 6% per annum till August 1, 1987 and thereafter 15% per annum on the enhanced compensation till date of deposit in the Court. As regard the solatium is concerned, they are entitled to 30% solatium on the enhanced H compensation. As regards the additional amount under Section 23(1-A) is

concerned, the claimants are not entitled to the additional amount since the awards came to be passed by the Land Acquisition Officer on October 12, 1981 and July 16, 1981 in Mahavir Housing Co-operative Society and Jai Ambe Co-operative Housing Society Ltd. respectively.

In *Prem Nath Kapur and Anr.* v. *National Fertilizers Corpn. of India Ltd. and Ors.*, [1996] 2 SCC 71, considered the entire case law by a bench of three Judges in paragraph 17 had held that the power to grant additional amount under section 23(1-A) and enhanced interest under the proviso to Section 28 and solatium at 30 per cent was due to amendments brought under Act 68 of 1984. Prior thereto the court has no power or jurisdiction to grant them. Therefore, the additional amount, the excess rate of interest or solatium at 30 per cent granted were without jurisdiction and a nullity. The courts cannot correct the award of the decree in exercise of the power under Sections 151 and 152 C.P.C. This Court has relied upon the Constitution Bench decision in *Union of india* v. *Raghubir Singh*, [1989] 3 SCR 316. This Court has reiterated the same principle in another recent judgment in *Bai Shakriben* v. *Spl. L.A.O.*, (1996) 4 SCALE 636. Therefore, objection would be raised in execution under section 47. The award of the additional amount was one of without jurisdiction and so a nullity.

It is contended for the respondent in *Mahavir Housing Co- operative Society's* case, that since the award was allowed to become final including grant of additional amount under Section 23(1-A), it is not open to the review at a later date since it is not one of initial lack of jurisdiction but an illegality has been committed in awarding the additional amount. In support thereof, learned counsel relied upon a judgment of this Court in *State of Punjab & Ors.* v. *Mohinder Singh Randhawa & Anr.*, [1993] Supp. 1 SCC 49, paragraph 3. It is true that in a case where the proceedings were properly conducted and the order was allowed to become final, the matter may be construed to be an order of illegality. When it is one of jurisdiction, this Court has repeatedly, in plethora of precedents, had held that the courts have no jurisdiction to award additional amount under Section 23(1-A) since the Collector had already passed the award under Section 11 and the benefit of additional amount would be confined to the period between the date of the notification under Section 4(1) and the award under Section 11 when the proceedings were pending before him. In this case, since we have already recorded the finding that the award became

A final due to collusion by the officers and the claimants, the principle of illegality in the award does not apply since fraud unravels the entire procedure and makes the award a nullity.

The appeals are accordingly allowed as indicated above, but in the circumstances, without costs. As regards strictures awarded by the reference Court, they stands upheld.

B

G.N. Appeal allowed.

MOLLY JOSEPH @ NISH

v.

GEORGE SEBASTIAN @ JOY

SEPTEMBER 18, 1996

[N.P. SINGH AND S.B. MAJMUDAR, JJ.]

Indian Divorce Act, 1869 :

Sections 17, 19(4), 20—Marriage annuled by order or Ecclesiastical Tribunal—Validity of—Held : When a Legislature enacts a law even in respect of the personal law of a group of persons following a particular religion, the statutory provisions shall prevail and override any personal law usage or custom prevailing before coming into force of such Act—District Court or High Court vested with the power—No other authority including Ecclesiastical Tribunal could exercise power in connection with matrimonial matters covered by the Act—District Judge disposed of the application for divorce without any enquiry into the allegations relating to the subsistence of the former marriage—Hence High Court justified in remitting the matter to the District Judge for decision in accordance with law.

Lakshmi Sanyal **v.** *Sachit Kumar Dhar,* **AIR (1972) SC 2667 = [1973] 2 SCR 122, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8782 of 1994.

From the Judgment and Order dated 20.7.94 of the Kerala High Court in C.M.R. No. 5 of 1994.

Verghese Kalliath, Shaju Francis, C.N. Sreekumar, K.M.K. Nair, S. Balakrishnan and M.T. George for the appearing parties.

The following Order of the Court was delivered :

This appeal has been filed on behalf of the wife for setting aside the judgment of the Special Bench of the Kerala High Court, directing the District Judge to conduct enquiry into the allegations relating to the subsistence of a former marriage of the appellant and then to pass a decree in accordance with law. A petition was filed by the respondent-husband

before the District Judge for a declaration that his marriage with the appellant is a nullity on the ground (i) the marriage between the appellant and one Prince Joseph was subsisting on the date the appellant married the respondent; (ii) the appellant was insane and continued to be so till the date of marriage. That application was contested by the appellant saying that although she had married earlier with aforesaid Prince Joseph, the said marriage was annulled by the order of the Ecclesiastical Tribunal (Church Court as it is referred to at times). It also asserted on her behalf that previous marriage was known to the respondent and inspite of that he agreed to marry the appellant.

The learned District Judge did not conduct any enquiry and he declared the marriage between the appellant and the respondent a nullity merely on basis of the pleadings of the parties. According to him, as the appellant had admitted the earlier marriage and as there was no decree of any Civil Court in accordance with the provisions of the Indian Divorce Act, 1869 (hereinafter referred to as the 'Divorce Act') the former marriage continued inspite of annulment order passed by the Ecclesiastical Tribunal, and the marriage had to be declared a nullity because of Section 19(4) of the Divorce Act. As required by Section 20 read with Section 17 of the aforesaid Act the order of the District Judge was placed before a bench of three Judges presided over by Justice K.T. Thomas (as he then was) for confirmation. The High Court held :

> "Canon Law (or personal law of Christians) can have theological or acclesiastical implications to the parties. But after the Divorce Act came into force a dissolution or annulment granted under such personal law cannot have any legal impact as statute has provided a different procedure and a different code for divorce or annulment."

This appeal is against the aforesaid judgment of the High Court.

The preamble of the Divorce Act says :

> "Whereas it is expedient to amend the law relating to the divorce of persons professing to Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial; it is hereby enacted as follows ....."

Section 3(4) defines 'Court' to mean the High Court or the District Court, as the case may be. Section 4 provides : A

> "Matrimonial jurisdiction of High Courts to be exercised subject to Act.
>
> Exception - the jurisdiction now exercised by the High Courts in respect of divorce a *mensa et toro*, and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise; except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed." B C

Section 10 enables any husband to present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery. A wife may also present a petition to District Court or to the D High Court for dissolution of the marriage on the grounds mentioned therein. In view of Section 17 every decree for dissolution of marriage made by the District Judge shall be subject to confirmation by the High Court. The said Section requires that cases for confirmation of decree for dissolution of marriage shall be heard by a Bench comprising of three Judges. It also vests power in the High Court, if it thinks necessary, to direct further E enquiry or additional evidence to be taken. Chapter IV deals with nullity of marriages. In view of Section 18 any husband or a wife may present a petition to the District Court or to the High Court praying that his or her marriage may be declared null and void. Section 19 prescribes the grounds on which a marriage can be declared to be nullity. Section 19 provides : F

> "Grounds of decree - Such decree may be made on any of the following grounds :–
>
> (1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit; G
>
> (2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;
>
> (3) that either party was as lunatic or idiot at the time of the marriage; H

A (4) that the former husband of wife or either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud."

Every decree of nullity of marriage made by the District Judge shall be subject to confirmation by the High Court because of Section 20 and provisions of Section 17, clauses one, two, three and four, shall, mutatis C mutandis be applicable.

From a bare reference to the different provisions of the Act including preamble thereof it is apparent that Divorce Act purports to amend the law relating to divorce of persons professing the Christian religion and to D confer upon courts which shall include District Court and the High Court jurisdiction in matrimonial matters. In this background, unless the Divorce Act recognises the jurisdiction, authority or power of Ecclesiastical Tribunal (sometimes known as Church Court) any order or decree passed by such Ecclesiastical Tribunal cannot be binding on the courts which have been recognised under the provisions of the Divorce Act to exercise power E in respect of granting divorce and adjudicating in respect of matrimonial matters. It is well settled that when legislature enacts a law even in respect of the personal law of a group of persons following a particular religion, then such statutory provisions shall prevail and override any personal law, usage or custom prevailing before coming into force of such Act. From the F provisions of the Divorce Act it is clear and apparent that they purport to prescribe not only the grounds on which a marriage can be dissolved or declared to be nullity, but also provided the forum which can dissolve or declare the marriage to be nullity. As already mentioned above, such power has been vested either in the District Court or the High Court. In this background, there is no scope for any other authority including Ecclesias- G tical Tribunal (Church Court) to exercise power in connection with matrimonial matters which are covered by the provision of the Divorce Act. The High Court has rightly pointed out that even in cases were Ecclesiastical Court purports to grant annulment or divorce the Church authorities would still continue to be under disability to perform or solemnize a second H marriage for any of the parties until the marriage is dissolved or annulled

in accordance with the statutory law in force. A

The learned counsel appearing for the appellant placed reliance on the judgment of this Court in the case of *Lakshmi Sanyal* v. *Sachit Kumar Dhar,* AIR (1972) SC 2667 = [1973] 2 SCR 122, in support of his stand that inspite of the provisions of the Divorce Act and procedures prescribed therein for dissolution of marriage or declaration of a marriage to be nullity, Ecclesiastical Tribunal can also dissolve a marriage. In that case, this Court was considering whether a marriage could be declared a nullity on the ground that the parties were within the prohibited degrees consanguinity which is a ground for declaring a marriage to be nullity under Section 19(2) of the Divorce Act. In that connection, It was said : B C

> "The Second point relates to the effect of the marriage between the parties within the prohibited degree of consanguinity. The Indian Divorce Act or the Indian Christian Marriage Act do not give any definition of what the prohibited degrees are. It has been urged on behalf of the appellant that assuming the Canon Law had to be looked at for finding the prohibited degrees it has been found that the appellant and the respondent being children of real sisters fell within those degress. Section 19 of the Divorce Act lays down in categorical terms that a marriage may be declared null and void, *inter alia*, where the parties are within the prohibited degree of consanguinity. There is no exception contained in ground No. 2 in the said section It is not open it has been contended, to the courts to the travel beyond S. 19 or the provisions of the Divorce Act to discover whether such an impediment which renders the marriage null and void *ab initio* can be removed by a dispensation granted by the competent authority of the Roman Catholic Church D E F
>
> .....
>
> The question of capacity to marry and impediments in the way of marriage would have to be resolved by referring to their personal law. That, for the purpose of deciding the validity of the marriage, would be the law of the Roman Catholic Church, namely the Canon law of that Church." G

From the judgment aforesaid it is apparent that this Court having said that Section 19(2) makes a marriage between the parties within the prohibited degrees of consanguinity a ground for declaring the marriage to H

A be nullity, pointed out that the Divorce Act does not give definition was to what are the prohibited degrees. Thereafter it was said that for that limited purpose personal law has to be looked into. According to us, on basis of the aforesaid judgment of this Court it cannot be held that any declaration of marriage to be void by Ecclesiastical Tribunal shall be binding on the
B District Court or the High Court. Such Ecclesiastical Tribunal cannot exercise a power parallel to the power of the District Court or the High Court which have been vested in the District Court and the High Court by the provisions of the Divorce Act. Section 18 provides that any husband or wife may present a petition to the District Court or to the High Court praying that his or her marriage may be declared null and void. In that
C event, it excludes the jurisdiction and authority of any other Tribunal or Court including Ecclesiastical Tribunal (Church Court).

As the District Judge had disposed of the application for divorce without any enquiry into the allegation relating to the subsistence of the former marriage, the High Court was justified in remitting the matter to
D the District Judge for fresh decision in accordance with law. We find no reason to interfere with the said order. The appeal is accordingly dismissed. No costs.

Criminal Appeal No. 447 of 1994.

E *ORDER*

In view of the order passed in C.A. No. 8782/94 the appeal is dismissed.

G.N. Appeals dismissed.

UNION OF INDIA AND ANR. A

v.

MADHAV S/O. GAJANAN CHAUBAL AND ANR.

SEPTEMBER 18, 1996

[K. RAMASWAMY, FAIZAIN UDDIN AND G.B. PATTANAIK, JJ.] B

Service Law :

Promotion—Reservation in—Single post—Rule of rotation and roster point—Tribunal holding that no reservation could be granted to the reserved candidates as it would amount to 100% reservation and therefore the promotion made was unconstitutional—On appeal held, even though there is a single post, if the Government have applied the rule of rotation and the roster point to the vacancies that had arisen in the single point post and were sought to be filled up by candidates belonging to reserved categories at the point on which they are eligible to be considered such a rule is not violative of Art. 16(1)—Constitution of India, Articles 14, 16(1) and 16(4). C D

Arati Ray Choudhary **v.** *Union of India & Ors.,* **[1974] 1 SCC 87 followed.**

Chetan Dilip Motghare **v.** *B.L. Education Society Nagpur & Ors.,* **[1995] Supp. 1 SCC 157, overruled.** E

General Manager, Southern Railway **v.** *Rangachari,* **[1962] 2 SCR 596;** *State of Kerala* **v.** *Thomas,* **[1976] 1 SCR 906;** *State of Punjab* **v.** *Hira Lal,* **[1970] 3 SCC 567;** *A.B.S.K. Sangh* **v.** *Union of India,* **[1985] 2 SCR 185;** *Comptroller & Auditor General* **v.** *S.K. Jagannath,* **[1986] 2 SCR 17;** *Indra Sawhney & Ors.* **v.** *Union of India & Ors.,* **[1992] Supp. 3 SCC 217;** *S.R. Bommai* **v.** *Union of India,* **[1994] 3 SCC 1;** *LIC of India* **v.** *Consumer Education and Research Center,* **[1995] 5 SCC 482;** *Smt. H.B. Usha* **v.** *D.S. Ramachandra,* **[1995] Supp. 2 SCC 49;** *R.K. Sabharwal & Ors.* **v.** *The State of Punjab & Ors.,* **[1995] 2 SCC 745 and** *State of Bihar* **v.** *Bageshwardi Prasad,* **[1995] Suppl. 1 SCC 432, relied on.** F G

Dr. Chakradhar Pasvan **v.** *State of Bihar,* **[1988] 2 SCC 214;** *Commissioner of Commercial Taxes* **v.** *D. Sathu Madhva Rao,* **[1996] 7 SCC 512 and** *M. Venkteswarlu* **v.** *Government of Andhra Pradesh,* **[1996] 5 SCC 167, referred to.** H

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12871 of 1996.

From the Judgment and Order dated 11.3.92 of the Central Administrative Tribunal, Bombay in O.A. No. 613 of 1990.

B N.N. Goswami, Ms. Shashi Kiran, D.S. Mehra, S.W.A. Qadri and Das for the Appellants.

The following Order of the Court was delivered :

Delay condoned.

C

Leave granted.

On the last occasion when the matter had come up after notice, since the respondents were not represented either in person or through counsel and when the counsel had pointed out the decision followed by the D Tribunal, namely, *Dr. Chakradhar Pasvan* v. *State of Bihar,* [1988] 2 SCC 214, this Court had referred the matter to three-Judge Bench. Thus, the matter has come up to-day. Even now, none is appearing for the respondents; nor are they appearing in person. We have taken the assistance of Sri Goswami, learned senior counsel. We requested him to place on record E the decisions for or against him. He has fairly argued case.

The admitted facts are that in the National Savings Scheme Service, the Government had created various posts upto the post of Superintendent; there are number of posts but there is only one post of Secretary. This post is a feeder post for promotion as Regional Deputy Director in which F category there are several posts. The Government applied the rule of reservation by rotation to the vacancies in the post of Secretary. 40 point roster is also being applied to these vacancies. In the post of Secretary, point No. 4 vacancy was reserved for Scheduled Tribes. When that vacancy was sought to be filled up by promotion from the Superintendents in Group A category from Scheduled Tribe candidates, the respondent filed OA in G the Central Administrative Tribunal at Bombay. The Tribunal following the decision of this Court in *Pasvan's* case (supra), by order dated March 11, 1992 in OA No. 613/90, set aside the promotion holding that since the post of Secretary is a single point post, no reservation could be granted to the reserved candidates as it would amount to 100% reservation; therefore, it H is unconstitutional. Thus, this appeal by special leave.

The question is : whether the application of 40 point roster to the successive vacancies in the post of Secretary violates Article 16(1) of the Constitution? Shri Goswami has contended that in *Pasvan's* case, that question was left open since the controversy did not arise therein on those facts. Since the Government have decided that when in a single post vacancy arises as per roster point and when candidates belonging to Scheduled Castes or Scheduled Tribes are available, then the vacancy reserved for respective Scheduled Caste or Scheduled Tribe could be considered as per rules for appointment by promotion to the post of Secretary. In the absence of their availability, the vacancies would be and is being carried forward. Therefore, the principle of rotation applied to a single post is not violative of Article 16(1) of the Constitution. He has taken us through various judgments of this Court concerning the question.

In *General Manager, Southern Railway* v. *Rangachari,* [1962] 2 SCR 586, the Constitution Bench, per majority, had held that appointment by reservation to the selection post was not violative of Article 16(1) of the Constitution. The same principle was followed in the case of promotion in *State of Kerala* v. *Thomas,* [1976] 1 SCR 906. In *The State of Punjab* v. *Hira Lal,* [1970] 3 SCC 567 and *A.B.S.K. Sangh* v. *Union of India,* [1985] 2 SCR 185 and *Comptroller & Auditor General* v. *S.K. Jagannath,* [1986] 2 SCR 17, the matters were referred to a larger Bench. In *Indra Sawhney & Ors.* v. *Union of India & Ors.,* [1992] Supp. 3 SCC 217, per majority, the Bench of nine Judges of this Court had held that Article 16(1) and 16(4) do not apply to appointment by promotion. They would be applicable only to initial appointments. By Section 2 of the Constitution (77th Amendment) Act, 1995, Article 16(4A) was introduced which envisages that nothing in this Article shall prevent the State from making any provision in reservation in matter of promotion to any class or classes of posts in the service under the State. It is well settled legal position that Preamble of the Constitution is part of the Constitution. In *S.R. Bommai* v. *Union of India,* [1994] 3 SCC 1, this Court has held that preamble to the Constitution is a part of its basic structure. Socio-economic justice, equality of opportunity and of status, dignity of persons are the arch of the Constitution. Social Justice is a fundamental right as held in *LIC of India* v. *Consumer Education and Research Centre,* [1995] 5 SCC 482. Economic empowerment to the poor was held to be a fundamental right in *Smt. H.B. Usha* v. *D.S. Ramachandra,* [1995] Supp. 2 SCC 49. Article 335 mandates the State to take into consideration the claims of the Dalits and Scheduled Tribes for appoint-

A ment to a post or office under the State, consistent with efficiency of administration. Article 46 enjoins upon the State to provide socio-economic and educational facilities and opportunities. Government evolved reservation in posts or offices under the State as one of modes to socio-economic justice to Dalits and Scheduled Tribes. Appointment to an
B office or post into a service under the State is one of the means to render socio-economic justice. Constitution 77th Amendment Act, 1995 has resuscituted the above objective to enable the Dalits and Scheduled Tribe-employees to improve excellence in higher echolons of service and a source of equality of opportunity in the matter of social and economic status guaranteed by the Preamble to the Constitution. As a consequence, the
C Parliament has removed the lacuna pointed out by this Court in *Indra Sawhney's* case. Thus, it would be seen that the legal position held by this Court in *Rangachari's* case and followed in other cases has been restored and reservation of appointment by promotion would be available to the members of the Schedule Castes and Scheduled Tribes as per 50% quota
D as is maintained by this Court in *Indra Sawhney's* case. The carry forward principle has also been upheld in *Indra Sawhney's* case. In *Commissioner of Commercial Taxes* v. *D. Sethu Madhva Rao,* [1996] 7 SCC 512 a Bench of three Judges and in *M. Venkteswarlu* v. *Government of Andhra Pradesh,* [1996] 5 SCC 167 a bench of two Judges have held that right to reservation in promotion stands restored by Constitution 77th amendment) Act which
E introduced clause (4-A) to Article 16.

The question, therefore, arises : whether the Government would be justified in law to provide reservation in promotion in a single post by rotating the vacancy as per the roster point prepared by the Government?
F It is true that in *Pasvan's* case the Government, with a view to provide reservation to the Scheduled Castes to the post of Director which is a single post, was fused with two posts of Deputy Directors which do not carry the same scale of pay. Therefore, this Court had pointed out that the cadre would mean the cadre carrying the same scale of pay. Since the Deputy Directors are not carrying the same scale of pay they cannot be
G fused together for applying the principle of reservation. By implication, this Court had accepted that two or more single posts carrying the same scale of pay would be fused to elongate the Constitutional objective of providing reservation to a post in the service or office of the State. It was then held that single post cannot be reserved which amounts to 100% reservation
H and, therefore, it is violative of Article 16(1) of the Constitution. The

further question whether in the same single point post, reservation by rotation could be granted and whether it will be violative of Article 16(1) was left open in that case. This constitution Bench of this Court in *Arati Ray Choudhary* v. *Union of India & Ors.*, [1974] 1 SCC 87 considered the question of the single post and applied the rule of reservation by rotation to the carried forward post and filled the post when reserved candidates were available on the carried forward posts. In this regard, this Court had laid down thus :

> "That is precisely what happened here. The S.E. Railway runs only two Secondary Schools for girls, one at Adra and the other at Kharagpur. Senior-most Assistant Mistress, Smt. Gita Biswas. In pursuance of the Memoraudum dated December 4, 1963 of the Ministry of Home Affairs, the Railway Board revised the Model Roster by their letter of January 16, 1964. The first point in this roster is a reserved point and therefore the Adra vacancy was strictly a reserved vacancy. But there being only one vacancy in the particular year of recruitment, it had to be treated as unreserved and therefore the appointment when to Smt. Biswas, an open, not a reserved candidate. This, however, had to be compensated for by carrying forward the reservation though not over more than 2 subsequent recruitment years. For the purposes of Services under the Railway administration 'recruitment year' means the 'financial year' and the Adra appointment having been made in the financial year 1966-67, it was permissible to carry forward the reservation till the close of the financial year 1968-69. There was no vacancy in 1967-68. The vacancy in the post of the Headmistress of the Kharagpur school occurred in the financial year 1968-69 by the retirement of Smt. Bina Devi with effect from December 31, 1968. This vacancy, indubitably, had to be treated as a reserved vacancy and since from amongst the 4 Assistant Mistresses, respondent No. 8 was the only candidate belonging to the Scheduled Caste, she was entitled to be considered for selection to the post of the Headmistress, to the exclusion of the other 3. The claims, if any, of the petitioner who is not a reserved candidate have to be postponed, though in the normal course it may be quite some years before she gets her turn. The Adra Headmistress and respondent No. 8 would seem to have a long tenure in their respective office."

A Accordingly, it was held that in carried forward post in a single post, reservation would be applied and the vacancies, after carrying forward, would be filled up by promotion from the members of the Scheduled Castes. This principle would apply in a single post carried forward by applying rotation and it would be consistent with the principle of equality B envisaged under Articles 14 and 16(1) of the Constitution. Article 14 and 16(1) equally applies to Scheduled Castes and Scheduled Tribes and they too are entitle to seek equal opportunity to hold the single post by promotion, Otherwise, it would amount to total prohibition of opportunity to hold the single point post which also violates Articles 14 and 16(1). A three C Judges Bench was to consider the same question in *Sou. Vidyulata Arvind Kakade* v. *Digambar Gyanba Surwase & Ors.,* C.A. No. 242 of 1992 decided on January 17, 1992 in a short judgment. This Court stated thus :

> "We have also perused the judgment of the Constitution Bench and the Division Bench of this Court in *Arati Ray Choudhary* v. D *Union of india & Ors.,* [1972] 2 SCR 1 and *Dr. Chakradhar Paswan* v. *State of Bihar & Ors.,* [1988] 2 SCC 214 respectively. No copy of the writ petition has been filed in this Court. There is no material on record to show that the Resolution providing for reservation provides that the reservation has not to be applied in isolated posts E which is the basis of the Challenge in this petition."

It would thus be seen that this Court has accepted that reservation could be provided even to the isolated posts on the basis of the rule of rotation. Extension of reservation in such cases is not unconstitutional. On F the other hand, such scheme provides opportunity and facilities to Scheduled Castes and Schedule Tribes to be considered for promotion to hold single posts consistent with equality of opportunity on par with others. In *R.K. Sabharwal & Ors.* v. *The State of Punjab & Ors.,* [1995] 2 SCC 745 a Constitution Bench of this Court considered whether the reservation as per the roster by promotion could be valid and consistent with Article 16(1) G of the Constitution. This Court had pointed out that the reservation to the post as per the roster for the purpose of promotion is valid in law. The same can be filled up applying the roster points prescribed by the Government. When a candidate belonging to the backward classes is appointed by promotion on merit, he cannot be considered to be reserved candidate; the H candidate appointed on rule of reservation would be fitted into the post on

the basis of roster point available to reserved candidates. In *Chetan Dilip Motghare* v. *B.L. Education Society Nagpur & Ors.*, [1995] Supp. 1 SCC 157 a Bench of two Judges of this Court considered whether reservation to single post could be valid in law. Though the decision in *Vidyulata Arvind Kakade's* case was brought to the notice of the learned Judges, the learned Judges found that it did not lay down any contra principle to the one laid down by this Court in *Paswan's* case and, therefore, it was held that single point post could not be reserved for promotion. With due respect, we hold that the learned Judge have not correctly appreciated the ratio laid down by this Court in *Vidyulata's* case and *Arati Couudhary's* case. In *State of Bihar* v. *Bageshwardi Prasad,* [1995] Suppl. 1 SCC 432, the Bihar Government had provided by way of a circular, the rule of rotation to a single post and applied the roster point for providing promotion to the vacancies that had arisen in accordance with roster point. This Court had upheld the rule of reservation and held that reservation to the single post by applying the rule of rotation is not violative of Articles 14 and 16(1) of the Constitution. The judgment in *Pasvan's* case was distinguished.

Thus, we hold that even though there is a single post, if the Government have applied the rule of rotation and the roster point to the vacancies that had arisen in the single point post and were sought to be filled up by the candidates belonging to the reserved categories at the point on which they are eligible to be considered, such a rule is not violative of Article 16(1) of the Constitution.

In this case, it is seen that the post of Secretary is carrying the scale of pay of Rs. 2200-4000. The Government have decided to apply the 40 point roster maintained for the post of Secretary. The vacancy available at the time of point No. 4 of the roster was reserved for the Scheduled Tribes. When the Department had sought for the clarification from the Department of Personnel and Training, the Government of India, had stated thus:

> "There is no change in the position however, it may be stated that unless this Department changes the earlier instructions, the old order will remain in force. Thus the Supreme Court Judgment cannot be made applicable to other cases automatically".

Thus, the Government have adhered to the rule of rotation to a single post and the 40 point roster to the single post was applied and the vacancy reserved for the Scheduled Castes and Scheduled Tribes as and when had

A arisen, was sought to be filled up, when the candidates were available. Thus, we hold that the roster point No. 4 in the vacancy of the Secretary reserved for the Scheduled Tribes was valid and constitutional. When the officer available was eligible to be considered, he was entitled to be considered in accordance with the rules and be promoted as Secretary. The B Tribunal, therefore, was not right in directing that the rule of rotation to the single post could not be applied. It is brought to our notice that the original promotee died pending the proceedings and, therefore as and when vacancy arises as per rule of rotation as per roster the same would be filled up in accordance with law.

C The appeal is accordingly allowed but in the circumstances, without costs.

G.N. Appeal allowed.

DELHI CLOTH AND GENERAL MILLS CO. LTD. AND ANR. A

v.

UNION OF INDIA AND ANR.

SEPTEMBER 19, 1996

[S.P. BHARUCHA AND K. VENKATASWAMI, JJ.] B

Customs Tariff Act :

S. 3—Assessee importing tyre cord grade wood plup from USA—Called upon to pay additional duty thereon—Challenged before the Assistant Collector and thereafter before the High Court, but without success—On appeal, held, where a like article is not produced or manufactured in India additional duty is required to be levied on the imported article on the basis of the excise duty leviable on the class or description of articles to which the imported article belongs—Articles not elsewhere described under the residuary entry 68 form a class by themselves—Hence if a like article is not described in the Tariff, additional duty is leviable on the imported article upon the basis of the levy of excise duty under the provisions of Entry 68. C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3400 of 1984. E

From the Judgment and Order dated 27.5.82 of the Rajasthan High Court in D.B.C.W.P. No. 1381 of 1990.

H.K. Puri for the Appellants.

Joseph Vallappally and C.V. Subba Rao for the Respondents. F

The following Order of the Court was delivered :

A limited argument is addressed in this appeal that impugns the judgment and order of a Division Bench of the High Court of Rajasthan. G

The appellants manufacture tyre yarn cord and fabric for which purpose they import tyre cord grade woodpulp from the United States of America. The appellants were called upon to pay additional duty thereon under the provisions of Sections 3 of the Customs Tariff Act.

Among other contentions raised by the appellants was this : The said H

A woodpulp was not produced or manufactured in India. Under the terms of Section 3 additional duty had, therefore, to be calculated on the basis of the excise duty that would be leviable on the class or description of article to which the said woodpulp belonged. There was no entry in the Tariff that related to an article of the like of the said woodpulp. Entry 68, being a residuary entry relating to no class or description of goods, did not apply. B No additional duty was, therefore, leviable on the said woodpulp.

The said contention was rejected by the Assistant Collector and by the High Court in the writ petition filed by the appellants.

C It is the only contention raised before us.

Section 3 of the Customs Tariff Act, so far as it is relevant, reads thus :

"S. 3.- Levy of Additional Duty equal to Excise Duty :

D (1) Any article which is imported into India shall, in addition, be liable to a duty (hereinafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its E value, the additional duty to which the imported article shall so liable shall be calculated at that percentage of the value of the imported article.

Explanation : In this Section, the expression 'the excise duty for the time being leviable on a like article if produced or manufac- F tured in india' means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty G is leviable at different rates, the highest duty,"

It is the Explanation which is important. The expression "the excise duty for the time being leviable on the like article if produced or manufactured in India used in the body of sub-section (1) is explained to mean the excise duty for the time being in force (a) which would be leviable on a H like article if produced or manufactured in Indian, or (b) if a like article

is not produced or manufactured in India, the excise duty that would be leviable on the class or description or articles to which the imported article belongs. A

Where a like article is not produced or manufactured in India additional duty is required to be levied on the imported article upon the basis of the excise duty that is leviable on the class or description of articles to which the imported article belongs. Articles which are not elsewhere described, falling under the residuary Entry 68, form a class by themselves. Hence, if a like article is not described in the Tariff, additional duty is leviable on imported article upon the basis of the levy of excise duty under the provisions of Entry 68. B C

The only contention raised before us is rejected.

The appeal is dismissed, with no order as to costs.

G.N. Appeal dismissed.

A RAMJI SHARMA @ RAMJI BABU (DEAD) BY LRS.

v.

THE STATE OF BIHAR AND ORS.

SEPTEMBER 19, 1996

B [N.P. SINGH AND S.B. MAJMUDAR, JJ.]

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 :

C *Sections 2(b), 2(g), 16(3)—Transfer of lands to any person other than the co-sharer or a raiyat of adjoining land—Right of any co-sharer of the transferor or any raiyat holding land adjoining the land transferred, to make an application for transfer of the land to him—Held : In view of the fact that the lands in question were in the urban area, the High Court rightly rejected the application—Appellant permitted to withdraw the amount deposited by* D *him along with the application—Refund ordered to be made within three months.*

Fakir Mohammad v. *Salahuddin & Ors.*, **AIR (1975) Patna 119, approved.**

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1505 of 1981.

From the Judgment and Order dated 15.9.80 of the Patna High Court in L.P.A. No. 103 of 1980.

F L.R. Singh for the Appellants.

S.B. Sanyal, S.K. Sinha, R.P. Singh, A.K. Pandey for the Respondents.

G The following Order of the Court was delivered :

This appeal has been filed for setting aside the judgment of the High Court, dismissing the application under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the Act) filed on behalf of the appellants, H claiming retransfer of the lands which had been transferred by respondent

No. 5 in favour of respondent No. 7 through the registered sale deed dated 30.12.1969. The respondent No. 7 by the aforesaid sale deed purchased 5 *kathas* of land of survey plot No. 610 and 6 *kathas* 10 *dhurs* of land of survey plot No. 614 from respondent No.5 for a consideration amount of Rs. 4,600. The purchase had been made for construction of house in *Mohalla* Sahjadpur Aderkila within the town of Hajipur.

An application under sub-section (3) of Section 16 of the Act was filed on behalf of the appellants before the Deputy Collector, Land Reforms, for a direction that respondent No. 7, the transferee be directed to convey the lands purchased by him by executing and registering a deed of transfer in favour of the appellants in terms of the said sub-section (3) of Section 16. That application was dismissed by the Deputy Collector, Land Reforms, on the ground that the lands which had been transferred shall not be deemed to be the lands within the meaning of the Act, as such the provisions thereof shall not be applicable. However, an appeal being filed on behalf of the appellants, was allowed by the Collector. The Member, Board of Revenue, dismissed the Revision Application, filed on behalf of Respondent No. 7 Thereafter, a writ petition was filed on behalf of Respondent No. 7, for quashing the orders passed by the Collector and the Member, Board of Revenue before the High Court. The High Court by the impugned judgment quashed the orders passed by the Collector and the Member, Board of Revenue, on a finding that as the lands which had been transferred were within the town of Hajipur and were urban in nature, the provisions of the Act shall not be applicable including sub-section (3) of Section 16 thereof. This finding of the High Court is being questioned in this appeal.

The Preamble of the Act says that it is an Act to provide for fixation of ceiling, restriction on sub-letting and resumption by certain raiyats, for personal cultivation of land, acquisition of status of raiyat by certain under raiyats and acquisition of surplus land by the State in the State of Bihar and matters connected therewith. Section 2(f) defines land :

> "(f) "land" means land which is used or capable of being used for agriculture or horticulture and includes land which is an orchard Kharhur or pasturage (or forest land or even land perennially submerged under water) or the homestead of the land-holder;
>
> Explanation I. - "Homestead" means a dwelling house for the

A purpose of living or for the purpose of letting out on rent together with any courtyard, compound, attached garden, orchard and out-building and includes any outbuilding of the purpose connected with agriculture or horticulture and any tank, liberary and place of worship appertaining to such dwelling house.

B Explanation II. - Land perennially submerged under water shall not include land submerged in the bed of a river."

Section 2(g) defines 'land holder' :

C "(g) 'land holder' means a family as defined in clause (ee) holding land as raiyat or as under-raiyat or a mortgagee or land in possession or holding land permanently settled by Government or lessee of land not resumable by Government."

On a plain reading of the definition of land it means which is used or D capable of being used for agriculture or horticulture or for the homestead of a land-holder. Explanation I, specifies what is meant by homestead which shall include dwelling house for the purpose of living or for the purpose of letting out on rent together with courtyard, compound, attached garden, orchard and includes any outbuilding for the purpose connected with agriculture or horticulture. Section 4 prescribes the ceiling area of the E land which a land-holder can hold under the provisions of the Act. The other provisions relate to fixation of such ceiling and declaration of the surplus land which shall vest in the State. Sub-section (1) of Section 16 provides that no person shall, after, the commencement of the Act, either by himself or through any other person, acquire or possess by transfer, F exchange, lease, mortgage, agreement or settlement any land which together with the land, if any, already held by him exceeds in the aggregate the ceiling area. Sub-section (3) of Section 16 provides :

"3(i) When any transfer of land is made after the commencement of this Act to any person other than a co-sharer or a raiyat G of adjoining land, any co-sharer of the transferor or any raiyat holding land adjoining the land transferred, shall be entitled, within three months of the date of registration of the document of transfer, to make an application before the Collector in the prescribed manner for the transfer of the land to him on the terms H and conditions contained in the said deed :

Provided that no such application shall be entertained by the Collector unless the purchase-money together with a sum equal to ten per cent thereof is deposited in the prescribed manner within the said period.

(ii) on such deposit being made the co-sharer or the raiyat shall be entitled to be put in possession of the land irrespective of the fact that the application under clause (i) is pending for decision :

Provided that where the application is rejected, the co-sharer or the raiyat, as the case may be, shall be evicted from the land and possession thereof shall be restored to the transferer and the transferee shall be entitled to be paid a sum equal to ten per cent of the purchase-money out of the deposit made under clause (i).

(iii) If the application is allowed, the Collector shall by an order, direct the transferee to convey the land in favour of the applicant by executing and registering a document of transfer within a period to be specified in the order and, if he neglects or refuse to comply with the direction, the procedure proscribed in Order XXI, Rule 34 of the Code of Civil Procedure, 1908, (IV of 1908), shall be, so far as may be, followed."

In view of sub-section (3) of Section 16, whenever any transfer of land is made to any person other than the co-sharer or a raiyat of adjoining land, any co-sharer of the transferor or any raiyat holding land adjoining the land transferred, shall be entitled within the period prescribed therein to make an application before the Collector for the transfer of the land to him on the terms and conditions contained in the said deed. He has to comply with the other requirements of the said Section by way of deposit of purchase money along with a sum equal to 10% thereof.

The question which is to be answered is as to whether the expression land as defined in the Act will include not only the lands which are being used or capable of being used for agriculature or horticulture purposes but also lands within the urban areas meant for building purposes. It is well known that in and around the towns and urban areas at one point of time most of the lands were being used for agriculture or horticulture purposes. With growth of population and development activities slowly-slowly such

A agricultural lands are converted to uses which are non-agricultural. Many colonies have been developed by the side of the old cities which at one point of time were agriculture fields and crops used to be grown. But with passage of time and cry for more plots of land for construction of buildings they lost their original character and purpose. It appears that the farmers
B of the Act were quite conscious of this aspect of the matter, that is why while defining 'land' they laid much emphasis in respect of the nature of use such land was being put by saying that it meant land which is used or capable of being used for agriculture or horticulture or the homestead of the land-holder. It need not be pointed out that the sole object of the Act
C is to put ceiling on the lands held by land-holders for agriculture or horticulture purposes and to declare the areas beyond the ceiling as surplus which shall vest in the State Government. In this background neither it can be assumed nor it can be held that the framers of the Act had in mind even the lands which are in the heart of the cities meant for construction of buildings. It is a matter of common knowledge that even in areas which are
D completely urban in nature or even in a colony some plots are lying vacant as no constructions have been made over the same for one reason or the other including financial constraint. Till constructions are made they are being used for growing some crops or fruits. But can it be said that such plots which are meant for building purposes shall be deemed to be land
E within the meaning of Section 2(f) of the Act? According to us, the answer is in negative. Whenever an application under sub-section (3) of Section 16 is filed, which is in respect of a land within the urban area, the authorities or the High Court concerned should first examine what is the primary object for which such land was being used or is capable of being
F used. If it is found that the land was being retained by the transferor or was being transferred to another person for a purpose and object which is not connected with agriculture then an application under sub-section (3) of Section 16 should not be entertained. On other hand, if the authorities or the High Court are satisfied that the land which has been transferred is fully covered by the definition of land as given under Section 2(f) then
G provision of the Act have to be applied for examining the question as to whether the applicant was entitled for retransfer in his fovour from the transferee on the same terms and conditions. A Full Bench of the Patna High Court in the case of *Fakir Mohammad* v. *Salahuddin & Ors.*, AIR (1975) PATNA 119, presided over by N.L. Untwalia, C.J. (as he then was)
H examined the scope of expression 'land' as defined in Section 2(f) of the

Act, It was observed : A

> "The consensus of opinion - and, as I shall presently show, there is no conflict in any of the decisions - is that a parti piece of land belonging to a raiyat, an agriculturist, which is his homestead on which there is no dwelling house or any of the things as mentioned in the Explanation, is not a land covered by Act. *It has been further pointed out that a land fit for building proposes not connected with agriculture situated ordinarily and generally in town or bazaar areas, to which are applicable the provisions of the Transfer of Property Act, is not the homestead of a land-holder to made it a land within the meaning of Section 2(f).*" B C
>
> (Emphasis supplied)

We are in agreement with the view expressed in the aforesaid judgment of the Full Bench. D

So far the facts of the present case are concerned, the High Court has rejected the contention that the land in question can be held to be land within the meaning of Section 2(f) merely because in the Kathian Entry it had been recorded as *Bhit Land*. The High Court in the impugned order has observed : E

> "It goes without saying that all the urban lands at some point to time or the other were rural in nature where agricultural operations were carried on. Therefore, mere description of the land as a Bhit Land by the Survey authorities would not be a conclusive proof that land was agricultural in nature. The fast development and urbanisation of the town of Hazipur which has very recently been made a district, cannot be lost sight of. Therefore, I would accept the second contention of Mr. Krishna Prakash Sinha and hold that the pre-emptor has not succeeded in establishing his case that the disputed land was a land within the meaning of the provisions of the Act to which the provisions of section 16(3) would apply." F G

In view of the findings recorded by the High Court that the land which have been transferred were in the town of Hajipur and in the urban area, H

A the application filed under sub-section (3) of Section 16 has been rightly dismissed. Accordingly, appeal fails and it is dismissed. There shall be no orders as to cost.

The appellant shall be permitted to withdraw the amount which has been deposited on behalf of the appellant in connection with the applica-
B tion under sub-section (3) of Section 16 of the Act. The refund shall be made within three months from the date of the filing of the application on behalf of the appellant.

G.N. Appeal dismissed.

KUMUD LATA DAS

v.

INDU PRASAD

SEPTEMBER 19, 1996

[K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Code of Civil Procedure, 1908 :

Order IX Rule 13—Application for setting aside exparte decree—Property in possession of daughter-in-law—She could not live amicably with her husband—Mother-in-law filing suit for possession on the basis of her alleged title—Appellant was set ex-parte—Application for restoration of decree disposed of by the High Court by imposing condition of depositing mesne profits for the execution of the exparte decree—Not justified—Matter remitted to High Court for fresh consideration of the application for setting aside the decree on merits and in accordance with law.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12729 of 1996.

From the Judgment and Order dated 16.4.96 of the Delhi High Court in I.A. No. 8629/95 in Suit No. 3781 of 1990.

M.N. Krishnamani and S.B. Upadhyay for the Appellant.

A.K. Ganguli, Manish Mishra for N.S. Bisht for the Respondent.

The following Order of the Court was delivered :

Leave granted.

This appeal by special leave arises from the order made on April 16, 1996 by the Delhi High Court in I.A. No. 8629/95 in Suit No. 3781/90. The suit was for possession of the property from the appellant. The plaintiff is the mother-in-law of the appellant. The appellant and her husband are not able to live amicably in matrimonial tie. The proceedings for divorce are pending. The appellant is in possession of the property and, therefore, the respondent-mother-in-law filed a suit for possession on the basis of her alleged title. The appellant was set *ex parte* and the application under

A Order 9, Rule 13 CPC is now pending before the High Court. The application for restoration of the decree has been disposed of with directions to deposit and to continue to deposit *mesne profits* at the rate of Rs. 2,000 per month from the date of *ex-parte* decree, Hence, this appeal by special leave.

B In view of the fact that the parties are closely related and the matter has been disposed of *ex-parte*, we are of the view that it is not a fit case to impose costs of depositing *mesne profits* from the date of *ex-parte* decree and to continue to deposit it as a condition to contest the application to set aside *ex-parte* decree. Moreover, such onerous condition is not valid, C though discretionary.

Under these circumstances, we think that the learned Single Judge was not right in imposing the condition of depositing the *mesne profits* as a condition precedent for execution of the *ex-parte* decree. The impugned order of the High court is accordingly set aside. There shall be stay of D execution of the *ex-parte* decree. The matter is remitted to the High Court for fresh consideration of the application for setting aside the decree on merits and in accordance with law.

The appeal is allowed. No costs.

E G.N. Appeal allowed.

P.A. THOMAS AND ANR. A

v.

M. MOHAMMED TAJUDDIN AND ANR.

SEPTEMBER 19, 1996

[K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.] B

Rent Control and Eviction :

Tamil Nadu City Protection Act, 1922 :

Section 2(4)(ii)(a)—Tenant—Open land let out to defendant in the suit—He converted his individual business into a partnership business—Not having control over the property—Held : He had sublet the property to the partnership firm and thereby contravened the conditions of lease—Hence liable for ejectment—Decree of ejectment granted by trial Court and affirmed by High Court—Not vitiated by any error of law warranting interference. C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1569 of 1987.

From the Judgment and Order dated 9.1.87 of the Madras High Court in S.A. No 1706 and C.R.P. No. 3135 of 1985. E

Ms. Seira Vidyalingem for the Appellants.

K.R. Chowdhary for the Respondents.

The following Order of the Court was delivered : F

A Bench of three Judges of this Court by judgment dated May 26, 1989 while negativing all the contentions raised by the appellant-tenant found merit in the contention raised by the counsel that if the first appellant was in effective control over the management of the business of the partnership to which he had taken two other partners, it would amount that G he had not sublet the premises and that he would be "a tenant" within the meaning of sub-clause (a) of Clause (ii) of sub-section (4) of Section 2 of the Tamil Nadu City Protection Act, 1922.

Sub-section (4) of Section 2 defines the terms "tenant" in relation to any land. Clause (i) thereof runs as follows : H

A "(i) means a person liable to pay rent in respect of such land, under a tenancy agreement express or implied".

Sub-clause (a) of clause (ii) of sub-section (4) of Section 2 of the said Act runs as follows :

B "(a) any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement."

The relevant part of sub-clause (b) of the said clause runs as follows:

C "(b) any person who was a tenant in respect of such land under a tenancy agreement to which this Act is applicable under sub-section (3) of Section 1 and who or any of his predecessors in interest had erected any building on such land and who continues in actual physical possession of such land and building, notwithstanding that

D ....."

Since there is no evidence on this issue this Court thought that a finding was required to be given by the High Court and if required, the matter may be sent to the trial court for recording the evidence for submission thereof to the High Court. In furtherance thereof, the High E Court remitted the matter to the trial court for recording further evidence afresh which was adduced.

After consideration of the evidence, the High Court noted that in paragraph 8 of the plaint it is stated that the business of the first defendant F was converted into a partnership in name and style of "P.A. Thomas and Co." taking the second defendant who was looking after the business and another as partners. The averment that the second defendant was looking after the business was not specifically denied in the written statement. Therefore, no issue was raised in that behalf. The first defendant was not continuing to have effective control over the business even after its conver- G sion into a partnership firm. The High Court pointed out that though the partnership deed was filed in this Court in the appeal, the same was not produced either in the trial Court; nor was it produced in the High Court. The first defendant did not choose to examine himself as a witness after remand. Only the second defendant who was examined as DW-1, has H reiterated his evidence given on earlier occasion. The first defendant was

doing business only upto 1970 in the suit property and thereafter he never turned up. On the other hand, the business was being run in the suit property exclusively by the second defendant. It was also noted by the High Court that the first defendant was doing business in Mundakkayam as pointed out in paragraph 5 of the judgment. The High Court has recorded the finding that after remand, DW-1 admitted that his father, the first defendant, was living in Mundakkayam, Kerala State and he as his son was doing the business in the suit property at Cumbum. The evidence of DW-2 is also to the same effect and he claimed that it was he who remitted the rent by money orders to the plaintiffs and later deposited the rent in the Court. After considering the entire evidence on record and drawing an adverse inference against the first defendant for his failure to get himself examined as a witness, though opportunity was given to him, a finding was recorded by the High Court that the first defendant was not in exclusive control of the business. On the other hand, the second defendant was doing the business in the premises after converting it into partnership firm. This being the finding of fact, we do not think that there is any question of law is involved.

In view of the definition of "tenant" and in view of the fact that the first defendant to whom the open land was let out, had converted individual business into a partnership business and was not having any control over the property or the business, *it can be said that* he had sub-let the property leased out to the first defendant, to the partnership firm and thereby, contravened the conditions of the lease. Accordingly, he became liable for ejectment. The decree of ejectment granted by the trial Court and affirmed by the High Court was thereby not vitiated by any error of law warranting interference.

The appeal is accordingly dismissed. No costs.

G.N. Appeal dismissed.

A DR. CHITTARANJAN SHARMA AND ORS.

v.

THE STATE OF HIMACHAL PRADESH AND ANR.

SEPTEMBER 19,1996

B [K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Service Law :

Absorption of employees of Ayurvedic Degree College taken over by the
C *State Government—Regular absorption made on the basis of recommendations made by screening committee constituted for this purpose—Appellants not possessing the requisite qualifications—Hence absorbed in suitable administrative posts to which they were eligible—Challenged before the Tribunal and it directed to maintain their scale of pay and to absorb them in the post of Ayurvedic Chikitsa Adhikaris—On appeal held, directions of Tribunal*
D *based on equity and hence no interference called for.*

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1248-49 of 1987.

From the Judgment and Order dated 15.12.86 of the State Ad-
E ministrative Tribunal, Shimla in T. No. 74 and 77 of 1986.

S.V. Deshpande for the Appellants.

T. Sridharan, T.A. Khan, Shiva Pujan Singh and Rajiv Nanda for the
F Respondents.

The following Order of the Court was delivered :

These appeals by special leave arise from the order of the Administrative Tribunal made on December 15, 1986. Admittedly the H.I.M.
G Ayurvedic Degree College, Paprola, District Kangra was taken over by the Government and handed over to the H.P. Health and Family Welfare Department. Clause (3) of the agreement envisages as under :

"The service of the existing staff, principal, Teaching Administrative and other employed on regular basis in the college who fulfil
H the requisite qualifications and age conditions may be taken over

with effect from 3.3.1978 after due screening if done by a screening committee constituted for this purpose by the Government in which 2 members i.e. principal and Manager from the Managing Committee shall also be included. Service of the present employees will be protected according to Government rules."

In accordance therewith, the existing staff, principal, teaching, administrative and other employees employed on regular basis in the college were eligible to be absorbed on regular basis provided they fulfilled the following conditions : (1) they were appointed on regular basis in the college before taking over; (2) they possessed the requisite qualifications prescribed for the posts; and (3) they fulfilled the age condition at the time of taking over w.e.f. March 3, 1978. On fulfilment of all these conditions, they would be sent to a screening committee constituted for the purpose by the Government including to members, i.e., the Principal and Manager to the Managing Committee to represent the employees in the screening committee. On recommendation made by the Committee, the regular absorption could be made.

Unfortunately, the appellants were not regularly appointed; nor did they possess the requisite qualifications for absorption on regular basis in the posts as on the date of the take over. Resultantly, instead of throwing them out of service by retrenchment, the Government issued the order exercising the power under proviso to Article 309 of the Constitution on May 24,1980 in consultation with the Himachal Pradesh Public Service Commission and Rules for Recruitment and Promotion of the Ayurvedic College employees, Paprola, District Kangra. Admittedly, the appellant even than did not satisfy those qualifications prescribed under the Rules. Resultantly, they were absorbed in suitable administrative posts to which they are eligible. When they challenged their absorption, the Tribunal in the impugned order directed to maintain the scale of pay which they were drawing on the date of the take over and directed their absorption in the posts of Ayurvedic Chikitsa Adhikaris etc. Thus, these appeals by special leave.

It is seen that since the appellant had not fulfilled the requisite qualifications either when they were initially appointed by the committee before take over nor when statutory rules were made by the Governor so as to enable for absorption. Instead of retrenching them from service due

A to nor-fulfilment of the requisite qualifications, the Government came to absorb them in the Ayurvedic Chikitsa Adhikaris posts etc. to which they are eligible. The Tribunal has given the direction to maintain the pay-scales and to make adjustment and absorption. In our view directions are correct and based on equity and do not call for any interference. They may also be considered for further promotion from the absorbed posts in accord-
B ance with the rules.

The appeals are accordingly dismissed. No. costs.

G.N. Appeals dismissed.

MEERUT DEVELOPMENT AUTHORITY ETC. A

v.

SATBIR SINGH AND ORS. ETC.

SEPTEMBER 19, 1996

B

[K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Land Acquisition Act, 1894 :

Sections 4(1), 6, 17(4)—Simultaneous publication of the declaration under S. 6 along with publication of notification under S. 4(1)—Validity of—Judicial decision holding it invalid—Amending Act—Cannot simply seek to take away the effect of the judgment—In that case it would amount to legislative repeal of the judicial decision—Held, S. 2 of the U.P. Amendment Act 5 of 1991 would operate prospectively and retrospectively from April 24, 1984 applying to the previous notifications and declarations but also to notifications and declarations to be published subsequently—Retrospective effect given from date of issuance of ordinance to the Act and operation retrospectively from the date of judgment—No inconsistency in operation of the Act or invalidity in giving two dates for the retrospective operation of the provisions of the Act—Acquisition for housing development is an urgent purpose and exercise of the power under S. 17(4) dispensing with the enquiry under S. 5A is not invalid—Exercise of power under S. 4(1) and declaration under S. 6 are not vitiated by any manifest error of law warranting to quash the declaration under S. 6 as was done by the High Court—Constructions made despite status quo order passed by Supreme Court—Such constructions will not bind the authority—No compensation for these illegal constructions—Land Acquisition Officer to take note of these at the time of passing the Award—Award to be passed within six months.

C D E F

Smt. Somawanti & Ors. **v.** *State of Punjab & Ors.,* **[1963] 2 SCR 775;** *Ghaziabad Development Authority* **v.** *Jai Kalyan Samiti, Sheopuri, Ghaziabad & Anr.,* **[1996] 2 SCC 365;** *Indian Aluminium Co. & Ors. v. State of Keral & Ors.,* **JT (1996) 2 SC 85;** *State of Orissa* **v.** *Gopal Chandranath,* **[1995] 6 SCC 243;** *Bhubaneswar Singh & Anr.* **v.** *Union of India & Ors.,* **[1994] 6 SCC 77;** *Comorin Match Industries P. Ltd.* **v.** *State of Tamil Nadu,* **[1996] 4 SCC 281;** *Gouri Shankar Gauri & Ors.* **v.** *State of U.P. & Ors.,* **[1994] 1 SCC 92;** *Government of Andhra Pradesh* **v.** *H.M.T.,* **[1975] Supp. SCR 384;** *Aflatoon* G H

A **v. *Lt. Governor of Delhi & Ors.*, [1975] 4 SCC 285; *Smt. Pista Devi* v. *M.D.A.*, [1986] 4 SCC 251 and *State of Tamil Nadu* v. *L. Krishnan*, [1996] 7 SCC 450, relied on.**

State of U.P. & Ors. v. *Radhey Shyam Nigam & Ors.*, **[1989] 1 SCR 92; *Madan Mohan Pathak* v. *Union of India*, [1978] 2 SCC 50; *State of U.P.**

B **& Anr.* v. *Keshwav Prasad Singh*, [1995] 5 SCC 587 and *State of Haryana* v. *The Karnal Co-operative Farmers' Society Ltd.*, JT (1993) 2 SC 235, referred to.**

CIVIL APPELLATE/ORIGINAL JURISDICTION : Civil Appeal

C No. 1828 of 1988 Etc. Etc.

From the Judgment and Order dated 14.1.88 of the Allahabad High Court in C.M.W.P. No. 10551 of 1985.

Dr. Rajeev Dhawan, M.N. Krishnamani, Anis Suhrawardy, Mrs. S.

D Janani, V.J. Francis, R.D. Upadhyay, R. Bana, Ms. Laxmi Arvind, Subodh Markandeya, Ms. Chitra Markandeya M.M. Chopra, Ms. Meenakshi Agarwal, (Anip Sachthey, P.D. Sharma, R.B. Misra, A.S. Pundir), (NP), Pradeep Misra, T. Mahipal, (R.C. Verma) for, Ashok K. Srivastava for the appearing parties.

E The following Orders of the Court was delivered :

Substitution allowed.

Leave granted in all the special leave petitions.

F Notification under Section 4(1) of the Land Acquisition Act, 1894 (for short, the "Act") was published on June 11, 1985. The Government also exercised the power under Section 17(4) of the Act and dispensed with the enquiry under Section 5-A and had the declaration under Section 6 published on June 13, 1985. The publication of substance of the notification in

G the local newspapers came to be made on July 25, 1985. In August 1985, the respondents filed a batch of writ petitions in the High Court impugning the validity of the notification under Section 4(1) and of the declaration under Section 6 on six grounds. Five of the grounds raised by the respondents were negatived by the High Court as not sustainable but declaration under Section 6 was quashed on the ground that after the Amendment Act

H 68 of 1984 had come into force w.e.f. September 24, 1984, the simultaneous

publication of the declaration under Section 6 along with publication of notification under Section 4(1) was invalid in law. They relied upon judgment of this Court in *State of U.P. & Ors.* v. *Radhey Shyam Nigam & Ors. etc.,* [1989] 1 SCR 92. The respondents filed cross appeals against the findings that were negatived by the High Court in respect of all the other five points. Thus these appeals by special leave.

Pending appeals, the Governor exercising the power under Article 213 of the Constitution issued the Ordinance No. 32 of 1990 and State Legislature enacted the Land Acquisition (U.P. Amendment and Validation) Act, 1991 (UP Act 5 1991) which came into force from December 28, 1990, introducing proviso to Section 17(4) of the Act and also by Section 3 thereof validated all the notifications and declarations issued under the Act prior to the date of the judgment of this Court in *Radhey Shyam Nigam* case (supra). The Ordinance came to be challenged by way of Writ Petition No. 153/96. Thus all the matters tagged are disposed of together. With a view to satisfactorily resolve the controversy, it is, at the first instance, necessary to dispose of the writ petition.

It is seen that this Court in *Radhey Shyam Nigam's* case had considered the provisions of U.P. Urban Planning and Development Act and the Act. In exercise of power under Section 17(4) of the Act, the appropriate State Government was empowered to issue and get published the notification under Section 4(1) and the declaration under Section 6 of the Act simulatensouly. That was upheld by this Court in *Smt. Somawanti & Ors.* v. *State of Punjab & Ors.,* [1963] 2 SCR 775. After the Amendment Act 68 of 1984 was brought on statute, sub-section (4) of Section 17 envisages that the authority is empowered to have the declaration under Section 6 published after the publication of the notification under Section 4(1). In other words, the simultaneous exercise of power to get the notification under Section 4(1) and declaration under Section 6 was not valid in law. This Court had held thus :

> "It is true that the expression "after the date of the publication of the notification" introduced in Section 17(4) can be explained..... changes in Sections 4 and 6 of the Act".

It is to be seen that the State Legislature thereafter, has enacted proviso to sub-section (4) as under :

A "Provided that where in the case of any land, notification under Section 4, sub-section (1) has been published in the official Gazette on or after September 24, 1984 but before January 11, 1989, and the appropriate Government has under this sub-section directed that the provisions of Section 5-A shall not apply, a declaration under Section 6 in respect of the land may be made either simultaneously with, or at any time after, the publication in the official Gazette of the notification under Section 4, sub-section (1)."

B

This proviso was inserted by Section 2 of the State Amendment Act 5 of 1991. Sub-section (3) validated the acquisitions pending as on the date C of the judgment of this Court which reads as under :

"3. Validation of certain acquisitions. - Notwithstanding any judgment, decree or order of any Court, Tribunal or other authority, no acquisition of land made, or purporting to have been made, under the Principal Act before the commencement of this D Act and no action taken or thing done (including any order or declaration made, agreement entered into or notification published) in connection with such acquisition, which is in conformity with the provisions of the Principal Act as amended by this Act shall be deemed to be invalid or ever to have been invalid merely on E the ground that declaration under Section 6 of the Principal Act was published in the Official Gazette on the same date on which notification under Section 4, sub-section (1) of the Principal Act, was published in Official Gazette or on any other date prior to the date of publication of such notification as defined in Section 4, sub-section (1) of the Principal Act."

F

The controversy is not longer *res integra*. This Court in *Ghaziabad Development Authority* v. *Jai Kalyan Samiti, Sheopuri, Ghaziabad & Anr.*, [1996] 2 SCC 365 has considered the effect of the proviso introduced by the State Legislature by way of amendment to Section 17(4). The validity G has been upheld by the two-Judge Bench of this Court.

Shri Pradeep Misra, learned counsel for the respondents, contended that if the law is declared by this Court that simultaneous publication under Section 4(1) and declaration under Section 6 of the Act is invalid, the Legislature has no power to over-rule and nullify the judgment of this H Court by way of amendment. It has only to remove the defect, as pointed

out by this Court, by suitably amending the statute. In this case, a reading of the proviso would indicate that the State Legislature, without removing the defect, as pointed out by this Court, reiterated the defect and sought to validate all the invalid notifications or declarations as declared by this Court in *Radhey Shyam Nigam's* case (supra) as valid. Therefore, the U.P. Amendment Act 5 of 1991 is invalid in law.

It is well-settled by catena of decisions of this Court that when this Court in exercise of power of judicial review, has declared a particulate statute to be invalid, the Legislature has no power to over-rule the judgment; however, it has the power to suitably amend the law by use of appropriate phraseology removing the defects pointed out by the court and by amending the law inconsistent with the law declared by the court so that the defects which were pointed out were never on statute for effective enforcement of the law. This Court has considered *in extenso* the case law in a recent judgment in *Indian Aluminium Co. & Ors.* v. State of Kerala & Ors., JT (1996) 2 SC 85 had held that such an exercise of power to amend a statute is not an incursion on the judicial power of the court but is a statutory exercise of the constituent power to suitably amend the law to validate the actions which have been declared to be invalid. It laid down the following principles :

> "(1) The adjudication of the rights of the parties is the esential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the court to give effect to them;
>
> (2) The Constitution delineated delicate balance in the exercise of the sovereign power by the Legislature, Executive and Judiciary;
>
> (3) In a democracy governed by rule of law, the legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law;
>
> (4) Courts in their concern and endeavour to preserve judicial power equality must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil an egalitarian social order, the respective sovereign functionaries

A need free-play in their joints so that the march of social progress and order remain unimpeded. The smooth balance built with delicacy must always be maintained;

(5) In its anxiety to safeguard judicial power, it is unnecessary to be overjealous and conjure up incusion into the judicial preserve
B invalidating the valid law competently made;

(6) The Court, there fore, need to carefully scan the law to find out; (a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and
C constitutional requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution;

(7) The Court does not have the power to validate an invalid law
D or to legalise or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not the encroachment on judicial power.

(8) In exercising legislative power, the Legislature by mere declaE ration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous
F decision would not have been rendered by the Court if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The Legislature can change the character of the tax or duty from inpermisG sible to permissible tax but the tax or levy should answer such character and the Legislature is competent to recover the invalid tax validating such a tax or removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on
H that basis, make the imposition of levy collected and recovery of

the tax made valid, notwithstanding the declaration by the Court or the direction given for recovery thereof. A

(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same." B

The same view as reiterated in *State of Orissa* v. *Gopal Chandrarath,* [1995] 6 SCC 243; *Bhubaneswar Singh & Anr.* v. *Union of India & Ors.,* [1994] 6 SCC 77 and *Comorin Match Industries P. Ltd.* v. *State of Tamil Nadu,* [1996] 4 SCC 281. It is equally settled law that validating Act cannot simply seek to take way the effect of the Judgment of the Court. In such an event, it will be legislative repeal of judicial decision as had been held by this Court in *Madan Mohan Pathak* v. *Union Of India,* [1978] 2 SCC 50; *State of U.P. & Anr.* v. *Keshwav Prasad Singh,* [1995] 5 SCC 587 and *State of Haryana* v. *The Kamal Co-operative Farmers' Society Ltd.,* JT (1993) 2 SC 235. C D

The question in this case is : whether the Legislature has merely reiterated the defect pointed out by this Court and thereby caused legislative repeal of the judicial decision or it has cured the defect pointed out by this Court so as to be in conformity with the law? In this behalf, it must be remembered on the facts in this case that acquisition is a concurrent subject vide Entry 42 in the List III of the Seventh Schedule to the Constitution on which both the Parliament as well as the State legislature have competence to enact the law suitable to the situtation prevailing in the appropriate State. Article 254 of the Constitution deals with such an area. Clause (2) of Article 254 envisages that "Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by parliament, or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State". The scope thereof was elaborately considered by this Court in *Gouri Shakar Gauri & Ors.* v. *State of U.P. & Ors.,* [1994] 1 SCC 92 at 117-118 and it was held thus : E F G H

A "... (1) where the provisions of a Central Act and a State Act in the Concurrent List are *fully inconsistent and are absolutely irreconciliable*, the Central Act will prevail and the State Act will become void in view of the repugnancy; (2) where, however, a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to B the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) Article 254; (3) where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with or repugnant to a previous law C made by parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until D Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254. In that case it was held that part of the provisions were not repugnant in their application to the public men in Tamil Nadu but are void to the extent of public servants, E *T. Barai* v. *Henry Ah Hoe,* [1983] 1 SCC 177 is a case where Section 16(1)(a) of the Prevention of Food Adulteration Act, 1954, in the Concurrent List prescribes a punishment of six years and fine. The West Bengal State Legislature emended it by West Bengal Amendment Act, 1973 and prescribed a punishment of imprisonment for F life for the selfsame offence under Section 16(1) of the Act. Prevention of Food Adulteration Act was amended by Parliament in 1976. The question arose whether by operation of proviso to Article 254(2) the State law is void. Since the Central Amendment Act, 1976 occupies the same filed imposing lesser punishment, the previous State law imposing punishment of imprisonment for life, G though received the assent of the President, was held to be void."

It is not in dispute that the State Amendment Act 5 of 1991 was enacted and reserved for consideration of the President and received the assent of the President on 26.2.1991 and the Act was published in the H Gazette on 27.2.1991. It is to be seen that as regards simultaneous publi-

cation of the notification and the declaration in respect of acquisition of the land for public purpose exercising the power of eminent domain in certain situation where possession was needed urgently, depending upon the local needs and the urgency, Government requires such power. Consequently, the State Legislature thought it appropriate that despite the enactment of the Amendment Act 68 of 1984 Amending Section 17(4), the State needed further amendment. Resultantly, the U.P. Amendment Act 5 of 1991 came to be made and it was given retrospective effect from the date of the Amendment Act 68 of 1984 has come into force, i.e., September 24, 1984.

It is true that the proviso was not happily worded. But a reading of it would clearly give us an indication that the proviso to sub-section (4) introduced by Section 2 of the Amendment Act 5 of 1991 would deal with both the situations, namely, the notifications published on or after September 24, 1984 but before January 11, 1989 but also the declaration to be simultaneously published subsequent thereto. The literal interpretation sought to be put up by Shri Pradeep Misra would defeat the legislative object. Therefore, ironing out the creases we are of the view that the proviso applies not only to the notifications and declarations simultaneously published after the date of coming into force of the Amendment Act 68 of 1984 but also to the future declarations as well. Thus, it could be seen that the proviso would operate prospectively and retrospectively from April 24, 1984 applying to the previous notifications and declarations but also to the notification and declaration to be published subsequently.

It is true that normally the Legislature has to give effect to the judgment of the court only to cure the defects pointed out in the previous judgment so that the operation of the law would be consistent with the law declared by this Court. But in view of the peculiarity, namely, the special needs of the State, Article 254(2) itself gives such a power to the State legislature to amend the law to make applicable in relation to that State though Central Law may be inconsistent with the law operating in other States. In other words, when the topic is occupied in the Concurrent List, uniformity of the operation of the law is not the rule but simultaneous existence of the inconsistency would also operate in the same filed. But when the State Amendment was reserved and received the assent of the President to the extent of inconsistency it is saved in relation to that State. Therefore, the amendment by proviso to Section 17(4) is not invalid. Any

A other construction would dry out the power of the State Legislature to enact the law on the subject of acquisition.

It is seen that Section 3 of the Amendment Act 5 of 1991 seeks to validate the illegal declarations made simultaneously with the publication of the Section 4 notification and in some cases even prior to the publication B of Section 4 notification; it also seeks to validate certain acquisitions envisaged thereunder. This validation is not illegal. Shri Misra contended that since the appeals were pending before this Court, the Legislature would not be competent to amend the law so as to take away the effect of the decisions of this Court. In support thereof he contended that leave was C granted by this Court and it was directed to post these cases along with the main matter, i.e., *Radhey Shyam Nigam's* case. Since the matters were not disposed of, the amendment was brought about to defuse the effect of the judgment. Therefore, the amendment is not valid in law. We find no force in the contention.

D

Government of Andhra Pradesh v. *H.M.T,* [1975] Supp. SCR 384 was a case where pending appeals in this Court the Legislature has amended the Gram Panchayat Act and suitably defined 'house' which was found to be defective as declared by a judgment of A.P. High Court under appeal. Amendment was made to the Gram Panchayat Act. When the Validation E Act was challenged, a bench of three judges of this Court had upheld the validity of the Amendment Act and held that the State Legislature has not overruled or set aside the judgment of the High Court. It has amended the definition of 'house' by substitution of a new Section 217 for the old section and it has provided that the new definition shall have retrospective effect F notwithstanding anything contained in any judgment, decree or order of any court or other authority. In other words, it has removed the basis of the decisions rendered by the High Court so that the decisions would not have been given in the altered circumstances. The same ratio applies to the facts in this case.

G

It is then contended by Shri Krishnamani, learned Senior counsel appearing for some of the appellants in cross appeals that in the Amendment Act two inconsistent dates for coming into force of the Act and giving effect to the provisions of the Act have been introduced. That is also impermissible. We find no force in the contention. It is seen that the H Amendment Act 5 of 1991 was given effect from the date when the

Amendment Ordinance was published in the Gazette but the effect of the amendment was to remove the defects pointed out and to validate the notifications and declarations which otherwise would be invalid. Consequently, the retrospective effect was given from the date of the issuance of the Ordinance to the Act and it came into operation retrospectively from the date of judgment. Under those circumstances, we do not find any inconsistency in the operation of the Act or invalidity in giving two dates for the respective operation of the provisions of the Act.

Then it is contended by Smt. S. Janani, learned counsel for the appellants in cross appeals that the High Court was not justified in rejecting 5 of the contentions raised by the appellants. The exercise of the power is arbitrary. She has highlighted her point by placing before us a map in which some of the portions were omitted from acquisition while lands in question came to be acquired. Therefore, it is arbitrary exercise of the power. We find no force in the contention. When we have enquired from the counsel appearing for the M.D.A., it was pointed out that the lands left out were agricultural lands which could be acquired under the Land Reforms Act and that, therefore, they had not resorted to the acquisition under the Land Acquisition Act. It is also pointed, out that some of the lands were abadi is situated, were not acquired. Shri Rajeev Dhawan, learned senior counsel for the MDA further contended that certain lands were left out where greenery is in existence and that was not sought to be disturbed so as to maintain ecology. Mrs. Janani has pointed pointed out that the Kanugo had intimated that the respondents are free to construct houses without obtaining permission. The High Court has pointed out that such construction was invalid in law and therefore the notification under section 17(4) was not to be sustained on that ground. The view of the High Court is not correct in law. We find no force in the contention. It is seen that where large extent of land was acquired, mere existence of some houses even if they were constructed, may be according to rules or may not be according to rules, the exercise of the power under section 17(4) by the Government dispensing with the enquiry does not become invalid, when there was urgency to take possession of the acquired land. It is now settled legal position that acquisition for planned development of housing scheme is also urgent purpose as laid down by this Court in *Aflatoon* v. *Lt. Governor of Delhi & Ors.*, [1975] 4 SCC 285 and *Smt. Pista Devi* v. *M.D.A.*, [1986] 4 SCC 251 and in recent judgment of this Court in *State of Tamil Nadu* v. *Krishnan*, [1996] 7 SCC 450. In the light of the settled legal position the acquisition for housing development is an urgent purpose and exercise

A of the power under section 17(4) dispensing with the enquiry under Section 5A is not invalid.

Mrs. Janani has further contended that since no developments have been undertaken and no plants have been prepared, the acquisition is bad in law. We find no force in the contention. Under the U.P. Urban Development Act it is not mandatory that the entire scheme should be prepared prior to the notification under section 4(1) was published. Similar situation was considered by this Court in *L. Krishnan's* case (supra) and it was held that the acquisition on that account is not bad in law. Accordingly we hold that the exercise of the power under section 4(1) and declaration under section 6 are not vitiated by any manifest error of law warranting to quash the declaration under section 6 as was done by the High Court.

The appeals of the Meerut Development Authority are accordingly allowed. The appeals of the claimants-respondents stand dismissed. The writ petition also stands dismissed. But in the circumstances, without costs.

Shri Markandeya, learned counsel has pointed out that in some of the cases despite the status quo order passed by this Court, some of the respondents/appellants in contempt case have carried out the constructions and that, therefore, he has taken out contempt proceedings for violation of the orders of the court. We need not take any further steps in this case. Suffice to state that any constructions will not bind the authority nor are they entitled to compensation for these illegal constructions. The same would be taken note of by the Land Acquisition Officer at the time of passing the award and would be dealt with appropriately. The contempt petitions are accordingly dismissed. The Land Acquisition Officer should pass the award within six months from the date of the receipt of this order.

Civil Appeal Nos. 2313-14 of 1997.

ORDER

These appeals by special leave arise from the order of the Division Bench of the Allahabad High Court made on May 20, 1976 in W.P. Nos. 792/75 and 5032/75 and batch. The appellant challenged, along with yet other batch, the validity of the notification published under Section 4(1) on October 12, 1974 and declaration under Section 6 dated September 28, 1974 contending that the declaration under Section 6 could not be made until the notification under Section 4(1) was published in accordance with

law. Therefore, the notification is bad in law. The High Court noted, as a fact, that the notification under Section 4(1) and the declaration under Section 6 were simultaneously published on October 12, 1974. *There is no bar on the Government making the order that before publication of Section 4(1) declaration under Section 6 should also be published.* It is not in dispute that the State had in exercise of its power of eminent domain under Section 17(4) of the Act, dispensed with the enquiry under Section 5A. It is settled law that simultaneous publication of the notification under Section 4(1) and the declaration under Section 6 was valid in law prior to the coming into force of the Amendment Act 68 of 1984. It is also seen that in relation to the State of Uttar Pradesh, Land Acquisition (Amendment) Act 5 of 1991 has been brought into force w.e.f. February 17, 1991 and, therefore, in relation to the State of U.P. it is now settled law that when the State exercises the power of eminent domain and in exercise of the power under Section 17(4) dispensing with the enquiry under Section 5-A to acquire the land under Section 4(1) the State is entitled to have the notification under Section 4(1) and the declaration under Section 6 simultaneously published so as to take further steps as required under Section 9 of the Act, i.e. issuance of the notice and taking possession thereof under Section 17(2) of the Act. Thereafter, the land stands vested in the State free from all encumbrances. In view of the urgency, the Government exercised power of eminent domain and dispensed with the enquiry under Section 5-A; we do not find any illegality in the action taken by the respondents in having the notification under Section 4(1) and the declaration under Section 6 simultaneously published. It is then sought to be contended that the appellant has a small extent of the land and other lands have been excluded from acquisition and, therefore, it is arbitrary exercise of power. He also seeks to contend the procedural infirmities, but unfortunately none of the contentions have been pressed before the High Court, though might have been raised in writ petition. Under those circumstances, we cannot permit the appellants to argue these points afresh which are purely questions of fact to be verified on the basis of the material as the State had no opportunity to deal with them.

The appeals are accordingly dismissed but, in the circumstances, without costs. The Land Acquisition Officer is directed to pass the awards within a period of six months from the date of the receipt of the order of this Court.

G.N. Appeals dismissed.

A S.K. SINGH

v.

CENTRAL BANK OF INDIA AND ORS.

OCTOBER 19, 1996

B [K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Service Law :

Removal from service—Branch Manager of a Bank—Disciplinary proceedings as cash found short—Enquiry conducted—Order of removal from service—Challenged on the ground that copy of enquiry report was not supplied—Negatived by High Court—On appeal held, though copy of the enquiry report not supplied, the employee could not satisfy the Court as to the prejudice caused to him on account of its non-supply—Hence there is no illegality in the decision taken by the High Court.

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Managing Director, ECIL Hyderabad and Ors. **v.** *B. Karunakar and Ors.,* **[1993] 4 SCC 727, referred to.**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 18181 of 1996.

E

From the Judgment and Order dated 13.3.96 of the Madhya Pradesh High Court in L.P.A. No. 80 of 1996.

S.S. Khanduja, Yash Pal Dhingra and Baldev L. Satija for the Petitioner

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The following Order of the Court was delivered :

This petition is filed against the judgment of the Division Bench of the Madhya Pradesh High Court Gwalior Bench made on March 13, 1996 in L.P.A. No. 80/96.

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The admitted position is that the petitioner was working as a Branch Manager in the respondent-Bank. A sum of Rs. 20,000 was found to be short in cash of the Branch. Therefore, disciplinary proceedings were initiated against him and an enquiry was conducted and he was removed from service. He challenged the order of his removal in an appeal which

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was dismissed; the writ petition filed by him was also dismissed by the learned single Judge of the High Court and on appeal, it was confirmed.

The only controversy raised in the High Court was that as he was not supplied with the copy of the enquiry report, the order of dismissal was bad in law. The learned Single Judge as well as the Division Bench of the High Court have considered the effect of the judgment of the Constitution Bench of this Court in *Managing Director, ECIL, Hyderabad and Ors.* v. *B. Karunakar and Ors.*, [1993] 4 SCC 727. The learned single Judge as well as the Division Bench of the High Court had asked the petitioner as to what prejudice the petitioner had suffered for non-supply thereof. Since there was no adequate explanation offered by the petitioner, the High Court came to the conclusion, that though the copy of the report was not supplied, on the facts, as no prejudice was proved, it was not a case warranting interference.

It is contended by Sri Khanduja, learned counsel for the petitioner that since this Court has laid down the law that supply of copy of the enquiry report is a pre-condition for a competent officer to take disciplinary action, the appropriate course would have been to send back the case to the disciplinary authority. *For this course*, normally there is no quarrel, as this Court had settled the law that a copy of the report needs to be supplied to the delinquent employee to enable him to make representation against the proposed action or punishment and, thereafter, the authority is required to consider that explanation offered by the petitioner and then to take decision on the quantum of punishment. In this case, though copy of the report was not supplied, he was asked by the learned Single Judge as well as by the Division bench as to what prejudice he suffered on account of non-supply of the report; but he was not able to satisfy the learned Judges as to the prejudice caused to him on account of non-supply of the enquiry report. On the facts, we find that there is no illegality in the decision taken by the High Court.

The special leave petition is accordingly dismissed.

G.N. Petition dismissed.

A THE SCHEDULE CASTES AND SCHEDULED TRIBES OFFICERS' WELFARE COUNCIL

v.

STATE OF UTTAR PRADESH AND ANR.

B SEPTEMBER 19, 1996

[K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Service Law :

C *U.P. Regulation of Ad hoc Appointment (On Posts Within The Purview Of The Public Service Commission) Rules 1979 :*

Provincial Medical Health services—Reservation in promotion—Promotion to posts of Deputy Chief Medical Officer, Chief Medical Officer Additional Director, Director—Fixing minimum length of service
D *—Memorandum dated July 28, 1986 increasing the minimum length of service—In view of the new criteria three officers belonging to SC/ST were denied their entitlement to promotion as Chief Medical Officers and Joint Directors—Reservation Policy should be strictly adhered to and not left to the whims of officers to introduce their own criteria contrary to the general*
E *policy—Department not preparing separate list of general candidates, Schedule Castes and Scheduled Tribes in integrating them as per the roster prepared by the Government—Obviously it is an illegal procedure followed to deprive the officers belonging to SC, ST and Backward Classes in integrating their seniority according to roster—Hence the Memo dated July 28, 1986 and all other incidental instructions issued in furtherance thereof are*
F *quashed—Government to consider the cases of the three officers and all other eligible officers according to rules in vogue from 1973 till the date of introducing the offending rules—If necessary to create supernumerary posts in the respective vacancies to which the three officers are eligible to be considered and promoted in accordance with the rules with all consequential*
G *benefits—Directions issued.*

Constitution of India—Article 16—Reservation in Promotion.

Consumer Education & Research Centre & Ors. **v.** *Union of India & Ors.,* **[1995] 3 SCC 432;** *Dalmia Cement (Bharat) Ltd. & Anr.* **v.** *Union of*
H *India & Ors. Etc.,* **JT (1996) 4 SC 555;** *Murlidhar Dayandeo Kesekar* **v.**

Vishwanath Pandu Barde & Anr., **[1995] Supp. 2 SCC 549;** *Bihar State Electricity Board & Ors.* **v.** *Parmeshwar Kumar Agarwala Etc. Etc.*, **JT (1996) 5 SC 555;** *State of U.P.* **v.** *Dr. R.K. Tandon,* **[1995] 3 SCC 616 and** *State of U.P. & Ors.* **v.** *Dr. R.K. Tandon & Ors.*, **JT (1996) 7 SC 174, relied on.** A

Indra Sawhney **v.** *Union of India,* **[1992] Supp. 3 SCC 217, referred to.** B

"*Constitutional Law of India***" edited by M. Hidayatullah, former Chief Justice (Vol. II) at pages 294;** *Swami Vivekanand : Lecture entitled "The Before Us" (1897) published in "The Complete Works of Swami Vivekanand"* **(Vol. 3, p. 269 (1979 edn.)** *Swami Ranganathananda : "Enlightened Speeches"* **(First Edition), 1985;** *"Law, Justice and the Philosophy of Man"*, **by** *Swami Ranganathananda; Swami Ranganathananda "Social Responsibilities of Public Administration" an article in "The Responsible Society—The Ethos of which India Lacks Today"* **a commemorative volume to Justice V.S. Deshpande, former Chief Justice of Delhi High Court; "Eternal Values for a Changing Society" by Swami Ranganathananda (1971—3rd Edn.) page 693,** *S.A. de Smith "The abuse of statutory powers; "Ultra vires breach of statutory duty" by Peter Cane, Fellow of Corpus Christi College, Oxford, published in Public Law Series, 1981 p. 11; "Public Administration" by Pfiffner-presthus (4th Edn.) p. 550; "Responsibility in Government* **: Theory and Practice" by Herbert J. Spiro;** *"British Government and the Constitution—Test, Cases and Materials"* **by** *Colin Turpin* **(Third Edition-1995) p. 315 &** *"The Nature and Destiny and Man"* **Vol. II (New York : Charles Scribner's Sons, 1948) pp. 266 561, referred to.** C D E

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 621 of 1987. F

(Under Article 32 of the Constitution of India.)

D.N. Goburdan, Ms. Pinky Anand and Ms. Geeta Luthra for the the Petitioner.

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R.C. Verma for Ashok K. Srivastava, A.K. Goel, Mrs. M. Qamaruddin and M. Qamaruddin for the Respondents.

The following Order of the Court was delivered :

This writ petition under Article 32 was referred to a Bench of three H

A Judges to decide an important question of constitutional dimension raised in this case.

Admittedly, in the Health Department of Government of U.P. called Provincial Medical Health Services (for short, the 'Services') recruitment to the post of Doctors and promotion up to the post of Director were B regulated by executive instructions of the Government and from the year 1973 Government had appointed the doctors to the service. Until the U.P. Regulation of *Ad hoc* Appointment (On Posts Within The Purview Of The Public Service Commission) Rules, 1979 were made by the Governor, in exercise of power under proviso to Article 309 of the Constitution, all the C appointments and also promotions came to be made on *ad hoc* basis. The petitioner-Association is seeking for a writ to quash the memo dated July 28, 1986 and for declaration that promotions made within the cadre shall be on the basis of seniority subject to rejection on ground of unfitness and to regularise the services of all the officers in the cadre as per instructions D as were in vogue prior to the date of that memo and other reliefs.

The admitted position from the record, is that the Personnel Department of the Government has issued model rules to all the departments to exercise the power under the proviso to Article 309 of the Constitution and to frame the statutory rules for appointment made in accordance with the E rules. Pending making of the Rules, *ad hoc* appointments could be made but it would be for one year and as soon as regular appointments were made, the *ad hoc* appointments were to be regularised in accordance with the rules. In this case, admittedly, no statutory rules were made nor the procedure even as per instructions in force, was followed. Adhocism was F the rule at the whim of the Department of Medical Health. In the Services, as per instructions in vogue, appointment to the post of Doctor could be made from amongst qualified doctors and diploma-holders. For promotion from the post of Medical Officer to the post of Deputy Medical Officers etc., qualifications and experience have been prescribed. Prior to July 28, 1986, for promotion to the post to Deputy Chief Medical Officer ex- G perience of eight years of service was prescribed and for promotion to the post of Chief Medical Officer, two years'experience as Deputy Chief Medical Officer was prescribed. Similarly, for promotion to the post of Joint Director, two years' experience as Chief Medical Officer was prescribed; for promotion to the post of Additional Director, two years' H experience as Joint Director was prescribed; and for promotion to the post

of Director, one years experience as Additional Director but on the basis of merit and ability, was prescribed. For all other posts, seniority, subject to rejection on the ground of unfitness, was the rule. No minimum length of service was prescribed.

In the offending Memo dated July 28, 1986, they have increased the minimum length of service from 8 years to 12 years for promotion from the post of Medical Officer to the post of Deputy Chief Medical Officer and to 15 years for promotion from Deputy Chief Medical Officer to the post of Chief Medical Officer with a minimum experience of two years and selection would be subject to merit and ability. Similarly, for promotion from the post of Chief Medical Officer to the post of Joint Director, total service of 15 years and minimum experience of one year was prescribed. Merit and ability was prescribed for promotion from the post of Joint Director to the post of Additional Director; total length of service prescribed was 25 years with a minimum of four years' service as Joint Director subject to merit and ability. For promotion from the post of Additional Director to the post of Director, total service of 28 years with minimum qualifying service of one year subject to merit and ability, was the criteria. In normal circumstances, such prescription laying down minimum service as qualification would be unexceptionable to augment the efficiency in the Services and would evoke no ire. But whether it was laid only as pretext and subterfuge to deny the constitutional right and to frustrate the constitutional objective is the question. In the first instance, we reacted against the contentions of Sri Goburdhan, learned counsel for the petitioner. But when he ripped apart the veil and succeeded in connecting the links as camouflage, the game plan became transperently visible and naked to indicate that colourable exercise of power was used and abused to denude the legitimate rights of the officers belonging to reserved categories and to deny them of their rights. Sri Verma, very fairly, was unable to support the actions of the Department.

Sri Goburdhan contend that this procedure was devised only to avoid promotion to three eligible officers belonging to the Scheduled Castes and Scheduled Tribes as Joint Directors etc. and this was demonstrated with reference to the instructions issued by the Personnel Department and the successive orders issued by the respondents. It is not in dispute that the Personnel Department had issued instructions on December 27, 1956 that the principle of seniority-cum-rejection on the ground of being unfit for

A selection as eligibility criteria should strictly be observed. Where eligible and able persons are available in Government service, opportunity should be given to all. If no suitable and experienced officer is available, there is a possibility of worsenining in future of the persons facing the seniority criteria. The Government, therefore, directed that seniority-cum-rejection on the ground of being unfit be followed in promotion. The eligible persons should be offered opportunity. This principle eversince is being followed uniformly in all the Departments. In Memo No. E-210/80-SR-25-77 Personnel 1 dated April 9, 1980, the Government had issued instruction to frame the statutory rules and the manner and procedure to select the personnel was indicated and deviation as laid in para 5, which is relevant, reads as under:

> "5. This has also been decided by the State Government that if in adopting the provision as laid down in the enclosed model draft there comes any difficulty then instead thereof, as an exception and in special circumstances, if there is necessary to make any other arrangement in public interest then it may be done only after the consultation with the Karmik (personnel) and Judicial department with the higher orders (Council of Ministers of equivalent) or it can be continued."

The Personnel Department further issued directions on December 31, 1973 that there was a provision for reservation as per the orders of the Government dated March 8, 1973 for the Scheduled Caste and Scheduled Tribe persons in promotions. It read as under :

> "The Government has taken decision that the SC/ST will avail the benefits of reservation in service and posts on which the promotion is made on seniority basis and the promotions is done in the prescribed manner."

The Government have, therefore, reiterated the decision that SC/STs officers will avail of the benefit of reservation in services and posts and also in promotion. The principle of promotion is made on seniority basis subject to rejection on the ground of unfitness and the promotion is done in the prescribed manner.

But, in this case, instead of implementing the Government directions in promoting those three officers as per rules, the offending criteria was

introduced. It is not in dispute that the Government have issued that in case any special circumstances are made out in derogation to the general principles, the approval of the Personnel Department, Law Department and the Cabinet Sub-Committee was required to be obtained before issuing the special rules governing the Services. But, in this case, admittedly, the Medical Health Department in deviation of the general principle of seniority, subject to rejection on the ground of unfitness, introduced merit and ability to fill up that post of Chief Medical Officer and upwards, without obtaining prior approval of those three functionaries. The counsel for the petitioner contends members of the petitioner association also do not feel shy to compete on merit and ability provided their cases were considered honestly, sincerely and objectively without pre-disposed prejudice.

In the counter-affidavit, it has not been stated that the Department had obtained approval of the three authorities. Therefore, the offending resolution was obviously contrary to the general principles laid down by Government. It is also brought out from the orders passed by the Department itself the from 1973 till January 12, 1986 the rule of seniority-cum-rejection on the ground of unfitness was in vogue and they did not insist upon a minimum qualifying service in each of the promotional post except the minimum experience in the particular post which was prescribed for promotion. It is also to be noted that the Department had relaxed the above prescribed qualifying and minimum length of service immediately after six months when claim of general candidates had come up for consideration and after the promotion was given to the general candidates the rule was restored. The petitioner have specifically pleaded that the rule of minimum qualifying service was prescribed only to deny the promotion to three eligible officers belonging to SCs/STs because they did not have, while the general candidats had the prescribed total length of service. In paragraphs 9 and 10 of the writ petition, they have specifically averred and in para 25 of additional affidavit it is reiterated giving insistence in that behalf. In paragraph 25 of the counter-affidavit filed by the respondents, they vaguely denied that relaxation to general candidates in the interest of administration was given. When the petitioners pointed out that other Departments were not insisting upon the administrative experience, merit and ability upon the minimum qualifying service, it has been stated in the counter-affidavit that since the promotee officers up to the level of Chief Medical Officer, Joint Director, Additional Director are required to have

A administrative experience, minimum qualifying service etc. were insisted upon. But when it was pointed out that in other Departments administrative officers were not required to put up minimum qualifying service, they have stated in the counter- affidavit that in other Department, it was not insisted upon since the posts are administrative posts. The stand taken in the counter-affidavit is mutually inconsistent and blows hot and cold at the B same time. It is a volte face justification given by the Department only to justify their arbitrary and *mala fide* action. As soon as the Scheduled Caste and the Scheduled Tribe officers were eliminated from consideration and general candidates were promoted, they looked around and found it safe to retrace their steps and to fall in general line by restoring the rule of C minimum length of service, merit and ability and qualifying service. This gets demonstrated by the above undisputed facts.

It is also seen that when the post of Additional Director became vacant for general candidates only and when they were not available for D promotion since they did not have required length of minimum qualifying service, the Department relaxed the requirement of minimum qualifying service on the specious plea that services of the officers were required. They have stated that they were the only special circumstances for the officers concerned. Again, after the officers from general category were promoted, the general prescription of qualifying service was insisted upon. E These circumstances clearly would indicate that the persons manning the Department are using a policy of pick and choose to suit their convenience in abuse of colourable exercise of power creating disharmony in policy and resorting to victimisation of the eligible officers since they belong to reserved category. There circumstances would clearly and in unmistakable F terms demonstrate that the aforesaid instructions came to be issued by *mala fide* exercise of the power by the concerned officers with a view to deprive the eligible SC/ST officers for promotion to the posts to which they are entitled as Chief Medical Officers and Joint Directors.

G Under the scheme of the Constitution the political executive headed by the Governor of the State is assisted by the Chief Minister appointed by the Governor and the Council of Ministers appointed on the advice of the Chief Minister who would be collectively responsible for the administration of the State. The administration is carried on by and in the name of the Governor but the Chief Minister, Council of Minister and the H individual Ministers in charge of the assigned subjects individually and

collectively are responsible for the functioning of the concerned Ministry. The Constitution further envisages permanent bureaucracy with all India services and State services envisaged in Part XIV; their recruitment and conditions of service are regulated by provisions contained in Chapter XIV or any Acts of Legislature or the rules made under proviso to Article 309 of the Constitution or even executive instructions co-extensive with the legislative power of the State Legislature. The political executive lays broadly the policies and programmes consistent with their political manifesto but should be in conformity with the Directive Principles of the State Policy which binds the Government in power and also the Fundamental Rights. The bureaucracy works out the details of the policy and applies the law to the given circumstances in assisting the political executive. The preamble, the fundamental rights and the directive principles envisage establishment of an egalitarian social order to accord socio-economic justice, liberty. equality or status and of opportunity, dignity of person and fraternity in an integrated Bharat. The Indian social order is based on hierarchical social structure. Since the Scheduled Tribes habitate in reserved forests and forest areas, the funding fathers of the Constitution recognised and protected their special interests in Schedules V and VI to the Constitution so as to integrate them in the mainstream of the national life. Equally, the Schedule Castes who were denied social integration and kept away from the mainstream of the national life due to practice of untouchability abolished by Article 17 are protected from discrimination. In Part III of the Constitution, in particular Articles 17 and 15(2) enable them to have access to public places and denial of equality due to untouchability was declared to be constitutional offence punishable under Civil Rights Protection Act; Articles 14, 16 and 15 grant equality. Article 46 protects them from exploitation and directs the State to accord socio-economic justice, facilities and opportunities to have opportunities for appointment to an office/service/post so as to accord soio-economic justice for their integration in the mainstream of national life. The social imbalances should be removed only through rule of law. Law is a social engineer. The social justice was held to be a fundamental right by a Bench of three Judges in *Consumer Education & Research Centre & Ors.* v. *Union of India & Ors.*, 1995] 3 SCC 432 and *Dalmia Cement (Bharat) Ltd. & Anr.* v. *Union of India & Ors. Etc.,* JT (1996) 4 SC 555. Economic empowerment was also held by a Bench of three Judges in *Murlidhar Dayandeo Kesekar* v. *Vishwanath Pandu Barde & Anr.,* {1995] Supp. 2 SCC 549 and *Bihar State Electricity Board & Ors.* v. *Parmeshwar Kumar Agarwala Etc. Etc.,* JT (1996) 5 SC 555 to be fundamental right available to them. By operation of Article

A 38 and 46, in particular, facilities and opportunities are required to be provided to them to improve their excellence in all spheres of life. The State, therefore, has evolved, as held by this Court in *Indra Sawhney* v. *Union of India,* [1992] Supp. 3 SCC 217 appointment or employment to an office particularly in the service under the State as means to provide facilities and opportunities for employment. The opportunity for education B given under Article 15(4) and employment accord to them right to equality of opportunity and of status and the dignity of person, economic empowerment and opportunity to improve excellence. The Constitution (77th Amendment) Act, 1995 introducing clause (4A) of Article 16 made provision for reservation in matters of promotion of any class or classes of C posts in service under the State in favour of Scheduled Castes and Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State. Article 335 of the Constitution enjoins upon the State to take into consideration the claims of the Scheduled Castes and the Scheduled Tribes in making appointments to services and posts in connection with the affairs of the Union or of a State, D consistently with the maintenance of efficiency of administration. It is settled law that conditions of services include everything from cradle to grave, viz., recruitment to service or posts under the State, promotion, salary, pension etc. The conditions of services are regulated either by statautory rules or in their absence executive instructions. There is no need E for pre-existing statutory rules to regulate the conditions of services. Proviso to Article 309 of the Constitution gives power to the President or the Governor, as the case may be, subject to law made by the Parliament/the State Legislature to constitute services and to regulate the service conditions by making statutory rules governing the conditions of service. Under Article 162, the executive has the power to issue executive instruc- F tions consistent with the fundamental rights in Chapter III, to regulate conditions of service but they are subject to the law made by the State Legislature or the Rules made by the Governor under proviso to Article 309 of the Constitution. Executive instructions can also be made to supplement the law to fill in the yawning gaps. The permanent bureaucracy, therefore, in evolving the principles or giving shape to the policy of the G political executive on in applying the law, rules or instructions, is guided by constitutional philosophy and public policy envisaged thereunder. Article 261 of the Constitution, therefore, accords full faith and credit to the executive acts and records of the Union and the States, the law made by the Parliament or the Legislature or such of the rules or regulations etc. H made in furtherance thereof as well as judicial proceedings of the Union

and of every State.

In the "Constitutional Law of India" edited by M. Hidaytullah, former Chief Justice (Vol. II) at pages 294, on the doctrine of "full faith and credit" it is stated that relationship between the Union and the States leaves Article 261 to play greater role than its counter-part does in the U.S. Constitution. Our experience since the formation of the Constitution fully supports this conclusion. The public acts, records and judicial proceedings, in recognition of law, accorded by Article 261 are in accord with Entry 12 of the Concurrent List subject to the law made by the Parliament in clause (2) of Article 261". The founding fathers of the Constitution posed full faith and credit under Article 261 to all the enumerated acts, proceedings etc. with absolute faith that they are done to further the goals set down in the Preamble, the basic structure of the Constitution. But the crux of the matter is not the grammer of the language but the spirit behind the doctrine of full faith and credit. The reason is that the political executive assisted by the permanent bureaucracy faithfully implements the constitutional philosophy and applies the law to further the goals set down in the Constitution to establish the egalitarian social order under the rule of law and applies the law objectively, dispassionately and truthfully to elongate the constitutional perspectives and the objectives of the law made thereunder. Therefore, full faith and credit is accorded to the public acts and records. That apart, the same may be relied on by other States.

Swami Vivekanand in his lecture entitled "The Work Before Us" (1897) published in "The Complete Works of Swami Vivekananda" (vol. 3, p. 269 (1979 adn.) has stated the scope of enlightened citizenship thus :

> "The problem of life is becoming deeper and broader every day as the world moves on. The watchword and the essence have been preached in the days of yore when the Vedantic truth was first discovered, the solidarity of all life. One atom in the universe cannot move without dragging the whole world along with it. There cannot be any progress with the whole world following in the wake, and it is becoming every day clearer that the solution of any problem can never be attained on racial, or national, or narrow grounds. Every idea has to become broad till it covers the whole of this world, every aspiration must go on increasing till it has engulfed the whole of humanity, nay the whole of life, within its scope. This will explain why our country for the last two centuries

A has not been what she was in the past. We find that one of the causes which led to this degeneration was the narrowing of our view, narrowing the scope of our actions".

Swami Ranganathananda in his Inaugural Address at Swami Vivekananda Auditorium, speaking on the concept of enlightened citizenship as envisaged in Gita and its relevance in a democracy has stated in "Enlightened Speeches" (First Edition, 1985) a publication of Ramakrishna Mission, New Delhi, thus :

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"That is the primary status of man in India since 1950 - sovereign and free citizens in a sovering democratic republic. Since then, we have been re-living in India the ancient and modern Western political experience, in a big way, and learning our lessens in this new experience of, and adpating it into, a nation-wide political democracy, in the context of immense human diversities and complex social structures, of a continental size and millennia-old cultural traditions, which would have staggered the leaders of the simple Greek city states. The several national and state elections since independence have given a democratic political education to our people, which we never had in our millennia-old history. The Constitution treats the entire people of India as sovereign and free; none is treated as slaves or as outside that citizenship all the people of India are transformed into citizens of a free democratic state. What a beautiful concept and experience.

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It is a big change from subjection to freedom, from being praja or subject to citizenship. But it is unfortunate that we did not understand its implications or appreciate its significance; and we failed to take sustained energetic steps to assimilate the beauty and strength of this citizenship concept and value. After experiencing the ectasy of it during the first flag hoisting ceremony on the 26th January 1950, we day by day forgot all about it. We did not give serious thought to the question, what does it mean to be citizens of a free democracy? What changes should this statuts produce in myself, in my attitude and in my behaviour, to be able to deserve this status and to strengthen my new democratic state? After a little effervescence of a day or two, that ectasy of freedom slowly evaported away. The consciousness of being a free citizen, and what it involved during the modern period of our history, had

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dawned only in few people of our country. That has been our nation's misfortune. If during these thirty years, our intelligentsia, constituted of our school-and-college-educated section, had realized and assimilated the meaning of citizenship, what political and economic strength, what human energy resources, what shall-round national progress we would have achieved by now. In our Indian context at least, therefore, we have to introduce this new term, namely enlightned citizenship, making a distinction between mere political adult citizenship and enlightened citizenship. It is like the milk in our Indian market where we have to ask for pure milk, unlike in the West where our people, when they go there find an adjective sounds puzzling and absured to the people there, since all milk there is pure".

At page 259, under the heading "Citizenship on the Focus of Human Equality", he has stated elaborately that we are primarily citizens of India and secondarily only these and other similar functionaries. All these are only the functions that we severally perform as citizens of the country. He emphasised the unity of awareness of citizenship to elongate wider spectrum of functional affinity by getting rid of all forms of mental aberations from the humble to the high and the mighty and to widen broad mental horizens. He quoted from Bhartrhari in his Niti-sataka (verse 64) the four qualities of man thus :

"There is one type of people called the sat-purusas, good people, who sacrifice their own self-interest and work for the welfare of other people; the next group consists of the samanyas, the generality, or the majority, who also work for the welfare of other people, but without sacrificing their own self-interest; there are other the third group are the manava-raksasas, demons among men, who destroy other people's welfare in order to gain their own selfish interests; but they the fourth group on the contrary - alas, I do not know what to call them - destory other people's welfare, even without gaining anything for themselves."

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"The second group will constitute the majority of the population in every society. And enlightened citizenship belongs to that category. The Philosophy by which they live can also be described, in the language of the nineteenth-century British political

philosophy, as enlightened self-interest. They are frankly not ascetics; they have their own presonal and family interests to achieve; but they include these in a wider concern for society as a whole; and that constitutes the vital element of enlightenment attached to their self-interest. But there is need for this group to be alert; otherwise, there is every chance of this enlightenment getting eroded and self-interest ruling supreme. And once this erosion takes place, they slide slowly down and join the third group, among whom are found all those who indulge in all sorts of social malpractices, like bribery, corruption, tax-evasion, smuggling, food and drug adulteration. Out of these, some fall further down into the fourth category and become sheer vandals. The only remedy against the second type sliding into the third and fourth categories is alterness, and constant looking up to the people of the first category - the sat-purusas and drawing inspiration from that small minority of men and women who are, in the language of Jesus in New Testament, the 'salt of the earth'."

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"Human equality at the spiritual level has been preached and practised in our country since ages. This is the meaning of, and is derived from, the Vedantic teaching of the same divine Atman in all beings - integral, inalienable, and full, and the samatvam and the sama-darsitvam, 'equality and sameness of vision', flowing from it. A few sanints and devotees had realized this truth and lived by it. Bhakter jat nai, 'There is no caste and class distinction among devotees of God (as he dwells in all)', is a famous saying of Sri Ramakrishna. This great truth had never been translated into the wide social and economic fields, or transformed into a social fact of human awareness affecting millions. But that opportunity has come to us in the modern age, through the massage of modern democracy - political, economic, and social. That sama-darsityam at the spiritual level becomes, today, buttressed and strengthened by a sama-darsitvam at the political and social level, by the modern concept and practice of citizenship of a democratic state. Democratic citizenship is a focus of not only human freedom. and dignity but also of human equality. Swami Vivekananda considered the significance of the emerging modern period of our history to consist essentially in this practical implementation of the Vedantic

vision of human freedom, dignity and equality. In our new India, therefore, political efforts and spiritual efforts coalesce and reinforce each other, in the struggle to evolve an egalitarian society; the spiritual effort stresses human unity in the one Atman in all, and political effort stresses human unity in the unity of citizenship in our democracy."

On "Law, Justice and the Philosophy of Man", Swami Ranganathananda has stated thus :

"Our country is now discussing, and tardily going about affording, legal aid to the poor; it is good that we are slowly realizing that administering and dispensing law may not always be the same as dispensing justice, and that our democracy cannot be well established without bringing law closest to justice. Theoritically, our law is equal to all, and all are equal before our law. But in actual operation, it benefits the rich and the strong, not the poor and the weak. The Sanskrit word dharma stands for the integrating principle in human society and can be translated roughly as justice or righteousness or ethical sense. Next to the truth of the Atman, it is the most significant and pervasive truth and value in Indian culture. Dharma is that very truth of the Atman reflected in the social context of human interactions. The Brhadarnyaka Upanishad gives the following exposition of dharma as righteousness, as the soul of justice :

Yet He (the Cosmic Person) did not flourish (even after projecting all power into the universe - intellectual, politico-military, commercial and labour). He specially projected that excellent form, dharma, or righteousness. This dharma is the controller of the Ksatriya (the holder of power and authority). Therefore there is nothing higher than that, even a weak man hopes (to defeat) a stronger man through dharma, as (one contending) with the king. That dharma is verily truth.

Until law becomes not only in formulation but also in operation, law has no meaning."

In "The Responsible Society - The Ethos of which India lacks Today", a commemorative volume to Justice V.S. Deshpande, former Chief Justice of Delhi High Court, in his article "Social Responsibilities of Public Ad-

ministrators" Swami Ranganathananda has stated at page 1 thus :

> "I consider the administator primarily as a citizen of India and I want him to always remember this truth. It will do him good to know what that means. Nobody is born an administrator, and nobody is always an administrator. We are all born citizens of a free India, and acquire the status of full citizenship at the age of maturity as laid down under the Constitution. Some of those mature citizens choose to be, and are called upon to become, our administrators for some years of their life. This means that their primary individuality is not as administrators, but as citizens. We are all essentially citizens of free India called upon to perform particular functions in the service of our nation, so that citizenship constiutes our primary being, and what we do as administrators, or as members of some other profession becomes merely the function we discharge deriving inspiration from that being.:"

On "The Problem of Motivation", he has stated that bureaucracy is necessary for every State which is part of the whole process of Government. But a functionary need not be a bureaucrat, static and wooden, though functioning as a bureaucrat. On "Bureaucracy : Static versus Dynamic" at page 4, he has stated thus :

> "A static bureaucracy and a dynamic bureaucracy are both bureaucracies; the difference lies only in attitudes; the first represents a low notion of man as a mere functionary, man as a mere bureaucrat. That is a very poor state of man, in which he or she draws from his or her function to enrich his or her inner being which is otherwise empty; and this is the state of mind that is prone to, and often succumbs to, corruption. The second represents man as inwardly rich in his being, in the strength of citizenship awarness and patriotic impulse, and pouring out the richness into his or her function. And this attitude fosters a spirit of service and contains much innate strength to resist and overcome corrupting influences. In these context, attitude plays a great part. A change of attitude can produce termendous results. And attitude is something that one can control, that one can manipulate, that one can make to grow. This attitude control is an integral part of a philosophy of man, which can enrich one's being as well as function."

In his article "Role of the People and Institutions in a Responsible Society", published in "The Responsible Society" (ibid), Justice H.R. Khanna, former Judge of this Court has expressed his views at page 55 bout the role of the civil servants and has stated that "Apart from ensuring that there is no trespass by one wing of the State upon the domain of the other wings, we have also to ensure that within each wing proper norms which have been evolved for the healthy functioning of democracy are adhered to and complied with. It is in this context that one may first turn to the executive. This is the strongest wing of the State and consists of two parts - the ministers and the civil servants. So far as the ministers are concerned it is they who normally take the policy decisions and lay down the general pattern of administration. The execution of those decisions and the application of policy matters to individual cases is, however, to be left to the civil servants. The civil servants, therefore, of necessity, have to act in fulfilment of the promises in the policy and the Constitution. It is the duty of the civil servants to carry out the policies to fulfil the constitutional objectives and the responsibility of the government".

In "Eternal Values for a Changing Society" by Swami Ranganathananda (1971 - 3rd Edn.) at page 693, the pragmatic philosopher had in his speech advised the young Indian Administrative Officers, stating under the heading "The Administrator in a Welare State" that the State in a democratic society deives its strength from the co-ordinated wills of all its free and equal citizens. In the absence of this strength, the State becomes an imposition on the people. States have always been looked upon as irksome burdens by the people at large in our country, who have tolerated their existence for the little benefits of order and security derived from them. Quoting Bertrand Russel in his "Impact of Science on Society", Swami Ranganathananda has stated "Unless men increase in wisdom as much as in knowledge, increase of knowledge will be increase of sorrow". Buddhi connotes this ripening of knowledge into wisdom. Intelligence at the buddhi level creates a pattern of what Sorokin calls altruism in human character. It cannot function except in a creative and constructive way. Detachment and stability, resourcefulness and sympathy, are the hallmarks of such a character, at once efficient and human. He has stated that the Indian Administrative Service Training School has kept this two-fold efficiency as its objective, and has adopted for its motto the pregnant message of Sri Krisna in the second chapter of the Gita, verse 50; Yogah karmasu kausalam - Yogi is efficiency for action. A world of ethical and spiritual thought has been compressed in that brief message. Therefore, he

A has exhorted the IAS Officers thus : "Our politics and administration will have to breathe the spirit of this yoga if we are to realize the objectives of a welare State, if we are to establish a polity based on social justice and social peace, a polity free from all forms of exploitation, not merely economic, but also political and mental. This yoga however, is not a teaching to compose the distractions of a mere nation and people, but is
B universal in its scope".

S.A. de Smith in his article "The abusd of statutory powers" Published in Public Law Series 1956 (page 233) has stated at page 237 under the heading "Misuse of Powers in Bad Faith and in Good Faith" that a discretionary power may be exercised invalidly if its repository exercises it
C for an improper purpose or on the basis of irrelevant considerations or in disregard of relevant considerations or with gross unreasonableness.... The concept of bad faith eludes precise definition, but in relation to the exercise of statutory powers it may be said to comprise dishonesty and malice. A power is exercised dishonesty if its repository intends to achive an object
D other than that for which he believes the power to have been conferred. His intention may be to promote another public interest or his own private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

On the "*Ultra vires* breach of Statutory duty" by Peter Cane, Fellow
E of Corpus Christi College, Oxford, published in public Law Series, 1981 at page 11, the author has stated at page 13 on the "The Content and Scope of the Duty" that duties are not always couched in terms of such crystal clarity that they are practically self-applying. One of the important differences between a duty and a power is that the holder of a power has a greater or less freedom to give concrete content to the power in particular cir-
F cumstances, whereas the bearer of a duty has no control over the content of the duty. At page 19, he concludes by saying that the legal consequences of the use of the word 'duty' are varied and complex and depend to a large extent on how open-textured is the language in which the content of the duty is cast as well as on the political sensitivity of the area in which the
G duty operates, Secondly, by developing the notion of *ultra vires*, breach of duty, the courts have given themselves a degree of flexibility and power in the enforcement (or non enforcement of the duties of public authorities which has hitherto existed only in relation to the control of powers and discretions.

H In "Public Administration" by Pfiffner-Presthus (4th Edn.) at page

550 it is stated that public administration is responsible to the rule of law doctrine which proves a fairly effective standard for judging administrative decisions. Political responsibility is similarly involved with the idea of government's control by public opinion, political parties, and the community, Responsibility is also commonly used to denote the obligation of an individual to behave according to certain standards of conduct. In public administration, responsibility often has a negative connotation; we are usually satisifed if the official is kept from wrong doing. On "Responsibility and Accountability", he states that accountability refers to the formal or legal locus of responsibility, Responsibility, on the other hand, has a highly personal, moral quality and is not necessarily related to formal status or power, although it is probably true that greater power brings greater responsibility. Thus a department head is accountable for the actions of all his subordinates, although in actual fact he is not "responsible for their use of the power which he must of necessity delegate to them. Similarly, in exercising discretion the official is morally responsible for his decisions, although he is often not legally accountable. In practice, responsibility must be shared; it percolates down the stream throughout the entire administrative branch. On the other hand, accountability, which concerns the formal relationships between administration and the legislative and judicial branches, can never be shared,. In general, the bureaucracy is regarded as accountable to elected representatives and to the courts who give meaning to the rule of law doctrine. Within the Executive branch, accountability is sought through a hierarchy of offices and duties and makes possible a "line of command" from top to bottom. The chiefs of the various departments must answer to the President as repository of power. Each section and division heads are legally accountable in turn to departmental heads. Upon the Executive head falls the impossible task of coordinating and directing the entire executive branch. Under the Constitutional mandate that gives the President "executive power" and directs him to ensure that "the laws are faithfully executed." The Council of Ministers is accountable for the entire administrative branch. The bureaucracy has a representative function. In the case of regulatory activity, for example, administrators give meaning to board legislative declarations of social policy by their decisions in specific cases. In advancing the social objectives of the community, they sometimes develop the rule of public interest which is applied when decisions are made. The bureaucracy shares with the legislature the task of ensuring that the community receives a reasonable amount of justice in the distribution of public resources. Moreover, by virtue of a recruitment policy that gathers individuals with socio-economic backgrounds far more

A varied than those of elected representatives. The bureaucracy may be viewed as a truer cross-section of the nation, providing necessary supplement to the incomplete representation which the Parliament offers. Although this thesis violates traditional democratic theory, the hard facts of administrative policy determination and the official's role in compromising group demands suggest that orthodox interpretations require some
B modification, formulation and principles and policies; application of them requires pragmatism with broad vision to elongate the Constitution physolophy. Obviously, therefore, full faith was given to their acts and actions. In selecting among alternative policies, in extending or narrowing the efficacy of rule or policy, the official necessarily must work in a value
C context. Various factors impinging upon a particular decision are isolated and require assignment of relative weights nor in accordance with what the official thinks is "right" but in tune with and to effectuate mandates of the Constitution.; The "public interest" will be the ultimate element in this process. In "Responsibility in Government : Theory and Practice" by Herbert J. Spiro had stated at pages 86-87 and 95 thus :

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> ".... Modern law modern bureacycracy were created to fill the same needs. On the Continent, especially, the birth and growth of each cannot be conceived of without the other. Administrative law was designed to make responsible conduct possible for the ruler's new instruments, the bureaucrats, by giving them reasonable expecta-
> E tions of the probable consequences of their acts. As it became more than just administrative law facilitated more responsible conduct for all to whom it applied. Belief in the political responsibility of individuals is, therefore, intimately linked with advocacy of the rule of law. This rule of law, together with the resources already mentioned, gives us two components of the deliberately
> F created, explicit casual responsibility of the early bureaucrats. As the third component, they were endowed with not only the capacity, but the obligation, to make decisions. In other words, they had to exercise their discretion when they applied to specific cases the general rules and instructions laid down for them by the
> G sovereign himself, or on his behalf. Finally, the carefully cultivated esprit de corps of the new public services and, indeed, the spirit of the whole epoch, endowed both public servants and the subjects on whom they acted with the purpose and determination needed to make the novel system work."

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"It lead us also to characterise a healthy bureaucratic situation as a situation of responsibility par excellence." A

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"They consider the bureaucrat, or the citizen, responsible so long as he is honest, broadly speaking. They want to prevent, or at least to punish, dishonesty. The honesty of public servants and citizens is certainly an important matter." B

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"In terms of the constitutional, democratic postulate, each citizen delegates parts of his original, general casual responsibility to other groups and individuals - to political parties, to legislative and other representatives, to judges, and to administrators. Moreover, in the course of the constant division and sub division for labour, new special responsibilities are created". C D

In "British Government and the Constitution - Taxt, Cases and Materials" by Colin Turpin (Third Edition - 1995) it is stated at page 315 thus :

"Legitimacy is primarily a feature of constitutional systems. They possess this quality by virtue of a general public support for their authority, and may have it in greater or lesser decree. Successive governments, even unpopular ones, benefit from the legitimacy attaching to the constitutional order, so that their own actions are perceived as 'legitimate'. It will be evident that this is not the same thing as 'lawful' although legality is normally a condition of legitimacy, in that a government which disregards the law is seen to be acting disordantly with the constitutional system from which its legitimacy is derived". E F

Reinhold Niebuhr's has stated in "(T)he Nature and Destiny of Man" Vol. II (New York : Charles Scribner's Sons, 1948) p 266 at page 561 that bureaucracy, therefore, shares this responsibility when it talks in its forward thrust to effectuate the Constitutional philosophy and public justice. Administrative responsibility lies in giving shape and content not only to the policies laid down in the Constitution and by the executive, but also applies them to given set of facts. In this case, on the facts the executive G H

bureaucracy has forfeited the faith and credit according to them by the Constitution and betrayed public faith in honest and dispassionate decision making process and in applying the given set of standards of executive orders in giving promotions to different classes of officers in diametrically opposite way frustrating the constitutional objectives to promote socio-economic justice and equality of opportunity in promotion to the officers of the appellant-Association.

It is settled law that the Constitution having given the benefit of reservation and having adopted the policy by the Government, the policy should strictly be adhered to and it should not be made a farce and introducing at the whim of the officers, their own criteria contrary to the general policy. Therefore, it was directed by this Court in *State of U.P.* v. *Dr. R.K. Tandon,* [1995] 3 SCC 616 in paragraph 6 that the rule of reservation if applied and the candidates were selected, accordingly, their seniority vis-a-vis general candidates should be in accordance with the roster maintained by the State Government. The same was reiterated in *State of U.P. & Ors.* v. *Dr. R.K. Tandon & Ors.,* JT (1996) 7 SC 174 in paragraph 8 thus :

> "Yet another problem that was brought to our notice is that while preparing their *inter se* seniority and fitment, the Government was not strictly following the rule of roster and reserved for Scheduled Caste Scheduled Tribe and Backward Class candidates and their placement on the respective vacancies earmarked for them in the roster. It would be obvious that when the Government makes appointments through administrative instructions or statutory rules, the appointment of candidates should be according to order of merit and roster. The Government should follow the rule of reservation and make appointments as per roster points. That procedure is also prescribed even in the *Ad hoc* Rules. Therefore, even appointments from the lists of 1971, 1977, 1978, 1979 and among those retired from service or had the benefit of court orders or non-selectees, the *inter se* seniority should accordingly be determined as per the rule of reservation and roster. Even among the non-selectees when they are appointed under *Ad hoc* Rules and seniority under Rule 7 thereof is determined, the same principle should be followed. There roster points should also be worked out and appointments made accordingly. There shall be direction to

follow this procedure so that there will not be any deviation from the rules of appointment, reservation so that and the order of appointment would become according to rules and remain legal."

It is not in dispute that the department was not preparing separate list of the general candidates, Scheduled Castes and Scheduled Tribes in integrating them as per the roster prepared by the Government. It is obviously illegal procedure followed to deprive the officers belonging to Scheduled Castes, Scheduled Tribes and Backward Classes in integrating their seniority according to roster. Therefore, we have no hesitation to quash the offending memo issued by the Department of Provincial Medical Health Service, Government of U.P. dated July 28, 1986 and all other incidental instructions issued in furtherance thereof. The Government is directed to consider the cases of the three officers and all other eligible officers according to rules in vogue from 1973 till the date of introducing these offending rules. If necessary, the Government is directed to create supernumerary posts in the respective vacancies to which the three officers are eligible to be considered and promoted in accordance with the rules with all consequential benefits.

The writ petition is accordingly allowed. The respondents are directed to consider the cases of the three officers and if found fit, to promote them or any of other eligible officers within a period of six months from the date of the receipt of this order with all consequential benefits in accordance with the rules. The cases of all other officers should also be considered according to rules and if found eligible, they may be promoted against respective vacancies as per roster. No costs.

G.N. Petition allowed.

A DHARAMBIR SINGH

v.

UNION OF INDIA AND ORS.

SEPTEMBER 19, 1996

B [K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.]

Mines & Minerals (Regulation & Development) Act, 1957/Mineral Concession Rules, 1960.

C *Section 11/Rule 59—Mining licence and prospecting licence—Application from a person who had claimed that he had discovered the mine—State Government notifying that area—Challenged before the Central Government—Mines Tribunal setting aside the notification—Declined to grant mining lease to petitioner on the ground that the State Government had done so in its discretion and that the Central Government would not curtail the discre-*
D *tion—Challenge negatived by High Court—On appeal held, the State Government has a discretion to grant or refuse to grant any prospective licence or licence to any applicant—No applicant has a right, much less vested right, to the grant of mining lease for mining operations in any place within the State.*

E CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 18150 of 1996.

From the Judgment and Order dated 9.7.96 of Punjab & Haryana High Court in C.W.P. No. 9624 of 1996.

F K.B. Rohtagi, Ms. Aparna Rohtagi for the Appellant.

The following Order of the Court was delivered :

The petitioner has filed this special leave petition against the judgment of the High Court of Punjab & Haryana made on July 9, 1996 in CWP No. 9624 of 1996. The petitioner had applied for mining lease and the
G prospecting licence claiming that he had discovered limestone minerals in Bhemdemti Dostpur, Mohindergarh District in the State of Haryana. The Government has notified that area under Rule 59 of the Mineral Concession Rules, 1960. The petitioner challenged the reservation of the area in revision before the Central Government and prayed for grant of the lease
H in his favour. The Mines Tribunal of the Central Government while setting

aside the notification issued by the State Government, declined to grant mining lease to the petitioner stating that the State Government had done so in its discretion and that the Central Government would not curtail the said discretion as it is its property. The High Court dismissed the writ petition *in limine*. Hence this special leave petition.

Shri Rohtagi, learned counsel for the petitioner, placing reliance on sub-section (2) of Section 11 of the Mines and Minerals (Regulation & Development) Act, 1957, contended that the petitioner having filed an application for mining lease has got preferential right and the Mines Tribunal and the High Court were not right in rejecting his prayer. We find no force in the contention. Section 11 of the Act reads as under :

> "(1) Where a prospecting licence has been granted in respect of any land, the licensee shall have a preferential right for obtaining a mining lease in respect of that land over any other person;
>
> Provided that the State Government is satisfied that the licensee -
>
> (a) has undertaken prospecting operations to establish minerals resources in such land;
>
> (b) has not committed any breach of the terms and conditions of the prospecting licence; and
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> (c) is otherwise a fit person for being granted the mining lease.
>
> (2) Subject to the provisions of sub-section (1), where two or more persons have applied for a prospecting licence or a mining lease in respect of the same land, the applicant whose application was received earlier shall have a preferential right for the grant of the licence or lease, as the case may be, over an applicant whose application was received later :
>
> Provided that where any such applications are received on the same day, the State Government, after taking into consideration the matters specified in sub-section (3), may grant the prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.

A (3) The matters referred to in sub-section (2) are the following :

(a) any special knowledge, of, or experience in, prospecting operations or mining operations, as the case may be, possessed by the applicant;

B (b) the financial resources of the applicant;

(c) the nature and quality of the technical staff employed or to be employed by the applicant;

(d) such other matters as may be prescribed.

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(4) Notwithstanding anything contained in sub-section (2) but subject to the provisions of sub-section (1), the State Government may for any special reasons to be recorded and with the previous approval of the Central Government, grant a prospecting licence or a mining lease to an applicant whose application was received latter in preference to an applicant whose application was received earlier."

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Sub-section (1) of Section 11 envisages grant of a prospecting licence in respect of a land and a prospecting licensee has a preferential right for obtaining a mining lease in respect of the land over any other person; E provided, however, that the conditions enumerated in clauses (a) to (c) in proviso thereto are satisfied. Further, sub-section (2) states that subject to the provisions of sub-section (1), where two or more persons have applied for a prospecting licence or a mining lease in respect of the same land, the applicant whose application was received earlier, shall have a preferential F right for the grant of the licence or lease, as the case may be, over an applicant whose application was received later. It is also, again, subject to the conditions enumerated in the proviso. Sub-section (3) is not material for the purposes of this case. Sub-section (4) further provides that notwithstanding anything contained in sub-section (2) but subject to the G provisions of sub-section (1), the State Government, may for any special reasons to be recorded and with the previous approval of the Central Government grant a prospecting licence or a mining lease to an applicant whose application was received later in preference to an applicant whose application was received earlier.

H Thus it would be seen that while granting a prospecting licence or

mining lease, the area of discretion has been circumscribed by several factors enumerated in Section 11. In grant of mining lease of a property of the State, the State Government has a discretion to grant or refuse to grant any prospective licence or licence to any applicant. No applicant has a right, much less vested right, to the grant of mining lease for mining operations in any place within the State. But the State Government is required to exercise its discretion, subject to the requirements of the law. Therefore, the Tribunal of the Central Government has rightly held that it being in the area of discretion of the State Government, merely because the applicant had applied for, the State Government was not enjoined to grant the mining lease. The petitioner had taken the plea that since he alone had discovered the mines, he has got a preferential right over any other person. The Tribunal of the Central Government and the High Court rightly rejected that contention of the petitioner; that contention has not been pressed before us. We find no illegality in the order of the Tribunal refusing to grant mining lease to the petitioner nor is their any illegality in the order of the High Court.

A B C D

The special leave petition is dismissed.

G.N. Petition dismissed.

A THE CHIEF GENERAL MANAGER, JAGANNATH AREA AND ORS.

v.

STATE OF ORISSA AND ORS.

SEPTEMBER 20, 1996

B

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Orissa Motor Vehicles Taxation Act, 1975 :

C *Motor Vehicle—Levy of tax on—Dumper fitted with heavy duty tyres and used within mining areas—Such dumpers exceeded permissible dimensions prescribed by Motor Vehicle Rules—Consequently, there was an embargo for the dumpers to be used on public roads—Held : dumpers in question were motor vehicles—Hence, were taxable within the ambit of the Act—Central Motor Vehicles Rule, 1989—Rr. 92 and 93.*

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Motor Vehicle—Levy of tax on—Dumpers fitted with heavy duty tyres and capable of being used on public roads—But actually used within mining areas and not on public roads—Held : levy of tax on such dumpers was not inconsistent with compensatory nature of tax.

E *Motor Vehicle—Levy of tax on—Held : compensatory in nature.*

Motor Vehicle—Levy of tax on—Validity of—Held : not violative of Article 301—Constitution of India, 1950, Article 301.

F **The Dumpers belonging to the petitioners which were used within the mining areas were taxed as Motor Vehicles under The Orissa Motor Vehicles Taxation Act, 1975. The writ petition filed by the petitioners was dismissed by the High Court. Being aggrieved the Petitioners preferred the present Special Leave Petition.**

G **On behalf of the petitioners it was contended that the said dumpers ran on tyres of higher load-carrying capacity and were not capable of being used in public roads; that the manufacturers of the dumpers had given a certificate that the dumpers were not meant for plying on highways because (i) Culverts and bridges on highways were generally not designed to take care of such axis loads continuously; (ii) The vehicles cannot run at**

H **reasonable speed on highway and hence obstruct the flow of normal traffic;**

(iii) Width and height of the equipment would adversely affect the traffic and minimum preferable width of the road required for plying these vehicles was 50 ft; (iv) The vehicles were fitted with specially designed heavy duty tyres and the heat generation was much more and generally could not be run for more than about 5 kms. at one stretch; that since the dimensions of the dumpers exceeded the permissible dimensions under the Act there was an embargo for the dumpers to be used on public roads and as such the dumpers could not be held as Motor vehicles and could not be taxed under the act; and that the tax on dumpers being compensatory in nature the same could not be levied on vehicles which did not use the roads.

Dismissing the petition, this Court

HELD : 1. On the facts of this case it cannot be held that the vehicles in question were not adapted or suitable or capable of being used on public roads, even though for most of the time it might actually be used within the mining areas on the roads prepared by the mine owners. Therefore, it has to be held that the dumpers in question are motor vehicles and are taxable within the ambit of Orissa Motor Vehicles Taxation Act, 1975. [581-F-G]

Central Coal Fields Ltd. v. *State of Orissa,* [1992] Supp. 3 SCC 133 and *Union of India* v. *Chowgule & Co. Pvt. Ltd. & Ors.,* [1992] Supp. 3 SCC 14, relied on.

Bolani Ores Ltd. v. State of Orissa, [1974] 2 SCC 777, referred to

2.1. The tax imposed on the motor vehicles is basically a tax for the use of the roads within the State. It is no doubt a compensatory tax which facilitates trade, commerce and intercouse within the State by providing roads and maintaining roads in a good state of repair. [582-C]

Automobile Transport Ltd. v. *State of Rajasthan & Ors.,* [1963] 1 SCR 49, relied on.

2.2. If a statute fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, or who can use the services provided for, the imposition assumes the character of remuneration or consideration charged in respect of an advantage sought or received or advantage which can be received. The mere fact that any particular individual though can take advantage of the convenience of the

services provided by the State but for some reason or the other chooses not to enjoy the services provided cannot escape the taxing liability on that score nor can the provision imposing the tax become invalid on that score. Such levy of tax for keeping a motor vehicle for use on the public roads or which is capable of being used on the public roads are are no doubt compensatory taxes but does not violate provisions of Article 301 of the Constitution of India. [582-D-F]

Steel Authority of India Ltd. **v.** *State of Orissa,* **Original Jurisdiction case No. 847 of 1991 (Ori) decided on 18.6.92, referred to.**

Regional Transport Officer-cum-Taxing Authority, Rourkela & Ors. **[1995] 4 SCC 165, referred to.**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 16476 of 1996.

From the Judgment and Order dated 10.4.96 of the Orissa High Court in O.J.C. No. 811 of 1996.

Shanti Bhushan, Gopal Subramaniam, Sanjit Mohanty, H. Munshi, Anip Sachthey and C.D. Singh for the Petitioners

P.N. Misra for the Respondent.

The Judgment of the Court was delivered by

PATTANAIK, J. This Special Leave Petition is directed against the judgment of the Division Bench of the Orissa High Court dated 10.4.1996 passed in Original Jurisdiction case No. 811 of 1996. The question for consideration before the Orissa High Court was whether the Dumpers belonging to the petitioner which are used within the mining areas are taxable as Motor Vehicle under the provisions of Orissa Motor Vehicles Taxation Act (referred to as "The Taxation Act"). The Orissa High Court relying upon the decision of this Court in the case of *Central Coal Fields Ltd. v.* State of Orissa & Batch, [1992] Supl. 3 SCC 133 dismissed the Writ Petition. When the present application was listed for admission, the same was dismissed by us. But since Mr. Shanti Bhushan, learned senior counsel appearing for the petitioners had re-argued the matter at length for a considerable period and contended that the decision of this Court in *Central Coal Fields* case (supra) has no application we had indicated that

a reasoned order will follow and hence the reasons are being given for dismissing the Special Leave Petition. -

Under Section 3 of the Taxation Act, tax shall be levied on every motor vehicle used or kept for use within the State at the rate specified in the Schedule.

The expression "Motor Vehicle" means any wheeled conveyance which is propelled mechanically is a motor vehicle if it is adapted for use upon the road irrespective of whether the power of propulsion is transmitted thereto from an internal or external source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises. Because of the latter part of the definition of Motor Vehicles, the petitioner had made out the case before the Orissa High Court that the dumpers in question are so heavy that they cannot move on the public road and, therefore, are not taxable under the Taxation Act but the High Court had negatived the said contention.

Mr. Shanti Bhushan, learned senior counsel reiterated the same arguments in this Court and essentially raised two contentions :

(1) the Dumpers which have been taxed under the Taxation Act are used only within the mining areas and are not capable of being used in the public roads and, therefore, cannot be held to be Motor Vehicles and consequently are not taxable under the Taxation Act.

(2) secondly, the learned senior counsel argued that the tax on vehicles being compensatory in nature, levy of such tax can be sustained only on the ground that the vehicles used the roads for which tax is levied. If the vehicle in question did not use the roads and yet tax is levied on the same, the said levy is liable to be struck down.

In elaborating the first argument Mr. Shanti Bhushan took us through some of the provisions of the Motor Vehicle Rules which prescribe the dimension of such vehicle in the matter of width, length or height and which prohibits the vehicles beyond such dimensions to be used on public roads. In this connection the learned senior counsel brought to our notice

A Rules 92 and 93 of the Motor Vehicles Rules (hereinafter referred to as "the Rules" which are quoted hereinbelow in extenso :

RULE 92

GENERAL : (1) No person shall use or allow be to used in any
B public place any motor vehicle which does not comply with the provisions of this Chapter.

(Provided that nothing contained in this rule shall apply to vehicles manufactured prior to the coming into force of the Central
C Motor Vehicles (Amendment) Rules, 1993)

Nothing in this Rule shall apply to a motor vehicle -

(a) which has been damaged in an accident or to a vehicle stopped or impeded owing to shortage of fuel or other temporary
D defects while at the place at which the accident or defect occurred;

(b) which is defective or damaged and is being removed to the nearest place or repair or disposal' or

(c) which is more than fifty years old from the date of its
E registration and is being driven for taking part in a vintage car rally;

Provided that where a motor vehicle can no longer remain under the effective control of the person driving, the same shall not be used in a public place except by towing.

F

Overall dimension

93. *OVERALL DIMENSION OF MOTOR VEHICLES*;

(1) the overall width of a motor vehicle, measured at right
G angles to the axis of the motor vehicle between perpendicular planes enclosing the extreme points, shall not exceed;

(i) in the case of a motor vehicle, other than a transport vehicle, 2.5 metres;

H (ii) in the case of a transport vehicle, 2.7 metres.

EXPLANATION : A

For purposes of this Rule, a rear view mirror, or guard rail or a direction indicator when in operation shall not be taken into considerationin measuring the overall width of a motor vehicle.

(2) The overall length of a motor vehicle other than a trailer, shall B not exceed, -

(i) in the case of motor vehicle other than a transport vehicle having not more than two axles, 9.5 metres;

(ii) in the case of a transport vehicle with rigid frame having two C or more axles, 11.25 metres;

(iii) in the case of an articulated vehicle having more than two axles, 16 metres;

(iv) in the case of truck trailer or tractor trailer combinations, 18 D metres.

(3) In the case of an articulated vehicle or a tractor trailer combination specially constructed and used for the conveyance of individual load of exceptional length, - E

(i) if all the wheels of the vehicle are fitted with pneumatic tyres, or

(ii) if all the wheels of the vehicle are not fitted with pneumatic tyres, so long as the vehicle is not driven at a speed exceeding F twenty five kilometres per hour, the overall length shall not exceed 18 metres.

EXPLANATION

For the purposes of this Rule "overall length" means the length G of the vehicle measures between parllel planes passing through the extreme projection points of the vehicle exclusive of -

(i) a starting handle;

(ii) any hood when down; H

(iii) any fire-escape fixed to a vehicle;

(iv) any post office letter-box, the length of which measures parallel to the axis of the vehicle, does not exceed 30 centimetres;

(v) any ladder used for loading or unloading from the roof of the vehicle or any tail or indicator lamp or number plate fixed to a vehicles;

(vi) any spare wheel or spare wheel bracket or bumper fitted to a vehicle;

(vii) any towing hook or other fitment which does not project beyond any fitment covered by clauses (iii) to (vi).

(4) the overall height of a motor vehicle measured from the surface on which the vehicle rests, -

(i) in the case of a vehicle other than a double- decked motor vehicle, shall not exceed 3.8 metres;

(ii) in the case of a double-decked motor vehicle, shall not exceed 4.75 metres;

(iii) in the case of a laden trailer carrying ISO series 1 Freight Container, shall not exceed 4.2 metres;

Provided that the provisions of clauses (i) to (iii) shall not apply to fire-escape tower wagons and other special purpose vehicles exempted by general or special order of registering authority.

(5) The overhang of a tractor shall not exceed 1.85 metres.

(6) The overhang of the motor vehicle other than a tractor shall not exceed 60% of the wheel base.

Explanation I.-For the purpose of this rule "wheel base" means,-

(a) in the case of vehicles with only two axles, the distance measured horizontally and parallel to the longitudinal axis of the vehicle, between the centre points of the front axle and rear axle;

(b) in case of vehicle having only three axles, and the front axle

is only the steered axle, the distance measured horizontally and parallel to longitudinal axis of the vehicle between the centre of the front axle and centre point between the two rear-axles;

Explanation II. - For the propose of this Rule, "overhang" means the distance measured horizontally and parallel to the longitudinal axis of the vehicles between two vertical planes at right angles to such axis passing through the two points specified hereunder :

(A) The rearmost point of the vehicle exclude of -

(i) any hood when down ;

(ii) any post office letter-box, the length of which measured parallel to the longitudinal axis of the vehicle, does not exceed thirty centimetres;

(iii) any ladder forming part of a turnable fire- escape fixed to a vehicle;

(iv) any ladder used when the vehicle is at rest for loading or unloading from the roof of the vehicle, or any tail lamp or number plate fixed to a vehicle;

(v) any spare wheel or spare wheel bracket fitted to a vehicle;

(vi) any language carrier fitted to a motor vehicle constructed solely for carriage of passengers and their effects and adapted to carry not more than seven passengers exclusive of the driver;

(vii) any towing hook or other fitment which does not project beyond any fitment mentioned in clauses (ii) to (vi);

(viii) any mounted implement on a 3 point linkage of a tractor;

Provided that in the case of a stage carriage :

(a) the projection of any bumper or advertisement panel fitted at the rear of the vehicle shall not exceed fifteen centimetres;

(b) the projection in respect of an advertisement panel shall

not be such as to obstruct either the vision from the rear view mirror or project through the emergency exist at the rear or both;

(B)(i) in the case of a vehicle only two axles, one of which is not a steering axle, the centre point of that axle; or

(ii) in the case of a vehicle having only three axles and front axle is the only steering axle; The centre point of the rear most axle;

(iii) in the case of any vehicle registered in India before the commencement of these rules it shall suffice if the overhang does not exceed 7/24ths of the overall length of the vehicle;

(iv) in the case of a motor vehicle having only three axles where two front axles are steering axles, the centre point of the rearmost axle;

(v) in the case of the motor vehicle having four axles, where two front axles are steering axles, a point 102 millimetres in rear of the centre of a straight line joining the centre points of the rearmost two axles;

(vi) in any other case a point situated on the longitudinal axis of the vehicle such that a line drawn from it at right angle to that axis will pass through the centre of the minimum turning circle of the vehicle.

(7) No part of the vehicle other than a direction indicator, when in operation, or a driving mirror, shall project laterally more than 355 millimetres beyond the centre line of the rear wheel, in the case of single rear wheels, or more than 152 millimetres beyond the extreme outer edge of the outer tyres, in the case of dual rear wheels;

Provided that in case of agricultural tractors lateral projection upto 700 millimetres beyond the central line of the rear wheel shall be permitted.

Provided that the State Government or any authority authorised in this behalf by the State Government, if it is satisfied that it is

necessary because of the nature of any road or bridge or in the interest of public safety, may prohibit or restrict the operation of a motor vehicle in a specified route or area unless such vehicle complies with the requirements specified by the State Government for such route or area.

(8) No motor vehicle shall be loaded in such a manner that the load or any part thereof extends, -

(i) laterally beyond the side of the body;

(ii) to the front beyond the foremost part of load body of the vehicle;

(iii) to the rear beyond the rearmost part of the vehicle;

(iv) to a height beyond the limits specified in sub-rule (4) :

Provided that clause (iii) shall not apply to a goods carriage when loaded with any pole or rob or indivisible load so long as the projecting part or parts do not exceed the distance of one metre beyond the rearmost point of the motor vehicle."

According to Mr. Shanti Bhushan, learned senior counsel, since the dimension of the dumpers in question exceed the permissible dimensions under the aforesaid Rules, there is an embargo for the dumpers to be used on public roads and as such, the vehicle cannot be taxed under the Taxation Act. We are unable to persuade ourselves to agree with the submission of the learned senior counsel for the petitioner. The crux of the question is whether the dumper is a motor vehicle and whether the vehicle attracts the liability of tax under Section 3 of the Taxation Act? The very question came up for consideration before this Court in the case of *Central Coal Fields Ltd.* v. *State of Orissa & Batch* (supra) wherein the various provisions of the Orissa Motor Vehicles Taxation Act was under consideration and the vehicles which had been taxed under the Taxation Act in the said case were dumpers and rockers. This Court after tracing the legislative history and the decisions of this Court commencing from *Bolani Ores Ltd. State of Orissa,* [1974] 2 SCC 777, repelled argument of the mine owners who used dumpers within their mining premises to the effect that the dumpers are vehicles not adapted for use upon roads and, therefore, are outside the scope of the Taxation Act and held that these dumpers run on tyres, in

A marked contrast to chain plates like caterpillars or military tanks. It was also held that by the use of rubber tyres it is evident that they have been adapted for use on roads, which means they are suitable for being used on public roads and on the mere fact they are required at places to run at a particular speed is not to detract from the position otherwise clear that they are adapted for use on roads. The very nature of these vehicles make it clear that they are not manufactured or adapted for use only in factories or enclosed premises. The mere fact that the Dumpers or Rockers as suggested are heavy and cannot move on the roads without damaging them is not to say that they are not suitable for use on roads: The word "adapted" in the provision was read as "suitable" in *Bolani Ores'* case by interpretation on the strength of the language in Entry 57, List II of the Constitution. On the fact situation, therefore, it must be held that Dumpers and Rockers are vehicles adapted or suitable for use on roads and being motor vehicles *per se*, were liable to taxation on the footing of their use or kept for use on public roads.

The various restrictions contained in Rules 92 and 93 referred to by Mr. Shanti Bhushan, learned senior counsel are intended to lay down the outer limits for the vehicles to be plied on the public road. But that does not mean that the vehicles which are otherwise motor vehicles within the definition clause go out of the definition the moment they exceed the limit as provided in Rules 92 or 93 of the Rules. The taxability of dumpers again came up before this Court in the case of *Union of India & Ors.* v. Chowgule & Co. Pvt. Ltd. & Ors.; (1992) Sup. 3 Supreme Court Cases 141. In this case an argument had been advanced that the dumpers are used only in miming operation within the mining area and are not actually used on roads not are suitable for use on roads and, therefore, are not taxable. The Judicial Commissioner of Goa, Daman and Diu accepted the contention and allowed the appeal. Union of India had come up in appeal to this Court. This Court reversed the decision of the Judicial Commissioner of Goa, Daman and Diu and relying upon the earlier decision of this Court in *Central Coal FIelds Ltd.* v. *State of Orissa,* [1992] Suppl. 3 SCC 133 held the mere fact that dumpers were used solely on the premises of the owner, or that they were in closed premises, or permission of the authorities was needed to move them from one place to another, or that they are not intended to be used or are incapable of being used for general purposes, or that they have an unladen and laden capacity depending on their weight

and size, is of no consequence for, dumpers are vehicles used for transport of goods and thus liable to pay a compensatory tax for the availability of roads for them to run upon commission.

The dumpers in question which have been levied under the Taxation Act run on tyres as is apparent from the letter to the Automative Research Association of India dated 25th January, 1993, which has been annexed as Annexure 'C' to this Special Leave Petition but the tyres are of higher load carrying capacity from the certificate given by Hindustan Motors which has been annexed as Annexure 'D' to this Special Leave Petition. It appears that the reasons which impelled the manufacturer to give the certificate that the vehicles are not meant for plying on highway are -

(i) Culverts and bridges on highways are generally not designed to take care of such axle loads continuously;

(ii) The vehicles cannot run at reasonable speed on highway and hence obstruct the flow of normal traffic;

(iii) Width and height of the equipment will adversely affect the traffic and minimum preferable width of the road required for plying these vehicles is 50 ft.

(iv) The vehicles are fitted with specially designed heavy duty tyres and the heat generation is much more and generally cannot be run for more than about 5 kms. at one stretch which is not so in case of normal conventional hauling units which ply on highways.

On these facts it is difficult for us to hold that the vehicles are not adapted or suitable or capable of being used on public roads, even though for most of the time it might actually be used within the mining areas on the roads prepared by the mine owners. Following the two earlier judgment of this Court in *Central Coal Fields Ltd.* (Supra and *Union of India* v. *Chowgule & Co.* (supra) we hold that the dumpers in question are motor vehicles and are taxable within the ambit of the Taxation Act.

Coming now to the second argument of Mr. Shanti Bhushan, learned senior counsel which is on the question of compensatory nature of the Act it is to be seen that in the very decision in *Central Coal Fields Limited* v. *State of Orissa* (supra) it was held :

A "Thus on the fact situation, we have no hesitation in holding that the High Court was right in concluding that Dumpers and Rockers are vehicles adapted or suitable for use on roads and being motor vehicles *per se*, as held in *Bolani Ores* case (supra) were liable to taxation on the footing of their use or kept for use on public roads; the network of which, the State spreads, maintains B it and keeps available for use of motor vehicles and hence is entitled to a regulatory and compensatory tax."

The tax imposed on the motor vehicles is basically a tax for the use of the roads within the State. It is no doubt a compensatory tax which C facilitates trade, commerce and intercourse within the State by providing roads and maintaining roads in a good state of repair. As has been held by this Court in *Automobile Transport Ltd.* v. *State of Rajasthan & Ors.*, [1963] 1 SCR 491, it would not be right to say that the tax is not compensatory because the precise or specific amount collected is not actually used D in providing any facilities. If a statute fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, or who can use the services provided for, the imposition assumes the character of remuneration or consideration charged in respect of an advantage sought E or received or advantage which can be received. The mere fact that any particular individual though can take advantage of the convenience of the services provided by the State but for some reason or the other chooses not to enjoy the services provided cannot escape the taxing liability on that score nor can the provision imposing the tax become invalid on that score. Such levy of tax for keeping a motor vehicle for use on the public roads or F which is capable of being used on the public roads are no doubt compensatory taxes but does not violate provisions of Article 301 of the Constitution of India.

Mr. Shanti Bhushan, learned senior counsel appearing for the G petitioners strongly relied upon the decision of the Division Bench of the Orissa High Court in the case of *Steel Authority of India Ltd.* v. the State of Orissa., in *Original Jurisdiction* Case No. 847 of 1991 disposed of by a judgment dated 18.6.92, wherein Orissa High Court had held that vehicles kept by the Steel Authority of India for being used within its premises are H not liable to pay tax under the Orissa Motor Vehicle Taxation Act. But the

very decision has been reversed by this Court in *Regional Transport Officer-cum-Taxing Authority, Rourkela & Ors.*, [1995] 4 SCC 165 wherein it was held that the vehicle in question kept by the Steel Authority of India are taxable under the Motor Vehicle Taxation Act but the matter was remitted on an enquiry on which item of the Schedule the levy in question will remain. A B

In the premises, as aforesaid, the dumpers belonging to the petitioners are taxable as held by the Orissa High Court and we see no infirmity in the said judgment.

V.S.S. Petition dismissed. C

A THE SECRETARY, JAIPUR DEVELOPMENT AUTHORITY, JAIPUR

v.

DAULAT MAL JAIN

SEPTEMBER 20, 1996

B

[K. RAMASWAMY AND B.L. HANSARIA, JJ.]

Land Laws :

C *Rajasthan Land Acquisition Act, 1953 : Sections 4, 6, 16 and 31(3).*

Land Acquisition—Part of acquired land allotted to erstwhile owner-Subsequently owner sold such land to 'sub-awardees' or 'nominees'—Validity of—Held : Once notification of acquisition of land issued under S. 4, declaration made under S. 6 and possession of land taken under S.16, pre-existing D *right, title and interest of landowner stood ceased and same vested in State free from all encumbrances—Hence, allotment of part of land to erstwhile owner was void—It was not saved by S. 31(3) of Act or Rr. 31 and 36 of Rules—Subsequent sale of part of land to 'sub- awardees' or 'nominees' was opposed to public policy and hence void under S. 23 of Contract Act—Con-* E *sequently, purchasers acquired no right, title or interest therein—Rajasthan Land Acquisition Rules, 1956, Rr. 31 and 36—Rajasthan Improvement Trust (Disposal of Urban Land) Rules, 1956—Land Acquisition Act, 1894, Ss. 4, 6, 31(3) & (4)—Contract Act, 1872, S. 23.*

Constitution of India, 1950 : Articles 14 and 166(3).

F *Public Accountability—Misuse of power—By public servant viz., Minister—Held : Minister answerable and accountable to people for acts or conduct in performance of duties not only by him personally but also by bureaucrats working under him.*

G *Article 14—Discrimination—If some persons derived benefit by illegality, others similarly situated could not claim same benefit on ground of equality—Judicial process could not be abused to perpetuate illegalities.*

A notification under Section 4 of the Rajasthan Land Acquisition Act, 1953 was published in the Official Gazette for acquiring land for a H **housing scheme. After following the procedure, an award was passed and**

possession of the land was taken. Therein, apart from awarding compensation to the owners the land Acquisition Officer (LAO) granted plots to owners, sub-awardees or nominee in the scheme itself. It was the case of the respondents that pursuant to a public policy, the Government had decided to allot the lands to the sub-awardees/nominees. Further, the Minister, accepting the same, had directed delivery of possession of land. The respondents purchased the lands from the erstwhile owner, pursuant to the sale deeds executed by him. These allotments were questioned by way of writ petitions in the High Court. The High Court held that the LAO and the Minister had committed illegality for such allotments being obnoxious, deflected the scheme and defeated the public purpose by abusing public office. However, the High Court directed allotment of the lands to the respondents since allotment made to others had become final and denial thereof to the respondents would amount to violation of equality clause enshrined in Article 14 of the Constitution. Being aggrieved the appellant preferred the present appeal.

On behalf of the respondents it was contended that the LAO was empowered under the Rajasthan Land Acquisition Rules, 1956 to allot the lands in lieu of compensation; that Section 31 of the Land Acquisition Act, 1894 which is in *pari materia* with Section 31 of the Act empowered the LAO to allot land in lieu of compensation; that the public policy further reiterated it; that the Government decided to allot land to the awardees, sub-awardees or nominees of the erstwhile owners of the land; that in furtherance thereof, allotment came to be made, directions were given for deposit of the value of the sites pursuant to which the amount came to be deposited; that the Government had evolved the policy to mete out the problem of the rehabilitation of the awardees, sub-awardees and nominees; that the Government, therefore, in implementation of the scheme had allotted the plots, amounts were deposited in furtherance of the policy, irrespective of the fact whether or not the LAO had power to allot the land to the awardees or sub-awardees or nominees; that the policy of the Government to allot plots legitimated the allotment made to the respondents and, therefore, the allotment was valid in law; that since some people were given possession and some among them had built houses thereon, the respondents could not be denied of their right to possession; that having deposited the amount 20 years ago due to the impugned allotment they were denied the right to apply for allotment elsewhere; that consequentially, the respondents now would be rendered without any remedy for allot-

A ment; and that interference, at this distance of time, would cause undue hardship to the respondents.

Disposing of the appeal, this Court

HELD : 1.1. The Government runs the Executive Government of a
B State with the aid and advice of the Chief Minister and the Council of Ministers which exercise the powers and performs its duties by the individual Ministers as public officers with the assistance of the bureaucracy working in various Departments and Corporate sectors etc. Though they are expressed in the name of the Governor, each Minister is personally and
C collectively responsible for the actions, acts and policies. They are accountable and answerable to the people. Their powers and duties are regulated by the Law and the rules. The legal and moral responsibility or liability for the acts done or omissions, duties performed and policy laid down rest solely on the Minister of the Department. Therefore, they are indictable for their conduct or omission, or misconduct or misappropriation. The Coun-
D cil of Ministers are jointly and severally responsible to the Legislature. He/they is/are also publicly accountable for the acts or conduct in the performance of duties. [596-F, G, H & 597-A]

1.2. The Minister holds public office though he gets constitutional
E status and performs functions under constitution, law or executive policy. The acts done and duties performed are public acts or duties as holder of the public office. Therefore, he owes certain accountability for the acts done or duties performed. In a democratic society government by rule of law, power is conferred on the holder of the public office or the concerned authority by the Constitution by virtue of appointment. The holder of the
F office, therefore, gets opportunity to abuse or misuse the office. [597-B-C]

2.1. The Government acts through its bureaucrats, who shapes its social, economic and administrative policies to further the social stability and progress socially, economically and politically. Actions of the Govern-
G ment, should be accounted for social morality. Therefore, the actions of the individuals would reflect on the actions of the Government. The actions are intended to further the goals set down in the Constitution, the laws or administrative policy. The action would, therefore, bear necessary integral connection between the 'purpose' and the end object of public welfare and not personal gain. The action cannot be divorced from that of the individual
H actor. The end is something aimed at and only individuals can have and

shape the aims to further the social, economic and political goals. The ministerial responsibility threat comes into consideration. The Minister is responsible not only for his actions but also for the job of the bureaucrats who work or have worked under him. He owes the responsibility to the electors for all his actions taken in the name of the Governor in relation to the Department of which he is the head. He bears not only moral responsibility but also in relation to all the actions of the bureaucrats who work under him bearing actual responsibility in the working of the Department under his ministerial responsibility. [597-E-H, 598-A-C] A B

2.2. All purposes or actions for which moral responsibility can be attached are actions performed by individual persons composing the Department. All Government actions, therefore, means actions performed by individual persons to further the objectives set down in the Constitution, the laws and the administrative policies to develop democratic traditions. Social and economic democracy are set down in the Preamble, *Part III* and Part IV of the Constitution. The intention behind the Government actions and purposes is to further the public welfare and the national interest. Public good is synonymous to protection of the interests of the citizens as a territorial unit or nation as a whole. It also aims to further the public policies. The limitation of the policies are kept along with the public interest to prevent the exploitation or misuse or abuse of the office or the executive actions for personal gain or for illegal gratification. [598-D-E-F] C D E

3.1. The so-called public policy cannot be a camouflage for abuse of the power and trust entrusted with a public authority or public servant for the performance of public duties. Misuse implies doing or something improper. The essence of impropriety is replacement of a public motive for a private one. When satisfaction sought in the performance of duties is for mutual personal gain, the misuse is usually termed as corruption. The holder of a public office is said to have misused his position when in pursuit of a private satisfaction, as distinguished from public interest, he has done something which he ought not to have done. The most elementary qualification demanded of a Minister is honesty and incorruptibility. He should not only possess these qualifications but should also appear to possess the same. The rules of Code of Conduct for political executives, public servants and private entrepreneurs, emphasising merit and regulated system of appointment in state bureaucracy and stimulating pride in public service, would generate remedies for political corruption. [598-G, H, 599-A, 599-H] F G H

A *Director of Public Prosecutions* v. *Holly,* (1977) 1 All ER 316; *R.* v. *Andrews Weatherfoil Ltd. & Ors.,* (1972) 1 All ER 65; *Rother Valley Railway Co. Ltd.* v. *Ministry of Transport,* (1972) 2 W.L.R. 1041; *Ch. D, Regina* v. *Smith,* (1960) 2 W.L.R. 164 (Court of Criminal Appeal) and *R* v. *Braithwaite,* (1983) 2 All ER 87 (Cr.D), referred to.

B *Seymour Mertin Lipset : "Encyclopedia of Democracy"*, Vol. I, p-310, referred to.

3.2. The court, therefore, would be required to consider whether the policy sought to be relied on and directed by the Minister was to further C public good or was a means to fritter away the public property for personal gain or to misuse public power. The public policy under the Act is that the acquired land should be used only for public purpose declared under Section 6(1) of the Rajasthan Land Acquisition Act, 1953 or any other public purpose and under no circumstances, for any private purpose. The limited relaxation of public power entrusted with the LAO is to allot any D other land, if available to the owner with limited interest or remission of land revenue when limited interest is acquired for public purpose.

[600-H, 601-A-B]

4.1. The respondents purchased the lands from the erstwhile owner, pursuant to the sale deeds executed by him or an agreement of sale etc. E Their source of title, therefore, is the erstwhile owner. The sales obviously are void since the erstwhile owner had no right, title and interest in the land acquired pursuant to notification under Section 4(1) of the Act issued and possession taken under Section 16 of the Land Acquisition Act, 1894 and equivalent Section 16 of the State Act. The pre-existing right, title and F interest held by the erstwhile owner stood ceased and the same were vested in the appellant free from all encumbrances. All encumbrances stand extinguished by operation of Section 16 of the Act. Therefore, the purchaser gets no title to the acquired land. The sale (being opposed to the public policy) was void under Section 23 of Contract Act, 1872. Consequentially, the respondents acquired no right, title or interest either under the sale G deeds or agreement entered into by them with the erstwhile owner. The nomenclature of sub-awardees or nominees does not get elevated above the source and they had no right, title or interest under void sale except, if at all, only to claim compensation under Section 23(1) of the Act.

[595-E-H, 596-A-C]

H *Gian Chand* v. *Gopala & Ors.,* [1995] 2 SCC 528 and *Yadu Nandan*

Garg v. *State of Rajasthan & Ors.*, JT (1995) 8 SC 179, relied on. A

4.2. Rule 31 of the Rajasthan Land Acquisition Rules, 1956 was made to guide the exercise of power of the collector (Land Acquisition Officer) under Section 31(3) of the Act. The Government has empowered the Collector to allot "any other land" in lieu of money compensation only when the land acquired belongs to a person having "limited interest in the land", like widow's estate of minor's estate, Mutawali etc. In that behalf, Rule 31 amplifies the exercise of the power by the authorised LAO. Rule 31 is only to elongate the discretion which the LAO is expected to exercise in awarding land in lieu of cash consideration and the circumstances in which it would be done. Equally, Rule 36 deals with disposal of the excess land acquired by the Collector for a company and imposition of the conditions for sanction of transfer of excess land. Therefore, the absence of reference of them does not make any dent into the principle of law laid in *Radhey Shyam's* case. That apart, these two rules merely emphasise the limited power given to the Government and to the LAO to impose the conditions and restrictions to attain the public purpose for which the land is acquired and is not intended to fritter away public property for private purposes or gain or illegal gratification. The allotment to the respondents was not under the Rajasthan Improvement (Disposal of Urban Land) Rules, 1974. [601-C-H] B C D

Jaipur Development Authority v. *Radhey Shyam & Ors.*, [1994] 4 SCC 370, relied on. E

4.3. There was no policy laid down by the Government and it cannot be laid contrary to the aforestated rules and no such power was given to individual Minister by executive action, as the land was already notified conclusively under Section 6(1) for public purpose, namely, earmarked scheme. Since the persons whose land was acquired were not owners having limited interest therein, qua the owners having lost right, title and interest therein, the sub-awardees or nominees, after the acquisition under Section 4(1), would acquire no title to the land nor such *ultra vires* acts of the Minister would bind the Government. The actions, therefore, taken by the Minister-cum-Chairman of the appellate authority and bureaucrats for obvious reasons would not clothe the respondents with any vestige of right to allotment. The policy does not bear any insignia of a public purpose, but appears to be a devise to get illegal gratification or distribution of public property defeating the public purpose by misuse of public office. F G

[602-E-F, 603-A] H

A 5.1. There was no evidence that under the so-called policy, anyone from general public could equally apply for allotment of the plots or was eligible to apply for such allotment nor any such general policy was brought to the notice of this Court. The allotment was benefitted only a specified class, namely, the awardees, sub-awardees or nominees and none else. The decision by the Minister or the actions of the bureaucrats was B limited to the above class which included the respondent. Legitimacy was given to the void acts of the erstwhile owner as well as the LAO. Directions were given by the Minister and the bureaucrats acted to allot the land under the very void acts. They are *ultra vires* the power. These acts are in utter disregard of the statute and the rules. Therefore, it cannot be said C to have the stamp of public policy; rather it is a policy to feed corruption and to deflect the public purpose and to confer benefits on a specified category, as described above. [603-B-D]

5.2. The illegal allotment founded upon *ultra vires* and illegal policy D of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. Judicial process cannot be abused to perpetuate the illegalities. Article 14 proceeds on the premise that a citizen has legal and valid right enforceable at law and person having similar right and persons similarly circumstanced, cannot be denied of the E benefit thereof. Such person cannot be discriminated to deny the same benefit. The rational relationship and legal back up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some persons derived benefit by illegality and had escaped from the cultches of law, similar persons cannot plead, nor court can countenance F that benefit had from infraction of law and must be allowed to be retained. One illegality cannot be compounded by permitting similar illegal or illegitimate or *ultra vires* acts. The High Court was clearly in error in directing the appellants to allot the land to the respondents.

[604-A-C, 605-E-F]

G *Yadu Nandan Garg* v. *State of Rajasthan & Ors.*, JT (1995) 8 SC 179; *Coromandel Fertilizers Ltd.* v. *Union of India & Ors.*, [1994] Supp. SCC 457 and *Chandigarh Administration & Anr.* v. *Jagjit Singh & Anr.*, [1995] 1 SCC 745, relied on.

6.1. There is, however, force in the contention that if allotments H would be cancelled by this Court, it would be virtually impossible for the

respondents to acquire residential plots any where now in the city in view of the great increase in prices of land in the meantime. It is not possible to overlook or ignore this facet of the case; more so, because it may be that the respondents had not obtained the allotments by taking recourse to any illegal means. Therefore, this Court would not invoke its power under Article 136 to undo the impugned order of the High Court even if the same be illegal. [606-B, C]

6.2. It is, however, necessary to modify the direction of the High Court, as a very special case, in two respects. First, the respondents would be given allotment in some other scheme. Secondly, the area of the land to be allotted would be uniform. In similar cases, this Court has favoured uniformity as regards the area. As the plot would be needed for residential purpose, an area of 250 sq. yds. would be enough and proper. Therefore, it is ordered that an allotment of plot measuring about 250 sq. yds. be made to each of the two respondents in some other scheme of JDA. This would, however, be at the rate which was prevailing when the allotments were first made to them. [606-C-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12370 of 1996 Etc. Etc.

From the Judgment and Order dated 24.9.93 of the Rajasthan High Court in D.B.C.S.A.W. No. 680 of 1992.

Dr. Shankar Ghosh and S.K. Bhttacharya for the Appellant.

G.L. Sanghi, S.M. Jain, S.K. Jain, A.P. Dhamija, S. Ganesh, Mrs. Pratibha Jain for the Respondents.

The Judgment of the Court was delivered by

K. RAMASWAMY, J. The facts of these cases expose the blatant misuse of public office by Minister of Urban Development, Government of Rajasthan as Chairman of the appellant authority; they, in particular demonstrate the danger involved in entrusting unbridled dual powers in a single individual leading to abuse of office on account of lack of counter check. It would be appropriate to extract from the enquiry report dated November 12, 1992 of the Lokayukta of Rajasthan under Section 10 of the Rajasthan Lokayukta and Uplokayukta Act, 1973 as under :

A "In view of what has been stated above, it is *prima facie* established that Smt. Kamala, the then Hon'ble Minister, Urban Development and Housing Department, Government of Rajasthan-cum-Chairman J.D.A. Jaipur, Shri N.D. Kaurani, IAS the then Commissioner, Jaipur Development Authority and Shri Subhebhan Mitra, the then Zonal Officer, Lal Kothi Scheme, J.D.A. Jaipur have blatantly misused their official position to favour a few influential and highly placed individuals and have also thereby caused wrongful gain to them and wrongful loss to the Jaipur Development Authority and the public at large. But Smt. Kamala, the then Hon'ble Minister, Urban Development and Housing Department-cum-Chairman, J.D.A. is not now a public servant as defined in Section 2(1) of the Rajasthan Lokayukta and Up-Lokayukta Act, 1973 (for short, the 'Act') because she has ceased to be a Minister, so investigation is not being commenced against her but the investigation deserves to be commenced against S/Shri M.D. Kaurani, IAS and Subhebhan Mitra under Section I of the Act and I order accordingly."

Edmund Burke as early as in 1780 had lamented the corroding influence of corruption thus : "Corrupt influence, which is itself the perennial spring of all prodigality, and of all disorder, which loads us, more than millions of debt; which takes away from our arms wisdom from our councils, and every shadow of authority and credit from the most venerable parts of our constitution."

The facts in nutshell in these cases are as under :

Notification under Section 4 of the Rajasthan Land Acquisition Act, 1953 (for short, the 'Act') was published in the State Gazette on June 29, 1960 acquiring land in Bhojpura and Chuck Sudershanpura, Tehsil Jaipur popularly known as Lal Kothi Scheme, which is adjacent to the Jaipur City for urban development, viz., for multipurpose project of constructing Legislative Assembly M.L.A. quarters etc. After following the procedure, an award was passed on January 9, 1964 and possession taken later on. Therein, apart from awarding compensation to the owners, the Land Acquisition Officer granted plots ranging between 2000 sq. yds. to 1000 sq. yds. to owners, sub-awardees or nominees in the scheme itself. This Court in *Jaipur Development Authority* v. *Radhey Shyam & Ors.*, [1994] 4 SCC 370, known as *Radhey Shyam's* case, had held that the Land Acquisition Officer

(LAO) was devoid of the power and jurisdiction under Section 11 to allot part of the acquired land or any land to the land owners etc. in determining compensation under Section 23(1). It was, therefore, held that the award alloting land was void *ab initio* and it confered no right on an erstwhile khatedar/owner to claim possession of the land in execution of the award. The award, confirmed in the decree under Section 26, though had become final, being a nullity, it could be questioned at any stage, when it is sought to be executed/enforced. It was, therefore, held that the execution of such a decree and delivery of the possession in furtherance of the award was invalid, void and inexecutable. These cases spring from the same foul source and being part of the same scheme and same award, are governed by the above judgment. The Khatedar (owner) in these cases is one Chhote Lal whose 14 bighas of land had come to be acquired. The LAO awarded 2000 sq. yards to him. He entered into agreements with respondents Daulat Mal and Raj Kumari to Sell 1000, 500, 250 sq. yds. etc. The sale deeds came to be registered on December 14, 1970. The purchasers were described as sub-awardees or nominees, which terms are unknown to the law of property acquired for public purpose.

Then came into picture the Minister-cum-Chairman and the so-called Committees. It is now the case of the respondents that pursuant to a public policy, the Government had decided in 1978 to allot the lands to the sub-awardees/nominees @ Rs. 8 per sq. yd. Further, the Minister, accepting the same, had directed delivery of the possession and subsequently the amount was received @ Rs. 8 per sq. yd. or at revised rates of Rs. 50. per sq. yd.; details thereof being not material for the purpose of this case, are omitted. It would appear that, subsequently, the lands were further sub-divided to escalate the net by reducing the area of allotment in the proceedings dated September 16, 1980. Lots were drawn for allotment of the plots on December 23, 1980. They came to be questioned by way of writ petitions in the High Court. The High Court came heavily against the illegality committed by the LAO and the Minister for such allotments being obnoxious, deflecting the scheme and defeating the public purpose by abusing public office. When it was inquired into by the Lokayukta, in the aforestated report, he castigated the persons for the blatant abuse of the power and action was accordingly initiated. It shocks the judicial conscience in that it did not touch even the fringe of "actors". The counsel for respondents, rightly and in the light of the settled legal position, admitted that the respondents did not acquire any title to the lands sold to them

A under defective and void title. However, they strongly pressed into service the orders of allotment issued by the Minister, the acceptance of payment and the so-called public policy to support their claim for possession.

In this background, the question arises; whether the High Court was right in directing allotment of the lands to the respondents since allotment made to others had become final and denial thereof to the respondents would amount to violation of equality clause enshrined in Article 14 of the Constitution, which is now the subject matter of these appeals? In fairness, the learned Judges have held that the allotment of the plots was in violation of the scheme and the award of the LAO and did not confer any right to the purchasers, sub-awardees or nominees. Yet the relief has been founded on the premise of violation of equality on par with others who got possession under the void award etc. It directed the appellants to deliver possession of the plots allotted to them on the basis of the sales and letters of allotment thereof. Thus, these appeals arise from the judgment and order of the Division Bench of the Rajasthan High Court made on September 2, 1993 in Writ Petition No. 680 of 92 etc.

Dr. Shankar Ghosh, learned senior counsel appearing in one case and Shri S.K. Bhattacharya appearing in another, contended that in view of the law laid down in *Radhey Shyam's* case, the direction issued by the High Court is illegal. There is no discrimination for perpetration of wrongful acts in furtherance of void orders. Extension of the equality in Article 14 for breach of law would aid impetus to perpetrate further illegalities. Article 14 is unavailable in this backdrop.

M/s. G.L. Sanghi, learned senior counsel and M.S. Ganesh, learned counsel for the respondents and S.M. Jain for the petitioner in the third case, contended that the judgment in *Radhey Shyam's* case is *per incuriam* since the relevant provisions under the Act and the Rajasthan Land Acquisition Rules had not been brought to the notice of this Court. The LAO was empowered under the Rules to allot the lands in lieu of compensation; Section 31 of the Central Act which in *pari materia* with Section 31 of the Act empowers the LAO to allot land in lieu of compensation. The policy of 1978 further reiterated it. The Government decided to allot land to the awardees, sub-awardees or nominees of the erstwhile owners of the land. In furtherance thereof, allotment came to be made, directions were given for deposit of the value of the sites pursuant to which the

amount came to be deposited. The extent of the land purchased by the respondents in 500 sq. yds. and it was further reduced to 400 sq. yd. and 250 sq. yd. etc. The Government had evolved the policy to mete out the problem of the rehabilitation of the awardees, sub-awardees and nominees. The Government, therefore, in implementation of the Scheme had allotted the plots, amounts were deposited in furtherance of the policy, irrespective of the fact whether or not the LAO had power to allot the land to the awardees or sub-awardees or nominees. The policy of the Government to allot plots legitimatises the allotment made to the respondents. Therefore, the allotment is valid in law. Since some people were given possession and some among them had built houses thereon, the respondents cannot be denied of their right to possession. It is further contended that the respondents having deposited the amount 20 years ago due to the impugned allotment they were denied the right to apply for allotment elsewhere. Consequentially, the respondents now would be rendered without any remedy for allotment. Interference, at this distance of time, would cause undue hardship to the respondents. Though for different reasons, the High Court, therefore, was right in holding that the respondents were discriminated against due to non-delivery of possession of plots to them for construction of their houses.

The diverse contentions give rise to the first question : whether the respondents have a right to allotment of the lands? It is an admitted position that they purchased the lands from Chhote Lal, the erstwhile owner, pursuant to the sale deeds executed by him in 1970 or an agreement of sale etc. Their source of title, therefore, is Chhote Lal, the erstwhile owner. The sales obviously are void since Chhote Lal had no right, title and interest in the land acquired pursuant to notification under Section 4(1) issued on dated June 29, 1960 and possession taken under Section 16 of the Central Act and equivalent to Section 16 of the State Act. The pre-existing right, title and interest had by Chhote Lal stood ceased and the same were vested in the appellant free from all encumbrances. The nomenclature of sub- awardees or nominees does not get elevated above the source and they had no right, title or interest under void sale except, if at all, only to claim compensation under Section 23(1) of the Act. In *Gain Chand* v. *Gopala & Ors.,* [1995] 2 SCC 528 this Court had held that after the notification under Section 4(1) is published, any encumbrances created by the owner of the land does not bind the Government. The agreement of sale, if any, was frustrated by the publication of the notifica-

A tion under Section 4(1) and the declaration under Section 6. In *Yadu Nandan Garg* v. *State of Rajasthan & Ors.*, JT (1995) 8 SC 179 and catena of other decisions, this Court has held that the purchase after notification under Section 4(1) published in the Gazette was not lawful which did not clothe the sale with any colour of title as against the State. All encumbrances stand extinguished by operation of Section 16 of the Act. Therefore, the purchaser gets no title to the acquired land. The sale (being opposed to the public policy) was void under Section 23 of Contract Act. Consequentially, the respondents acquired no right, title or interest either under the sale deeds or agreement entered into by them with Chhote Lal, the erstwhile owner.

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The next question is : whether there is any public policy allotment of the land to the respondents independent of the colour of their title? It is seen from the record that the premise on which the Minister and the Committee headed by the Minister had proceeded to allot the lands to the respondents and other, was the void award made by the LAO giving land to the erstwhile owners, sub-awardees or nominees, apart from compensation given under Section 23(1). That premise was knocked of its bottom in the *Radhey Shyam's* case. It would be a mockery to call it a policy of the Government, much less a public policy.

E

The Governor calls upon the leader of a political party/groups that command majority in the Assembly to form the Government and appoints him as Chief Minister. On later's advice he appoints other Ministers. Business of the Government gets allocated and is run as per business rules framed under Article 166(3). The executive power of the State Government extends over which the legislature has power to make law. The Government runs the Executive Government of a State with the aid and advice of the Chief Minister and the Council of Ministers which exercise the powers and performs its duties by the individual Ministers as public officers with the assistance of the bureaucracy working in various Departments and Corporate sectors etc. Though they are expressed in the name of the Governor, each Minister is personally and collectively responsible for the actions, acts and policies. They are accountable and answerable to the people. Their powers and duties are regulated by the law and the rules. The legal and moral responsibility or liability for the acts done or omissions, duties performed and policy laid down rest solely on the Minister of the Department. Therefore, they are indictable for their conduct or omission, or

misconduct or misappropriation. The Council of Ministers are jointly and severally responsible to the Legislature. He/they is/are also publicly accountable for the acts or conducts in the performance of duties. A

The Minister holds public office though he gets constitutional status and performs functions under constitution, law or executive policy. The acts done and duties performed are public acts or duties as holder of the public office. Therefore, he owes certain accountability for the acts done or duties performed. In a democratic society governed by rule of law, power is conferred on the holder of the public office or the concerned authority by the Constitution by virtue of appointment. The holder of the office, therefore, gets opportunity to abuse or misuse the office. The politician who holds public office must perform public duties with the sense of purpose, and a sense of direction, under rules or sense of priorities. The purpose must be genuine in a free democratic society governed by the rule of law to further socio-economic democracy. The executive Government should frame its policies to maintain the social order, stability, progress and morality. All actions of the Government are performed through/by individual persons in collective or joint or individual capacity. Therefore, they should morally be responsible for their actions. B C D

When a Government in office misuses its powers figuratively, we refer to the individual Minister/Council of Ministers who are constituents of the Government. The Government acts through its bureaucrats, who shapes its social economic and administrative policies to further the social stability and progress socially, economically and politically. Actions of the Government, should be accounted for social morality. Therefore, the actions of the individuals would reflect on the actions of the Government. The actions are intended to further the goals set down in the Constitution, the laws or administrative policy. The action would, therefore, bear necessary integral connection between the 'purpose' and the end object of public welfare and not personal gain. The action cannot be divorced from that of the individual actor. The end is something aimed at and only individuals can have and shape the aims to further the social, economic and political goals. The ministerial responsibility threat comes into consideration. The Minister is responsible not only for his actions but also for the job of the bureaucrats who work or have worked under him. He owes the responsibility to the electors for all his actions taken in the name of the Governor E F G H

A in relation to the Department of which he is the head. If the Minister, in fact, is responsible for all the detailed workings of his Department, then clearly ministerial responsibility must cover a wider spectrum than mere moral responsibility : for no minister can possibly get acquainted with all the detailed decisions involved in the working of his Department. The B Ministerial responsibility, therefore, would be that the Minister must be prepared to answer questions in the House about the actions of his department and the resultant enforcement of the policies. He owes them moral responsibility. But for actions performed without his concurrence also, he will be required to provide explanations and also bear responsibility for the actions of the bureaucrats who work under him. Therefore, C he bears not only moral responsibility but also in relation to all the actions of the bureaucrats who work under him bearing actual responsibility in the working of the Department under his ministerial responsibility.

All purposes or actions for which moral responsibility can be attached are actions performed by individual persons composing the Department. All Government actions, therefore, means actions performed by individual person to further the objectives set down in the Constitution, the laws and the administrative policies to develop democratic traditions. Social and economic democracy are set down in the Preamble, Part III and E Part IV of the Constitution. The intention behind the Government actions and purposes is to further the public welfare and the national interest. Public good is synonymous to protection of the interests of the citizens as a territorial unit or nation as a whole. It also aims to further the public policies. The limitations of the policies are kept along with the public F interest to prevent the exploitation or misuse or abuse of the office or the executive actions for personal gain or for illegal gratification.

The so-called public policy cannot be a camouflage for abuse of the power and trust entrusted with a public authority or public servant for the performance of public duties. Misuse implies doing of something improper. G The essence of impropriety is replacement of a public motive for a private one. When satisfaction sought in the performance of duties is for mutual personal gain, the misuse is usually termed as corruption. The holder of a public office is said to have misused his position when in pursuit of a private satisfaction, as distinguished from public interest, he has done H something which he ought not to have done. The most elementary

qualification demanded of a Minister is honesty and incorruptibility. He should not only possess these qualifications but should also appear to possess the same. A

In the Encyclopedia of Democracy by Seymour Martin Lipset, Vol. 1, page 310, in the Chapter "Corruption", it is stated that corruption is an abuse of public resources for private gain. The occasions for political corruption increases when control on the activity of public administrators are fragile and the division of power between political actors and the public bureaucrats, as well as between the Government and the middle man, is unclear. It is difficult to discover and punish cases of corruption. Research has shown that political corruption tends to be more widespread in authoritarian or totalitarian regimes and when public opinion and the press are unable to denounce corruption. Corruption developes because of confusion about the borders between State and society and between traditional and modern values. It can be expected to grow during phases of transition. Corruption should disappear in modern stable democratic societies. Instead, it is growing. Since State intervention in economic and social life has increased the occasions for political corruption, new technologies have increased the cost of electoral campaigns and the professionalisation of political careers has increased the number of those who have to make a living from politics rather than living for politics. Corruption has not disappeared. Corruption has dangerous consequences for politics. Although political corruption is more widespread in non-democratic regimes, it is particularly dangerous for democracy because it undermines two of the major principles on which democracies are based; the equality of citizens' rights and the transparency of the political decision-making process. Bribes open the way for access to the State for those who are willing to pay and can afford the price. The situation may leave non-corrupt citizens with the belief that one "counts" only if one has the right personal contacts with those who hold power. Because of its illegal nature, corruption increases the range of public decision that are made in secrecy. It was suggested that internal controls on public bureaucracies through administrative controls and accounting procedures as well as ombudsman systems for public complaints, are remedies to control political corruption. The rules of Code of Conduct for political executives, public servants and private enterpreneurs, emphasising merit and regulated system of appointment in state bureaucracy and stimulating pride in public service, would generate remedies for political corruption. B C D E F G H

A In *Director of Public Prosecutions* v. *Holly Director of Public Prosecutions* v. *Manners,* (1977) 1 All ER 316 (House of Lords), the expression 'public body' came up for consideration. The applicability of Prevention of Corruption Act was not restricted to local authorities but referred to any public body having public or statutory duties to perform and which carried on activities of public interest. In that behalf, House of Lords, had held B that the Prevention of Corruption Act was not restricted to local authorities; it was applicable to any body which has public and statutory duties to perform and bodies which perform those duties and carry out their transactions for the benefit of the public and not for private profit. Accordingly, it was held that the persons who perform public functions are C liable to prosecution for corruption. Similar views were expressed in *R* v. *Andrews Weatherfoil Ltd. & Ors.,* (1972) 1 All ER 65; *Rother Valley Railway Co. Ltd.* v. *Ministry of Transport,* (1972) 2 W.L.R. 1041 (Chancery Division); *Regina* v. *Smith,* (1960) 2 W.L.R. 164 (Court of Criminal Appeal); and *R* v. *Braithwaite R* v. *Girdham,* (1983) 2 All ER 87 (Criminal Division).

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The court, therefore, would be required to consider whether the policy sought to be relied on and directed by the Minister was to further public good or was a means to fritter away the public property for personal gain or to misuse public power. The object of publication of the notification under under Section 4(1) in the Official Gazette is to give notice to the E owner that the land is needed for public purpose and he is prevented to create any sort of encumbrance on the land with effect from that date etc. The land, if ultimately acquired, vests in the State under Section 16 or 17(2) of the Act free from all encumbrances. The public policy of the Government should only be to further the public purpose and issue of declaration F is the conclusive proof of public purpose under Section 6(1) or any other similar public purpose. Limited public purpose given under Section 31(3), by operation of which, the LAO/Collector is empowered, after the sanction is accorded by the appropriate Government, with the liberation of *non obstante* clause, is to allot any other land, in lieu of money compensation only, to such persons having a *limited interest* in such land, either by the G grant of some other lands in exchange or remission of land revenue on other lands held under the same title, or in such other way as may be equitable "having regard to the interest" of the persons having limited interest in the land.

H In other words, the public policy under the Act is that the acquired

land should be used only for public purpose declared under Section 6(1) of the Act or any other public purpose and, under no circirumstances, for any private purpose. The limited relaxation of public power entrusted with the LAO is to allot any other land if available to the owner with limited interest or remission of land revenue when limited interest is acquired for purpose.

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B

We may at this juncture dispose of the contention that the ratio in *Radhey Shyam's* case is *per incuriam*. The basic postulate of the contention is the omission to refer to Rules 31 and 36 of the Rajasthan Land Acquisition Rules, 1956. Rule 31 was made to guide the exercise of power of the Collector (LAO) under Section 31(3) of the Act. As seen the Government has empowered the Collector to allot "any other land" in lieu of money compensation only when the land acquired belongs to a person having "limited interest in the land", like widow's estate or minor's estate, Mutawali etc. In that behalf, Rule 31 amplifies the exercise of the power by the authorised LAO. It says that "the Collector cannot force a party to take land in lieu of cash. Where, however, the interest of the party is so limited as in the case of a trustee of a wakf property or a Hindu widow, as to make it extremely difficult, if not impossible, to arrive at an adequate cash estimate of its value or where, from the circumstances of a case, it is impossible to place the parties concerned by cash compensation in the same or nearly the same position as before acquisition, sub-section (3) enables the Collector to arrange to award land (subject to the same limitation of interest) in lieu of cash. In *Radhey Shyam's* case the scope of sub-section (3) of Section 31 has been considered and explained *in extenso*. Rule 31 is only to elongate the discretion which the LAO is expected to exercise in awarding land in lieu of cash consideration and the circumstances in which it would be done. Equally, Rule 36 deals with disposal of the excess land acquired by the Collector for a company and imposition of the conditions for sanction of transfer of excess land. Therefore, the absence of reference of them does not make any dent into the principle of law laid in Radhey Shyam's case.

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That apart, these two rules merely emphasise the limited power given to the Government and to the LAO to impose the conditions and restrictions to attain the public purpose for which the land is acquired and is not intended to fritter away public property for private purposes or gain or

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A illegal gratification.

The Rajasthan Improvement Trust (Disposal of Urban Land) Rules, 1974, were made in exercise of power under Rajasthan Urban Improvement Act, 1959. Therein elaborate procedure has been provided to grant lease, restrictions thereunder, assessment of the ground rent, preparation B of the scheme, sale or disposal of the land, reservation of the land for residential plot or allotment of non-residential plots at concessional rates to the specified categories, reservation of non-residential lands, fixation of the premium, reserved prices or fixed prices, assigning allotment and sale of non-residential land, allotment of residential plots at concessional rates, C priorities, categories, procedure, size, the procedure for recovery of cost of the land, resale of the plot to recover for non-compliance of conditions, allotment of land to public or charitable institutions, to institutions other than charitable and public institutions, grant of sale deeds, etc. Allotment to the respondents obviously was not under these Rules nor is it their case.

D

Therefore, there was no policy laid by the Government and it cannot be laid contrary to the aforestated rules and to such power was given to individual minister by executive action, as the land was already notified conclusively under Section 6(1) for public purpose, namely, earmarked scheme. Since the persons whose land was acquired were not owners E having limited interest therein, qua the owners having lost right title and interest therein, the sub-awardees or nominees, after the acquisition under Section 4(1), would acquire no title to the land nor such *ultra vires* acts of the Minister would bind the Government. The actions, therefore, taken by the Minister-cum-Chairman of the appellate authority and bureaucrats for F obvious reasons would not clothe the respondents with any vestige of right to allotments. Acceptance of the contentions of the respondents would be fraught with dangerous consequences. It would also bear poisonous seeds to sabotage the schemes defeating the declared public purpose. The record discloses that such allotment in many a cases was in violation of the Urban Land Ceiling Act which prohibits holding the land in excess of the G prescribed ceiling limit of the urban land. In some instances, a person whose land of 500 square yards was acquired, was compensated with allotment of 2000 square yards and above, which is against the public policy defeating even the Urban Land Ceiling Act. Would any responsible Minister or a bureaucrat, with a sense of public duty and responsibility, transfer H such land to sabotage the planned development of the scheme? Answer

has obviously to be in the negative. The necessary inference is that the policy does not bear any insignia of a public purpose, but appears to be a devise to get illegal gratification or distribution of public property defeating the public purpose by misuse of public office.

There is no iota of evidence placed on record that under the so-called policy, anyone from general public could equally apply for allotment of the plots or was eligible to apply for such allotment nor any such general policy was brought to our notice. The allotment has benefitted only a specified class, namely, the awardees, sub-awardees or nominees and none else. The decision by the Minister or the actions of the beaurocrats was limited to the above class which included the respondents. Legitimacy was given to the void acts of Chottey Lal, the erstwhile owner as well as the LAO. Directions were given by the Minister and the bureaucrats acted to allot the land under the very void acts. They are ultra vires the power. These acts are in utter disregard of the statute and the rules. Therefore, by no stretch of imagination it can be said to have the stamp of public policy; rather it is a policy to feed corruption and to deflect the public purpose and to confer benefits on a specified category, as described above.

The question then is : whether the action of not delivering possession of the land to the respondents is on par with other persons who had possession is *ultra vires* act and violates Article 14 of the Constitution? We had directed the appellants to file an affidavit explaining the actions taken regarding the allotment which came to be made to others. An affidavit has been filed in that behalf by Shri Pawan Arora, Deputy Commissioner, that allotments in respect of 47 persons were cancelled and possession was not given. He listed various cases pending in this Court and the High Court and executing court in respect of other cases. It is clear from the record that as and when any person had gone to the court to get the orders of the LAO enforced, the appellant-authority resisted such actions taking consistent stand and usually adverse orders have been subjected to decision in various proceedings. Therefore, no blame of inaction or favouratism to others can be laid at the door of the present set up of the appellant-authority. When the Minister was the Chairman and had made illegal allotments following which possession wad delivered, no action to unsettle any such illegal allotment could have been taken then. That apart, they were awaiting the outcome of pending cases. It would thus be clear that the present set up of the bureaucrats has set new standards to suspend the claims and is trying to legalise the *ultra vires* actions of Minister and

predecessor bureaucrats through the process of law so such so that illegal and *ultra vires* acts are not allowed to be legitimised nor are to be perpetuated by aid of Article 14. The apart, Article 14 has no application or justification to legitimise an illegal and illegitimate action. Article 14 proceeds on the premise that a citizen has legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot be denied of the benefit thereof. Such person cannot be discriminated to deny the same benefit. The rational relationship and legal back up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some person derived benefit by illegality and had escaped from the clutches of law, similar persons cannot plead nor court can countenance that benefit had from infraction of law and must be allowed to be retained. Can one illegality be compounded by permitting similar illegal or illegitimate or *ultra vires* acts? Answer is obviously no.

In *Yadu Nandan Garg's* case (supra), it was contended that one of the person whose land was acquired, had the benefit of exemption from the acquisition; writ petition was filed seeking similar benefit. When it was contended that it was violative of Article 14, this court in paragraph 5 had held that "a wrong exemption under wrong action taken by the authorities will not clothe others to get the same benefit nor can Article 14 be pressed into service on the ground of invidious discrimination."

In *Coromandel Fertilizers Ltd.* v. *Union of India and Ors.*, [1984] Supp SCC 457, it was held in paragraph 13, that wrong decision in favour of any party does not entitle any other party to claim the benefit on the basis of the wrong decision. In that case, one of the items was excluded from the schedule, by wrong decision, from its purview. It was contended that authorities could not deny benefit to the appellant, since he stood on the same footing with excluded company. Article 14, therefore, was pressed into service. This Court had held that even if the grievance of the appellant was well founded, it did not entitle the appellant to claim the benefit of the notification. A wrong decision in favour of any particular party does not entitle another party to claim the benefit on the basis of the wrong decision. Therefore, the claim for exemption on the anvil of Article 14 was rejected.

In *Chandigarh Administration & Another* v. *Jagjit Singh & Another*, [1995] 1 SCC 745, allotment of the sites was subject matter under several

proceedings in the High Court; ultimately some persons had the benefit of allotment while others were denied of the same. When Article 14 was pressed into service, this Court in paragraph 8 at page 750 had held, that the basis of the principle, if it can be called one, on which the writ petition had been allowed to be taken, was unsustainable in law and indefensible in principle. The mere fact that the respondent-authority had passed a particular order in the case of another person similarly situated, can never be the ground for issuing a writ in favour of petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid *or it might not be*. That has to be investigated first before it can be directed to be followed in the case of petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order could not be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality to cause another unwarranted order. The extraordinary and discretionary power of the High Court under Article 226 cannot be exercised for such a purpose.

A host of other decisions in that context have laid the same principle. It is not necessary to burden the judgment any further. Suffice to hold that the illegal allotment founded upon *ultra vires* and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents.

It is then contended that the respondents have been deprived of right to apply for allotment of a plot of land in this or any other scheme right from 1970, in view of the long lapse of time and the escalation of the prices, it would be impossible for the respondents to purchase any site. To permit the authorities to cancel the allotment made in favour of the respondents would cause great injustice. Therefore, it is not a fit case for this Court to interfere under Article 136.

We have given our considered thought to the fervent and persuasive plea of Shri Sanghi. There are two aspects of the matter. The *first is that* this Court has the duty to correct all obvious *ultra vires* or illegal exercise

A of power or misuse of the same. Failure to do so send wrong signals that the court legitimise wrong actions. There is, however, force in the contention of Shri Sanghi that if allotments would be cancelled by this Court, it would be virtually impossible for the respondents to acquire residential plots any where now in a city like Jaipur in view of the great increase in B prices of land in the meantime. We have not been able to overlook or ignore this facet of the case; more so, because it may be that the respondents herein had not obtained the allotments by taking recourse to any illegal means. So, we have felt persuaded to agree with Shri Sanghi that we may not invoke our power under Article 136 to undo the impugned order of the High Court, even if the same be illegal, according to us.

C

So, we have decided not to disturb the direction of the High Court, as a very special case. We would, however, modify the same in two respects. First, the respondents would be given allotment in some other scheme. Secondly, the area of the land to be allotted would be uniform. In similar cases, this Court has favoured uniformity as regards the area. As the plot D would be needed for residential purpose we think an area of 250 sq. yds. would be enough and proper. We therefore order for an allotment of plot measuring about 250 sq. yds. to each of the two respondents in some other scheme of the JDA. This would, however, be at the rate which was prevailing when the allotments were first made to them. Since we laid down E the law for the first time, we have not interfered with the direction of the High Court but have suitably modified it. This direction, therefore, will not be used as a precedent.

Appeals arising out of SLP(C) Nos. 20857/93, 20936/93 an CC No. 25107/94 are disposed of accordingly. Appeals arising out of SLP(C) No. F 2492/90, which is by Shanti Swaroop against the judgment of the High Court in A.K. Garg and connected cases is, however, dismissed. There would be no order at to costs.

V.S.S. Appeal disposed of.

THE STATE OF KARNATAKA AND ANR. A

v.

T. VENKATARAMANAPPA

SEPTEMBER 20, 1996

[M.M. PUNCHHI AND K. S. PARIPOORNAN, JJ.] B

Service Law :

Karnataka Civil Service Rules :

Rule 28—Government Servant contracting a second marriage while the first one was subsisting—Suspended from Service—Criminal proceedings for bigamy—Discharged—Departmental proceedings—Quashed by the Tribunal and suspension lifted—On appeal held, departmental enquiry be held since it is not necessary that a conviction for bigamy under S.494 is a pre-requisite for the same—But since the order of discharge is in favour of the employee, his continued suspension during the enquiry not warranted—Indian Penal Code, S.494. C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12312 of 1996. E

From the Judgment and Order dated 26.10.90 of the Karnataka Administrative Tribunal, Bangalore, in A. No. 4928 of 1990.

M. Veerappa for the Appellant.

Mahabir Singh for the Respondents. F

The following Order of the Court was delivered :

Leave granted.

This is an appeal against the order of the Karnataka Administrative Tribunal (the Tribunal) at Bangalore whereunder the respondent seemingly was absolved from facing a departmental enquiry on the charge of having contracted a second marriage in the presence of the one subsisting with his acknowledged wife and, as a result of which, the orders of suspension passed against the respondent were lifted conferring consequential G H

A benefits. It appears from the record that the respondent, a Police Constable, faced prosecution at the instance of his wife, before the criminal court and was discharged for want of evidence of the 2nd marriage. On the other hand, a departmental enquiry was instituted against the respondent for which, priorly, he was suspended. He, in turn, approached the B Tribunal for the twin relief of (i) lifting the suspension order and (ii) to stop the enquiry on the ground that the criminal court had on 14.1.1988 discharged him of the offence of bigamy. These pleas found favour with the Tribunal and, resultantly, the departmental proceedings were quashed and the suspension lifted.

C

When this matter was brought to this Court, it was pleaded that the said order of the criminal court, dated 14.1.1988 had been subjected to revision and there was a likelihood of the view of the Magistrate being reversed. Now, it transpires that the Court of the Additional Sessions Judge concerned vide order dated 11.9.1990, has affirmed the view of the Trial D Magistrate with the result that the respondent remains discharged. This apparently is on the basis that strict proof of solemnisation of the second marriage must be proved before conviction can be recorded for such offence. There is a string of judgments of this Court whereunder strict proof of solemnisation of the second marriage, with due observance of E rituals and ceremonies, has been insisted upon. The prosecution evidence in the criminal complaint may have fallen short of those standards but that does not mean that the State was in any way debarred from invoking Rule 28 of the Karnataka Civil Service Rules, which forbids a Government servant to marry a second time without the permission of the Government. F But, here, the respondent being a Hindu, could never have been granted permission by the Government to marry a second time because of his personal law forbidding such marriage. It was thus beyond the ken of the Tribunal to have scuttled the departmental proceedings against the respondent on the footing that such question of bigamy should normally not be taken up for decision in departmental enquiries, as the decisions of com- G petent courts tending to be decisions in rem would stand at the highest pedestal. There was a clear fallacy in such view because for purposes of Rule 28, such strict standards, as would warrant a conviction for bigamy under Section 494 IPC, may not, to begin with, be necessary. We therefore explain away the orders of the Tribunal to the afore extent that Rule 28 H can be invoked, but would certainly maintain the orders of revocation of

suspension since in the presence of the orders of discharge in favour of the respondent, his continued suspension during the enquiry was totally unwarranted. Let the enquiry be held. A

There is thus partial success for both the parties. The appeal stands ordered with these observations and directions. B

G.N. Appeal disposed of.

A P. SIDDALINGAPPA

v.

THE STATE OF KARNATAKA AND ORS.

SEPTEMBER 20, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Service Law :

Karnataka Municipal Corporation Act, 1976/Karnataka Municipal Corporation Rules, 1977 :

C

Sections 82, 84/Rule 26—Bangalore City Corporation—Promotion—Revenue Officers to Deputy Commissioners—Appointment order—Held : Promoted Deputy Commissioners—Power to appoint vests with the Commissioner and not with the Government.

D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12872 of 1996.

From the Judgment and Order dated 23.1.96 of the Karnataka High Court in W.A. No. 1265 of 1993.

E

Rama Joise and S.N. Bhat for the Appellant.

Vijaya Shankar, K.R. Nagraja and Kishan Tyagi for the Respondents.

The following Order of the Court was delivered :

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Leave granted.

We have heard learned counsel on both sides. The admitted position is that the Karnataka Municipal Corporation Rules were framed under the Karnataka Municipal Corporation Act, 1976. The appointing authority in

G respect of various posts governed under the provisions of the Act is regulated by Sections 82 and 84 of the Act. Section 82 reads as under :

> "82. *Appointment of Engineer, Health Officer etc.* – (1) The Government shall appoint for every corporation such officers of the State Civil Services as it considers suitable to be the engineer, health

H officer, revenue officer, chief accounts officers and council

secretary for the efficient functioning of the corporation and such officers shall be subordinate to the Commissioner. The Government may also appoint one or more Deputy Commissioners and Assistant Commissioners who shall exercise such powers and discharge such functions as may be specified in the rules. They shall be subordinate to the Commissioner.

(2) The Government shall, in consultation with the Mayor, appoint an officer not below the rank of an Assistant Commissioner to be the council secretary. The officer appointed shall be on deputation ordinarily for a period of three years and if the corporation by two thirds majority of its members so desire he shall be withdrawn earlier and another person appointed. It shall be the duty of the council secretary to attend every meeting of the corporation and the standing committees and he shall perform such other duties as are imposed on him by or under this Act.

(3) The officers appointed under sub-section (1) shall be whole-time officers of the corporation and shall not undertake any work unconnected with their offices.

(4) Every officer of the Government appointed under sub-sections (1) and (2) shall be paid by the corporation such salary as may be determined by the Government from time to time which shall be met out of the corporation fund and shall be entitled to leave and other privileges in accordance with the rules and regulations applicable to the Government service to which he belongs and in force for the time being, and the corporation shall make such contribution towards his leave allowance, pension and provident fund as may be payable under such rules and regulations by him or on his behalf."

Section 84 reads as under :

"*84. Appointment to the other posts on the corporation establishment.*– (1) Subject to the provision of Section 85 and 86 appointment to posts on the corporation establishment other than those borne on the cadres of the Karnataka Municipal Administrative Service and the posts, referred to in Section 82 shall be made by the Commissioner in accordance with this act, the rules and the

A regulations framed thereunder."

Rule 26 of the Karnataka Municipal Corporation Rule, 1977 (for short, the 'Rule') envisages mode of appointment and the source of appointment as under :

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"Sl. No.	Posts	Method of appointment of Officer	No. of Posts
1.	.....		
2.	Deputy Commissioner	By deputation of an Officer from the I.A.S. Cadre By deputation of an Officer (Senior scale) from the K.A.S. Cadre in the Cadre of K.A.S. (Senior scale) By promotion from the Cadre of revenue Officers of Bangalore City Corporation.	1 ....."

C

D

A reading of Section 82(1) and (4) conjointly would indicate that the Government is empowered to appoint to the every Corporation such officers of the State Civil Services as it considers suitable to be the Engineer, Health Officer, Revenue Officer, Chief Accounts Officer and Council Secretary. The Government may also appoint one or more Deputy Commissioners and Assistant Commissioners who shall exercise such powers and discharge such functions as may be specified in the Rules. Sub-section (4) postulates that every officer of the Government appointed under sub-section (1) and (2) shall be paid by the Corporation such salary as may be determined by the Government from time to time which shall be met out of the Corporation fund and shall be entitled to all the service benefits enumerated therein. Section 84, as stated earlier, is subject to Sections 85 and 86 and it also says that appointment to posts other than those borne on the cadres of the Karnataka Municipal Administrative Service and the posts referred to in Section 82 shall be made by the Commissioner in accordance with the Act, the rules and the regulations framed thereunder. It would thus be seen that such of the officers of the State Government which are appointed by the State would function under the control of the Commissioner. In addition, the Commissioner also has power under Section 82 to appoint Deputy Commissioner or assistant

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Commissioners by promotion in accordance with the procedure of the Act, the rules and regulations framed thereunder. Clause (2) in the Schedule of Rule 26 envisaged that Deputy Commissioners are appointed by the Government by deputation of an officer from the IAS cadre and also by deputation of an officer (senior scale) from K.A.S. cadre in the cadre of K.A.S. (senior scale); Deputy Commissioners by promotion from the cadre of Revenue Officers of Bangalore City Corporation. In other words, under sub-section (1) of Section 82, the Government may also appoint one or more Deputy Commissioners who are the IAS officers or senior scale officers, Karnataka Administrative Service cadre officers. But, as regards the Deputy Commissioners promoted from the cadre of the Revenue officers of the Bangalore City Corporation, by operation of sub-section (1) of Section 84, it is the Commissioner who is empowered to make appointment to such posts according to the Act, rules and regulations framed thereunder. Resultantly, promoted Deputy Commissioners from the Revenue Officers of the Bangalore City Corporation are required to be appointed by the Commissioner and Government have no power to make appointments of them.

The appeal is accordingly allowed. The judgment and order of the Division Bench made in Writ Appeal No. 1265 of 1993 dated January 23, 1996 stands set aside and that of learned single Judge stands confirmed but in the circumstances without costs.

G.N. Appeal allowed.

A RAMESH KUMAR CHOUDHA AND ORS.

v.

STATE OF M.P. AND ORS.

SEPTEMBER 20, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Service Law :

M.P. Irrigation Engineering Services (Gazetted) Recruitment Rules, 1968 :

C

Rules 7, 15, 16—Promotion—Assistant Engineer—Eligibility as on 1st January of the year—Graduate Engineers to have a minimum 8 years experience—Diploma Engineers to have a minimum of 12 years experience—If the Diploma Engineers acquire graduation they become eligible for promo-

D *tion after 8 years—But cut-off date being 1st January, even if they had acquired degree, prior to that date, their eligibility would be taken into account after the cut-off date—Those promoted prior to their eligibility on the basis of Tribunal's orders—To be treated ad hoc and de hors the rules—Not entitled to seniority from that date—DPC to sit every year in February or March—DPC*

E *to sit and consider the candidates for filling up the vacancies from 1992 to 1996.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12859-69 of 1996.

F From the Judgment and Order dated 12.8.94 of the Madhya Pradesh Administrative Tribunal at Bhopal Bench in O.A. No. 180. of 1993.

S. B. Sanyal and R.D. Upadhyay for the Appellants.

B.S. Banthia for the Respondents.

G S.K. Agnihotri and Sakesh Kumar for the State.

The following Order of the Court was delivered :

Delay condoned.

H Leave granted.

We have heard learned counsel on both sides. A

These appeals by special leave arise from the orders of the Madhya Pradesh State Tribunal made on October 1, 1994 in O.A. No. 616/93 and batch.

The admitted position is that the appellants as well as the respondents are governed by the provisions of M.P. Irrigation Engineering services (Gazetted) Recruitment Rules, 1968 issued by the Governor in exercise of the power under proviso to article 309 of the Constitution. Rule 7 of the Rules prescribes the mode of recruitment either by direct recruitment or by promotion of substantive or officiating feeder cadre, i.e., sub-Engineers, or by transfer of person who held in a substantive capacity such post as may be specified by the State Government in that behalf. Eligibility criteria has been prescribed under Rule 15 and procedure for consideration under Rule 16 which read as under : B C

"15. Condition of eligibility for promotion: D

(1) Subject to the provisions of sub-rule (2), the committee consider the cases of all persons who on the 1st day of January of that year had completed the prescribed years of service (whether officiating or substantive) on the post/service mentioned in column 2 of Schedule IV or any other post or posts declared equivalent thereto by the Government as under and are within the zone of consideration as per sub-rule (2): - E

(i) Sub-Engineers Head Draftsman/Draftsman to the post of Assistant Engineers minimum "Service of 12 years as Sub-Engineers, Head Draftsman/Draftsman. F

Provided that a sub-Engineer head Draftsman/Draftsman who completed a minimum of 8 years service and possessed degree in Civil/Electrical/Mechanical Engineering from recognised University or qualifications declared equivalent thereto by the State Government will also be eligible for promotion to the post of Assistant Engineer and will be considered each time, just after the zone of consideration and the final selection list shall be made from both the groups on the basis of merits, for example, if ten posts are vacant in the cadre of Assistant Engineer to be filled by G H

promotion of sub-Engineers then 10 x 5-50 diploma holders sub-Engineers from working list be considered first and thereafter the eligible graduate sub-Engineers be considered in the order of their seniority for promotion.

(ii) Junior Engineers to the post of Assistant Engineers minimum Service of 2 years as Junior Engineers. (iii) Research Assistants to the post of Assistant Research Officers—Minimum Service of 8 years as Research Assistant.

(iii) Embankment Inspector/Silt Analysts to the post of Assistant Research Officers-minimum service of 8 years as Embankment Inspector/Silt Analyst.

(iv) Assistant Engineers promoted from sub-Engineers Head Draftsman/Draftsman cadres to the post of E.E. minimum 18 years of total service out of which at least 6 years should be as Assistant Engineers.

(v) Assistant Engineers to the post of Executive- Engineers minimum 6 years as Assistant Engineer.

(vi) Superintending Engineers to the post of Chief Engineers-Minimum Service 6 years as Superintendent Engineers.

(2) The field of selection shall ordinarily be limited to five times the number of officers to be included in the select list, provided that if the required number of suitable officers are not available in the field so determined the field may be enlarged to the extent considered necessary by the Committee by mentioning the reasons in writing.

16. Preparation of list of suitable officers :

(1) The committee shall prepare a list of such persons as satisfy the condition prescribed in the Rule 15 above and are held by the committee to be suitable for promotion to the service. This list shall be sufficient to cover the anticipated vacancies on account of retirement and promotions during the course of one year from the

date of preparation of the select list. A reserve list consisting of 25% of the number of persons included in the said select list shall be prepared to meet the unforeseen vacancies occurring during the course of the aforesaid period.

(2) The selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority.

(3) The names of the officers included in the list shall be arranged in order of seniority in the (as in column II Schedule IV service at the time of preparation of each select list; provided that any Junior Officer, who is in the opinion of the committee, is of an exceptional merit and suitability, may be assigned in the list a higher place then that of officers senior to him.

Explanation : A person whose name is excluded in the select list but who is not promoted during the validity of the list shall have no claim to seniority over those considered in a subsequent selection merely by the fact of his earlier selection.

(4) The list so prepared shall be reviewed and revised every year.

(5) If in the process of the selection, review or revision, it is proposed to supersede any member of the service or members of Madhya Pradesh Irrigation Department (non-gazetted) Service, the committee shall record its reasons for the proposed supersession."

A resume of these Rules would clearly indicate that the eligibility is considered as on Ist of January of the year. the incumbent must have completed the prescribed years of service, namely, 8 years of service for the Graduation Engineers and 12 years of service for the sub-Engineers. It is not in dispute that the appellants as on January 1992 had not acquired the Graduation qualification but some of them had completed 8 years of service. Similarly, the respondents who were promoted as per the directions of the Tribunal had admittedly acquired the qualifications of Graduation in October 1992. When the DPC met in December 1992 for filling up of the vacancies for the year 1992 their claims did not come up for consideration. So, the respondents filed OAs and the Tribunal has held that since they had completed 8 years of service and also acquired the graduation, they should be considered if found fit to be promoted. Thus

A they came to be promoted.

The case of the appellants is that though the respondents had completed the eligibility criteria as on January 1 of the year 1992, a fact that the graduation qualifications acquired subsequent to that date but before B the DPC had considered their cases are not entitled to be promoted. The approach adopted by the Tribunal is illegal and contrary to Rules 15 and 16 of the Rules referred to hereinbefore. We find force in the contention. As seen Rule 15 is a clear mandate as to the eligibility criteria. Firstly, the diploma-holders should have minimum of 12 years qualifying service for eligibility to be considered for promotion as Assistant Engineers. If a C diploma holder acquires graduation, he should complete minimum of eight years of service then only he becomes eligible for consideration for promotion as Assistant Engineer. He should hold the post as sub-Engineer in a substation or continuous officiating capacity as prescribed. But the cut off date for eligibility is 1st January of the year in which the eligibility was to D be considered. Since the respondents acquired the qualifications in October 1992, They did not become eligible for consideration for promotion for the year 1992 though the DPC had met in December 1992. Consequently, the direction issued by the Tribunal and the appointments of the respondents made pursuant to the contempt orders are clearly illegal. We are informed that they have been already promoted. Therefore, their E promotions should be treated to be *ad hoc* and *de horse* the rules. Though as per the orders of the Tribunal, they came to be promoted, such promotions do not confer any right to seniority over any other eligible candidates who acquired the qualifications as on January 1, 1992. Therefore, the DPC is directed to sit every year either in the month of February or March for F consideration of respective claims of the candidates provided if any vacancy exists or is anticipated. As regards this year is concerned, they should sit in this year to consider the vacancies that had arisen between 1st January 1992 to 1st January 1996. The DPC should get identified the vacancies having arisen in each year and consider the cases of respective eligible candidates diploma-holders as well as Engineers, who have com- G pleted 12 years of service by the diploma holders or the diploma holders who acquire graduation before first day of January each year for promotion in accordance with rules. Such of the candidates found fit and recommended fit be given regular promotion provided they are substantive or substantively in officiating capacity in the lower ranking. It would appear H that some of the candidates who approached the Government taking

advantage of the orders of the Tribunal and got promoted, also came to be considered and were promoted. All appointments are also to be treated as *ad hoc*. A

The appeals are accordingly disposed of. The orders of the Tribunal are set aside. No costs.

B

G.N. Appeals disposed of.

A U.P. STATE ROAD TRANSPORT CORPN.
THROUGH ITS MANAGING DIRECTOR AND ANR.

v.

GOBARDHAN AND ANR.

SEPTEMBER 20, 1996

B

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Service Law :

C *U.P State Road Transport Corporation—Waiting list of candidates to be-recruited during peak season or during suspension of conductors or against leave vacancy for 15 days or one month—Appointed after notification in newspapers—In respect of absentees seniority not adhered to and juniors appointed—Respondent not appointed though some of his juniors were appointed and regularised—Filed writ petition—High Court directing the Cor-*
D *poration to appoint him—On appeal held, after cancellation of the wait-list procedure, though no one has a right, those on the wait list need to be considered in accordance with the rules in view of the fact that their juniors got appointment and were even regularised—Appellant-Corporation directed to consider the case of respondent as a special case and make appointment*
E *according to the procedure—Others who had not approached or would approach the Court belatedly would not be entitled to any relief.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12286 of 1996.

F From the Judgment and Order dated 31..8.95 of the Allahabad High Court in W.P. No. 6727 of 1993.

Pradeep Misra for the Appellants.

S.K. Bhattacharya and P.K. Jain for the Respondents.

G The following Order of the Court was delivered :

Leave granted.

We have heard learned counsel on both sides.

H This appeal by special leave arises from the judgment of the Al-

lahabad High Court made on August 31, 1995 in Writ Petition 6727/93. For the recruitment in the year 1980, the Regional Manager of the appellant-Corporation had prepared a waiting list of 414 candidates to be recruited during peak season or during suspension of any conductors or against leave vacancy for 15 days or one month. It would appear that the list continued for 1980- 81, 1981-82 and 1982-83. The appointments were to be made during the peak season by notification in the newspapers and whoever would come within 7 days would be given appointment. Thereafter, in respect of absentees, seniority was not being adhered to and juniors were given appointments. It would appear that the respondent is one of the candidates placed in the seniority list. Since he had not received the intimation, he did not join during the peak seasons. He filed a writ petition in 1993 challenging his non-appoint, he took the plea that those juniors to him were already appointed and some of them were even regularised. The High Court has accepted the contention and given the direction to appoint him to the post of conductor since some of his juniors had come to be appointed, Thus, this appeal by special leave.

Shri Pradeep Misra, learned counsel for the Corporation, has contended that the Corporation has evolved the principle of wait list to meet the contingencies during peak season etc. The wait- list, for the year 1980 in fact was cancelled in July 19, 1980; the writ petition which came to be filed against the cancellation were dismissed; the respondent filed the writ petition for the first time in 1983; from, 1988 onwards, the wait-list procedure has been dispensed with and, therefore, the High Court was not justified in giving the direction. Shri Bhattacharya, learned counsel for the respondent, contended that since the newspaper had no circulation in the region in which he was living he could not see the newspaper publication; as a result, he could not appear and join the post; but since his juniors came to be appointed and some of them were even regularised, he is also entitled to the same benefit. Though we find force in the contention of Shri Pradeep Misra that the candidates have no right to the post since they are in the wait-list, since the Corporation has already appointed some of the juniors who are in the waiting list, necessarily, before following that procedure, they should have given intimation to those candidates who were placed in the waiting list; if even then they do not turn up, then it could be taken that they have waived the right of appointment. But in this case, it might be that a candidate who was in the waiting list was under the expectation that he would get an order of appointment from the Corpora-

A tion as and when the vacancy arises and may be he could not read the newspaper, though published. Under these circumstances, we think that after the cancellation of the wait-list procedure, though no one has a right; those who were on the wait list need to be considered in accordance with the rules in view of the fact that their juniors had got appointment and
B were even regularised. Therefore, the appellant are directed to consider the case of the respondent as a special case and make appointment according to the procedure.

Any other persons who had not approached or would approach the Court belatedly, would not be entitled to any relief.

C The Appeal is accordingly disposed of. No costs.

G.N. Appeals disposed.

STATE OF U.P. AND ANR. A

v

T.P. LAL SRIVASTAVA

SEPTEMBER 20, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.] B

Service Law :

Dismissal from service on charges of Misappropriation—Charge-sheet for committing gross irregularities—Employee not submitting his reply despite several letters—Employer holding the employee guilty of misappropriation and dismissing him from service—Employee challenging it and the High Court holding that documents not supplied to the employee and the action vitiated by error of law—On appeal held, Employer not conducted enquiry though the employee avoided giving reply—Employee had foregone his right to submit his reply—However employer not absolved of the duty to hold an ex-parte enquiry—Disciplinary authority to communicate copy of enquiry report and seek an explanation from the employee—Appropriate orders to be passed thereafter in accordance with law—Till then the employee deemed to be under suspension. C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12885 of 1996. E

From the Judgment and Order dated 15.3.93 of the Allahabad High Court in C.M.W.P. No. 12480 of 1987.

Irshad Ahmad for A.K. Srivastava for the Appellants. F

The following Order of the Court was delivered :

Though notice was sent to the respondent on January 25, 1995, till date neither acknowledgment nor unserved cover has been received back. Under these circumstances, notice must be deemed to have been served on the respondent. He is set *ex-parte*. G

Leave granted.

We have heard learned counsel for the appellant. H

A This appeal by special leave arises from the judgment of the Allahabad High Court made on March 15, 1993 in Writ Petition No. 12480/87. The admitted position is that while the respondent was working as a Senior Marketing Inspector, a charge-sheet was served on him on November 23, 1984 calling upon him to explain the charges for committing gross irregularities in the movement of wheat outside the State of U.P. Instead of B submitting reply to the charge-sheet, he went on dilly-dallying in submitting the reply. Several letters addressed to the respondent proved ineffective. Resultantly, the appellants took a decision on June 26, 1987 holding that the respondent was found guilty of misappropriation. Consequently, he came to be dismissed from service. The respondent challenged the same C in the writ petition. The High Court has set aside the order in the impugned order holding that the documents have not been supplied to the respondent and, therefore, the action was vitiated by error of law. We do not find any justification in the view taken by the High Court; the substratum of the result is that the appellants have not conducted any enquiry though the D respondent had been avoiding to give the reply. Since the respondent had avoided to submit the reply, he has forgone his right to submit his reply. Nonetheless, the appellants are not absolved of the duty to hold an ex-parte enquiry to find out whether or not the charge has been proved. In the event of the Enquiry Officer find that the charge is proved, he would submit that report to the disciplinary authority. The disciplinary authority should com- E municate the copy of the enquiry report to the respondent and seek an explanation for the proposed action thereon. If the respondent submits any explanation, the same may be taken into consideration and appropriate order may be passed according to law. Until then, the respondent must be deemed to be under suspension.

F The appeal is accordingly allowed, but in the circumstances, without costs.

G.N. Appeal allowed.

ALL ORISSA ELECTRICAL WORKERS UNION

v.

STATE OF ORISSA AND ORS.

SEPTEMBER 20, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Service Law :

Superannuation—Employees under the State of Orissa—Class III and upwards though skilled or highly skilled not entitled to the benefit of 60 years for superannuation—Class IV employees though skilled, semi skilled or highly skilled alone entitled to the benefit of superannuation at the age of 60 years.

State of Orissa v. *Adwant Charan Mohanty & Ors.*, **[1995] Supp. 1 SCC 470 and** *State of Orissa* **v.** *Arnab Kumar Dutta*, **JT (1996) 2 SC 516, referred to.**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 12717 of 1996.

From the Judgment and Order dated 21.3.96 of the Central Administrative Tribunal at Cuttak in O.A. No. 1087 of 1996.

Mrs. Indira Jaising, Bharat Sangal and Ms. Anita Chinoy for the Petitioner.

The following Order of the Court was delivered :

Smt. Indira Jaising, learned senior counsel for the petitioner in this petition, has argued on 2.8.1996 before the Bench comprising Hon'ble Mr. Justices M.M. Punchhi and K. Venkataswami, JJ. and the learned Judges have referred the matter for reconsideration of the earlier decision by the Bench of which Hon'ble Sri Hansaria, J. was a member. Consequently, it was posted on August 5, 1996 before the Bench consisting of Hon'ble Justice G.N. Ray and Hon'ble Justice Hansaria who have referred the matter again to us for reconsideration of the judgment rendered in *State of Orissa* v. *Adwant Charan Mohanty & Ors.*, [1995] Supp. 1 SCC 470. We thought that there was a conflict between the judgment in *State of Orissa* v. *Arnab Kumar Dutta*, JT (1996) 2 SC 516 and the judgment in *Mohanty's*

A case. After going through the two judgments, we find that there is no conflict of the views. On the other hand, in *A.K. Dutta's* case, the Bench has followed the decision in *Mohanty's* case.

Smt. Indira Jaising has contended that the Government have treated different classes of the persons, namely, electrician, plumber, mastry, fitters
B Grade II, roller mechanic, mechanic, wireman, etc..... as skilled workmen entitled to the benefit of 60 years and that the judgment in *Mohanty's* case requires consideration. We do not think that the learned counsel is right in her submission. We have considered the entire service rules operating in the State of Orissa and also various instructions issued by the Govern-
C ment from time to time together with the note to Rule 71(a) of the Rules. We have categorised various persons who are eligible to superannuation at the age of 60 years and such of those employees who have been fitted into class III and upwards, though they are skilled or highly skilled, they are not entitled to the benefit of 60 years for superannuation. They are required to retire on attaining the age of 58 years while the Class IV employees,
D though skilled, semi-skilled or highly skilled alone are entitled to the benefit of superannuation at the age of 60 years. In that view, we are of the considered opinion that the judgment in *Mohanty's* case does not require reconsideration.

E The special leave petition is accordingly dismissed.

C.K. LOKESH

v.

P.E. PANDURANGA NAIDU

SEPTEMBER 20, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Code of Civil procedure, 1908 :

Order 5 Rule 20A, Order 9 Rule 13—Suit for declaration of title and for injunction restraining the appellant from interfering with suit property—Personal service not effected on the appellant—Substituted service by publication in the newspaper directed by the Court also not reaching the appellant set ex-parte—On becoming aware appellant filing application for setting aside the ex-parte decree and order—Allowed by District Judge—Single Judge setting aside the same—On appeal held : the District Judge was right in holding that the appellant had filed the application to set aside the ex-parte order within 30 days from the date of knowledge—High Court was in error in interfering with the same—Appellant to appear before the District Judge and file a written statement—The District Judge to dispose of the suit as expeditiously as possible.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 13086 of 1996.

From the Judgment and Order dated 7.12.95 of the Madras High Court in C.R.P. No. 2566 of 1995.

R. Mohan and T. Raja for the Appellant.

A.T.M. Sampath and V. Balaji for the Respondent.

The following Order of the Court was delivered :

Leave granted.

We have heard learned counsel on both sides.

The appellant is defendant in O.S. No. 288/84 on the file of the District Munsif Court, Cheyyar. The appellant was set ex-parte on March 30, 1985. The respondent filed a suit for declaration of his title and for

A injunction restraining the appellant from interfering with the suit property, i.e., the land to the extent of 2 acres and 30 cents. It is admitted that personal service was not effected on the appellant. It would appear that the Court has directed to effect the substitute service by publication in the newspaper but that also did not reach the appellant. On becoming aware of the ex-parte decree and order in 1990, the appellant filed an application
B under Order 9, Rule 13, C.P.C. within 30 days from the date of his knowledge to set aside the decree and order. He filed an application under Section 5 of the Limitation Act to condone the delay. The district Judge condoned the delay holding that :

> C "I uphold the submissions of the petitioner that the petitioner had no knowledge of the case nor he was aware of the pending case and, therefore, he is entitled to prefer this petition within 30 days from the date of knowledge. hence the petition is allowed."

Against the aforesaid order, the respondent carried the matter in
D revision. The learned single Judge allowed the petition setting aside the order passed by the District Judge. Thus, this appeal by special leave.

It is contended by Sri Sampath, learned counsel for the respondent, that the respondent had taken all the steps available under Order 5 CPC including of effecting service through substitute service under Rule 20A,
E Order 5 CPC. Therefore, the Court was right in setting the appellant *ex parte* and passing the *ex-parte* decree. The learned District Judge after going through the entire material on record came to the above conclusion that the appellant had not been served with a notice and, therefore, he was entitled to file the application under Article 123 of the Schedule of Limitation act, which is 30 days from the date of knowledge. Accordingly, the
F application came to be filed, though belated by 2015 days. Under these circumstances, the learned District Judge was right in holding that the appellant had filed the application to set aside the ex- parte appeal within 30 days from the date of knowledge. The High Court was clearly in error in interfering with the order passed by the District Judge.

G The appeal is accordingly allowed. The order of the High Court is set aside and that of the District Judge stands confirmed. The appellant is directed to appear before the District Judge on 28th October, 1996 and he should also file a written statement. The learned District Judge is directed to dispose of the suit as expeditiously as possible. No costs.

H G.N. Appeal allowed.

KRISHI UTPADAN MANDI SAMITI ORAI DISTRICT, JALAUN THROUGH ITS SECRETARY

v.

AMAR SINGH AND ANR.

SEPTEMBER 20, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Land Acquisition Act, 1894 :

Sections 23(1-A), 23(2), 26 and 28—Compensation Award passed by the Reference Court—On appeal High Court awarding additional amount, enhancing solatium and also awarding interest—Held : High Court was in error in granting the additional amounts to which the claimants not entitled—They are entitled to interest @ 6% on the enhanced compensation from date of taking of possession of the land till date of deposit and solatium at 15% on the enhanced compensation.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 13090 of 1996.

From the Judgment and Order dated 19.5.94 of the Allahabad High Court in C.M.A. No. 3684/90 in F.A. No. 4 of 1981.

O.P. Rana, T. Mahipal and Pradeep Misra for the Appellant.

V.K.. Choudhary and A.S. Pundir for the Respondents.

The following Order of the Court was delivered :

Leave granted.

Though the notice was issued, neither the acknowledgment nor the unserved cover has been received from the second respondent. The first respondent is appearing through the counsel.

We have heard the learned counsel for the appellant and the first respondent. A notification under Section 4(1) of the Land Acquisition Act, 1894 was published on March 1, 1973. The award of the Collector was made on 15th October, 1975. On reference under Section 18, the Civil Court enhanced the compensation on January 30, 1975. On July 9, 1981,

A the appeal filed by the State was dismissed confirming the compensation @ Rs. 10,000 per acre. Subsequently, the claimant's appeal was disposed of on August 24, 1987 with enhancement of the solatium and interest and also the additional amount under Section 23(2), proviso to Section 28 and Section 23(1-A) respectively. In March 1990, application under Section 151, CPC filed by the appellant for correction of the award granted by the B High Court was dismissed on May, 1994. Thus, this appeal by special leave.

It is now well settled legal position that when the award itself under Section 26 was passed by the reference Court on January 10, 1979, the High Court was obviously in error in awarding the additional amount under the C Amendment Act 68 of 1984 as per Section 23(2), proviso to Section 28 and Section 23(1-A) enhancing solatium to 30%, interest @ 9% for one year and @ 15% thereafter from the date of taking possession on enhanced compensation and additional amount @ 12% per annum from the date of the notification till the date of taking possession or award, whichever is earlier. In these circumstances, the High Court was obviously in error in D granting those additional amounts. When an application under Section 151, CPC was filed, the High Court ought to have corrected its mistake, but instead it dismissed it. Under these circumstances, we hold that the claimants are not entitled to the aforesaid benefits; instead, they are entitled to the interest @ 6% on the enhanced compensation from the date E of taking possession of the land till the date of deposit and solatium at 15% on the enhanced compensation.

The appeal is accordingly allowed, but without costs.

G.N. Appeal allowed.

F

GIRIDHARI PARAMANAND VADHAVA ETC.

v.

STATE OF MAHARASHTRA

SEPTEMBER 23, 1996

[G.N. RAY AND G.B. PATTANAIK, JJ.]

Indian Penal Code 1860—Sections 302/120-B and 120-B—Brutal murder of an innocent young school boy-kidnapped and held for ransom by the accused—Demand for Rs. 2 lacs—Consented and assured by the victim's family—Victim subjected to physical and mental torture with utmost brutality—Killing by strangulation of neck of the victim with a belt by the accused—Conviction by trial court—Held, evidence clearly established that the accused tortured the victim both physically and mentally apart from taking active role in holding the victim for ransom and murdering him—Conviction and sentence upheld.

Terrorist and Disruptive Activities (Prevention) Act 1987—Section 3(1) and 3(2) (i)—Kidnap of an innocent school boy—Held for ransom—Despite promises by the family members—Boy was killed brutally—Held, intention to strike terror in the minds of people can be reasonably inferred—An innocent boy was killed only because demand for ransom amount was not met by the family members—Such killing can not but send a shock wave and bring about terror in the minds of the people of the locality—Hence rightly convicted and sentenced.

According to the Prosecution, 'V', the deceased was studying in a school. Appellant (A-3) was the friend of 'V' and also of P.W. 3. A casio piano of 'V' was bought by P.W. 3 on the negotiations of Appellant. On September 15, 1992 at 7.00 P.M., Appellant took 'V' along with him on a scooter from his house, on the false pretext that the price of the Piano could be realised by 'V' from P.W. 3 by coming to the farm house of P.W. 3. The Farm house belonged to P.W. 10, an aunt of P.W. 3 A2, A4 and A5 had taken a room on rent on the first floor of the farm house. PW 5 was a friend of PW 3 and was visiting P.W. 3 in the farm house quite frequently. At the relevant time P.W. 5 was present at the place of occurrence along with P.W. 3, and their hands were tied by the accused persons to ensure that both of them would not go out and shout for help.

A At about 8.15 P.M. on September 15, 1992, 'V's family started searching for their son and when all the efforts failed they informed the Police Station. At about 11.15 P.M., a person talked to the complainant, the grandfather of 'V', on telephone in Hindi and informed him that 'v' was in their custody and he would be released if the amount of Rs. 2 lacs would b e paid. 'V' also talked to the complaint on phone and stated that the B said persons were severely beating him and would kill him. 'V' requested the complainant to save him by paying the demanded amount. 'V' also informed that he was being tied with a rope and a revolver was pointed on his head. The complainant requested the person who talked to him earlier not to beat 'V' and he would comply with their demand.

C

The police was informed. They went to the house of A.3, but were informed that since morning, he had gone to Bombay. At about 4,30 a.m.; a complaint was lodged.

On September 16, 1992 at about 6.00 a.m. the police informed the D complainant that 'V' had been brought to the hospital. On reaching the hospital, 'V' was found dead, wearing only an under pant, and several injuries including swelling on the neck of the dead body, were noticed. The complainant was informed that the accused had kidnapped 'V' and had taken him to the premises of a Farm house and they had killed 'V' as the E ransom of Rs. two lacs had not been paid to them.

After apprehending A3, the police were led by him to the Farm house, wherein all the other accused persons were present except one 'B', and they were apprehended.

F Considering the evidences adduced in the case the Designated Court came to the finding that the accused were guilty of the offences punishable under Section 120 B IPC and Section 302 read with Section 120 B IPC and also for the offence under Section 3(2)(1) of TADA and convicted al the said accused for the aforesaid offences. The designated court sentenced G each of the accused to suffer imprisonment for life on each count by indicating that the sentences would run concurrently. Hence this appeal.

Dismissing the appeal, this Court

HELD : 1.1. It has been clearly proved by PW3 and PW5 that all the H accused including A3 had taken part in killing V after holding him for

ransom and attempting to realise money from his family. From his evidence, it has transpired that 'B'; was a dreaded criminal. He had extorted money from other persons on previous occasions. He also master-minded the crimes committed by the accused including A3 and had also taken the leading role and finally killed 'V' by strangulating him with his own belt. But from the evidences adduced in the case, it has also been clearly established that all the other accused including A3 conspired to hold for ransom when he would be brought to the Farm House. All the said accused also actively associated with 'B' in murdering 'V'. [654-D, E]

1.2. When A3 had realised the price of the piano, there was no necessity of bringing 'V' for realisation of the price of the said piano from PW3 residing in the said Farm house, situated in a lonely place. It is in the evidence that 'B' was not residing in the first floor but at that time he was also present at the Farm house when 'V' was taken there. The satisfaction expressed by 'B' by thanking A3 for doing an excellent job for bringing 'V', a son of Katyare family indicates that 'B' and other accused had been waiting for A3 who was expected to bring the only son of his parents in Katyare family. It will be significant to note in this connection that 'B' did not cause any enquiry as to who was the boy but he definitely caused the enquiry as to whether or not the boy brought by A3 was a member of the Katyare family. This fact coupled with subsequent events and the role played by A3 in threatening 'V' with serious consequences if he would not listen to the dictates of 'B' and his associates and his overt act in slapping PW 3 and asking him to remain quiet and also tying his hands so that he could not go out of the Farm house and thereafter connecting the residential telephone of 'V' from the telephone at the Farm house so that the demand for ransom could be made. This clearly indicates that A3 had conspired that 'V' after being taken to the farm house would be held for ransom to extort money from 'V's family. It is true that A3 himself did not assault 'V' and also did not torture him like some of the co-accused, but he had taken an active role in holding 'V' tightly when 'B' had decided that 'V' would be killed and started pulling with force the belt which was fastened around the neck of 'V'. Both PW 3 and PW 5 have specifically stated that A3 along with other accused held 'V' tightly when he was trying to free himself from the clutches of 'B', so that killing by strangulation was facilitated. [649-A-D]

State of Maharashtra v. *Som Nath Thapa and Others*, (1963) 3 SCALE

A 449, referred to.

1.3. It is true that A3 himself did not assault 'V' and also did not torture him like some of the co-accused, but he had taken an active role in holding 'V' tightly when 'B' had decided that 'V' would be killed and started pulling with force the belt which was fastened around his neck. B Both PW3 and PW5 have specifically stated that A3 alongwith other accused held 'V' tightly when he was trying to free himself from the clutches of 'B', so that killing by strangulation was facilitated. When searches were made by the members of the family to trace out 'V', the family members had also gone to house of A3 because 'V' had left his home in his company. C The family members of A3 disclosed that he had left for Bombay in the morning. The fact remains that A3 had not left for Bombay but he was very much in the town itself. It is quite likely that in view of the conspiracy to hold 'V' for ransom, A3 knew that he would not come back to his home at night and presumably to explain his absence from his home, he had made a false representation to the members of his family that he would go to D Bombay. [653-D-H, 654-A-C]

2.1. The intention to strike terror in the minds of the people can be reasonably inferred because 'B' declared such intention in no uncertain term by indicating that 'V' should be killed in order to send message to E the people in the locality that if the demand of 'B' and his associates was not met, extreme consequences of killing of innocent persons would be resorted to. In order to send such message to the society, it was decided that 'V' would be killed and he was killed for giving effect to the intended threat to the people. If an innocent boy is killed only because the demand for ransom amount was not met by the family members, such killing F cannot but send a shock wave and bring about terror in the minds of the people of the locality. [654-H, 655-A-B]

Niranjan Singh Karam Singh Punjabi Advocate v. *Jitendra Bijaya and Ors.*, [1990] 4 SCC 76, referred to.

G

2.2. In the facts of the case, the Designated Judge has rightly convicted the accused for offences under Section 120 B and Section 302 read with Section 120B of the IPC. In any event, for the offences of murder the accused have been convicted and sentenced to life imprisonment. It will be of little consequence so far as sentence part is concerned, if the conviction H under Section 3(2) (1) of TADA is not made. [655-D-E]

2.3. So far as the other co-accused are concerned, some of them had even tortured 'V' both physically and mentally apart from taking active role in holding 'V' for ransom and murdering him. Hence, convictions of all the accused for the aforesaid offences are fully justified and no interference is called for against such convictions. [655-F] A

2.4. So far as the question of quantum of punishment is concerned, it appears that it was 'B' who had masterminded that crime and had taken the leading role in committing the crime. Although, other accused who faced the trial in the absence of 'B', since absconding, are also guilty of the offences under Sections 120B and 302 read with 120B of the IPC and Section 3(2) (1) of TADA. In the facts of the case, it does not appear that their offence murdering 'V' can be held to be an offence for murder in the rarest of the rare cases. The Designated Court has, therefore, rightly passed the sentence of life imprisonment against the accused. Therefore, appeals preferred by the convicted accused are dismissed and also appeal preferred by the State for enhancing the sentence. [655-G, H, 656-A-B] B C D

2.5. A crime even if perpetrated with extreme brutality may not constitute 'terrorist activity' within the meaning of Section 3(1) of TADA. For constituting 'terrorist activity' under Section 3(1) of TADA, the activity must be intended to strike terror in people or a section of the people or bring about other consequences referred to in said Section 3(1). Terrorist activity is not confined to unlawful activity or crime committed against individual or individuals but it aims at bringing about terror in the minds of people or section of people disturbing public order, public peace and tranquility, social and communal harmony disturbing or destabilising public administration and threatening security and integrity of the country. [654-F-H] E F

Hitendra Vishnu Thakur **v.** *State of Maharashtra*, **[1994] 4 SCC 602, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 319 of 1995 Etc. G

From the Judgment and Order dated 22.9.94 of the Designated Court at Nasik in Special Case No. 1 of 1993.

Ms. Rani Jethmalani, S.M. Sarkar, Parvez Siddiqui, Qamarruddin, H

A Rajiv Mehta for Kailash Vasdev for the Appellants.

K.T.S. Tulsi, Additional Solicitor General and S.M .Jadhav for the Respondent.

B The Judgment of the Court was delivered by

G.N. RAY, J. These appeals have been filed under Section 19 of the Terrorists and Disruptive Activities (Prevention) Act (hereinafter referred to as TADA) against convictions and sentences passed by the learned Judge. Designated Court, Nasik in Special Case No. 1 of 1993 by Judgment C dated September 21, 1994. Five accused including the three appellants were tried for offences under Sections 143, 364, 368, 385, 302 read with Section 120B and Section 140 IPC and Section 3 (2) (1) of TADA.

The prosecution case in short is that on september 15, 1992, the D complainant Kantilal Katyare returned to his house at about 8.15 P.M. He was then informed by his wife that his grandson Vaibhav had gone with the accused No. 3 Girdhari who is the appellant in Crl. Appeal No.319 of 1995 on a scooter to bring the price of casio piano since sold by vaibhav but Vaibhav had not returned. Suspecting something foul, Vaibhav's father had gone in search of Vaibhav. At about 9.30 P.M., Vaibhav's father Vijay E informed the complainant on phone that Vaibhav could not be traced. He had, therefore, gone to the Deolali Camp police station. The complainant had also informed the police on phone to search Vaibhav. At about 11.15 P.M. a person talked to the complainant on phone in Hindi informing the complainant that Vaibhav was in their custody and if the amount of Rs. F two lacs would be paid, Vaibhav would be released. Vaibhav also talked to the complainant on phone stating that the said persons were severely beating him and would kill him. So he should pay the amount as demanded by them. On enquiry by the complainant, Vaibhav told that he was talking from Deolali Camp. Vaibhav also informed that he was tied with a rope and a revolver was pointed on his head and the said persons were not G allowing him to give their phone number or addresses. Vaibhav requested the complainant to save him. The complainant thereafter requested the person who talked to him earlier, not to beat Vaibhav and he also informed that he was prepared to comply with their demand and they would take away the amount or the complainant would himself come with the amount H at the place to be named by them.

It is the prosecution case that immediately thereafter, the complainant went to the Nasik Road police station and informed the matter to the police. Along with police he had also come to Deolali Camp and they had also gone to the house of Girdhari accused No. 3 But they were informed by the family members of Girdhari that since morning, Girdhari had gone to Bombay. They also searched the house of the friends of Vaibhav but Vaibhav could not be found.

Vijay also searched for Vaibhav but without any success. At about 4.30 A.M. on September 16, 1992, a complaint was lodged expressing apprehensions that at about 7.00 P.M. on September 15, 1992. Vaibhav had been kidnapped by Girdhari under the pretext of realising the price of casio but later on the accused had demanded ransom of R. two lacs. At about 6.00 A.M. on September 16, 1992, the police had come to the complaint's house and informed him that Vaibhav had been brought to Bytoo hospital. Thereafter, the complainant had gone to the hospital where they found the dead body of Vaibhav. He was wearing only an under pant and several injuries including swelling on the neck on the dead body of Vaibhav, were noticed. The complainant was informed that Girdhari, Birju and their colleagues had kidnapped Vaibhav and had taken him to the premises known as Mithun Farm near, Deolali camp and they had killed Vaibhav as the ransom of Rs. two lacs had not been paid to them. Accordingly, a supplementary complaint was recorded as part of the complaint Ex. 21 and Crime No. 323 of 1992 was registered by the police.

The investigation had been carried out by Mr. Pote Police Inspector (Crime) Ex.76, Police Inspector Mr. Sarnaik Ex. 93, Mr. Marathe, Police Inspector (Crime) Ex. 95 and Mr. Chaudhari Police Inspector (Crime) Nasik Ex. 98. The investigations made by the police disclosed that Girdhari was apprehended by Police Inspector Dilip Daswani Ex. 25 and Shankar Albard Ex. 74 at about 4.30 P.M. On September 16, 1992 outside Mithun Farm house. Accused No. 1 Ranjit @ Ravindra and accused No. 2 Ravi @ Raviraj were also arrested on September 16, 1992 by 2.30 P.M. Accused No. 4 Major alias Ravindar Mogal was arrested on November 29, 1992. Witness Prabhakar Bawiskar had held identification parade on December 25, 1992 (Ex. 53) in which PW 4 Dilip Daswani identified accused No. 5 as per panchnama Ex. 50. Prabhakar Bawiskar, the Special Judicial Magistrate again held identification parade on January 14, 1993 (Ex. 53) in which witness Shankar Albard identified accused No. 5 as per

A panchnama Ex. 52. Accused Nos. 1, 2, 3 and 4 were produced before Shri Bansode, Dy. Commissioner of Police on November 4, 1992 for recording their confessional statements. The said accused were given 48 hours time for reflection. Thereafter, they were again produced before the Dy. Commissioner of Police on November 16, 1992. These four accused Nos 1, 2, 3 and 4 had given their confessional statements Ex. 83, 87 85 and 81 respectively before the Dy. Commissioner of Police.

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The said accused however at the trial had stated that Birju who had killed Vaibhav by strangulating him with the help of his belt had absconded. All the accused denied the charges made against them and claimed to be tried and they asserted that they had been falsely involved in the case. The accused Nos 1 to 4 also contended that their confessional statements before the Dy. Commissioner of Police were recorded after they were severely beaten and under threat of their being killed and they had not voluntarily given confessional statements recorded in Ex. 81, 83, 85 and 87. Accused No. 1 in his statement under Section 313 of the Criminal Procedure Code also stated that absconding accused Birju Indori, PW 3, PW 5 and Carroline themselves formed a gang and Birju was the agent of Katyare Family. .The accused No. 2 stated in the statement that though he had no concern with the alleged offences, he was brought by the police from his house at Deolali Camp under the assurance that he would be released on the same evening but he was falsely involved in the said case. The accused No. 3 Girdhari stated that he was a college student and also worked as a salesman in a cloth stores. The accused No. 4 stated that on September 17, 1992 when he was playing football on Cantonment school ground, the police jeep came there and he was brought to Deolali Camp police station. He had given his name as Ravindra Mohan Pande but the police were insisting that his name was Virendra Major Pande and were alleging that he was a colleague or companion of the absconding accused Birju Indori. He also stated that he was given a severe beating at the police station and along with him 3 to 4 persons were apprehended by the police. Two ladies, a boy of fair complexion and the said 3 to 4 persons were brought to Mukti Dham where some talks took place between Shri Pote, Police Inspector and the said 3 to 4 persons. He was only detained but the others were allowed to go. He also alleged that he was given electric shock on his private part. He thereafter became unconscious and later on brought to the civil hospital Nasik where his injury was sutured. Accused No .5 alleged that in the newspaper he had read about the incident wherein his name

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was also mentioned as a person involved in murdering Vaibhav Therefore, along with the said newspaper, he himself had gone to the police station and gave his name as Sanjay Mohan Jadhav. The police insisted him to disclose who was Bandya and he pleaded his ignorance .He also alleged that he had been falsely implicated in the said case.

P.W. 10 Carroline has deposed that Mithun Farm House belonged to her and PW 3 Pravin was her sister's sons. Such fact has also been stated by PW 3 Pravin. Both the said witnesses have deposed that Pravin was staying in Mithun Farm house since September 1992. PW 3 and PW 5 have deposed that there was a phone in Mithun Farm House and the number of the telephone is 42177. The police has also noted the presence of a telephone in Mithun Farm House, number of which is 42177. Ex. 38 is a bill of the said telephone for the period from June 6, 1992 to August 5, 1992 and such phone stands in the name of Carroline the witness No. 10. The complainant and his daughter-in-law PW 2 deposed that they have also got a phone, the number of which is 61841. The learned Designated Court has, therefore, held that it has been clearly established that there are two phones respectively at the said two premises namely at Mithun Farm and at the house of the deceased Vaibhav.

About the location of Mithun farm house, the depositions of PWs. 3, 5, 22-25 get corroboration from the Map Ex.. 29 and the panchanama of place of offence Ex. 30.. It transpires that the place where the incident had taken place is isolated. From the evidence of PW.3 and also from the evidence of PW. 10, it is revealed that/PW3 had been staying in the Mithun Farm House belonging to his aunt, PW. 10. Accused Nos. 2, 4 and 5 had taken a room on rent on first floor of the house. The owner of the said Mithun Farm House has also deposed that she had let out the first floor of the house to accused Nos. 2, 4 and 5 at a monthly rental of Rs. 500. Such deposition stands unchallenged. It has been established by cogent evidence that PW. 5 was a friend of PW 3 and the said PW5 used to come to the said Farm House to meet his friend PW 3. It is also established that a boy aged about 10 years was engaged as a part time domestic helper for washing the utensils of PW 3. It also transpires from the deposition of PW 5 that PW 3 and 5 were reading in the same class and since two years prior to the said incident, PW 5 was visiting PW 3 in the said Mithun Farm House quite frequently.

A It may be stated here that no identification parade was held in respect of accused No. 3 Girdhari. The said accused was apprehended by the police and such fact is established from the deposition of PW 4, 18, 22, 23 and 24. It also transpires that after apprehending accused No. 3, he was taken in a police jeep and the accused No. 3 had led the police to the
B Mithun Farm House.

The learned designated court has observed that in view of such facts there was no necessity of holding any identification parade for the accused No. 3. From the evidences of PWs. 23 and 24 it also transpires that when the police reached the Mithun Farm House along with accused No. 3, the
C lights inside and outside the house were switched on. PW, 23 has deposed that four persons were seen standing in the varandah. One of them was the absconding accused Birju. The said two witnesses have also deposed that on noticing the presence of the police party, Birju had shouted that police had come and they should run away. Such depositions of PWs 23 and 24
D also stand corroborated from the evidences of PWs. 3 and 5 who had also heard the said statement made by Birju. PW 23 has deposed that P.S.I. Gite chased Birju and he asked the other police personnel to chase the other culprits. PW 23 thereafter chased other persons who were running towards the south. The said PW 23 could apprehend one of them at a distance of 100 feet and produced him before PSI Gite and the person who
E was apprehended by PW 23 is accused No. 1. Similarly, PW 24 has deposed that on being asked by PSI Gite, he also chased one of the accused who was running towards the east and he apprehended the said accused at a distance of 100 ft. and the person so apprehended is accused No. 2.

F The learned designated court has observed that such depositions of the police personnel are fully reliable and there is nothing on record which may impel the court to discard such evidence. PW 2 Meena the mother of the deceased, has deposed that accused No. 3 Girdhari was working in Deepak Hosiery. She has further deposed that Deepak Hosiery was very close to her house. The complainant and PW 2 Meena have also deposed
G that there was friendship between the deceased Vaibhav and Accused No. 3 Girdhari and accused No. 3 was on visiting terms with Vaibhav at his residence.

The actual incident in holding the deceased for ransom and the
H incident of murdering him after torturing him brutally and mercilessly

assaulting him had taken place inside the Mithun Farm House. PW3 the resident of Mithun Farm House and PW 5, the friend of P.W. 3 who was then present in the said Farm House, have given a detailed account as to how Vaibhav was brought in Mithun Farm House by the accused No. 3 on the pretext of realising the price of a casio piano which was sold by Vaibhav to PW 3 and how thereafter the accused Birju and other accused came down from the fist floor and thereafter they started assaulting and torturing Vaibhav. PW 3 and PW 5 have deposed that on two occasions Birju telephoned to the members in the house of the deceased Vaibhav demanding ransom and he also compelled Vaibhav to speak to the members of his family over the telephone that his life was in danger and the persons who had held him for ransom were mercilessly beating him and if the money was not paid as demanded, he would be killed. From the depositions of PWs. 3 and 5, it clearly transpires that although Birju took leading part in holding the deceased Vaibhav for ransom had also demanding such ransom on two occasions after connecting the telephone number at the house of Vaibhav from the telephone kept in the said Mithun Farm, the other accused also played their respective role in assaulting and torturing the deceased after tying PW 3 and PW 5 and threatening them not to utter a word, otherwise to be killed. Both the said PWs. 3 and 5 have deposed that when second time the house of Vaibhav was contacted from the telephone kept in Mithun Farm and Birju talked on the telephone, Birju disconnected the telephone and declared that the amount of Rs. two lacs as demanded by him was not gong to be paid and Vaibhav should, therefore be killed to set an example that if the demand of Birju was not met, it would entail a very severe consequence.

Both the said witnesses have also deposed that Vaibhav was undressed and seriously assaulted and with the help of the belt of Birju, Birju tried to strangulate him. At one stage, the accused No. 3 Girdhari cautioned Birju that if the belt would be pulled on so tightly, the boy would die immediately and that should not be done. Birju then replied that the boy should be killed and he started pulling the belt tightly around the neck of Vaibhav with force. At that time all the accused including Girdhari held Vaibhav tightly, who was then desperately trying to free himself, so that Birju could execute the strangulation. Both PW 3 and PW 5 have deposed that after some time froth started coming from the mouth of Vaibhav and when the belt being pulled with great force gave away, the other accused

A holding Vaibhav released their hold. Vaibhav fell on the ground dead. Both of them have deposed that when second time, Vaibhav's house was contacted over the telephone from Mithun Farm, Vaibhav was forced to speak on the phone and Vaibhav had told his mother by saying that Mummy should pay the amount as demanded otherwise he would be killed. PW 2 B has also deposed to the same effect that when the accused contacted the telephone of the house of Vaibhav for the second time, PW 2 had picked up the telephone and she heard Vaibhav speaking to her over the telephone to meet the demands of the accused otherwise he would be tortured and killed. The demand for ransom as made by Birju over the telephone on the first occasion stands corroborated by the deposition of C the complainant who received the said telephone call.

Considering the evidences adduced in the case, the learned designated court has come to the finding that the prosecution case was fully established that although the price for the piano had been paid by PW 3 D to the accused No. 3 a day before when such piano was delivered to him, Girdhari accused No. 3 acting on a false pretext to realise the price of the said piano from Mithun Farm took Vaibhav to the said Mithun Farm House. Immediately after Vaibhav was brought by Girdhari in the said Mithun Farm, the other accused including the absconding accused Birju E came down from the first floor and when Birju enquired as to whether the said boy was from Katyare family and Girdhari answered in the affirmative, Birju said that Girdhari had done excellent job. Thereafter, attempt to realise two lacs of rupees by way ransom was made by the said accused including the absconding accused Birju and having failed to get any as- F surance from the mother of Vaibhav, who is PW 2 Meena, that rupees two lacs would be paid as demand, Birju took the decision that Vaibhav should be murdered, to set an example as to what would happen if their demand was not met. Thereafter, the said boy was murdered after being very cruelly tortured and mercilessly assaulted by the accused. The learned designated court has come to the finding that the accused were guilty for the offences G punishable under Section 120B IPC and Section 302 read with Section 120B IPC and also for the offence under Section 3(2)(1) of TADA and he convicted all the said accused for the aforesaid offences. The learned designated court has sentenced each of the accused to suffer imprisonment for life on each count by indicating that the sentences would run concur- H rently.

Against the said order of conviction and sentence passed by the learned Designated Court accused No. 3 Girdhari has preferred Crl. Appeal No. 319 of 1995 before this court and accused No. 4 Major @ Revindra Mogal Pande has preferred Crl. Appeal No. 1305 of 1995. The State of Maharashtra has also preferred Crl. Appeal No. 702 of 1993 praying for enhancement of sentence of the convicted accused in view of the grave nature of offences committed by them. All the said appeals have been heard analogously and are being disposed of by this common judgment.

Ms. Rani Jathmalani, learned counsel appearing for the appellant Girdhari, the accused No. 3 has submitted that Girdhari was admittedly a friend of the deceased Vaibhav and was on visiting terms with Vaibhav. He had only negotiated a deal of selling a casio piano belonging to Vaibhav which PW 3 intended to purchase as he happened to know both of them. In order to secure the price of the said piano sold by Vaibhav to PW 3 he had taken Vaibhav to Mithun Farm. There is no evidence to hold that Girdhari belonged to the group of absconding accused Birju and other accused who used to stay in the first floor of Mithun Farm. It is not unlikely that Birju or other residents of first floor had noticed Vaibhav coming to Mithun Farm and they got down from the first floor with an intention to hold Vaibhav for ransom and Girdhari had no idea of such intention of the other accused including the absconding accused Birju.

Ms. Rani Jethmalani has contended that when Birju enquired as to whether Vaibhav belonged to Katyare family Girdhari answered in the affirmative and according to depositions of PWs 3 and 5, Birju expressed his happiness for bringing Vaibhav to Mithun Farm. The learned counsel for the appellant Girdhari has submitted that it was not unlikely that Birju who was a hardened criminal for which evidences have been led, and was contemplating to hold Vaibhav for ransom became happy when for a different purpose, Vaibhav was taken by Girdhari to the Mithun Farm and expressed his happiness on seeling Vaibhav brought to the said farm by Girdhari. Form such evidence, it cannot be held that Girdhari was a party to conspiracy to hold Vaibhav for ransom. Ms. Jethamalani has submitted that only because PW 3 has deposed that he had paid the price of the piano, on the previous day to Girdhari, it cannot be held in the absence of any corroboration, that PW 3 had actually paid the price. If the price was really paid, it was quite unlikely that Girdhari would take Vaibhav for

A realisation of the price of the piano only at the risk of being exposed that he was dishonest. Ms. Jethmalani has further submitted that Girdhari was not supposed to anticipate that there would not be other persons present at Mithun Farm when Vaibhav was taken there because admittedly the said farm house was a residential unit. She has submitted that the finding by the learned designated court that Girdhari was a party to the conspiracy B in holding Vaibhav for ransom and in execution of such conspiracy, he had brought Vaibhav on a false plea of realising the price of casio, is based more on surmise and conjecture than on any convincing and clinching evidence. Hence, conviction of Girdhari on account of conspiracy must be held illegal.

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Ms. Jethmalani has also submitted that even if depositions of PW 3 and PW 5 are taken to be correct on their face value, it clearly transpires from the deposition of PW 3 and 5 that it was Birju who was commanding every one to act according to his dictate. Girdhari was asked to connect the telephone at the house of Vaibhav because he knew the number but D Girdhari did not make any demand for ransom either on the first or on the second occasion when residential telephone of Vaibhav was connected. On both the occasions Birju spoke over the phone and demanded ransom. Ms. Jethamalani has submitted that it has been deposed by both PW 3 and PW 5 that Girdhari asked Vaibhav to act as per direction of Birju because Birju E and his associates were dangerous persons. Such advice of Girdhari, according to learned counsel, only indicates that being a friend of Vaibhav, he was alarmed and greatly concerned for the well being of Vaibhav when Birju and his associates came down and held Vaibhav for ransom.

Ms. Jethmalani has submitted that the overt act alleged against F Girdhari is that he had tied Praveen's hands and slapped him when he had enquired as to why Birju and his associates were holding Vaibhav. Such act on the part of Girdhari, according to learned counsel, may be reasonably explained by indicating that Girdhari did not dare flouting any command of Birju, a notorious and hardened criminal. It is not unlikely that he was G afraid that Praveen and his friend might be in grave danger if having witnessed Birju and his associates in holding Vaibhav for ransom, they would try to escape from the place or shout for help.

Ms. Jethmalani has submitted that Girdhari did not take any part in torturing or assaulting Vaibhav or even treating him with cruelty by pouring H Beer in his mouth or forcing him to take meat. Both PW 3 and 5 have

specifically deposed that when Birju tied his belt around to neck of Vaibhav and was attempting to pull the belt with force, it was Girdhari who had cautioned Birju not to pull the belt with force, otherwise Vaibhav would die. Such act of Girdhari clearly reveals that he did not intend that Vaibhav should be killed.

Ms. Jethmalani has submitted that PW 3 and PW 5 made an omnibus statement that when Birju had declared that Vaibhav should be killed to give a lesson that a dire consequence would follow if Birju's demand was not met, all the accused held Vaibhav tightly ad Birju pulled the belt fastened at the neck of Vaibhav with force till he had died. The learned counsel has submitted only for such omnibus statement, without specifying individual role of each of the accused as to how and what part of the body of the victim was held by such accused, no conviction for murdering Vaibhav can be based against Girdhari. Ms. Jethmalani has submitted that essential ingredients of common object or common intention to murder Vaibhav so far as Girdhari is concerned are totally absent. Unfortunately, the learned Judge of the designated court being obsessed with the view that Girdhari hatched a conspiracy for holding Vaibhav for ransom, proceeded on the assumption that he had also taken part in killing Vaibhav.

Ms. Jethmalani has submitted that in any event, conviction of Girdhari under Section 3(2)(1) of TADA is wholly illegal. The learned counsel has contended that from the evidences adduced in the case, it only transpires that Birju was a hardened criminal and he had extorted money on some occasions. Even if it is accepted that Birju and his associates hatched a conspiracy to hold Vaibhav for ransom and formed an unlawful assembly at Mithun Farm and actually held Vaibhav for ransom and made demand for the ransom money and not getting such money tortured Vaibhav with cruelty and ultimately killed him,such criminal activities cannot be held to have been committed to overawe Government or to strike terror in the people or any section of the people or to do such other acts as mentioned in Section 3(1) of TADA so that the accused may be held to have committed terrorist act'. The criminal activities, alleged by the prosecution, only indicate that the accused including the absconding accused made an attempt to realise ransom from the family of Vaibhav but not being successful to realise the amount demanded, had killed the victim after torturing him. Such act, according to learned counsel, is at best a crime under the penal law of the land. Only because Birju exclaimed that Vaibhav would be killed to teach a lesson to others that if demand of Birju

A was not met, the same would entail a serious consequence, it cannot be reasonably held that the said acts would hold the society at large, terror striken.

In this connection, Ms. Jethmalani, has referred to a decision of this Court in *Niranjan Singh Karam Singh Punjabi, Advocate* v. *Jitendra Bijaya and Ors.*, [1990] 4 SCC 767. In the said case, accused exclaimed "Presently, Raju and Kesav are having dominance in the town. We would become dadas of the town upon taking lives out of them. Then there would not be any rival to us in the town. Upon commission of murder of Raju and Kesav on account of terror, the people would be scared". The designated court held that the materials placed before the Court did not disclose offence under Section 3(1) of TADA. According to the designated court, the intention of the accused was not to strike terror in the people or a section of the people but only to eliminate Raju and Kesav their rivals in the underworld with a view to gain supremacy of the underworld. Upholding the finding of the learned designated court, it has been indicated by this Court that "a mere statement to the effect that the show of such violence would create terror or fear in the minds of the people and none would dare to oppose them, cannot contribute offence under Section 3(1) of the Act. That may indeed be fall out of violent act but that can not be said to be the intention of the perpetrators of the crime".

Ms. Jethmalani has submitted that Birju might have intended to project himself to be a dreaded and hard core criminal whose dictate could not be lightly taken but that by itself was not sufficient to make an individual criminal act, even if perpetrated with utmost cruelty, to be an act which was likely to strike terror in the mind of the people at large or a section of people as contemplated under Section 3(1) of TADA.

Ms. Jethmalani has also contended that even if it can be assumed that Birju committed a gruesome murder by intending that such act would strike terror in the minds of the people or a section of the people so far as he was concerned, there is no material which would warrant a finding that other accused and particularly Girdhari had also intended to strike terror in the minds of the people by associating with Birju in committing the murder of Vaibhav. Girdhari had no tack record of criminal activity. There was no occasion for him to project himself as a notorious criminal to strike terror in the minds of the people. Ms. Jethmalani has submitted

that TADA is a monstrous Act and provisions of this Draconian statute must be construed very strictly so that a crime is not unjustly branded as an offence of 'terrorist activity' under Section 3(1) of TADA. A

Ms. Jethmalani has submitted that conviction of Girdhari under Section 120b. 302 read with 120B IPC and under Section 3(2)(1) of TADA is wholly unjustified and he should therefore be acquitted by allowing his appeal. B

The learned counsel appearing for the other appellants and for accused respondents Nos. 2 and 5 in the appeal preferred by State for enhancing the sentence, have supported the contentions of Ms. Jethmalani. C It has been contended by the learned counsel that the absconding accused Birju masterminded the crime. He made demands for ransom and when his demands were not met, he decided to kill Vaibhav to set an example to others as to consequences of not meeting his demand. It is Birju who took out his own belt and fastened the same on the neck of Vaibhav and D pulled the belt with force and thus strangulated Vaibhav and killed him. From the evidence adduced in the trial, it has clearly come out that it was Birju who dictated others to do certain things and they had to follow such command. Birju was a notorious criminal and it was not possible for the other accused to disobey his command. It is quite evident from the depositions that excepting Birju no one had decided or intended to kill Vaibhav E but Birju decided to kill him to project his dreaded image. Even if the accused had helped Birju in holding Vaibhav for ransom, the other accused cannot be convicted for the offence of murder or offence under Section 3(1) of TADA. They may at best, be convicted for only abetting Birju to hold Vaibhav for ransom The learned counsel have therefore submitted F that convictions of the other accused for murder with conspiracy and terrorist activities should be set side.

Mr. Tulsi, the learned Additional Solicitor General appearing for the State, has, however, refuted the contentions of Ms. Jethmalani and other G learned counsel appearing for the convicted accused. Mr. Tulsi has submitted that complicity of Girdhari for the offences for which he has been convicted with other co- accused is clearly established if the following facts, which have been convincingly proved, are taken into consideration : (a) Girdhari had already received the price of the piano from PW 3 on the previous day but on a false pretext of realising the price, he brought H

A Vaibhav to Mithun Farm House situated at a lonely place in the evening. (b) when Birju and other accused came down to the ground floor and enquired whether the boy from katyare family was brought, he answered in the affirmative by addressing Birju as 'BOSS' and Birju expressed his happiness for the good job done by Girdhari (c) when Vaibhav was B assaulted by the accused. Girdhari did no raise a voice of protest or even requested Birju and others not to resort to such activity of assaulting and torturing but told to Vaibhav that he would act as dictated by the accused by threatening that the accused were dangerous people (d) In order to ensure that PW 3 and PW 5 would not go out and shout for help he tied the hands of Praveen and slapped him when he protested against rough C dealing with Vaibhav. The friend of Praveen was similarly tied by a co-accused (e) Girdhari connected the telephone at Vaibhav's house so that demand for ransom could be made. (f) When liquor and mutton were brought by the co- accused, Girdhari, on his own, bolted the door from inside so as to ensure that no one could enter. (g) When finally Birju D declared that Vaibhav should be killed, the neck of Vaibhav was fastened with the belt and Birju started pulling the same with force to strangulate Vaibhav, and Vaibhav had attempted to extricate himself, Girdhari along with other co-accused tightly held Vaibhav in order to facilitate the killing of Vaibhav by strangulation. Girdhari held Vaibhav till he breathed his last.

E Mr. Tulsi has submitted that when PW 3 told Vaibhav and Girdhari that he had paid the price of piano on the previous day, Girdhari did not protest against such assertion. It is, therefore, quite evident that Girdhari brought Vaibhav to the said secluded place, namely, Mithun Farm House in the evening on a false pretext of realising the price of piano from PW F 3. Birju and other accused were waiting for arrival of the boy from Katyare family and when Girdhari brought Vaibhav, they all came down from the first floor and after ascertaining the identity of the boy thanked Girdhari for doing an excellent job. If the fact of bringing Vaibhav to the said secluded place on a false pretext is considered along with subsequent event that followed in the context of specific role played by Girdhari, there is no G manner of doubt that he was a party to the conspiracy to hold the boy for ransom and played his role in executing the conspiracy.

Mr. Tulsi has submitted that Girdhari knowingly became a member of an unlawful assembly and played positive role in executing the game plan H to realise ransom from the family members of Vaibhav. Mr. Tulsi has also

submitted that when Vaibhav was mercilessly tortured and assaulted and the belt of Birju was fastened around the neck of Vaibhav and Birju declared that Vaibhav would be murdered and started pulling the belt with force. Girdhari did not remain as a silent spectator but along with other co-accused he tightly held Vaibhav so that he could not extricate himself for which he was then making efforts, and he held Vaibhav tightly till he was brutally murdered. Mr. Tulsi has submitted that at the first phase of attempt to strangulate Vaibhav, Girdhari requested Birju not to pull the belt with much force otherwise Vaibhav would die immediately. Such conduct of Girdhari, according to Mr. Tulsi, may be explained by indicating that in all probability Girdhari had desired that attempt to realise ransom money should be continued by keeping Vaibhav alive. Even if it is assumed that Girdhari did not, upto that moment, intend to kill Vaibhav but when the decision was taken by Birju that Vaibhav would be killed, he shared the common intention of killing Vaibhav by playing an active role in holding Vaibhav tightly to facilitate the act of Killing.

Mr. Tulsi has submitted that whether an act is committed with an intention to strike terror in the people or a section of people or not is to be gathered from the commission of the act and surrounding circumstances. In the instant case, it has come out in evidence that Birju was a dreaded and hard core criminal. He had already extorted money from others by threatening them. Birju made a demand for large sum of money, namely, rupees two lakhs from the family members of Vaibhav who was held for ransom by Birju and other co-accused. Birju decided that Vaibhav should be killed in order to strike terror in the society by sending a clear message that the demand made by the gang of Birju was not to be stifled in any manner and if the demand was not met, the innocent person held for ransom would be killed.

Mr. Tulsi had submitted that the fact in *Niranjan Singh's* case (supra) as considered by this Court was entirely different. In *Niranjan Singh's* case, the accused really intended to gain supremacy in the underworld by killing his rivals who were also underworld dons thereby intending to cow down any other rival of the accused. In the facts of that case, both the learned designated court and this court held that the evidence adduced in the case did not warrant any finding that the accused had, in fact, intended to strike terror in the minds of people or a section of people. Mr. Tulsi has submitted that even in *Niranjan Singh's* case this court has clearly indicated

A that "It would have been a different matter, if to strike terror some innocent persons were killed. In that case. the intention would be to strike terror and the killings would be to achieve that objective" Mr. Tulsi has submitted that in the instant case an innocent boy, held for ransom was brutally killed with a clear intention to strike terror in the minds of people in that locality so that a command of the gang led by Birju was to be acceded to without B protest otherwise innocent person would be mercilessly killed. Such activity by indicating clear intention constitutes offence of terrorist activity under Section 3(1) of TADA.

In this connection, Mr. Tulsi has referred to the decision of this C Court in *Hitendra Vishnu Thakur* v. *State of Maharashtra*, [1994] 4 SCC 602. In that case, this Court has considered the import of terrorist activity' as contemplated under Section 3(1) of TADA by indicating that terrorism has not been defined under TADA nor is it possible to give a precise definition of terrorism or lay down what constitutes terrorism. It may be possible to D describe it as use of violence when its most important result is not merely physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime E capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or to terrorise people and the society and not only those directly assaulted. Mr. Tulsi has submitted that the murder of the innocent boy on failure to meet the exorbitant demand of money immediately, was com- F mitted with an avowed intention to strike terror in the society and such wanton act of killing can not but bring about shock and fear psychosis in the minds of people, thereby bringing the offence within the parameter of 'terrorist activity' under Section 3(1) of TADA.

G Mr. Tulsi has also submitted that to establish a charge of conspiracy, knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. When the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do so long as it is known that H the collaborator would put the goods unlawfully obtained to unlawful use.

For such contention. Mr. Tulsi has referred to the decision of this Court in *State of Maharashtra* v. *Som Nath Thapa and Others*, [1963] 3 SCALE 449. Mr. Tulsi has submitted that in the instant case it was clearly declared by Birju that Vaibhav would be held for ransom and as a matter of fact he was held for such ransom. Thereafter demand for ransom money was made from the family members of Vaibhav who was also tortured and compelled to speak over the phone to the members of the family to pay the money demanded by the accused. When the family members failed to meet the full amount as demanded immediately, decision to kill Vaibhav was taken and he was killed and in such act of killing each of accused had played a role. Mr. Tulsi has, therefore, submitted that the convictions of each of the accused as made by the learned designated judge are fully justified and no interference with such convictions is warranted.

Mr. Tulsi has submitted that the innocent boy was cruelly tortured and murdered by assaulting him mercilessly, kicking on his private part, forcing him to consume liquor and meat and thereafter killing him by strangulation after undressing him and giving burn injuries on some parts of his body with cigarette butt. Such extreme cruelty in committing the murder of an innocent school boy make the offence of murder as one of the rarest cases for which extreme penalty for death is wholly justified. Mr. Tulsi, however,has fairly submitted that quantum of punishment is primarily the concern of the court and is to be decided by delicately balancing the aggravating and mitigating circumstances in committing the crime by evaluating the evidence adduced in a case. He has submitted that the Birju, the absconding accused, no doubt masterminded the crime and took the leading role and also tortured the boy with extreme brutality and ultimately killed him by strangulating, the other accused also helped him in perpetrating the crime and some of them also tortured the victim by assaulting him and compelling him to consume liquor and meat. Hence, all of them also deserve exemplary punishment for the murder of an innocent boy.

After giving our careful consideration to the facts and circumstances of the case and the evidences through which we have been taken by the learned counsel appearing for the parties, it appears that a young school boy was brutally murdered after subjecting him to various physical and mental torture with utmost cruelty. The deceased Vaibhav was taken from his home by the accused No. 3 Girdhari to Mithun Farm House which was

A situated at a lonely place. It has been clearly established by the deposition of the mother of the deceased PW 2 Meena that Girdhari was a friend of the deceased and was on visiting terms with Vaibhav. It has also come out in the evidence that Girdhari negotiated for the sale of a Casio piano which belonged to Vaibhav and purchased by PW 3 who was also known to
B Girdhari. According to PW 3, he had paid the price of the said piano on the previous day when such piano was delivered by Girdhari. Even then, on a false pretext that the price of the piano would be realised by Vaibhav from PW 3 by coming to his house at Mithun Farm, Vaibhav was taken to the said Mithun Farm by Girdhari. When Girdhari told PW 3 that the owner of the said casio piano had come with him to realise the price of
C the said piano, PW 3 immediately replied that why the owner would come when he had already paid the price for the said piano to Girdhari on the previous day. Girdhari did not make any protest for such assertion about the payment of price of piano by PW 3. Such assertion by PW 3, without any protest by Girdhari, stands corroborated by the deposition of PW 5. It
D is, therefore, quite evident that Girdhari had received the price from PW 3 but on a false plea of realising the sale price of the piano, he induced the deceased Vaibhav to come with him at the Mithun Farm House.

It has also come out in the evidence that Birju and other accused were present in the first floor of the said Farm House where Vaibhav was
E taken by Girdhari. It has also been proved that immediately after the arrival of Vaibhav Birju and other accused came down from the first floor and ascertained from Girdhari as to whether the boy from Katyare family had come with him. When Girdhari answered in the affirmative by addressing Birju as 'BOSS, Birju expressed his happiness by saying that Girdhari had
F done a good job. Although it has been contended by Ms. Jethmalani that simply because Birju expressed his satisfaction for bringing Vaibhav by Girdhari to the said Mithun Farm House, it cannot be presumed that Girdhari was a member to the conspiracy to hold Vaibhav for ransom, we are not inclined to accept such submission of Ms. Jethmalani. It has already
G been indicated that when Girdhari had realised the price of the piano, there was no necessity of bringing Vaibhav for realisation of the price of the said piano from PW 3 residing in the said Mithun Farm, situated in a lonely place. It has also come out in the evidence that Birju was not residing in the first floor but at that time he was also present at Mithun Farm when Vaibhav was taken there. The satisfaction expressed by Birju by thanking
H Girdhari for doing an excellent job for bringing Vaibhav a son of Katyare

family indicates that Birju and other accused had been waiting for Girdhari who was expected to bring the only son of his parents in katyare family. It will be significant to note in this connection that Birju did not cause any enquiry as to who was the boy but he definitely caused the enquiry as to whether or not the boy brought by Girdhari was a member of the katyare family. This fact coupled with subsequent events and the role played by Girdhari in threatening Vaibhav with serious consequences if he would not listen to the dictates of Birju and his associates and his overt act in slapping Praveen and asking him to remain quiet and also tying his hands so that he could not go out of the Mithun Farm and thereafter connecting the residential telephone of Vaibhav from the telephone at Mithun Farm so that the demand for ransom could be made. In our view, clearly indicate that Girdhari had conspired that Vaibhav after being taken to Mithun farm house would be held for ransom to extort money from katyare family. It is true that Girdhari himself did not assault Vaibhav and also did not torture him like some of the co-accused, but he had taken an active role in holding Vaibhav tightly when Birju had decided that Vaibhav would be killed and started pulling with force the belt which was fastened around the neck of Vaibhav. Both PW 3 and PW 5 have specifically stated that Girdhari along with other accused held Vaibhav tightly when he was trying to free himself from the clutches of Birju, so that killing by strangulation was facilitated. Ms. Jethmalani has submitted that when initially Birju tightened his belt around the neck of Vaibhav and was pulling it, Girdhari requested Birju not to pull with force otherwise Vaibhav would die immediately, According to Ms. Jethmalani, such act on the part of Girdhari only reflects that Girdhari did not intend to kill Vaibhav. Such submission cannot, however, be accepted because of the subsequent role of Girdhari. If after making such statement Girdhari had not taken any active role in helping Birju to commit the murder of Vaibhav, the said statement of Girdhari perhaps would have indicated about his intention not to kill Vaibhav. In our view, in all probability, as submitted by Mr. Tulsi, Girdhari wanted that Vaibhav should be kept alive for some more time so that the ransom amount would be realised by keeping him detained. But when Birju after talking to the mother of Vaibhav declared that the amount as demanded by Birju was not going to be paid by the family of Vaibhav and Vaibhav should be killed so as to set an example that if the demand of Birju and his associates was not met it would invite the death and then proceeded to kill Vaibhav after undressing him and torturing him brutally, Girdhari along with other

A B C D E F G H

A accused actively assisted Birju in murdering Vaibhav by holding Vaibhav tightly till he breathed his last. It may also be indicated here that when searches were made by the members of the family to trace out Vaibhav, the family members had also gone to Girdhari's house because Vaibhav had left his home in the company of Girdhari. On enquiry at the house of Girdhari, the family members disclosed that Girdhari had left for Bombay B in the morning. The fact remains that Girdhari had not left for Bombay but he was very much in the town itself. It is quite likely that in view of the conspiracy to hold Vaibhav for ransom, Girdhari knew that he would not come back to his home at night and presumably to explain his absence from his home, he had made a false representation to the members of his family C that he would go to Bombay.

It has been clearly proved by PW 3 and PW 5 that all the accused including Girdhari had taken part in killing Vaibhav after holding him for ransom and attempting to realise money from the family of Vaibhav. From the evidence, it has transpired that Birju was a dreaded criminal. He had D extorted money from other persons on previous occasions. He also master-minded the crimes committed by the accused including Girdhari and had also taken the leading role and finally killed Vaibhav by strangulating him with his own belt. But from the evidences adduced in the case, it has also been clearly established that all the other accused including Girdhari E conspired to hold Vaibhav for ransom when he would be brought to Mithun Farm. All the said accused also actively associated with Birju in murdering Vaibhav.

A crime even if perpetrated with extreme brutality may not constitute F 'terrorist activity' within the meaning of Section 3(1) of TADA. For constituting 'terrorist activity' under Section 3(1) of TADA, the activity must be intended to strike terror in people or a section of the people or bring about other consequences referred to in said Section 3(1). Terrorist Activity is not confined to unlawful activity or crime committed against individual or individuals but it aims at bringing about terror in the minds G of people or section of people disturbing public order, public peace and tranquility , social and communal harmony, disturbing or distabilising public administration and threatening security and integrity of the country. In the instance case, the intention to strike terror in the minds of the people can be reasonably inferred because Birju declared such intention in no H uncertain term by indicating that Vaibhav should be killed in order to send

the message to the people in the locality that if the demand of Birju and his associates was not met, extreme consequence of killing of innocent person would be resorted to. In order to send such message to the society, it was decided that Vaibhav would be killed and Vaibhav was killed for giving effect to the intended threat to the people. If an innocent boy is killed only because the demand for ransom amount was not met by the family members, such killing cannot but send a shock wave and bring about terror in the minds of the people of the locality. In *Niranjan Singh's* case (supra), this Court has also indicated that killing of underworld dons who were held to be rivals of the accused for gaining supremacy in the underworld cannot be held to have been intended to strike terror in the minds of the people or a section of the people but it will assume altogether a different dimension if in order to strike terror in people or a section of people some innocent persons are killed because in that case, the intention to strike terror will achieve that objective. It is the impact of the crime and its fall cut on the society and the potentiality of such crime in producing fear in the minds of the people or a section of the people which makes a crime, a terrorist activity under Section 3(1) of TADA. In our view, in the facts of the case, the learned designated Judge has rightly convicted the accused for offences under Section 3(1) of TADA besides convicting each of them under Section 120B and Section 302 read with Section 120B of the IPC. We may, however, indicate here that in any event, for the offence of murder the accused have been convicted and sentenced to life imprisonment, it will be of little consequences so far as sentence part is concerned, if the conviction under Section 3(2) (i) of TADA is not made.

So far as the other co-accused are concerned, some of them had even tortured Vaibhav both physically and mentally apart from taking active role in holding Vaibhav for ransom and murdering him. Hence, convictions of all the accused for the aforesaid offences are fully justified and no interference is called for against such convictions.

So far as the question of quantum of punishment is concerned, it appears to us that it was Birju who had masterminded the crime and had taken the leading role in committing the crime. Although other accused who faced the trial in the absence of Birju, since absconding, are also guilty of the offences under Sections 120 B and 302 read with 120 B of the IPC and Section 3(2)(1) of TADA, in the facts of the case, it does not appear to us that their offence in murdering Vaibhav can be held to be offence

A for murder in the rarest of rare cases. The learned designated court has, therefore, rightly passed the sentence of life imprisonment against the accused. We, therefore, dismiss the appeals preferred by the convicted accused and also the appeal preferred by the State for enhancing the sentences.

B M.K. Appeals dismissed.

JASWANT SINGH AND ANR. A

v.

THE STATE OF PUNJAB

SEPTEMBER 23, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.] B

Service Law :

Appointment—Alternative appointment to Drivers who had become blind while in service—Removal from service not justified—Alternative employment—Directions issued. C

Anand Bihari v. *Rajasthan S.R.T.C.*, **[1991] 1 SCC 731, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 12832-33 of 1996. D

From the Judgment and Order dated 18.7.95 of the Punjab and Haryana High Court in C.W.P. Nos. 3020 and 3027 of 1994.

P.N. Puri for the Appellants.

H.S. Munjral for Manoj Swarup for the Respondent. E

The following Order of the Court was delivered :

Leave granted.

We have heard learned counsel for the parties. F

These appeals by special leave arise from the judgment of the Punjab and Haryana High Court made on July 18, 1995 in CWP Nos. 3020 and 3027 of 1994.

The appellants were appointed as drivers. While in service, they G became blind and, therefore, they sought for alternative appointment. Instead, they were removed from service. The controversy is no longer *res integra*. This Court in *Anand Bihari* v. *Rajasthan S.R.T.C.*, [1991] 1 SCC 731 had considered the controversy in similar circumstances and issued directions for alternative appointment as indicated in paragraph 15 of the judgment. H

"In view of the helplessness shown by the Corporation, we are constrained to evolve a scheme which, according to us, would give relief as best as it can to the workmen such as the ones involved in the present case. While evolving the scheme and giving these directions we have kept in mind that the workmen concerned are incapacitated to work only as drivers and are not rendered in capable of taking any other job either in the Corporation or outside. Secondly, the workmen are at an advanced age of their life and it would be difficult for them to get a suitable alternative employment outside. Thirdly, we are also mindful of the fact that the relief made available under the scheme should not be such as would induce the workmen to feign disability which, in the case of disability such as the present one, viz., the development of a defective eyesight, it may be easy to do. Bearing in mind all the aforesaid factors, we direct the Corporation as follows :

(i) The Corporation shall in addition to giving each of the retired workmen his retirement benefits, offer him any other alternative job which may be available and which he is eligible to perform.

(ii) In case no such alternative job is available, each of the workmen shall be paid along with his retirement benefits, an additional compensatory amounts as follows :

(a) where the employee has put in 5 years' or less than 5 yeas' service, the amount of compensation shall be equivalent to 7 days' salary per year of the balance of his service;

(b) where the employee has put in more than 5 years' but less than 10 yeas' service, the amount of compensation shall be equivalent to 15 days' salary per year of the balance of his service;

(c) where the employee has put in more than 10 years' but less than 15 years services, the amount of compensation shall be equivalent to 21 days' salary per year of the balance of his service;

(d) where the employee has put in more than 15 years' service

but less than 20 years' service, the amount of compensation shall be equivalent to one month's salary per year of the balance of his service;

(e) where the employee has put in more than 20 yeas' service, the amount of compensation shall be equivalent in two months' salary per year of the balance of his service.

The salary will mean the total monthly emoluments that the workman was drawing on the date of his retirement.

(iii) If the alternative job is not available immediately but becomes available at a later date, the Corporation may offer it to the workman provided he refunds the proportionate compensatory amount.

(iv) The option to accept either of the two reliefs, if an alternative job is offered by the Corporation, shall be that of the workman.

Under these circumstances, the appeals are allowed. The respondent is directed to consider the cases of the appellants for alternative appointment as and when vacancies arise. No costs.

G.N. Appeals allowed.

A HARJINDER SINGH SODHI

v.

STATE OF PUNJAB AND ORS.

SEPTEMBER 23, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Service Law:

Punjab Civil Services Executive Branch—Selection to—Public Service Commission and Government applying the principle of 50% marks for the record and 50% for the interview—Held: Since no written examination was conducted for consideration of the claims of candidates, the principle adopted is not arbitrary—Government rightly did not consider the case for selection for subsequent vacancies which would affect the candidates who qualified later.

C

D CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No.14737 of 1996.

From the Judgment and Order dated 29.1.96 of the Punjab & Haryana High Court in C.W.P. No. 4882 of 1995.

E Arvind Kr. Shukla and Irshad Ahmad for the Petitioner.

The following Order of the Court was delivered :

This special leave petition is filed against the order of the Division Bench of the Punjab and Haryana High Court made on January 29, 1996 F in W.P. No. 4882/95. No doubt, pursuant to the direction issued by this Court on the earlier occasion on November 25, 1994, the case of the petitioner was considered but he was not selected by the Punjab Public Service Commission to Punjab Civil Services Executive Branch. Three contentions have been raised by the learned counsel for the petitioner firstly, that when this Court had directed to consider the case of the G Petitioner vis-a-vis others, the Public Service Commission should have evaluated the respective merit and found whether the petitioner is more meritorious over those persons but that was not done. We find no force in the contention. A counter-affidavit has been filed by the Public Service Commission in the High Court in which it was pointed out that the relevant H merit of the 12th respondent vis-a- vis the petitioner was considered and

she was found to be more meritorious. The second contention was that the Public Service Commission having found him eligibile, called on the government to find whether there is an additional vacant post which would show that petitioner was more meritorious. There was an additional post vacant but the Government had given false statement that the post was not available. We find no force in the contention. Admittedly, having been sought for nomination to the posts available in 1991, merit has to be considered only among the candidates for appointment to nine posts arose in 1991. Therefore, Government have rightly did not consider the case for selection for subsequent vacancies which would effect the candidates who became qualified later. It is then contended that 50% of the marks were allotted to the interview and 50% marks were allotted for the record. Allotment of 50% for interview is arbitrary in view of the law laid down by this Court. We find no force in the contention. It is not the case that any written examination was conducted for consideration of the claims of the parties. Accordingly, the Public Service Commission and the Government have applied the principle of keeping 50% marks for the record and 50% for the interview. Under those circumstances, we do not find any illegality in the order passed by the High Court.

A B C D

The SLP is accordingly dismissed.

G.N. Petition dismissed. E

A THE AGRICULTURAL PRODUCE MARKET COMMITTEE BY ITS SECRETARY ETC.

v.

THE LAND ACQUISITION OFFICER AND ASSISTANT COMMISSIONER AND ANR. ETC.

B SEPTEMBER 23, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Land Acquisition Act, 1894 :

C

Compensation—Awarded by Land Acquisition Officer—Enhanced by Reference Court—Reduced by High Court—On appeal held, no prudent purchaser in open market would offer to purchase the land on Sq. ft. basis that too on the basis of few small sale transactions—Small extents of land would always fetch higher market value—Large extent of land would never command such high price—Such instances of sale of small extent not comparable sales—Awards and decrees of the Reference Court and High Court set aside—Matter remitted to civil court for decision afresh after giving opportunity to the parties and then to decide the market value—Additional amount under S.23 (1-A) awarded by High Court also set aside since land Acquisition Officer made the award before the Amendment Act came into force.

D

E

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12883 of 1996 Etc.

F From the Judgment and Order dated 7.10.92 of the Karnataka High Court in M.F.A. No. 837 of 1987.

K.M. Reddy, N.D.B. Raju, G. Prakbhakar and M. Veerappa for the appellants.

G Ranjit Kumar, P. Mahale and K.K. Gupta for the Respondents.

The following Order of the Court was delivered :

Leave granted.

H We have heard learned counsel on both sides.

Notification under Section 4(1) of the Land Acquisition Act, 1894 (for short, the 'Act') was published on April 14, 1977 acquiring an extent of 3 acres 34 gunthas, 1 acre 2 gunthas for extension of Agricultural Produce Marketing Committee, Gadag in Dharwad District of Karnataka State. The Land Acquisition Officer (LAO) by his award dated January 23, 1982 determine the compensation of the rate of Rs. 0.76 per sq. ft. On reference, the Civil Judge, Gadag in his award dated November 29, 1982 enhanced the compensation to Rs. 8.50 per sq. ft. On appeal under Section 54, in the impugned judgment dated October 7, 1992 and November 4, 1992 in MFA No. 837/87 and MFA No. 1962/87 respectively, the High Court of Karnataka reduced the compensation to Rs. 7 per sq. ft. Thus, these appeals by special leave.

The reference Court and the High Court relied on three sale instances of an extent of 38. 4 sq. ft. and 87.35 sq. ft. which worked out at the rate of Rs. 8 and Rs. 19.98 per sq. ft.; another sale deed of 78 sq. ft. was worked out at the rate of Rs. 31.25 per sq. ft. The question is whether the principle adopted by the courts below is correct in law? It is now settled legal position by catena of decisions of this Court that the Civil Court has to sit in the arm chair of a willing prudent purchaser and put a question to itself and answer whether such a willing prudent purchase would offer to purchase in the open market at the rate Court proposed to determine as compensation. When a total extent of 7 acres and odd is sought to be acquired no prudent purchaser in open market would offer to purchase the open land on sq. ft. basis that too on the basis of few small sale transactions and small extents would always fetch higher market value and the same will never command such price in respect of large extent. This Court had always rejected such instances as being not comparable sales. Therefore, the Civil Judge adopted feats of imagination and determined the compensation on the basis thereof. Unfortunately, the High Court also fell into the same grave error in determining the compensation on the same basis but deducted 1/3rd towards developmental charges. The principle adopted by the courts below is obviously erroneous and, therefore, it cannot be sustained on that basis. However, when we asked the learned counsel for the parties to produce the evidence, the appellant has produced certain documents indicating therein that for the same purpose they appeared to have negotiated and purchased the properties for others at the rate of Rs. 9,000 per acre and registered sale deed came to be executed. They are produced for the first time. Shri Ranjit Kumar, learned counsel

A for the respondents, contended that the documents were not placed either in the reference Court or in the High Court. He also says that location of the lands are different. Under these circumstances, we cannot decide for the first time the value of the land on the basis thereof without giving an opportunity to either of the parties for adducing evidence and without consideration thereof by the reference Court. Accordingly, the awards and
B decrees of the reference Court and that of the High Court stand set aside. The cases are remitted to the civil Court for decision afresh after giving an opportunity to the parties to adduce evidence afresh and then decide the market value according to law. Pending these appeals since the respondents have withdrawn the amount as per the interim direction passed by
C this Court, the same may not be disturbed and the amount withdrawn will be adjusted when the award was passed by the reference Court.

The appeals are accordingly disposed of. The judgment of the High Court to the extent of awarding additional amount under Section 23(1-A) of the Act stands set aside since the LAO had made his award before the
D Amendment Act came into force. No costs.

G.N. Appeals disposed of.

MADHAVKRISHNA AND ANR. A

v.

CHANDRA BHAGA AND ORS.

SEPTEMBER 23, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.] B

Code of Civil Procedure :

S. 11—Res judicata—Suit filed—Trial Court held that properties in question not family properties—Decree became final—Properties bequeathed by way of a will—Suit filed for title and possession—Decreed—High Court setting aside the decree on the ground that the other party had perfected the title by adverse possession—On appeal held, since there was no claim of hostile title against the owner of the property, the earlier decree operates as res judicata—Subsequent suit filed within 12 years from date of death of the owner—Obviously no adverse possession had been perfected against the appellant—Moreover, as against the predecessor in title of the appellant, the earlier decree operates as constructive res judicata on the principle of might and ought—Judgment and decree of High Court set aside. C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12994 of 1996. E

From the Judgment and Order dated 3.7.95 of the Madhya Pradesh High Court in S.A. No. 102 of 1989.

A.K. Chitale and Niraj Sharma for the Appellants. F

Sushil K. Jain for the Respondents.

The following Order of the Court was delivered :

Leave granted. G

This appeal by special leave arises from the judgment and order dated July 3, 1995 passed by the High Court of Madhya Pradesh Bench at Gwalior in S.A. No. 182/89.

The admitted facts are that Mansaram had two sons by name, H

A Babulal and Parasram. The appellants are the descendants through Babulal and the respondents are descendants through Parasram. In an earlier suit No. 384-A/64, the respondents pleaded in their plaint that Mansaram, Babulal and Prasaram were members of the joint family and, therefore, each of them was entitled to 1/3rd share in the suit property. B They sought for partition and a decree for partition by meets and bounds to the extent of their 1/3rd share in the said house. It was held that Mansaram was the exclusive owner of the property and that it was not a joint family property and that the respondents have no right to partition of the said property. The decree has become final. Mansaram, during his C lifetime, had executed a registered Will on March 28, 1964 bequeathing the properties to the appellants and Mansaram died on December 12, 1968. The appellants filed the suit on November 14, 1977 for declaration of title and for possession thereof. The Civil Court in Suit No. 942-A of 1984, VIIth Civil Judge, Civil II, Gwalior by order dated May 10, 1985 D decreed the suit. On appeal, the 4th Additional Judge, Gwalior upheld the same by decree and judgment dated August 21, 1989. The High Court in the second appeal while upholding that the Mansaram was the owner and had validly bequeathed it under the Will in favour of the appellants set aside the decree on the ground that the respondents had perfected that title by adverse possession. Thus, this appeal by special leave. E

It is seen that the respondents have pleaded in their written statement in para 9 as under :

F "The plaintiffs are not the exclusive owners of the suit house. The northern portion of House Municipal No. 2/7 situated at Nimbaji Ka Bag, Jiwaji Lashkar, was constructed by Parasarm and Mansaram. Parasaram had died 25 years ago. The defendants are the heirs of Parasram. The southern portion was constructed by the defendants and Mansaram together. In this way, the defendants G are residing in the suit house in the capacity of owner which fact is within the knowledge of the plaintiffs and their ancestors from the very beginning. House Municipal No. 2/7 is of the joint Hindu Family of the plaintiffs and the defendants. For this reason, the plaintiffs have no right to file the suit and recover possession and H the defendants being in actual possession of the suit land for over

12 years, the suit is barred by limitation and deserves to be dismissed." A

No doubt there is an issue raised on the plea of adverse possession and findings recorded by the course below was that the respondents had not perfected their title by adverse possession. The High Court has B reversed that finding on the ground that the respondents remained in possession for more than 12 years and thereby they perfected their title by adverse possession. The question is : whether the view of the High Court is correct in law? A reading of the pleadings would clearly indicate that they set up their own title to the property and they have remained C in possession for more than 12 years and, therefore, they sought for the suit to be dismissed on that ground. In view of the fact that Mansaram was found to be the owner in the earlier suit and he died on December 12, 1968 until then the question of adverse possession did not arise. The plea of adverse possession as against Mansaram was not pleaded. In this D case, except repeating the title already set up but which was negative in the earlier suit, namely, that they had constructed the house jointly with Mansaram, there is no specific plea of disclaiming the title of the appellants from a particular date, the hostile assertion thereof and then of setting up adverse possession from a particular date to the knowledge E of the appellants and of their acquiescence. Under these circumstances, unless the title is disclaimed and adverse possession with hostile title to that of the Mansaram and subsequently as against the appellant is pleaded and proved, the plea of adverse possession cannot be held proved. In this case, such a plea was not averred nor evidence has been adduced. The F doctrine of adverse possession would arise only when the party has set up his own adverse title disclaiming the title of the plaintiff and established that he remained exclusively in possession to the knowledge of the appellant's title hostile to their title and that the appellant had acquiesced to the same. Since there is no plea that he had claimed any G hostile title against Mansaram, the owner of the property, the earlier decree operates as *res judicata*. The present suit was filed within 12 years from the date of the demise of Mansaram; hence, it was obvious that no adverse possession has been perfected against the appellant. Moreover, as against Mansaram, the predecessor in title of the appellant, the earlier H

A decree operate as constructive *res judicata* on the principle of might and ought. The High Court, obviously, was incorrect in its finding that the respondents had perfected their title by adverse possession.

The appeal is accordingly allowed. The judgment and decree of the
B High Court stands set aside and that of the trial Court and the appellate Court stand restored. No costs.

G.N. Appeal allowed.

GUPTA STEEL INDUSTRIES

v.

M/S. JOLLY STEEL INDUSTRIES PVT. LTD. AND ANR.

SEPTEMBER 23, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Code of Civil Procedure, 1908 :

Compromise decree—Modification of—Pending the first appeal in the High Court, a compromise decree was passed whereunder respondents were required to deposit in trial court certain amounts and the appellants to hand over possession of the land and machinery to the receiver—Respondents did not deposit the amount within time—High Court accepted delayed payment by the respondents and directed the appellant to pay damages for use and occupation as may be determined by civil court—Held, as a principle of law, High Court was incorrect in interfering with and modifying the consent decree unless parties agree for the same—However, it would not be justified to interfere with the order at this distance of time—Directions given to trial court to conduct an inquiry whether the appellant was prevented by the respondents to remain in possession from working out the factory and decide the question of damages accordingly—If the amount deposited to the credit of the suit had not been invested in interest earning security, respondents would pay interest at the commercial rate from the date of deposit till date of judgment of the High Court.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 12995-13000 of 1996 Etc.

From the Judgment and Order dated 18.7.96 of the Bombay High Court in C.A. Nos. 3588/91, 1686, 3580/92 1415 and 1414 of 1993.

Bhimrao Naik and A.M. Khanwilkar for the Appellant.

Soli J. Sorabjee, J.K. Das and J. Savla for the Respondents.

The following Order of the Court was delivered :

Leave granted.

We have heard learned counsel on both sides.

A These appeals by special leave arise from the order of the Division Bench of the High Court of Bombay made on July 18, 1996 in Civil Application Nos. 3588-89/91 in FA No. 1 & 2/90.

The admitted position is that pursuant to a compromise entered into between the parties, pending the first appeal in the High Court, a com-
B promise decree came to be made by the Division Bench on 12.4.1991. Clause (2) of the Compromise Decree reads as under :

> "2. (a) The parties agree that Jolly Steel Industries Pvt. Ltd. and Jolly Torsteel Pvt. Ltd., the respondents herein and the Original
> C plaintiffs in Suit No. 446 of 1987 and Suit No. 447 of 1987, respectively, shall between them deposit in the Trial Court, a sum of Rs. 15,00,000 (Rupees Fifteen Lakhs only) in the aggregate on or before 31st May, 1991 and a further sum of Rs. 10,40,000 (Rupees Ten Lakhs and forty thousand only) on or before 29th June, 1991;
>
> D
>
> (b) These amounts are to be deposited in Suit No. 446 of 1987 in the Court of Additional Civil Judge, Senior Division, Pune, on account of over payment by the Appellants (Original defendants) as the defendants were not liable to pay and the Respondents
> E (Original plaintiffs) were not entitled to receive the same.
>
> (c) The Appellants (Original Defendants) are at liberty to withdraw the aforesaid amounts."

Admittedly, Rs.12 lakhs was deposited after expiry of the last date,
F namely, June 29, 1991, after one month. In the meanwhile, the respondents filed an application for extension of time in the trial Court. That was dismissed on the ground that it had no jurisdiction. Consequently, the application came to be filed in the High Court. Similarly under Clause 5(a) the appellants also agreed to hand over possession of the disputed land and the machinery to the receiver on or before 31st March, 1992. In view
G of the default committed by the respondent, the appellants came to file an application, on the basis of which the High Court passed an order to maintain the *status quo* on March 27, 1992. The appellants have taken out contempt proceedings against the respondents in which another Division Bench of the High Court passed an order on July 18, 1996 stating that the
H respondents have prevented the appellants from taking possession due to

the factory having been locked by the respondent. Nonetheless, no action was taken on the contempt petition. In the impugned order, the Division Bench passed an order accepting the delayed payment by the respondents and directed the appellants to pay damages for use and occupation as may be determined by the civil Court. Thus, these appeals by special leave.

As principle of law, the High Court was obviously incorrect in interfering with and modifying the consent decree unless parties agree for the same. Though it is contended by Shri Bhimrao Naik, learned senior counsel for the appellants, that the High Court has no power after the expiry of the period to extend the time for the compliance on the facts and circumstances, we do not think that we would be justified to interfere with this order at this distance of time. However, as regards the direction to make payment of compensation, we do not think that it would he appropriate at this stage to give any finding; however, the trial Court is directed to conduct an enquiry whether the appellant was prevented by the acts of the respondents to remain in possession and work out the factory. In the event of the finding being recorded that the appellant was prevented by the acts of the respondent for working out the factory, the appellant will not be liable to pay damages whatsoever. On the other hand, if it is found that the appellant had worked out the factory in view of the fact that the High Court had granted the order of *Status quo*, we think they are liable to pay @ Rs. 2,500 p.m.

It is stated by Mr. Soli J. Sorabjee, learned senior counsel for the respondents, that Rs. 12,00,000 (Rupees Twelve lakhs only) deposited by the respondents before the expiry of the period six months by way of a demand draft, has been encashed by the appellant. The appellants are denying the same. The trial Court is directed to verify whether the amount was subsisting till the date of the order passed by the High Court and whether the amount stands deposited in any interest earning security, within a period of six months from the date of receipt of this order. In case the amount was deposited to the credit of the suit and it had not been invested in interest earning security then the respondents are directed to pay interest at the commercial rate from the date of the deposit till date of the Judgment of the High Court. In case the appellant was found to have withdrawn it, the need to pay interest does not arise.

Mr. Bhimrao Naik further requests that the amount of Rs. 20,00,000

A (Rupees twenty lakhs only) standing to the credit of the suit, may be directed to be withdrawn by the appellant. We are not inclined to give any direction. After the enquiry into *mesne profits* is conducted by the trial Court and if there is any amount due to either party, the same may be worked out accordingly by way of adjustment.

B The appeals are accordingly disposed of. No costs.

R.P. Appeals disposed of.

BIHAR STATE ELECTRICITY BOARD

v.

HOTEL SATKAR PVT. LTD. AND OTHERS

SEPTEMBER 24, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Indian Electricity Act, 1910—Discontinuance of supply of electricity—Whether Electricity Board justified in making demands on the basis of contract demand in the absence of agreement between parties—Parties agree to inter-determination of dispute for the period upto February 1984 by an officer not below rank of Chief Engineer to be nominated by Government—Chief Engineer determining the amount payable on the basis of actual consumption—Held : Decision of Chief Engineer is binding on the parties.

The respondent filed a Writ Petition challenging the legality of notice u/s. 24(1) of the Indian Electricity Act 1910 for disconnection of electricity supplied to the Respondent by the appellant Board on the ground of non-payment of bills amounting to Rs. 3,01,449.30 upto March 1979 submitted by the Board to the respondent. The respondent's contention was that in the absence of any contract entered into with the appellant Board, charge could be levied only on the basis of actual consumption and not on basis of contract demand. It was further contended that the bills submitted by the appellant being disputed, no notice could have been issued u/s. 24(1) and the matter could only have been referred to be Electrical Inspector for a decision u/s. 24(2) of the Act. The High Court accepted the contentions of the respondent and quashed the notice of demand and issued a mandamus to the appellant Board not to disconnect the supply line so long as the dispute was not resolved in accordance with law.

On appeal preferred by the Board, this Court, issued certain interim directions regarding payment of bills on the basis of actual consumption. On 9th May, 1984, the appellant Board disconnected the supply of electricity as the respondent failed to pay the bills issued by the Board. On an application filed by the respondent, this Court by its order dated 28.5.1984, on the agreement and joint submissions of both parties, directed that the correct amount payable be determined by an officer, not below the rank of Chief Engineer to be nominated by Government. Subject to the

A respondent undertaking that the amount so determined shall be paid within a week and compliance therewith, this Court directed the Board to restore the supply of electricity. Such payment however was to be without prejudice to the rights and contentions raised in the appeal. The Chief Engineer nominated by the Government, after hearing the parties came to the conclusion that for the period from 1st April 1977 to February 1984, B the respondent was liable to pay a sum of Rs. 9,68,335.67 on the basis of actual consumption of energy and giving credits for amounts actually paid, the outstanding dues till February 1984 worked out to Rs. 3,84,559.33. Objections were filed by the respondent to the report of the Chief Engineer.

C Disposing of the appeal, this Court

HELD : 1. The Respondent could not seek to wriggle out of the Chief Engineer's report submitted pursuant to this Court's order dated 28.5.1984 which has been passed on the agreement of both parties, on the ground that it was without prejudice to the contentions in the appeal. [678-E-G]

D

2. Though initially the dispute related to bills sub-mitted upto 1979 on the date the Court passed the order i.e. on 28.5.1984, the controversy was in respect of the amount charged till February 1984 and not the original amount which was the subject matter of the Writ Petition. [679-B-C]

E

3. The Chief Engineer had determined the liability not on the basis of contract demand but on the basis of actual consumption. [679-D-E]

4. The fact that the dispute regarding the bills raised upto 1979 had been referred to the Chief Inspector under section 24(2) of the Electricity F Act must be considered in the light of subsequent developments and any order that may be passed by the Electrical Inspector cannot over-ride the ultimate decision taken by the Chief Engineer in determining the liability of the respondent. [679-G-H, 680-A-B]

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 921. of 1980.

From the Judgment and Order dated 7.9.79 of the Patna High Court in C.W.J.C. No. 1710 of 1979.

H Pramod Swarup and Praveen Swarup for the Appellant.

S.B. Sanyal and P.P. Singh for the Respondents. A

The Judgment of the Court was delivered by

PATTANAIK, J. This appeal is directed against the judgment of Division Bench of the Patna High Court dated 7th September, 1979 in Civil Writ Jurisdiction Case No. 1710 of 1978. B

The respondent filed the writ petition challenging the legality of the notice served by the appellant issued in exercise of power under Section 24(1) of the Indian Electricity Act, 1910 (hereinafter referred to as 'the Act') *inter alia* on the ground that a *bona fide* dispute exists between the licensee and the consumer of electric energy and as such the provisions of Section 24(1) of the Act will not apply. The case of the respondent - consumer is that the appellant has been supplying energy to the respondent hotel but the said respondent has not entered into any agreement and therefore the appellant is entitled to be charged on the basis of the actual consumption and not on the basis of any contract demand. The appellant, however, submitted bills in respect of the energy consumed on the basis of the contract demand which the respondent did not pay and for such default in payment of the amount charged under the bills the appellant issued notice of discontinuance under Section 24 of the Act. According to the respondent's case the bills submitted by the appellant being disputed, no notice could have been issued by the appellant under sub-section (1) of Section 24 and the matter can only be referred to the Electrical Inspector for a decision as provided under sub-section (2) of Section 24. The appellant disputed the aforesaid stand of the respondent and submitted that the respondent having failed to pay the bills raised by the appellant in respect of the energy consumed, the appellant was fully justified in issuing notice under Section 24(1) of the Act and there is no illegality in the same. The High Court by the impugned judgment came to the conclusion that no agreement had been entered into between the licensee, namely, the Bihar State Electricity Board and the consumer, the respondent. It further came to the conclusion that in the absence of any agreement between the parties the Board was not entitled to raise the bills on the basis of the contract demand and can only charge on the basis of the actual consumption of energy. Finally, the High Court came to the conclusion that there existed a *bona fide* dispute between the licensee and the consumer, and therefore, until that dispute is resolved by a determination made by the Electrical

C D E F G H

A Inspector under sub-section (2) of Section 24, the licensee was not entitled to issue notice of disconnection in exercise of power under sub-section (1) of Section 24 of the Act. The High Court, therefore, quashed the notice of demand and the threat of disconnection and issued a mandamus to the licensee not to disconnect the supply line so long as the dispute is not resolved in accordance with law. The High Court also further held that B until the dispute is finally resolved, the consumer would be liable to be charged on the basis of actual consumption of energy. The amount of accumulated arrear which was indicated in the notice of disconnection to the licensee was Rs. 3,01,449,30 upto March, 1979 which demand was quashed by the High Court by the impugned judgment. This Court on 1st C May, 1981 directed that the respondents shall pay the amount due on the bills submitted to them by the appellant for the consumption and future bills will be paid by the respondents from time to time on the basis of actuals and such submission of bills and payment will be without prejudice to the rights and contentions of the parties. By another Order dated 5th D May, 1982 this Court further indicated that for the time being the Board will not collect any energy charges by the application of the multiplier of the two. Thereafter, as the respondent failed to pay the bills issued by the Board, the supply of electricity to the respondent was disconnected on 9th of May, 1984. The respondent, therefore, approached this Court by filing an application for necessary direction to the Board to restore the connec- E tion of electricity supply and to injunct the Board from disconnecting the supply without permission of this Court during the pendency of the appeal, which was registered as C.M.P. No. 23405 of 1984. In the said application it was alleged that the appellant Board went on giving inflated bills based on erroneous conclusion on the basis of 315 KVA of maximum contract F demand which has already been quashed by the Patna High Court and which is contrary to the interim orders issued by this Court as stated earlier. This application was disposed of by this Court with the following direction :

> "Counsel for both the parties have jointly submitted before me that G the parties are agreeable that the correct amount payable by the respondent in the appeal by way of charges for actual consumption of electric energy as per tariff rates applicable may be determined by any officer not below the rank of Chief Engineer nominated by the Secretary, Department of Energy, Govt. of India. This suggestion appears to me just and fair which is accordingly accepted and

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the Secretary, Department of Energy will forth with nominate any one officer underhim of the rank indicated above to go into the question as to what amount, if any, remains payable upto date by the Hotel Satkar (P) Ltd. to the Bihar State Electricity Board, Patna by way of consumption charges taking into account actual consumption. Such determination will be made after hearing both the parties of their representatives at Delhi or at Patna as will be convenient to the officer nominated by the Secretary, Department of Energy. The entire process or determination of the amount should be completed within four weeks from today. The Respondent shall file an undertaking during the course of the day today to pay to the Bihar Electricity Board within one week from the date of such determination of the exact amount by the Officer nominated by the Secretary, Department of Energy. Subject to the fulfilment of this condition the Bihar State Electricity Board is hereby directed to restore forthwith the electric connection to the respondent Hotel Stakar (P) Ltd. If the respondent Hotel Stakar fails or defaults in the payment within one week of determination of the amount due, it will be open to the Bihar State Electricity Board to disconnect electric connection. The payment to be made by the Respondent in pursuance of this order will be without prejudice to the rights and contentions raised in the appeal pending before this Court."

Pursuant to the aforesaid order of this Court the Chief Engineer, Central Electricity Authority was nominated by the Secretary, Department of Power Ministry of Energy to go into the question as to what amount, if any, remains payable upto date by the respondent. The said Chief Engineer heard the parties and gave opportunity to present their respective case and after analysing all the relevant papers and documents produced before him, came to the conclusion that for the period from April 1977 to February 1984 the respondent is liable to pay the appellant a sum of Rs. 9,68,335.67 for the energy consumed on the basis of actual consumption and out of the said amount the consumer has paid a total of Rs. 5,83,776.34 and, therefore, the outstanding dues till February 1984 work out to Rs. 3,84,559.33. On behalf of the respondent an objection to the aforesaid report of the Chief Engineer has also been filed in this Court.

Mr. Pramod Swarup, learned counsel appearing for the appellant contended that in view of the agreement between the parties this Court

having passed the order on 28th May, 1984 requiring an officer not below the rank of Chief Engineer be nominated by the Secretary, Department of Energy, Govt. of India to go into the entire controversy and the said Chief Engineer having gone into the controversy and having determined the liability of the respondent, the parties are bound by the same and it is no longer necessary to examine the legality of the conclusion arrived at by the Patna High Court. Mr. Sanyal, learned senior counsel appearing for the respondent on the other hand contended that the report submitted by the said Chief Engineer is patently erroneous, and therefore could not bind the respondent for liability as found and further the judgment of the Patna High Court is unassailable. The learned counsel further contended that the very order of this Court dated 28th May, 1984 indicates that payment to be made by the respondent will be without prejudice to the rights and contentions raised in appeal pending before this Court. Mr. Sanyal, further contended that the aforesaid order passed by this Court was in relation to a fresh demand having been raised by the Board during the pendency of the appeal and disconnection of the electric supply for non-payment of the same and it would not cover the demand for the period which was the subject matter in the writ petition before the Patna High Court and which is the subject matter of appeal in this Court.

Having considered the rival submissions and having applied our mind to the relevant documents and several orders passed by this Court we are of the considered opinion that this Court was persuaded to pass the order of 28th May, 1984 on the agreement of the parties to get the controversy examined by an officer not below the rank of Chief Engineer to be nominated by the Secretary, Department of Energy, Govt. of India. The said Chief Engineer having examined the documents produced before him by the parties concerned and having determined the entire liability upto February, 1984 the respondent cannot wriggle out of the said order on the ground that the said order was without prejudice to the contentions to be raised in the appeal. As it appears, the controversy between the parties was, whether the Board was justified in raising demands on the basis of the contract demand in the absence of any agreement between the parties and the High Court had ordered that demand can be raised only as per the actual consumption of energy. It further appears from the materials on record that the meters which had been installed to record the consumption of energy were only suitable for 5 Amp. and had their dials calibrated to register consumption corresponding to loads of 100 Amp., 200 Amp., 300

Amp. or 400 Amp. It further transpires that though initially the dispute related to the bills which had been submitted upto the year 1979 but during the pendency of the appeal in this Court when fresh bills were also submitted by the Board and the respondent did not pay the same, the appellant took action of disconnection and respondent, therefore, approached this Court for necessary direction for reconnection. It is on consideration of all these materials and on the agreement between the parties this Court passed the order on 28th May, 1984 requiring the entire controversy to be re-examined by any officer not below the rank of Chief Engineer to be nominated by the Secretary, Department of Energy, Govt. of India. Thus on the date this Court passed the order on 28th May, 1984 the controversy between the parties was in respect of amount charged till February, 1984 and not the original amount which was the subject matter of the writ petition. This being the position and the matter having been duly scrutinised by an officer of the Government of India and amount having been arrived at and the parties having agreed the controversy to be re-examined by such officer it is not permissible for the respondent to contend that they are not bound by the decision thus arrived at. So far as the merits of the objections to the report of the Chief Engineer is concerned we find that the said Chief Engineer has not determined the liability on the basis of contract demand but on the basis of the actual consumption of energy. Mr. Sanyal's argument, however, was that in terms of sub-section (2) of Section 24 of the Act when the matter has been referred to the Electrical Inspector and the said Electrical Inspector has determined the dispute in favour of the respondent, such statutory determination cannot be given a go-bye unless and until it is annulled by any superior authority. He further contended that multiplying factor as applied by the Chief Engineer is not at all applicable to the facts and circumstances of the present case when there was no defect with the meter at any point of time. We find ourselves unable to accept these objections raised by Mr. Sanyal appearing for the respondent. In respect of the dispute with regard to the liability of the respondent to make the payment as per the bills raised upto 1979 no doubt had been referred to the Electrical Inspector under sub-section (2) of Section 24 of the Act. But during the pendency of the appeal in this Court when further bills were raised by the appellant and for non-payment of the same the electrical connection was disconnected and respondent challenged the same and ultimately agreed before this Court to get the entire controversy examined by an independent officer of the

A Government of India and this Court ultimately passed the order on 28th May, 1984, the entire controversy with regard to the liability of the respondent to pay for the energy consumed was before the Chef Engineer and consequently any order passed by the Electrical Inspector under sub-section (2) of Section 24 cannot override the ultimate decision taken by the Chief Engineer in determining the liability of the respondent. The objections of Mr. Sanyal, therefore cannot be sustained.

In the aforesaid premises the impugned judgment of the Patna High Court stands reversed and the liability of the respondent as determined by the Chief Engineer for the energy consumed upto February 1984 becomes C enforceable. The respondent would be liable to pay in accordance with the said determination after adjusting the amount already paid. The appeal is disposed of with the aforesaid direction. There will be no order as to costs.

R.D. Appeal disposed of.

HAFIZ WASHI AHMED

v.

KUTUBUDDIN AND ORS.

SEPTEMBER 24, 1996

[K. RAMASWAMY, K. VENKATASWAMI AND G.B. PATTANAIK, JJ.]

Administration of the Evacuee Property Act, 1950:

Ss. 28 and 46—Vesting of the property in the custodian of the evacuee property—Appellant claiming exclusive right in a portion of the land vested in the custodian of the evacuee property and the structure standing thereon on the basis of a gift—Suit for injunction by the appellant—Trial Court holding that the question whether the property was in exclusive possession of the appellant or was it not vested in the custodian of the evacuee property has to be adjudicated at the trial of the suit—In revision petition, High Court holding that by operation of ss. 28 and 46 of the Act the property in dispute stood vested in the custodian of the evacuee property and the suit is not maintainable—Held, trial court was right in its direction—Order of the High Court stands set aside and that of the trial court stands confirmed—Matter is remitted to the trial court for decision after adjudication of the question of fact whether the property exclusively belongs to the plaintiff-appellant as claimed by him.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1007 of 1980.

From the Judgment and Order dated 7.11.74 of the Patna High Court in C.R. No. 300 of 1974.

Syed Ali Ahmed, Tanweer Ahmed and Mohan Pandey for the Appellant.

D. Goburdhan for the State.

The following Order of the Court was delivered :

This appeal by special leave arises from the judgment of the High Court of Patna made on November 7, 1974 in C.R. No. 300/74. The

A appellant filed the suit for injunction restraining the respondent from interdicting with his possession and enjoyment of a portion of the property bearing plot No. 1323 and the structure standing thereon. The appellant claimed that though the plot No. 1499 bounded with Khata No. 246 in Touzi No. 3274 was declared as an evacuee property, the house in respect of which the appellant claimed is situated in a part of Khata No. 263 in B Plot No. 1499 and the same Touzi number, belongs to him. The learned Munsif had taken the view that it is required to have an adjudication at the trial of the suit whether the property bearing Khata No. 263, though situated in Plot No. 1499 of the same Touzi No. 3274 was his exclusive property or was not vested in the custodian of the evacuee property. The C objection raised by the respondent was rejected. In the revision, the High Court has taken the view that by operation of Sections 28 and 46 of the Administration of the Evacuee Property Act, 1950, the lands and the buildings stood vested in the custodian of the evacuee property and, therefore, the suit is not maintainable. When the matter had come up this D Court before grant of leave, the counsel were heard and it was stated that the house or structure on Plot No. 1499 was only a portion and there was no claim that it was evacuee property in respect portion of plot No. 1323 or any structure thereon. Therefore, this Court granted leave concerning the question of dispossession in respect of Plot No. 1499.

E In view of fact that the appellant has claimed exclusive title in respect of the property in dispute, the Court is required to go into the question whether or not it is the part of the land which was declared as evacuee property and stood vested in the custodian of the evacuee property or is appellant's exclusive property on the basis of the alleged gift said to have F been given to the appellant. This is a question of fact to be adjudicated at the trial of the suit before considering whether the land vested in the custodian of the evacuee property. If the learned District Munsif would find that the suit property is the evacuee property necessarily it stands vested in the custodian of the evacuee property and thereby the civil suit is not maintainable. On the other hand, if the finding would be that it is G not part of the evacuee property, necessarily the injunction as claimed to be considered whether or not to be granted. All facts required to be investigated at the trial.

We think that the trial Court was right in its direction. The appeal H is accordingly allowed. The order of the High Court stands set aside an

that of the trial Court stands confirmed. It is made clear that we have not expressed any opinion on merits. The issue is at large. The matter is remitted to trial Court. As the suit is pending for over two decades, the trial Court is directed to dispose of the suit within a period of six months from the date of the receipt of this order. No costs. A

R.P. Appeal allowed. B

A STATE OF MADHYA PRADESH

v.

SWAROPCHANDRA

SEPTEMBER 24, 1996

B [K. RAMASWAMY, K. VENKATASWAMI AND G.B. PATTANAIK, JJ.]

M.P. Ven Upaj Vyapar Viniyaman (Adhiniyam), 1969/Forest Act, 1927:

C *Ss. 19(1)(b), 22/s.52 and 53 (as amended by State Amendment Act 9 of 1965).*

Seizure of truck with forest produce—Confiscation of truck—Writ petition—High Court holding that State Act did not provide for confiscation of truck—Appeal—Held, ss. 52 and 52-A as amended by Amendment Act 9 of D *1965, having occupied the field in respect of confiscation of vehicles etc. and the procedure thereunder, the Legislature had not expressly provided such procedure again for confiscation under the State Act—High Court erred in holding that by operation of s. 22, the vehicle used for transportation of specified forest produces in contravention of the State Act has excluded* E *applicability of the provisions of the Central Act as amended by State Amendment Act 9 of 1965 in respect of vehicles etc.*

Constitution of India, 1950 :

Article 254 'occupied field' Forest Act, 1927, ss. 52 and 53 as amended F *by M.P. Amendment Act 9 of 1965 and M.P. Ven Upaj Vyapar Viniyam Adhiniyam, 1969—Provision for confiscation of vehicle transporting the forest produce in contravention of State Act—Held, in view of the fact that the Forest Act as amended under the State Amendment Act 9 of 1965 has already occupied the field for confiscation of the vehicles etc. it is not necessary again* G *to provide the same procedure under the State Act.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1380 of 1988.

From the Judgment and Order dated 31.3.83 of the Madhya Pradesh H High Court Court in W.P. No. 203 of 1983.

Sakesh Kumar for S.K. Agnihotri for the Appellant. A

Sunil Gupta, S.K. Gambhir and Vivek Gambhir for the Respondent.

The following Order of the Court was delivered :

This appeal by special leave arises from the judgment of the Division B Bench of the Madhya Pradesh High Court made on 31st March, 1983 in Misc. Petition No. 203 of 1983.

The admitted facts are that since the truck bearing No. 9493 was found carrying 22 logs of timber on October 4, 1983 without permit, it was seized on the said date by Divisional Forest Officer under the M.P. Ven C Upaj (Vyapar Viniyaman) Adhiniyam, 1969, No. 9 of 1969 (for short, the 'Act'). On October 5, 1983, a notice was issued to the driver of the truck whether he was willing to have the offence compounded. The truck was valued at Rs. 70,000. The driver consented to the compounding of the offence and paid a sum of Rs. 1,000. After following the prescribed D procedure, by impugned order, the truck was confiscated as the value thereof was not paid. The respondent challenged the power of seizure in the writ proceedings in the High Court. The High Court held that the Act did not provide the power of confiscation of the truck under Section 19(1)(b) of the Act. By operation of Section 22 of the Act, the Central E Forest Act, 1927 as amended by the State Amendment Act 9 of 1965 (for short, the 'Forest Act') is not applicable to the confiscation of the truck. The Divisional Forest Officer had not produced the truck before the criminal court nor did he lay any charge-sheet for prosecution of the offender. Therefore, the order of confiscation was without authority of law. Accordingly a direction was given to release the vehicle. Pending appeal F in this Court, interim direction was given to release the vehicle to the respondent on furnishing security for a sum of Rs. 25,000.

The question, therefore, is : whether the view taken by the High Court is correct in law? It is contended by Mr. Sakesh Kumar, learned G counsel for the State, that Section 15 provides for the seizure. Section 19 gives power to compound the offence including payment of the compensation for release of the vehicle seized and confiscation of specified forest produce. Section 22 excludes only the specified forest produce. Section 52 of the Forest Act read with the State Amendment Act 9 of 1965 gives power for confiscation of the vehicle or receptacle used for transportation H

A of the forest produce which includes the specified forest produce. Therefore, there is no necessity to expressly provide in the Act, the power for confiscation in Section 19 of the Act of the vehicle, tools or receptacle etc. used for transportation of the specified forest produce. Therefore, the view taken by the High Court is not correct in law.

B Mr. Sunil Gupta, learned counsel for the respondent, on the other hand, contended that the Act has occupied the field in respect of specified forest produce with power of seizure, power to levy penalty or collect compensation in lieu of prosecution, power to prosecute either for the forest offence or confiscate the forest produce. Having specified the C detailed procedure and identified the specified forest produce alone to be confiscated, by necessary implication, the Legislature intended not to take by action for confiscation of the vehicle, cart, receptacle or tools etc. used for offence of transport of forest produce. Unless it is an offence of forest produce under the Forest Act, Sections 52 to 55 of the Forest Act have no D application to the facts. Thereby, there is no express power given by the Legislature to the officer to confiscate the vehicle used for the transportation of the specified forest produce. Thus considered, the High Court was clearly right in directing the release of vehicle.

With a view to appreciate the respective contentions, it is necessary E to look into the relevant provisions under the Act. Section 2(d) defines "Forest Produce". Section 2(k) defines "specified area". Section 2(1) defines "Specified forest produce". Section 5 imposes restrictions on purchase or transport of specified forest produce except in accordance with the permit issued under the Act and the rules made thereunder. Section 15 deals with F power of entry, search, seizure of the forest produce given to the Forest Officer or vehicles used for the transport to satisfy the compliance of the Act or rules or used in contravention of the provisions of the Act or the rules made thereunder so as to ensure compliance of the provisions of the Act. The details thereof are not necessary for the purpose of the case. But Section 15(1)(iii) gives power to seize the specified forest produce in G respect of which the officer suspects that any of the provisions of the Act or rules made thereunder have been, are being or are about to be contravened, along with the receptacle or vehicle containing such produce, or the vehicle or boats, carts etc. used in carrying such produce. The provisions of Section 102 and 103 of the Code of Criminal Procedure, 1898 H (for short, the 'Repealed Code') are *pari materia* with the provisions of the

Code of Criminal Procedure, 1973 would apply for such seizure as well. Section 19(1)(b) provides that when the property, other than a specified forest produce, has been seized *is liable to confiscation*, to release the same on payment of the value thereof as estimated by such officer. The State Government may, by notification empower a Forest Officer. Under sub-section (2) of Section 19, on payment of such sum or money, or such value or both, as the case may be, to such officer, the suspected persons shall be discharged, and the property other than the specified forest produce, if any, seized, shall be released and not further proceedings shall be taken against such person or property. Resultantly, if a suspected person pays compensation of the value of the property seized other than specified forest produce the same should be released and no further prosecution would lie and the proceedings would be closed. The receptacle or vehicle, boats or carts etc. used for the carriage of the specified forest produce when seized, the necessary consequence would be, the same procedure would be followed for non-payment. What provision of law would be applied is the question? Section 22 of the Act, prior to the Amendment Acts 15/1987 and 16/1990, reads as under :

> "Nothing contained in the Indian Forest Act, 1927 (No. 16 of 1927) shall apply to specified forest produce in respect of matters for which provisions are contained in this."

In other words, if there is a specified procedure provided in the Act in respect of the specified forest produce, by operation of the provisions of Section 22 of the Act, the provisions of Forest Act stand excluded. The question is : whether the content, i.e., specified forest produce, is liable to confiscation and whether on payment of value of vehicle etc. it is liable to release and proceedings closed, whether on non-payment in respect of the container i.e. vehicle used in contravention of the provisions of the Act or rules and seized by the officer, is liable to confiscation under the provisions of the Forest Act or to be released? There is no provision for release of the vehicle by the officer except on payment of the value thereof. It is seen that when the Act was made with a view to prevent illicit transportation of the forest produce or the specified forest produce and seizure and confiscation have been provided for, could it be said that the Legislature intended to exclude the confiscation of the container, i.e., vehicle or receptacles or boats, carts or tools used for carriage of the specified forest produce, i.e., content, in contravention of the provisions of the Act? The

A answer is obviously no.

In our view, the High Court was clearly in error in reaching the conclusion that there is no such provision under the Act. It is seen that the Act occupies the field in respect of the specified matters enumerated thereunder. In view of the fact that the Forest Act, as amended under the B State Amendment Act 9 of 1965 has already occupied the field for confiscation of the vehicles etc., it is not necessary, again to provide the same procedure under the Act. In this behalf, it is relevant to look into the procedure provided in the Forest Act as amended by M.P. Act 9 of 1965. Section 52 deals with the seizure of the property liable to confiscation and C procedure thereunder. Section 52-A deals with the appeal against orders of confiscation. Section 52-B deals with revision before Court of Sessions against order of appellate authority. Section 53 gives power to the Forest Officer to release the seized property under certain circumstances enumerated thereunder. Thus, it could be seen that Section 52 as amended by the State Amendment Act 9 of 1965 and having and Section 52-A, D having occupied the field in respect of the confiscation of vehicles etc. and the procedure thereunder, the Legislature had not expressly provided such procedure again for confiscation under the Act. The High Court, therefore, was clearly in error in coming to the conclusion that by operation of Section 22 of the Act, the vehicle used for transportation of the specified forest E produce in contravention of the Act has excluded the applicability of the provisions of the Forest Act, as amended by Act 9 of 1965 in respect of vehicles etc. It was confined only to specified forest produce.

The order of the High Court stands set aside. The release order will be subject to the respondent's paying the balance amount, after deducting F the sum already secured. The sum of Rs. 25,800 be realised from the security. The balance sum will be paid within a period of six months from today. If he does not pay the amount, it would be open to the appellant to seize the vehicle, if available, or proceed against any other property or person of the respondent.

G

Accordingly, the appeal is allowed and writ petition stands dismissed. No. costs.

R.P. Appeal and Petition dismissed.

JAGANNATH KASHINATH PATIL

v.

NARAYAN BALUGAIKAR

SEPTEMBER, 24, 1996

[K. RAMASWAMY, K. VENKATASWAMI AND G.B. PATTANAIK, JJ.]

Suit—Title to property—Proof—Plaintiff respondent filed suit against defendant-appellant for removing constructions and intefering with his possession over the plot in dispute—Plaintiff claiming title as successor of his maternal grand-mother, owner of the property—Mortgagee had delivered possession of the property to the plaintiff—Appellant failing to file any proof of title except his oral testimony—Held the trial court and the High Court were right in decreeing the suit—The plaintiff/respondent having been found as a successor to the property from his maternal grand-mother and was in possession of the property delivered by the mortgagee, succession to the estate of grand-mother furnished him the title to the property and delivery of possession to him by the mortgagee reinforces his lawful title to and legal possession of the property—Respondent is entitled to have the possession retained without any inter-ference as sought for and the injunction granted by the trial Court is correct in law.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1205 of 1980.

From the Judgment and Order dated 30.1.79 of the Bombay High Court in S.A. No. 553 of 1971.

V.B. Joshi for the Appellant.

V.N. Ganpule, Makarand D. Adkar, S.D. Singh, Kumar Parimal and Ejaz Maqbool for the Respondent.

The following Order of the Court was delivered :

This appeal by special leave arises from the judgment of the single Judge of the Bombay High Court made on January 30, 1979 in Second Appeal No. 553 of 1971.

A The admitted facts are that the respondent filed suit against the appellant for removal of construction and to restrain him from interfering with his possession and enjoyment of land admeasuring 50' x 30' marked by letter "A B C & D" in the sketch (Exh. 44) claiming title to the said plot. The trial Court decreed the suit, on appeal it was reversed. B In the second appeal, the High Court set aside the decree of the appellate Court and confirmed the decree of the trial Court. Thus, this appeal by special leave.

It was not disputed during the cross-examination of the witnesses that C the property originally belongs to Rukmanibai, the maternal grand-mother of the respondent who had executed possessory mortgage in favour of one Pukharaj and the said Pukharaj had given back the mortgage deed and also delivered possession of the house to the respondent. The High Court, therefore, has taken into consideration all these factual matrix and concluded that the respondent-plaintiff has succeeded to the estate of his D grand mother and given possession to him by the mortgagee and remained in possession of the property. The appellant had constructed one room and w.c. therein for convenient enjoyment of his property. Though the appellant had set up his own title, he has not filed any proof of title except his oral testimony. The appellate Court has concluded that the mortgage does not E create any title and proper evidence should have been produced to establish title of the respondents and on that premise set aside the judgment and decree of the trial Court.

Sri Joshi, learned counsel for the appellant, contended that the view F of the appellate Court on the above facts is correct in law and the High Court was not justified to interfere with the finding of fact recorded by final Court of facts. We find no force in the contention. The plaintiff/respondent having been found as a successor to the property from his maternal grand- mother and was in possession of the property delivered G by Pukharaj, the mortgagee, succession to the estate of grand-mother furnished him the title to the property and delivery of possession to him by the mortgagee reinforces his lawful title to and legal possession of the property. The respondent is entitled to have the possession retained without any interference as sought for and the injunction granted by the H trial Court is correct in law. The High Court rightly allowed the second

appeal. The appellant is directed to remove the offending structure put up on the said property within a period of three months from today. On default, the respondent will be at liberty to have it removed in execution of the decree and recover the costs incurred therefor from the appellant. A

The appeal is accordingly dismissed. No costs. B

R.P. Appeal dismissed.

A STATE OF KARNATAKA AND ANR.

v.

UPPEGOUDA AND ORS. ETC.

SEPTEMBER 24, 1996

B [K. RAMASWAMY, K. VENKATA SWAMI AND G.B. PATTANAIK, JJ.]

Karnataka Land Reforms Act, 1961/Mysore Tenancy Act 1952 :

C *Ss. 44 and 45/5(2)—'Land holder' giving the land to tenant in 1950 for a period of 5 years—Tenant remained in possession till after 2.6.1965—Land holder claiming that the tenant had surrendered the land and entries in revenue records were made accordingly—Held, entries in revenue record are of no relevance—Mysore Tenancy Act protected possession of the tenant—On contractual tenancy coming to an end, statutory tenancy sets in operation and* D *tenant would be liable for ejectment only on proved grounds of statutory contravention—There is no order of competent authority for eviction of tenant on such grounds—The tenant who was lawfully entitled to cultivate the land personally immediately prior to coming into force of the amendment Act, but was wrongfully prevented from doing so, is entitled to registration of occupan-* E *cy u/s 45.*

P.G. Eshwarappa v. *M. Rudrappa & Ors.*, JT (1996) 8 SC 171, relied on.

Balesha Ram Khot & Ors. v. *Land Tribunal, Chikodi & Ors.*, (1978) K F KLJ 116, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1284-85 of 1980.

From the Judgment and Order dated 20.6.77 of the Karnataka High G Court in W.A. No. 196(A) and 197 of 1977.

M. Veerappa for the Appellants.

The following Order of the Court was delivered :

H We have heard learned counsel for the appellant.

Though the respondents were served with notice, they do not appear either in person or through counsel. A

These appeals by special leave arise from the judgment of the Division Bench of the Karnataka High Court made on June 20, 1977 in Writ Appeal Nos. 196A and 197 of 1977. B

The admitted facts are that Sy. No. 16 admeasuring 2 acres and 30 gunthas of land of Mattighatta village belonged to respondent No. 2 (hereinafter called, the 'Land holder'). Respondent No. 1, Puppegouda was put in possession of the land from the year 1950 as tenant under a lease for 5 years which was extended from time to time upto 1960. Renewal of C lease deed was executed in 1960 for a further period of 5 years. The Karnataka Tenancy Act, 1961 came into force protecting the tenancy rights. Land Reforms (Amendment) Act introducing Section 44 and other provisions came into force w.e.f. March 1, 1974 abolishing intermediary right of land-holders and conferment of permanent rights to the tiller of D the soil, i.e., tenant. The land-holder became entitled to compensation payable under the Act.

The question is : whether the tenant was continuing in possession as on the date the land stood vested in the State Government so as to confer title on the tenant? A Full Bench of the High Court in *Balesha Ram Khot & Ors.* v. *Land Tribunal, Chikodi & Ors.*, (1978) (k) KLJ 116 had held that E "even if the land was not in actual possession of the tenant, immediately prior to 1st March, 1974 if it was tenanted land, it vested in the State Government. That the land could not be registered in favour of the tenant who was not in actual possession immediately prior to 1st March, 1974 was F not relevant for the purpose of deciding the question as to whether the land stood vested in the State Government under Section 44 of the Act".

The tenant who was lawfully entitled to cultivate the land personally immediately prior to the commencement of the Amendment act, but was G wrongfully prevented from doing so is entitled to registration of occupancy under Section 45 of the Act.

The Act provides procedure to recover possession from an unauthorised occupant by a person entitled to such possession (Sections 41, 121 and 129). A tenant who has been wrongfully or illegally prevented from H

A cultivating the land may request the land Tribunal to defer consideration of his application till possession is restored to him and if he recovers possession, he may ask the Tribunal to proceed with his application.

In this case, in view of the fact that the tenant continued in possession of the land from January 30, 1950 upto 2nd June 1965 when the Mysore B Tenancy Act was in force, it protected his possession. Sub-section (2) of Section 5 of the Tenancy Act reads as under :

> "Notwithstanding any agreement usage or law to the contrary, no tenancy shall be terminated before the expiry of a period of five C years except on the grounds mentioned is Section 15.
>
> Provided that with the consent of the landlord any tenancy may be terminated by a tenant before the expiry of a period of five years by surrendering his interest as a tenant in favour of the landlord."

D This Court in a recent judgment in *P.G. Eshwarappa* v. *M. Rudrappa & Ors.,* JT (1996) 8 SC 171 had held that ejection of a tenant under a decree obtained prior to the coming into force of the Karnataka Land Reforms Act, 1961 had come into force was illegal and that he was entitled to restitution of the possession illegally taken away from him. It was held E that on the date when the Act had come into force and the tenant was found to be in possession of the land by operation of sub- section (1) of Section 22, with a *non-obstante* clause, the tenant shall not be evicted from the land held by him except on the grounds enumerated in clauses (a) to (e) of Section 22.

F In this case, land holder has merely asserted that the tenant had surrendered the land and entries in revenue records were received in support thereof. It is easy to have the entries made with the assistance of patwari who had exclusive custody of records. The object of the Tenancy Act is to protect the tenants to remain in possession and enjoy it subject G to compliance of the provisions of the Tenancy Act. Contracted tenancy come to an an end and statutory tenancy sets in operation and so he would be liable for ejectment only on proved grounds of statutory contravention, the entries of revenue records are self-serving. There was no order of a competent authority of eviction of tenant for contravention of the above H mentioned grounds. The proviso, though enables a landlord to obtain

possession on surrender, it must be proved strictly, as several devices would be used to circumvent the beneficial provision and illiteracy and ignorance of the tenant would be taken advantage of. There is no proof of eviction of the tenant. The stand taken by the land-holder is not supported by legal setting. The High Court committed grave error of law. Accordingly, the judgment of the High Court is not correct in law and stands set aside. A B

The appeals are allowed with no order as to costs.

R.P. Appeals allowed.

A CHATTAR SINGH AND ORS.

v.

STATE OF RAJASTHAN AND ORS.

SEPTEMBER 24, 1996

B [K. RAMASWAMY, K. VENKATASWAMI AND G.B. PATTANAIK, JJ.]

Service Law :

C *Rajasthan State and Subordinate Services (Direct Recruitment by combined competitive Examinations) Rules, 1962 :*

Rule 13 Proviso, read with Rule 7—Services of the State—21% reservation for O.B.Cs.—Recruitment for the year 1991—Recruitment by competitive examination—Preliminary examination and main examination—Number of D *candidates to be examined in main examination to be 15 times of total vacancies—Discretion of Commission to keep cut off marks upto 5% less than general candidates in case of Scheduled Caste and Scheduled Tribes if they are not in sufficient number to come up to 15 times of total number—Candidates belonging to O.B.C. category claiming the benefit of 5% cut* E *off in marks like Scheduled Caste and Scheduled Tribes—Held, 5% cut off marks in the preliminary examinations from the lower range fixed for general candidates is confined only to Schedule Caste and Scheduled Tribe candidates who could not secure total aggregate marks on par with the general candidates—The Rule expressly confines the benefit of the proviso to Scheduled Castes and Scheduled Tribes—By process of interpretation O.B.Cs.* F *cannot be declared alike the Scheduled Castes and Scheduled Tribes—Candidates belonging to OBCs are not entitled to 5% cut off marks as provided under the proviso to Rule 13—However, in view of the latest amendment the Commission would prepare and publish separate lists of candidates in each category i.e. General, OBCs, SCs, STs and physically handicapped so as to* G *make up number of candidates 15 times the vacancies and enable them to appear in the main examination.*

Constitution of India, 1950 :

Articles 14, 15(4), 16(4)—Proviso to Rule 13 of Rajasthan State and H *Subordinate Services (Direct Recruitment by Combined Competitive Ex-*

aminations) Rules, 1962 providing for Scheduled Caste and Scheduled Tribe candidates 5% cut off marks less than the general candidates in preliminary examination so as to make them eligible for main examination—Candidates belonging to OBCs also claiming the benefit of the proviso—Held, Scheduled Castes and Scheduled Tribes stand as two separate classes while OBCs stand apart—Though OBCs are socially and educationally not forward they do not suffer the same social handicaps inflicted upon Scheduled Castes and Scheduled Tribes—They are always treated dis-similar and they do not form an integral class with Dalits and Tribes for purpose of Articles 16(4) and 15(4).

Madhu Kishwar & Ors. v. *State of Bihar & Ors.*, **[1996] 5 SCC 125, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 13118 of 1996.

From the Judgment and Order dated 30.8.96 of the Rajasthan High Court in C.W.P. No. 1579 of 1996.

Sushil Kumar Jain for the Appellants.

B.D. Sharma for the Respondents.

The following Order of the Court was delivered :

Mr. B.D. Sharma, learned counsel for Public Service Commission, takes notice.

We have heard learned counsel for the parties.

Leave granted.

This appeal by special leave arises from the judgment and order of the High Court of Rajasthan, made on August 30, 1996 in Civil Writ Petition No. 1579/96. The Government of Rajasthan issued a notification on September 28, 1993 declaring reservation to the extent of 21% of the posts in various services of State of Rajasthan reserved for the OBCs which was given statutory force by Rule 8-A of the Rajasthan State and Subordinate Services (Direct Recruitment by Combined Competitive Examinations) Rules, 1962 (for short, 'the Rules') w.e.f. September 28, 1993.

A Notification dated November 21, 1994 was issued calling applications for recruitment to 275 posts in administrative and subordinate services; of them, 137 were for general candidates; 52 for OBCs.; 50 for Schedules castes; and 36 for Schedules Tribes. On April 9, 1996, preliminary examinations were conducted and results of the candidates for final examination were declared. Candidates belonging to OBCs came to challenge the vires
B of the proviso to Rule 13.

Rule 13 of the Rules prescribes the mode of conducting preliminary as well as main examination. It reads as under :

C "13. Scheme of Examination, personality and *viva-voce* test :– The Competitive Examination shall be conducted by the Commission in two stages i.e., preliminary Examination and Main Examination as per the scheme specified in Schedule-III. The marks obtained in the preliminary Examination by the candidates, who are declared qualified for admission to the Main Examination will not
D be counted for determining their final order of merit. The number of candidates to be admitted to the Main Examination will be 15 times the total approximate number of vacancies to be filled in the year in the various services and posts; provided they are otherwise eligible, but in the said range all those candidates, who secure the
E same percentage of marks as may be fixed by the Commission for any lowest range will be admitted to the Main Examination.

Provided further that if adequate number of candidates belonging to the Scheduled Castes/Scheduled Tribes are not available amongst the candidates to be declared qualified for admission to
F the Main Examination, the Commission may at their discretion keep the cut off marks upto 5 (five) per cent less the General candidates.

Candidates who obtain such minimum qualifying marks in the Main Examination as may be fixed by the Commission in their
G discretion shall be summoned by them for an interview. The Commission shall award marks to each candidate interviewed by them, having regard to their character, personality, address, physique and knowledge of Rajasthani Culture. However for selection to the Rajasthan Police Service Candidates having 'C' certificate
H of N.C.C. will be given preference. The marks so awarded shall be

added to the marks obtained in the Main Examination by each such candidate." A

Rule 7 prescribes the syllabus for examinations and the subjects in which the candidates are required to write the examination as set out in Scheduled III which deals in that behalf. B

A reading of Rule 7 read with Schedule III would indicate that the Scheme of Examination consists of :

(i) Preliminary Examination;

(ii) Main Examination. C

The Preliminary Examination will consist of two papers i.e. one Compulsory Paper and one Optional Paper, which will be objective type and would carry a maximum of 400 marks in the subjects mentioned in Sections 'A' and 'B'. The Examination is meant to serve as a screening test D only. The marks obtained in the Preliminary Examination by the candidates, who are declared qualified for admission to the Main Examination will not be counted for determining their final order of merit. The number of candidates to be admitted to the Main Examination will be 15 times the total or approximate number of vacancies to be filled in the year in various services and posts, provided they are otherwise eligible, but in the said E range all those candidates, who secure the same percentage of marks as may be fixed by the Commission for any lowest range, will be admitted to the main Examination. The proviso left that embargo and empowers the Commission to keep in its discretion the cut off marks up to 5 per cent less than the general candidates, if adequate number of candidates belonging F to the Scheduled Castes/Scheduled Tribes are not available amongst the candidates to be declared qualified for admission to the Main Examination.

When the matter had gone before the Division Bench consisting of Hon'ble B.R. Arora and J.C. Verma, JJ., the learned Judges differed on G the interpretation of the proviso to Rule 13. The learned Judge Mr. Justice B.R. Arora had held that the OBCs are not entitled to the benefit of the proviso to Rule 13 for reducing 5% of the qualifying marks secured in the preliminary Examinations so as to enable the OBCs to be 15 times the required number of posts reserved for OBCs. The learned Judge Mr. Justice J.C. Verma held that having included OBCs, SC and STs as H

A backward classes in Article 16(4), the omission of them in proviso to Rule 13 would violate Article 16(4) of the Constitution. When the matter was referred to the third Judge limited to the point of difference of opinion, the learned Judge Mr. Justice V.J. Kokje, agreed with Shri Justice Arora and held that proviso does not apply to the OBCs. Therefore, OBCs are not eligible to claim reduction of 5% of the marks secured by them in the B Preliminary Examination for enabling them to appear in the Main Examination. Thus, this appeal by special leave.

Shri Sushil Kumar Jain, learned counsel for the appellant raises three-fold contention. According to the learned counsel, the main part of C Rule 13 does not speak of any minimum marks so as to enable the candidate to appear in the Main Examination. The rule requires consideration of all those candidates who have applied for the post, if they have fulfilled basic qualifications prescribed for the posts. The qualified candidates are eligible to write Preliminary Examination conducted by Public D Service Commission. While calling the qualified candidates to the main examination, the PSC should announce results in such a way that candidates numbering 15 times the total posts earmarked for each category, are called to write the main examination. Under Rule 13 on working out the number, the Public Service Commission has to put the minimum of the marks in such a way that there would be available opportunity to the 15 E times the candidates belonging to various categories to appear for the main examination. Therefore, the prescription of the minimum of the marks and elimination of the candidates irrespective of the fact whether or not they reached 15 times the posts is an arbitrary procedure adopted by the Public Service Commission.

F

Secondly, it is contended that Article 16(4) of the Constitution does not specify whether they should belong to Scheduled Castes, Scheduled Tribes or OBCs. All are compendiously called Backward Classes. OBCs have now been declared eligible for selection under the reserved quota, having been fused for the purpose of Article 16(4); their elimination under G proviso to Rule 13 is arbitrary, violating their fundamental right to equality enshrined in Articles 14 and 16(1) and 16(4). He further contends that once the reservation has been prescribed to various categories, namely, Scheduled Castes, Scheduled Tribes & OBCs under Article 16(4) the Public Service Commission is required to prepare a separate list of the H candidates while declaring the result of the Preliminary Examination and

to call candidates numbering 15 times the total posts earmarked for them. The candidates who secure the minimum of the marks so as to be eligible to appear in the main exams should be called. The latest amendment to Rule 13 and IIIrd Schedule to Rule 7 and also to Rule 10(1) of the Rules by notification dated April 2, 1996 which indicates that the result should be declared categorywise, was relied on. So categorywise declaration is implicit in it. The High Court, therefore, was not right in its consideration of the effect of Rule 13.

Shri Badri Das Sharma, learned counsel for the Public Service Commission, contended that main part of Rule 13 is that the Public Service Commission would prescribe minimum cut off marks out of the aggregate marks secured by the general candidates in the preliminary examination conducted as per Rule 7 read with IIIrd Schedule. From among the candidates who obtain such minimum qualifying marks as may be fixed by the Commission in their discretion and candidates numbering 15 times the posts shall be summoned by them for main examinations. If more candidates should secure same cut off marks, all will be called for main examination. If the candidates are more than the 15 times posts, only that number, and all candidates who secure the minimum cut off marks, irrespective of whether it exceeded 15 times or not are to be permitted to write main examination. This interpretation is consistent with the main part of Rule 13. The operation of the proviso should be extended only in cases where the SCs and STs do not come upto the minimum of 15 times even after getting 5% of the minimum cut off marks in the lowest range. Those candidates who secured further lowest of 5% marks less than the lowest range of general candidates will be called to appear for the main examination. The Rule thus worked out by the Public Service Commission is consistent with the spirit and letter of Rule 13. He also contends that though OBCs declared eligible for the selection to the said services and had 21% of the vacancies reserved for them, the OBCs and Scheduled Castes and Scheduled Tribes are distinct classes. The Scheduled Castes and Scheduled Tribes have been dealt with separately by the Constitution. All OBCs, are not identified under the Constitution to get the benefit under Article 16(4) or 15(4); those, among them, identified by a Commission appointed by the President under Article 340 of the Constitution and accepted by the State Government or Central Government and notification in the Gazette as OBCs alone are treated as a Class but they cannot be confused with the Scheduled Castes or Scheduled Tribes who would stand

A a separate class. The learned minority Judge was not right in holding that Article 14 was violated.

As regards the third contention of Mr. Sushil Kumar Jain, Shri Sharma contends that there is no need to prepare a separate result of various categories for which the recruitment was called for. That became B necessary only as per the amended Rule under the notification dated April 2, 1996 which is only prospective. Therefore, it does not apply to the recruitment for the year 1991.

In view of the respective contentions, the first question that arises for C consideration is whether Rule 13, as interpreted by Shri Sushil Kumar Jain, is valid in law? To be fair to the learned Judges of the High Court, the first question was not addressed before the learned Judges in the manner in which it was argued before us. The thrust of the arguments before them was on proviso to Rule 13. A reading of Rule 13 would indicate that D competitive examination shall be conducted by the Public Service Commission in two stages, namely, Preliminary Examination and Main Examination. As per the Scheme specified in Rule 7 and Schedule III, preliminary examinations are conducted on the subjects as per the syllabus and aggregate marks are taken into consideration to call the candidates for main examination. Marks obtained in the preliminary examination by a candidate E would not be counted for the purpose of main examination to determine final order of merit. The number of candidates to be admitted to the main examination will be 15 times the total approximate number of vacancies to be filled in the year of recruitment in the various services and posts/vacancies notified or expected. However, the candidates would be otherwise F eligible in a particular range. All those candidates, who secure the same percentage of marks as may be fixed as the lowest range will be admitted for the main examination. It would thus be seen that Rule 13 read with Rule 7 and Schedule III does not prescribe any minimum of the lowest range of marks for calling the candidates for appearing in the main examination. What requires to be done is that the Public Service Commis- G sion has to consider the number of vacancies notified or likely to be filled in the year of recruitment for which notification was published. Then candidates who had appeared for the Preliminary Examination and qualified for main examination are to be screened by the test. The object is to eliminate unduly long list of candidates so that opportunity to sit for H main examination should be given to candidates numbering 15 times the

notified posts/vacancies in various services; in other words for every one post/vacancy there should be 15 candidates. There would be wider scope to get best of the talent by way of competition in the examination. The ultimate object is to get at least three candidates or as is prescribed, who may be called for *vivo-voce*. Therefore, the lowest range of aggregate marks as cut off for general candidates should be so worked out as to get the required number of candidates including OBCs, Schedule Castes and Scheduled Tribes. The lowest range would, therefore, be worked out in such a way that candidates numbering 15 times the notified posts/vacancies would be secured so as to afford an opportunity to the candidates to compete in the main examination.

Under the proviso, if that range has not been reached by the candidates belonging to the SCs or the STs, there may be 5% further cut off from the last range worked out for the general candidates so as to declare them as qualified for appearing in the main examination. In other words, where candidates belonging to the SCs and STs numbering 15 times the total vacancies reserved for them are not available then the Service Commission has to go down further and cut off 5% of the marks from the lowest of the range prescribed for general candidates and then declare as eligible the SC and ST candidates who secured 5% less than the lowest range fixed by P.S.C. for general candidates so as to enable them to appear for the main examination. The candidates who thus obtain qualifying marks are eligible to appear and write the main examination. The respective proportion of 1 : 3 or as may be prescribed and candidates who qualified in the main examination will be called by the Commission, in their discretion, for interview. The Commission shall award marks to each candidate interviewed by them, having regard to their character, personality, address, physique and knowledge of Rajasthani culture as is in vogue as per rules. However, for selection to the Rajasthan Police Service; candidates having 'C' Certificate of N.C.C. will be given preference. The marks so awarded shall be added to be marks obtained in the main examination by each such candidate.

In working out this procedure, if the minimum of 15 times of the candidates are identified and results declared, it would not be necessary to pick up more general/reserved candidates. It would not be necessary to declare the result of more than 15 times the total notified vacancies/posts so as to enable them to compete in the main examination. The object of

A screening test is to eliminate unduly long number of persons to appear for main examination. If more candidates are called by declaring their result in preliminary examination, the object of Rule 15 would be frustrated.

The next question is : whether the OBCs are to be treated alike B Scheduled Castes and Scheduled Tribes and given the 5% cut off marks in the Preliminary Examination under proviso to Rule 13 and whether omission thereof prohibits the right to equality envisaged in Article 14? Article 14 provides right to equality of opportunity and equal protection of law. Articles 15 and 16 are species of Article 14. Article 16(1) prohibits discrimination and gives equality of opportunity to every citizen in matters C relating to employment or appointment to any office under the State. Article 16(4) elongates the equality of opportunity to unequals by affirmative action by enjoining upon the State to make provision for reservation of appointments for posts in favour of "any backward class of citizens" which in the opinion of the State is not adequately represented in the D service under the State. It is now well settled legal position that Article 16(4) is not exception but a facet of Article 14 and 16(1). It gives power to the State to effectuate the opportunity of equality to any backward class of citizens. Article 366(24) defines 'Scheduled Castes' and Article 366(25) defines 'Scheduled Tribes'. Article 341 empowers the President in consultation with the Governor of the State specify by public notification that the E tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be. Similarly, Article 342(1) gives power to the President to specify the tribes or tribal communities which shall, for the purpose of F Constitution, be deemed to be Scheduled Castes in relation to the State or Union Territories, as the case may be. That will be subject to the law made by the Parliament under clause (2) of Article 341 and 342(2) thereof. The expression "Backward Classes" has not been defined under the Constitution but the President has been empowered to appoint as Commission to investigate into the conditions of backward classes for recommendation G with regard to steps to be taken by the Union or the State Governments to remove difficulties and to improve their conditions. Commissions like Kelcker Commission and Mandal Commission were appointed by the President who identified the backward classes. On identification of social and educational backwardness and acceptance thereof by the appropriate H Government, the President or the Governor of the State Government

would issue public notification extending the benefits to improve their conditions. Until such a notification is published, Backward Classes are not entitled to the benefit of reservation under Article 15(4) or 16(4) of the Constitution. Articles 14 and 16 read with the Preamble gives equality of opportunity in matters relating to employment or appointment to any office under the State. By hierarchical unequal social status and denial of opportunities and facilities due to untouchability, a practice against Scheduled Castes and Scheduled Tribes living in the forest area require protective measures to remove handicaps and disavantages suffered by the members belonging to the Scheduled Castes and Scheduled Tribes so as to enable them to compete for selection. The appearance of injustice is denial of justice. In *Madhu Kishwar & Ors.* v. *State of Bihar & Ors.*, [1996] 5 SCC 125, para 38, it was laid down that law is the manifestation of principles of justice. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual should exercise his rights to his best advantage to achieve excellence, subject to the protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society stands. If the law is to adept itself to the needs of the changing society, it must be flexible and adaptable. The constitutional objective of socio-economic democracy cannot be realised unless all sections of the society participate in the State power equally irrespective of their caste, community, race, religion and sex. All discriminations in sharing the State power made on these grounds and those discriminations are to be removed by positive measures. The concept of equality, therefore, requires that law should be adaptable to meet equality. Article 38 mandates to minimise inequality in income and to eliminate the inequality in status, facilities and opportunities not only among the individual but also among the groups of people to secure to them adequate means to improve excellence in all walks of life. Article 46 directs the State to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and to protect them from social injustice and all forms of exploitation. Equal protection class, therefore, requires affirmative action for those placed unequally. Equality for unequals is secured by treating them une-

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A qually. Affirmative action or positive discrimination, therefore, is inbuilt in equality of opportunity in status enshrined in Articles 14 and 16(1) of the Constitution. Therefore, Scheduled Castes and Scheduled Tribes stand as two separate classes while OBCs stand apart.

B The State had evolved the principle of reservation to an office of the State or post as an affirmative action to accord socio-economic justice guaranteed in the Preamble of the Constitution; the fundamental rights and the directive principles which are the trinity of the Constitution to remove social education and economic backwardness as a constitutional policy to accord equality of opportunity, social status or dignity of person as is C enjoined in Articles 14, 15, 16, 21, 38, 39, 39A, 46 etc. Article 335 enjoins the State to take the claims of Dalits and Tribes into consideration for appointment to an office/post in the services of the State consistently with efficiency of administration. Though OBCs are socially and educationally not forwards, they do not suffer the same social handicaps inflicted upon D Scheduled Castes and Scheduled Tribes. Articles 15(2) and 17 furnish historical and social dissatisfaction inflicted on them. The object of reservation for the Scheduled Castes and Scheduled Tribes is to bring them into the mainstream of national life, while the objective in respect of the backward classes is to remove their social and educational handicaps. Therefore, they are always treated dis-similar and they do not form an E integrated class with Dalits and Tribes for the purpose of Article 16(4) or 15(4). Obviously, therefore, proviso to Rule 13 confines the 5% further cut off marks in the preliminary examination from the lowest range fixed for general candidates. So, it is confined only to the Scheduled Castes and Scheduled Tribes who could not secure total aggregate marks on par with F the general candidates. The Rule expressly confines the benefit of the proviso to Scheduled Castes and Scheduled Tribes. By process of interpretation, OBCs. cannot be declared alike the Scheduled Castes and Scheduled Tribes. Therefore, the contention that the doctrine of fusing "any backward class of citizen" in Article 16(4), further classification of Scheduled Castes and Scheduled Tribes and OBCs. as distinct classes for G the purpose of reservation and omission to extend the same benefits to OBCs violates Article 14 is devoid of substance. If the logic of equality, as propounded by minority Judge is given acceptance, logically they are also entitled to reservation of seats in the House of the People or in the Legislative Assemblies of States, though confined to Scheduled Tribes and H Scheduled Castes, by operation of Article 334(a) of the Constitution with

a *non obstante* clause engrafted therein. The founding fathers of the Constitution, having been alive to the dissimilarities of the socio-economic and educational conditions of the Scheduled Castes and Scheduled Tribes and other segments of the society have given them separate treatment in the Constitution. The Constitution has not expressly provided such benefits to the OBCs except by way of specific orders and public notifications by the appropriate Government. It would, therefore, be illogical and unrealistic to think that omission to provide same benefits to OBCs, as was provided to Scheduled Castes and Scheduled Tribes, was void under Article 16(1) and 14 of the Constitution.

Accordingly we are of the view that the OBCs. are not entitled to 5% cut off marks in the priliminary examination as provided under proviso to Rule 13.

As regards the preparation of separate list of General, OBCs, SCs STs and physically handicapped, in view of the fact that the latest amendment has been made explicit what was implicit in Rule 13, we are of the view that separate lists are required to be published by the Service Commission in respect of the candidates in the respective categories so as to make up number of candidates 15 times the notified or anticipated posts/vacancies so as to enable them to appear in the main examination. It is true that the amendment is prospective in operation. However, it does not detract from the efficiency of Rule 13 originally made. In view of the above, the Public Service Commission is directed to call all those candidates that constitute 15 times the posts/vacancies notified or anticipated in terms of the above declaration of law so as to enable them to appear in the main examination.

The appeal is accordingly disposed of. No costs.

R.P. Appeal disposed of.

A GULZARI LAL AGARWAL

v.

ACCOUNTS OFFICER

SEPTEMBER 25, 1996

B [KULDIP SINGH AND S.P. KURDUKAR, JJ.]

Consumer Protection Act, 1986 : Ss. 2(jj), 9(b), 13, 14(2), & (2A), 16, 18 and 29A.

C *State Commission—President not appointed or President not discharging his function—Order passed by State Commission in the absence of President—Validity of—Held Seniormost member shall discharge function of President until a person is appointed to fill such vacancy or the President becomes functional in terms of sub-rules (9) and (10) of R. 6—Thus State Commission will not be rendered non-functional for want of the Presi-*
D *dent—Hence order passed by the State Commission in the absence of the President is neither illegal nor void—West Bengal Consumer Protection Rules, 1987, Rule 6(9) and (10).*

Section 14—Scope of—Held : Consumer Forum has no jurisdiction or
E *power to pass any interim order pending disposal of original complaint filed before it :*

Interpretation of Statutes :

Harmonious construction—Held : Every provision in the Act should be
F *construed harmoniously with a view to promoting the object and spirit of the Act as long as no violence is caused to the plain language of the provision.*

The appellant filed a complaint before the District Forum as regards inflated telephone bills. The District Forum passed an interim order directing the respondent not to disconnect the telephone connection on the
G **condition that the appellant deposited a sum of Rs. 4,000. The appellant complied with the said order.**

Being aggrieved the respondent filed an appeal before the State Commission, which was dismissed. Thereafter the respondent preferred a Revision Petition under Section 21 of the Consumer Protection Act, 1986
H **before the National Commission, and it allowed the appeal on the ground**

that the order passed by the State Commission was illegal and void being contrary to Section 14(2A) read with Section 18 of the Act since the State Commission was not having the President at the relevant time when the order was passed. The National Commission further held that the District Forum had no jurisdiction or power to pass any interim order pending disposal of an original complaint before it.

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On behalf of the appellant it was contended that the National Commission erroneously concluded that in the absence of the President of the State Commission the other two members had no jurisdiction to deal with the disputes/appeal filed before the State Commission; and that Section 2(jj), 14(2- A), 18-A and 29-A of the Act and Rule 6(9) and (10) of the West Bengal Consumer Protection Rules, 1987 should be construed harmoniously with a view to promoting the object and spirit of the Act.

C

Allowing the appeal in part, this Court

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HELD : 1.1. Every provision in an Act needs to be construed harmoniously with a view to promoting the object and spirit of the Act but while doing so, no violence would be done to the plain language used in the Section. It is this principle that needs to be made applicable while construing the provision of 14(2) and (2-A) of the Consumer Protection Act, 1986 read with Rule 6(9) and (10) of the West Bengal Consumer Protection Rules, 1987. If sub-sections (2) and (2-A) of Section 14 are read with Section 29-A of the Act and sub-rules (9) and (10) of Rule 6, it would be quite clear that it could never be the intention of the Legislature to stall or render the State Commission non-functional in the absence of the President either having not been appointed in time due to some valid reasons or if the President is on leave due to certain reasons beyond his control. Sub-section (2) of Section 14 is a presumptuous provision where the President of the State Commission is functional but it would not be correct to say that if the President of the State Commission is non-functional because of one or the other reason, the State Commission would stop its functioning and wait till the President is appointed. The only harmonious construction that could be given to sub-sections (2) and (2-A) of Section 14 read with sub-rules (9) and (10) of Rule 6 is that as and when the President of the State Commission is functional, he alongwith at least one member sitting together shall conduct the proceeding but where the President being non-functional, sub-rules (9) and (10) of Rule 6 will govern

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the proceedings. Sub-rule (9) provides that where any such vacancy occurs in the office of the President of the State Commission, the senior most (in order of appointment) member holding office for the time being, shall discharge the function of the President until a person is appointed to fill such vacancy. This sub-rule is made with a view to make the State Commission functional in the absence of the President and not to allow the State Commission to be rendered non-functional for want of the President. [716-E-H, 717-A-C]

1.2. Since the validity of sub-rules (9) and (10) of Rule 6 was never challenged, the above view is taken on the premise that there is no challenge to the validity of the Rules and they hold the filed. [717-D-E]

1.3. Having regard to the Composition of the District Forum and the State Commission, it is more appropriate and desirable to make the appointment of the President of the District Forum and the State Commission without any delay since the complaints under the Act involved fairly large stakes which require a judicial approach. [717-F]

2. The consumer forum has no jurisdiction or power to pass any interim order pending disposal of original complaint filed before it. [718-A]

Morgan Stanely Mutual Fund **v.** *Kartik Das,* **(1994) II CPJ 7 SC, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 33 of 1996.

From the Judgment and Order dated 17.5.95 of the Delhi High Court in R.P. No. 393 of 1994.

S.K. Bhattacharya for the Appellant.

S.S. Sabarwal and S.K. Sinha for the Respondent.

The Judgment of the Court was delivered by

S.P. KURDUKAR, J. This appeal is directed against the order dated May 17, 1995, in Revision Petition No. 393/94 passed by the National Consumer Disputes Redressal Commission, New Delhi (hereinafter referred to as 'National Commission'). It is not disputed that at the relevant

time when the order dated 21.1.1994 was passed by the State Commission constituted under the Consumer Protection Act, 1986 (for short 'the Act') was not having the President since he had retired. No new President was appointed on the said State Commission. A complaint was filed by the appellant herein before the District Forum, Bankura as regards inflated telephone bills. A prayer was made in the said complaint that the respondent herein be directed not to disconnect the telephone connection. An order was made by the District Forum in favour of the appellant directing the respondent not to disconnect the telephone connection and maintain the telephone line on condition that the appellant deposits a sum of Rs. 4,000. The appellant accordingly complied with the said order. It appears that despite this order, the telephone connection of the appellant was disconnected on 30.11.1993. The appellant thereafter moved an application for restoration and it is common premise that on 25.5.1994, the telephone connection was restored. The complaint as regards the excessive bill of Rs. 13,896 is still pending.

2. The respondent not being satisfied with the order passed by the District Forum preferred an appeal to the State Commission and the State Commission vide its order dated 21.1.1994 dismissed the said appeal, holding that the order passed by the District Forum was in consonance with the circular dated 15.10.1992 issued by the Telephone Department. Being aggrieved by the order passed by the State Commission, the respondent preferred Revision petition under Section 21 of the Act before the National Commission. The National Commission after hearing the parties vide its impugned order dated May 17, 1995 allowed the Revision Petition primarily on the ground of jurisdiction. The National Commission has held as under :

> "The impugned order passed by the State Commission, West Bengal has to be held illegal and void on the ground that the said order has been passed only by two Members of the State Commission without the junction of the President, which is manifestly contrary to mandatory provisions contained in Section 14(2A) read with Section 18 of the Consumer Protection Act, 1986. The said order of the State Commission is hereby set aside. We also set aside the interlocutory orders dated October 14, 1993 (Annexure 'B') and October 19, 1993 (Annexure 'C') passed by the District Forum, Bankura as being totally devoid of jurisdiction in the light

A of the recent pronouncement of the Hon'ble Supreme Court in *Morgan Stanely Mutual Fund* v. *Kartik Das,* (1994) II C.P.J. (S.C. 7) where it has been categorically laid down that a Consumer Forum has no jurisdiction or power to pass any interim order pending disposal of an original complaint filed before it".

B 3. It is this order passed by the National Commission which is the subject matter of challenge in this appeal.

4. Before we deal with the rival contentions raised before us, it would be appropriate to set out relevant provisions of the Act and Rules. Clause C (jj) of Section 2 defines : *member* :–

> "member" includes the President and a member of the National Commission or a State Commission or a District Forum, as the case may be."

D 5. Section 9 in Chapter III refers to the Consumer Disputes Redressal Agencies and the relevant provisions are as under :

> 9. "*Establishment of Consumer Disputes Redressal Agencies* :
>
> There shall be established for the purposes of this Act, the E following agencies, namely, :–
>
> (a) xxxx xxxx xxxx
>
> (b) a Consumer Disputes Redressal Commission to be known as the "State Commission" established by the State Government in the F State by notification; and
>
> (c) xxxx xxxx xxxx"

6. Section 13 prescribes the procedure to be followed on receipt of a complaint.

G 7. Section 14 enumerates the items on which the District Forum shall issue an order to the opposite party directing him to do one or more of the following things set out in sub-sections 14(1)(a) to 14(1)(i).

8. The controversy relates to Section 14(2) and 14(2A) which are H reproduced herein below :

14(2)-Every proceeding referred to in sub-section (1) shall be conducted by the President of the District Forum and at least one member thereof sitting together :

Provided that where the member, for any reason, is unable to conduct the proceeding till it is completed, the President and the other members shall conduct such proceeding *de novo*.

14(2A)-Every order made by the District Forum under sub-section (1) shall be signed by its President and the members or members who conducted the proceeding :

Provided that where the proceeding is conducted by the President and one member and they differ on any point or points, they shall state the point or points on which they differ and refer the same to the other member for hearing on such point or points and the opinion of the majority shall be the order of the District Forum.

9. Section 16 deals with the Composition of the State Commission and it reads as under :

"*16, Composition of the State Commission* : (1) Each State Commission shall consist of -

(a) a person who is or has been a Judge of the High Court, appointed by the State Government, who shall be its President :

(Provided that no appointment under this clause shall be made except after consultation with Chief Justice of the High Court;)

(b)	xxxx	xxxx	xxxx
(2)	xxxx	xxxx	xxxx
(3)	xxxx	xxxx	xxxx
(4)	xxxx	xxxx	xxxx"

10. Section 18 deals with the Procedure applicable to State Commissions and it reads thus :

"18. Procedure applicable to State Commission - The provisions of

A Sections 12, 13 and 14 and the rules made thereunder for the disposal of complaints by the District Forum shall, with such modifications as may be necessary, be applicable to the disposal of disputes by the State Commission".

11. Chapter IV of the Act deals with Miscellaneous Provisions. B Section 29 refers to the power to remove difficulties. Section 29A is the relevant provision which reads as under :

"29A - Vacancies or defects in appointment not to invalidate orders - No act or proceeding of the District Forum, the State C Commission or the National Commission shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof".

12. Sub-section (2) of Section 30 deals with the Powers of State Government to make rules. Sub-section (2) of Section 30 reads as under :

D "The State Government may, by notification, make rules for carrying out the provisions contained in (clause (b) of sub-section (2) and sub-section (4) of Section 7), sub-section (3) of Section 10, Clause (c) of sub-section (1) of Section 13, sub-section (3) of section 14, section 15 and sub-section (2) of section 16."

E Note :– Bracketed portion was incorporated by Act No. 34 of 1991, with effect from 15.6.1991.

13. The State Government in exercise of powers conferred by sub-section (2) of Section 30 of the Act framed the Rules which are called the F West Bengal Consumer Protection Rules, 1987. These rules were brought into force immediately. Sub-rules (9) and (10) of Rule 6 are relevant and they read as under :

6(9)-Where any such vacancy occurs in the office of the President G of the State Commission the seniormost (in order of appointment) member holding office for time being, shall discharge the functions of the President until a person appointed to fill such vacancy assumes the office of the President of the State Commission.

6(10)-When the President of the State Commission is unable to H discharge his functions owing to absence, illness or any other cause,

the senior most (in order of appointment) member of the State Commission shall discharge the function of the President until the day on which the President resumes the charge of the functions. A

14. In the light of the aforesaid provisions, it is necessary to consider as to whether the impugned order passed by the National Commission is legal. The National Commission held that the order passed by the State Commission is manifestly contrary to a mandatory provision contained in Section 14(2A) read with Section 18 of the Act as it was made by two other members of the said Commission without the 'junction' of the the President. B C

15. Mr. Bhattacharya, the learned counsel appearing for the appellant urged that the impugned order is unsustainable. He urged that the National Commission has totally overlooked certain provisions contained in the Act and the Rules erroneously came to the conclusion that in the absence of the President of the State Commission being functional, the other two members have no jurisdiction to deal with the disputes/appeal filed before the State Commission. In support of the submission, Learned Counsel drew our attention to the definition of a Member contained in Clause (jj) of Section 2 and Sections 14(2A), 18A and 29A. Reliance was also placed on sub-rules (9) and (10) of Rule 6. Mr. Bhattacharya urged that all these provisions will have to be construed harmoniously with a view to promote the object and spirit of the Act. The impugned order passed by the National Commission is unsustainable and the same be quashed and set aside. D E

16. Mr. S.K. Sabharwal, the learned Advocate appearing for the respondent supported the impugned order and urged that sub- sections (2) and (2A) of Section 14 in unmistakable terms indicate that every proceeding referred to in sub-section (1) shall be conducted by the *President of the District Forum and at least one member thereof sitting together.* Sub-section (2A) read with section 18 require that every order made by the District Forum/State Commission under sub-section (1) shall be signed by its President and the Member or Members who conducted the proceedings. In view of this mandatory provision, counsel urged that any proceeding conducted before the State Commission in the absence of the President would be non-est. He further urged that admittedly when the State Commission passed the orders on October 14, 1993 and October 19, 1993, the F G H

A President of the State Commission was not appointed by the State Government and, therefore, these orders were rightly held to be illegal.

17. After giving careful thought to the rival contentions raised before us, we are of the considered opinion that the relevant provisions which we B have quoted hereinabove will have to be construed harmoniously to promote the cause of the consumers under the Act. As indicated earlier, the definition of member includes the President and a member of the District Forum/State Commission. It is true that sub-section (2) of Section 14 read with section 18 require that every proceeding referred to under sub-section (1) shall be conducted by the President of the district C Forum/State Commission and atleast one member thereof sitting together. Section 2A is consequential in the sense that every order made by the State Commission under sub-section (1) shall be signed by its President and the Member of Members who conducted the proceeding. The procedure applicable to the District Forum is made applicable to the State Commission D vide Section 18 with such modifications as may be necessary. Plain reading of sub-sections (2) and (2A) of Section 14 may support the view taken by the National Commission but if these provisions are read with Section 29A of the Act and sub rules (9) and (10) of Rule 6, it would be quite clear that it could never be the intention of the legislature to stall or render the State Commission non-functional in the absence of the President either E having not been appointed in time due to some valid reasons or if the President is on leave due to certain reasons beyond his control. Sub-section (2) and (2A) of Section 14 and Section 18A of the Act were brought into force with effect from 18.6.1993 whereas Section 12A was made applicable from 15.6.1991. The Rules of 1987 were brought into force immediately. F The complaint before the District Forum by the appellant was filed on 14.10.1993. Therefore, all these amended provisions were very much brought into force when the complaint was filed. Sub- section (2) of section 14 is a presumptuous provision where the President of the State Commission is functional but it would not be correct to say that if the President of the State Commission is non-functional because of one or the other reason, G the State Commission would stop its functioning and wait till the President is appointed. In order to avoid such a situation, the State Government has framed the Rules and sub-rules (9) and (10) quoted hereinabove unmistakably provide answer to such a situation as in the present case. The only harmonious construction that could be given to sub-section (2) and (2A) H of section 14 read with sub-rules (9) and (10) is that as and when the

President of the State Commission is functional, he alongwith atleast one Member sitting together shall conduct the proceeding but where the President being non- functional, sub-rules (9) and (10) of Rule 6 will govern the proceedings. Sub rule (9) provides that where any such vacancy occurs in the office of the President of the State Commission, the senior most (in order of appointment) member holding office for the time being, shall discharge the function of the President until a person is appointed to fill such vacancy. This sub-rule is made with a view to make the State Commission functional in the absence of the President and not to allow the State Commission to be rendered non-functional for want of the President. It is well settled that every provision in the Act needs to be construed harmoniously with a view to promote the object and spirit of the Act but while doing so, no violence would be done to the plain language used in the section. It is this principle that needs to be made applicable while construing the provision of sub- sections (2) and (2A) of Section 14 read with sub-rules (9) and (10).

18. The West Bengal Government has framed the Rules in the year 1987 and the object of sub-rules (9) and (10) of Rule 6 appears to us to keep the State Commission functional in the absence of the President. From the impugned order it appears that the attention of the National Commission was not drawn to sub-rules (9) and (10) of Rule 6. It also appears from the record that the validity of sub-rules (9) and (10) of Rule 6 was never challenged. It is made clear that the view which we have taken in this appeal is on the premise that there is no challenge to the validity of the Rules and they hold the field.

19. Having regard to the composition of the District Forum and the State Commission, it is more appropriate and desirable to make the appointment of the President of the District Forum and the State Commission without any delay since the complaints under the Act involved fairly large stakes which require a judicial approach.

20. In view of above discussion, we are of the opinion that the National Commission committed an error in holding that order passed by the two members of the State Commission without the junction of the President is "illegal and void". Impugned order to that extent is set aside.

21. Coming to the second part of the order as regards the grant of interim order, in our opinion, the National Commission was right in apply-

A ing the law laid down by this Court in *Morgan Stanely Mutual Fund* v. *Kartick Das,* (1994) II CPJ 7 (SC). The consumer forum has no jurisdiction or power to pass any interim order pending disposal of original complaint filed before it. The impugned order in this behalf is confirmed.

22. In the result, the appeal is partly allowed. The impugned order
B holding that the order passed by the State Commission, West Bengal is illegal and void is quashed and set aside. But, however, the rest of the impugned order is confirmed. In the circumstances, parties are directed to bear their own costs.

C V.S.S. Appeal partly allowed.

COMMON CAUSE, A REGISTERED SOCIETY

v.

UNION OF INDIA AND OTHERS

SEPTEMBER 25, 1996

[KULDIP SINGH AND FAIZAN UDDIN, JJ.]

Constitution of India—Articles 14, 32 and 298—Minister—Allotment of retail outlets for petroleum products (Petrol Pumps) under discretionary quota—All the allotments made in favour of persons related to politicians/members of Oil Selection Boards/Officials in the Ministry—Allotments made in a cloistered and stereotyped manner without any guidelines or criteria—Held, arbitrary, discriminatory, malafide and illegal—Exercise of discretion must be transparent, just, fair and non-arbitrary in accordance with set norms, criteria or guidelines—Minister holds position of a trustee of public property in his charge and discretion—Arbitrary allotments of such property amount to breach of trust—Hence, liable to be set aside—Directions issued.

Constitution of India—Article 14—Allotments of petrol pumps by a Minister under his discretionary quota in an arbitrary manner—No guidelines followed—Held, Article 14 permits a reasonable classification having a rational nexus to the object sought to be achieved—It does not permit to pick and choose arbitrarily out of several persons falling in the category.

Public Servant—Discharge of functions—Malafide acts—Personal liability of—Held, is in a position of a trustee in respect of public property under his charge and discretion—Must distribute in a bonafide manner and in conformity with law—Should be held personally responsible for his malafide acts in the discharge of his functions as Public Servant for he betrays the trust reposed in him by the people under the Constitution.

The then Minister of State for Petroleum and Natural Gas, while exercising the powers of the Central Government made the allotments of retail outlets for petroleum products (petrol pumps) to fifteen persons under the discretionary quota.

Two of the allottees were the sons of politicians and seven of the allottees were related to the members of Oil Selection Boards (OSBs) or the members themselves and remaining six allottees were the relatives of

A the officials in the Petroleum Ministry. All the fifteen allottees mentioned in their applications for the allotment the reasons for compassionate grounds for allotment, such as unemployment, poverty etc. among other grounds. There was no advertisement issued to invite the applications. The applications were not received officially by the Ministry. There was no
B receipt entry on any of the applications. Nobody had the knowledge of number of petrol pumps available for allotment. No criteria was fixed, no guidelines were kept in view. The applicants seemed to have approached the Minister directly.

The petitioner had originally challenged the corruption in various
C fields of public life in a public interest petition. During its pendency, when the petitioner brought to the notice of the court a news item appeared in a national daily regarding the allotments of retail outlets for petroleum products (petrol pumps) by the Minister of State for Petroleum and Natural Gas, exercising the powers of Central Government, the Court took
D cognisance of it and a notice was issued on the petition.

Disposing of the writ petition, this Court

HELD : 1.1. The orders allotting the petrol pumps to fifteen persons are quashed. Allocation and allotment of petrol pumps/retail outlets
E dealerships by the Government of India, Indian Oil Corporation Ltd. or any other Corporation in their names shall stand cancelled with immediate effect. Those who have commissioned the petrol pumps and are running the same shall stop operating the petrol pumps and running the said business. The Government of India/Oil Corporation (concerned) shall take
F over the petrol pump premises from these persons. The Oil Corporation shall have the market value of the site and the construction thereon, determined in a fair and just manner. Each of the commissioned petrol pumps so taken over shall be disposed of by way of public auction. The original allottee may also participate in the auction. The petrol pump shall be allotted to the highest bidder. Out of the auction money the value of the
G site and the construction as determined by the Oil Corporation shall be paid to the original allottee and the remaining money shall go to the Government coffer. Prosecution proceedings shall be initiated against the Minister for criminal breach of trust or any other offence under law and also he shall be made liable to pay damages for his *malafide* action in
H allotting petrol pumps to the fifteen persons. [754-C-H, 755-A-C]

1.2 The allotments have been made by the Minister either on the ground of poverty or unemployment. Assuming that the allottees belong to either of these two categories then how the Minister has selected them out of millions of poor and unemployed in this country. All the 15 allotments have been made by the Minister in a stereotyped manner. The applications have not been officially received by the Petroleum Ministry. There is no receipt-entry on any of the applications. The applicants seem to have approached the Minister directly. None of the applications have been dealt with in any of the branches of the Ministry. There is nothing on the record to indicate that the Minister kept any criteria in view while making the allotments. How the applicants came to know about the availability of the petrol pumps is not known. No advertisement was made to invite the applications. There is nothing on the record to show that any other method of inviting applications was adopted. There is no indication in the allotment orders or anywhere in the record to show that the Minister kept any guidelines in view while making these allotments. None knew how many petrol pumps were available for allotment. The allotments have been made in a cloistered manner. The petrol pumps public property have been doled out in a wholly arbitrary and discriminatory manner. [750-D]

1.3. It is obvious that the Minister was personally interested in making allotments of petrol pumps in favour of all these 15 persons. He made allotments in favour of relations of his personal staff under the influence of the staff on wholly extraneous considerations. The allotments to the sons of Ministers were only to oblige the Ministers. The allotments to the members of the Oil Selection Boards and their/Chairman's relations have been done to influence them and to have favours from them. All these allotments are wholly arbitrary, nepotistic and are motivated by extraneous considerations. [751-B-C]

2.1. Capt. Satish Sharma acted in a wholly biased manner in as much as he unfairly regarded with favour the cases of 15 allottees before him. There is no justification whatsoever to pick up these persons except that they happen to have won the favour of the Minister on *malafide* considerations. The exercise of discretion was wholly arbitrary. Such a discretionary power which is capable of being exercised arbitrarily is not permitted by Article 14 of the Constitution of India. While Article 14 permits a reasonable classification having a rational nexus to the objective sought to be achieved, it does not permit the power to pick and choose arbitrarily

out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice among the members belonging to the same class or category is based on reason, fair play and non-arbitrariness. It is essential to lay down as a matter of policy as to how preferences would be assigned between two persons falling in the same category. Lack of transparency in the system promotes nepotism and arbitrariness. It is absolutely essential that the entire system should be transparent right from the stage of calling for the applications upto the stage of passing the orders of allotment. The names of the allottees, the orders and the reasons for allotment should be available for public knowledge and scrutiny. [751-G, 752-D-G]

2.2. The Minister has acted in utter violation of the law laid down by this court and has also infracted Article 14 of the Constitution of India. A Minister in the Central Government is in a position of a trustee in respect of the public property under his charge and discretion. The Petrol pumps/gas are a kind of wealth which the Government must distribute in a *bonafide* manner and in conformity with law. The Minister has betrayed the trust reposed in him by the people under the Constitution. It is high time that the public servants should be held personally responsible for their *malafide* acts in the discharge of their functions as public servants. The Minister shall show-cause within two weeks why he should not be made liable to pay damages for his *malafide* action in allotting petrol pumps to the fifteen persons. [753-D-E]

3.1. The allocation/allotment of the petrol pumps/retail outlet dealerships by the Government of India, Indian Oil Corporation Ltd., in the names of fifteen persons shall stand cancelled with immediate effect. The Government of India/Oil Corporation shall take over within ten days the petrol pump premises from those persons who have not commissioned them. As far those commissioned the petrol pumps, they shall stop operating them. Each of the commissioned petrol pumps, taken over by the Government/Oil Corporation shall be disposed of by way of public auction. [754-G]

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 26 of 1995.

(Under Article 32 of the Constitution of India.)

H.D. Shourie, In-person for the Petitioner.

Kapil Sibal for the petitioner in W.P. No. 26/95. A

Prashant Bhushan for Jayant Bhushan for the Petitioner in T.P. (C) No. 127/96.

Altaf Ahmed, Additional Solicitor General, P.P. Malhotra, H.L. Agrawal, K.N. Bhatt, A.B. Rohtagi, S.C. Maheshwari, B.K. Prasad, Navin Prakash, Krishan Mahajan, T.V. Ratnam, D.S. Mehra, Anil Katiyar, K.K. Gupta, Sanjeev Bansal, Pramod Dayal, A.K. Mahajan, Ms. Sandhya Goswami, Ms. H.Wahi, Ms. N. Mukherjee, T. Sridharan, Tufail A. Khan, Rajiv Nanda, A.K. Goel, Mrs. Sheela Goel, K. Swamy, (Piyush), Ved Prakash, Goodwill Indeevar and Rajesh K. Sharma, for (Pradeep Kumar and Gulam Ahmed Mia), D.M. Nargolkar, D.K. Sinha, K.R. Nagaraja, S.K. Agnihotri, S.A. Syed, G.K. Bansal, Ms. Kirti Misra, N.K. Sharma, S. Kulshreshthra, Pramod Dayal, S.K. Bisaria, J.M. Khanna and S.M. Ashri for the Respondents. B C

The Judgment of the Court was delivered by D

KULDIP SINGH, J. The allotments of retail outlets for petroleum products (the petrol pumps), by Capt. Satish Sharma, Minister of State for Petroleum & Natural Gas, exercising the powers of the Central Government, have been challenged in this public interest petition under Article 32 of the Constitution of India. The petition as originally filed was directed against corruption in various fields of public life. Mr. H.D. Shourie - Director "Common Cause" - appearing in person, invited this Court's attention to a news item dated August 11, 1995, on the front page of "Indian Express" under the caption "In Satish Sharma's Reign, Petrol and Patronage Flow Together". The solicitor general who was present in Court, took notice of the news item and stated that he would have the matter examined in the Ministry concerned and file an affidavit giving Ministry's response to the news item. The news item, inter alia, stated as under : E F

> "Not only the relatives of most of the officials working for Captain Satish Sharma but even his own driver and the driver of his additional Private Secretary have been allotted a petrol pump and a gas agency respectively. G
>
> The wives of two clerks and a stenographer in the Ministry have similarly been allotted petrol pumps. Some of these allotments H

A have been made from the discretionary quota with the Petroleum Minister while others have been made through an ostensibly objective selection process undertaken by the Oil Selection Boards (OSBs). ..... A Mr. Poda Rajshekar, a relative of Mr. G. Gurusharan, Private Secretary to Captain Sharma has been allotted a petrol pump at Banjara Hills, Hyderabad out of the Minister's B discretionary quota taking pity on the "financial circumstances that the family finds itself in."

Ms. Madhuri Safaya, a relation of the Additional Private Secretary to the Minister, Mr. V.N. Safaya has been allotted a C petrol pump "on compassionate grounds" from the discretionary quota.

Another relation of Mr. Safaya, Mrs. Monica Malla, has also been a beneficiary of a petrol pump, courtesy Captain Sharma.

D Mrs. Daya Rani, wife of Mr. Hari Ram Verma, personal assistant to the Additional PS to the Minister, Mr. V.N. Safaya, was allotted a petrol pump out of the discretionary quota..... Mrs. Vijaya Nair, wife of Mr. D.V. Pillai, another additional Private secretary to Captain Sharma has been allotted a petrol pump on E the grounds that the "applicant is a young unemployed (woman) with the responsibility of looking after a large family" – hardly a unique classification in this country of 900 million. ..... The Chairman of the OSB for Uttar Pradesh is Justice S.H. Abidi (retd.) who lives at 50, Dariyabad, Allahabad. It so happens that Syed Shaukat Hasan Abidi, his son, living at 50/1, Daryabad, F Allahabad put in a request and was allotted a petrol pump on "compassionate grounds" at Fatehpur (80 km Mile Stone) in Uttar Pradesh.

A former MLA, Mr. Shiv Balak Passi, from Rae Bareli is a G member of the OSB for Madhya Pradesh and his job is to allot petrol pumps to others. He too had put in a request for the discretionary allotment of a petrol pump. Lo and behold, on "compassionate grounds" he was immediately allotted a petrol pump on the Rae Bareli-Lucknow Road in UP.

H Mr. Krishna Swaroop, a Congress party worker and resident

of 18/7, Punjabi Bagh Extension, New Delhi-26 is a member of the OSB for Delhi and Chandigarh. His son, Mr. Pradeep Kumar, was favoured with a petrol pump by the Minister on the grounds that "the applicant is a young man from Scheduled Caste Community with no source of regular income. The case deserves sympathetic consideration. Therefore, a retail Outlet for MS-HSD in the Union Territory of Delhi is allotted to Shri Pradeep Kumar, r/o 18/7, Punjabi Bagh Extension, New Delhi-110026."

Mr. Ghulam Ahmed Mir is also a member of the OSB for Delhi and Chandigarh. An application was made by him for the allotment of a petrol pump. And the Minister passed the order on "compassionate grounds" from his discretionary quota.

Similarly the following OSB members, either themselves or their next of kin, have been allotted petrol pumps : Mr. K.L. Sharma (Member OSB, West Bengal), Mr. R.S. Nautiyal (Member OSB, Punjab), and Mr. Harbanslal Gupta (member OSB, Haryana). Two relations of Mrs. Satya Bahen (Member OSB, Haryana) were allotted a gas agency in Etah and a petrol pump at Itmadpur near Tundla, respectively.

The son of a former Home Minister who is currently a Cabinet Minister; the son of a present Minister of State from the North East; the brother-in-law of a former Janata Dal office-bearer and now a Congressman from Eastern UP; the son of a Dalit leader who was with the late H.N. Bahuguna at one time and is now in the Congress; the son of a former Congress Councillor of the Municipal Corporation of Delhi; the wife of an ex-Congress MP from the UP hills; the wife of a prominent Dalit leader in the Opposition and several political hacks from Amethi are among the hundreds who have been gifted petrol pumps or gas agencies during the tenure of Captain Satish Sharma as the Petroleum Minister."

Mr. Vijay L. Kelkar, Secretary in the Ministry of Petroleum and Natural Gas, Government of India, filed affidavit dated October 9, 1995. The relevant part of the affidavit is as under :—

"It may be relevant to point out here that under the approved

A Guidelines, the Hon'ble Minister personally decides each case and the order is a speaking order. An unsuccessful applicant in the same category is entitled to have a copy of the order if a request is made for it.

B The specific instances referred to in the Indian Express newspaper dated 11th August, 1995, appear to relate to allotments made prior to the order of this Hon'ble Court dated 31st March, 1995. However, those allotments also were made on merits of each case as appearing from the applications which contained the circumstances under which the request was made. For the cases C mentioned in the newspaper report, it is denied that the allotments were made on account of alleged relationship and/or any improper motive. The relationship of an applicant with any official of the Ministry has not been a relevant factor in considering discretionary allotment on compassionate grounds. Should this Hon'ble Court direct, the relevant files shall be produced for persual for this D Hon'ble Court."

This Court examined the affidavit of Mr. Kelkar on October 13, 1995 and passed the following order :

E "Mr. Vijay L. Kelkar, Secretary in the Ministry of Petroleum and Natural Gas, Government of India has filed an affidavit pursuant to this Court's order dated August 11, 1995. Without commenting on the affidavit, we direct the Ministry of Petroleum and Natural Gas to file a further and better affidavit within two weeks with F reference to the specific instances."

Pursuant to the above quoted order Mr. Kelkar filed affidavit dated October 28, 1995. The relevant part of the affidavit is as under :

G "That the Deponent, in compliance with the said order dated 13th October, 1995, has ascertained the position regarding the allegations that allottees under the discretionary quota are related to various political leaders, officials and members of Oil Selection Boards (OSBs) or the members themselves. Such allottees can be grouped under three different categories and allegation regarding H each one of them is answered and/or dealt with as follows :

A. ALLOTTEES SAID TO BE RELATED TO POLITICIANS. A

(i) With reference to the allegation that the son of a former Home Minister, who is currently a Cabinet Minister, has been allotted a Petrol Pump,..... It is correct that the allottee, Shri Sarbjot Singh is the son of the said Shri Buta Singh. B

(ii) with reference to the allegation that the son of a present Minister of State from North-East, has been allotted a petrol pump. ..... It is correct that the said allottee is the son of a Minister namely, Shri K. Hollahan, in the State Government of Nagaland. C

B. ALLOTTEES SAID TO BE RELATED TO THE MEMBERS OF OSBs OR THE MEMBERS THEMSELVES.

(i) With reference to the allegation that Shri Syed Shaukat Hasan Abidi is the son of Justice S.H. Abidi (retd.), who is the Chairman D of the OSB for Uttar Pradesh..... Discretionary allotment was made in favour of the applicant in January, 1995. It is correct that the said allottee is the son of the said Chairman of OSB for U.P.

(ii) With reference to the allegation that Shri Shiv Balak Passi is E a member of the OSB for Madhya Pradesh and he is himself an allottee from discretionary quota, ... A discretionary allotment was sanctioned in his favour in December, 1994. It is correct that Shri Passi is a Member of the OSB for Madhya Pradesh.

(iii) With reference to the allegation that the allottee, Shri Pradeep F Kumar, is the son of Shri Krishna Swaroop who is a Member of OSB for Delhi and Chandigarh, ... It is correct that the allottee is the son of the said Shri Krishna Swaroop.

(iv) With reference to the allegation that the allottee, Shri Ghulam G Ahmad Mir is a Member of OSB for Delhi and Chandigarh, ... It is correct that Shri Mir is a Member of the OSB, Delhi.

(v) With reference to the allegation that Shri R.S. Nautiyal, who is a Member of OSB, Punjab, has been allotted a Petrol Pump either in his own name or in the name of his next of kin, it is stated H

A that Smt. Neena Nautiyal, made an application in August, 1994. ..... It is correct that Smt. Neena Nautiyal is the wife of Shri R.S. Nautiyal, a Member of OSB, Punjab.

(vi) With reference to the allegation that a Petrol Pump was allotted to Shri Justice Harbanslal Gupta, a Member of OSB, Haryana, in his own name or in the name of his next of kin, it is stated that one Shri Arun K. Gupta made an application in September, 1993, ... It is correct that Shri Arun Kumar Gupta is the son of Shri Justice Harbanslal Gupta (Retd.) who is the Chairman of the OSB, Haryana.

(vii) With reference to the allegation that two relations of Smt. Satya Bahin, a Member of the OSB for Haryana, were allotted a Gas Agency and a Petrol Pump, it is stated that one Shri Dharmesh Kumar made an application in September, 1994, ... Along with his application there was a recommendation for discretionary allotment from Smt. Satya Bahin, Ex Member of Parliament..... It is stated that the relationship of Shri Dharmesh Kumar with Smt. Satya Bahin is not known.

C. ALLOTTEES WHO ARE SAID TO BE RELATED TO VARIOUS OFFICIALS IN THE MINISTRY.

(i) The allegation is that relatives of the Drivers of the Minister and of the Additional Private Secretary to the Minister have been allotted Petrol Pump and Gas Agency. It has been found that one Smt. Leela Devi, wife of late Shri Kishan Swaroop made an application that her husband was brutally murdered on 25.1.1994, she had no means of income to support her family and that she belonged to a Scheduled Caste. A retail outlet was allotted to Smt. Leela Devi on compassionate grounds from the discretionary quota in May, 1995. It has now been ascertained that Smt. Leela Devi happens to be a relative of a Driver of the Minister.

(ii) With reference to the allegation that Shri Poda Rajasekhar is a relative of Shri G. Gurucharan, Private Secretary to the Minister of State, it is stated that an application was made by Shri Rajasek-

har in July, 1993, ... A retail Outlet Dealership for MS-HSD at Secunderabad was sanctioned to Shri Rajasekhar on compassionate grounds. It has been ascertained that the said allottee is a relative of the said Shri Gurucharan. A

(iii) With reference to the allegation that Ms. Madhuri Safaya is a relative of Shri B.N. Safaya, Additional Private Secretary to the Minister, to whom a Retail Outlet has been allotted,..... It has been ascertained that she is related to the said Shri B.N. Safaya. B

(iv) With reference to the allegation that Ms. Monica Malla is also related to Shri B.N. Safaya, ... A Retail Outlet was allotted to her in November, 1994 out of discretionary quota. It has been ascertained that the said Ms. Malla is related to the wife of Shri B.N. Safaya. C

(v) With reference to the allegation that the allottee, Mrs. Daya Rani, is the wife of Shri H.R. Verma, Personal Assistant to the Additional Private Secretary to the Minister, Shri B.N. Safaya,..... It is correct that the allottee is the wife of Shri H.R. Verma. D

(vi) With reference to the allegation that Mrs. Vijaya Nair, who has been sanctioned a Retail Outlet, is that the wife of Shri D.V. Pillai, Additional Private Secretary to the Minister of State,..... It has been ascertained that Mrs. Vijaya Nair is not the wife of Shri D.V. Pillai, but she is related to him". E

This Court issued notice to all the 15 persons mentioned in the affidavit of Mr. Kelkar. Thirteen, out of them filed affidavits justifying the allotments of petrol pumps made to them by Capt. Satish Sharma. F

This Court by the order dated December 6, 1995 directed that "the minister may, if he so desires, file an affidavit in this regard". Capt. Satish Sharma has, however, not chosen to file any affidavit.

G

The relevant records have been produced before us.

Mr. Sarbjot Singh in his application mentioned that he was a commerce graduate belonging to the scheduled caste community. He completed graduation in the year 1991. He was interested in sports (shooting) and won awards at the national level. Because of his pre-occupation with H

A the sports, he had average academic record and as a consequence could not get admission to any professional courses. He further stated that in spite of his best efforts he could not get any suitable employment for supporting himself and as such a petrol pump in Delhi be allotted to him. The file does not indicate how the application was entertained. There is
B no receipt/entry on the application. No official/officer has examined the application before the Minister's order. There is nothing to show that any guide-lines were kept in view. The application, obviously, was given by hand to the Minister, who readily passed the allotment order. There is a separate sheet containing the order of the Minister which is as under :

C "Office of the Minister of State
(P&NG)

****

D Placed below is an application of Shri Sarbjot Singh for allotment of a retail Outlet dealership for MS-HSD. The applicant has stated that he is a graduate without any suitable employment.

Submitted for kind orders.

E Sd/-
(G. Gurucharan)
PS to MOS (P&NG)
31/1

Minister

F I have examined the application carefully. The applicant is an unemployed graduate and a sportsman who participated in national level competitions. The applicant has not been able to get any gainful employment and is unable to support himself. The case deserves sympathetic consideration. Therefore, a Retail Outlet for
G MS-HSD in the National Capital Territory of Delhi is allotted to Shri Sarbjot Singh r/o 16, Ashok Road, New Delhi.

Orders may be issued accordingly.

H Sd/-
(Capt. Satish Sharma)

Minister of State" A

Thereafter, the matter was processed in the office and in one of the notes by an officer of the Ministry it was mentioned that the allottee " is son of Shri Buta Singh, Minister of Civil Supplies". No one took notice of this fact and the allotment order was issued.

B

In all the cases discussed hereinafter the pattern of allotment and the method and procedure followed was the same as in *Sarbjot Singh's* case.

Benjamin K. Hollohon stated in his application that he was an educated unemployed youth and also active party worker in the area. He C belonged to scheduled tribe from Nagaland State. He requested in the application for allotment of petrol pump in Purana Bazar area of Dimapur town, Nagaland. The application was sent to Captain Satish Sharma by Mr. K. Hollohon, Minister, Industry and Commerce, Nagaland (Father of the applicant) along with a d.o. letter which reads as under :

D

"My dear Capt. Satish Sharma,

Kindly recall our discussions of date regarding allotment of one retail outlet petrol pump (petrol & Diesel) in the Purana Bazar area of Dimapur town in Nagaland in favour of my son Benjamin E K. Hollohon.

As you may be aware. that Benjamin's application and my earlier note in this regard are available in your Ministry. However, I am again enclosing copy of Benjamin's application for your perusal. F

It was indeed pleasure to note that you have very kindly agreed to allot one petrol pump in favour of my son Shri Benjamin after careful and due consideration as a *very very special case*. I shall personally grateful if you could kindly use your good offices in G issuing suitable instructions to the officials concerned in your Ministry so that the possible bureaucratic delays are averted and the permit is issued without much loss of time. Therefore, I request your personal intervention in the matter. I hope, you can very well appreciate may predicament in the matter and am sure, you will do the needful." H

A The allotment order by the Minister is reproduced hereunder :

"Office of the Minister of State
(P&NG)
****

B Placed below is an application of Shri Benjamin K. Hollohon for allotment of a retail outlet for MS-HSD. The applicant has stated that he is an unemployed youth belonging to Scheduled Tribe community. The applicant has also stated he no regular source of income.

C Submitted for kind orders.

Sd/-
(G. Gurucharan)
PS to MOS (P&NG)
D 10/10/94

Minister

I have examined the application carefully. The applicant is an educated unemployed Scheduled Tribe youth without regular E source of livelihood. The case deserves sympathetic consideration. Therefore, a Retail Outlet for MS-HSD at Purana Bazar, Dimapur, Nagaland is allotted to Shri Benjamin K. Hollohon r/o Durgapathar, 2 1/2 Mile, Dimapur, Nagaland, Pin Code -797 112.

F Necessary orders may be issued accordingly.

Sd/
(Capt. Satish Sharma)
Minister of State"

G Syed Hasan Shaukat abidi stated in his application as under :

"Respectfully I beg to state that I was born at Allahabad, Uttar Pradesh on 20th December, 1965. I have passed B.Sc. and completed my Master's in Business Administration (specialisation in Marketing). In spite of my best efforts. I have not been able to get H a suitable employment. I have no other source of income and am

entirely dependent on my aged parents for survival. My inability to find employment and settle down is causing anxiety to my parents. Hence, I would most humbly request you Sir, to grant me a petrol pump at Fatehpur (80 Km. Mile Stone) in Uttar Pradesh."

The Minister passed the following order :

"Office of the Minister of State
(P&NG)
****

Placed below is an application of Shri Syed Hasan Shaukat Abidi for allotment of a Retail Outlet for MS-HSD. The applicant has stated that he has completed his post Graduation in Business Administration and has not been able to find any suitable employment. The applicant has also stated that he has no other source of income and is dependent on his parents for sustenance.

Submitted for kind orders.

Sd/-
(G. Gurucharan)
PS to MOS (P&NG)
16/12

Minister

I have examined the application carefully. The applicant is a professional qualified man without any regular employment. The applicant has no other source of income and is entirely dependent on his parents for support and sustenance. The case deserves sympathetic consideration. Therefore, a Retail Outlet for MS-HSD at Fatehpur (80 Km. Mile Stone) in Uttar Pradesh is allotted to Shri Syed Hasan Shaukat Abidi r/o 50/1, Dariyabad, Allahabad, Uttar Pradesh.

Orders may be issued accordingly.

Sd/-
(Capt. Satish Sharma)
Minister of State"

A It is obvious from Mr. Kelkar's affidavit that Syed Hasan Shaukat Abidi is the son of justice S.H. Abidi (retd.) who was at that time Chairman of the Oil Selection Board for Uttar Pradesh.

Shiv Balak Passi applied for allotment of petrol pump in the following words :

B

> "I wish to state the following about myself. I am a social worker who has devoted his entire life for the upliftment of downtrodden, underprivileged. I have been in the forefront in all activities involving eradication of social evils. But Sir, I am growing old and am not in a position to support myself. Therefore, Sir, with due respect I request you to grant me a petrol pump at Lucknow-Rae Bareilley Road, Uttar Pradesh."

C

The Minister passed the following order :

D

"Office of the Minister of State
(P&NG)
****

Placed below is an application of Shri Shiv Balak Passi for allotment of a Retail Outlet for MS-HSD. The applicant has stated that he is a social worker without any regular source of income.

E

Submitted for kind orders.

Sd-
(G. Gurucharan)
PS to MOS (P&NG)
21/12

F

Minister

I have examined the application carefully. The applicant is an educated unemployed who has no regular source of income due to his serious pre occupation for the upliftment of downtrodden. The case deserves sympathetic consideration. Therefore, a Retail Outlet for MS-HSDA at Rae Bareilley Lucknow Road, UP, is allotted to Shri Shiv Balak Passi, Ex-MLA, District Rae Bareilley, Uttar Pradesh.

G

H

Orders may be issued accordingly.

Sd/-
(Capt. Satish Sharma)
Minister of State"

Mr. Kelkar's affidavit shows that Shiv Balak Passi himself is a member of the Oil Selection Board for Madhya Pradesh.

Pradeep Kumar, in his application stated that he was an unemployed young man from Scheduled Caste category with enterprise, initiative and determination and was very keen to make petrol pump dealership as his business. He indicated that he was appearing in B.A. (final). He further stated that his father has been an active congress worker since 1952 and has held many important positions in the organisation as well as on the executive side. The following order was made by the Minister :

"Office of the Minister of State
(P&NG)
****

Placed below is an application of Shri Pradeep Kumar for allotment of Retail Outlet for MS-HSD. The applicant has stated that he belongs to a Scheduled Caste Community and also an unemployed Under Graduate.

For kind orders.

Sd/-
(G. Gurucharan)
PS to MOS (P&NG)
20/6/94

Minister

I have examined the application carefully. The applicant is a young man from Scheduled Caste Community with no source of regular income. The case deserves sympathetic consideration. Therefore, a Retail Outlet for MS-HSD in the Union Territory of Delhi is allotted to Shri Pradeep Kumar, r/o 18/7, Punjabi Bagh Extension, New Delhi - 110 026.

A Orders may be issued accordingly.

Sd/-
(Capt. Satish Sharma)
Minister of State"

B While processing the order, noting on the file is as under :

"Reference notes on pre-page. MOS has sanctioned a retail outlet dealership at Delhi on compassionate grounds to Shri Pradeep Kumar who is belonging to SC Category. He has stated in his aplication vide p-1/c that he is appearing in BA final year. He is
C son of Shri Krishna Swaroop member of OSB, Delhi. The allowances and perks of the Member of OSB exceed Rs. 5000 per month.

2. However, in view of the sanction by MOS, file is put up with a fair sanction letter for signature, if approved.

D

Sd/-
27/6

Allotment of a dealership to the son of a sitting Member of the OSB will invite adverse criticism. It will also create an avoidable
E *impression that govt. is influencing the OSB in this manner.*

Sd/-
27.6.94"

F Mr. Kelkar's affidavit shows that Shri Pradeep Kumar is the son of Shri Krishan Swaroop, who was at that time member of Oil Selection Board for Delhi and Chandigarh. Pradeep Kumar in his application did not mention this fact. The file indicates that despite the noting to the effect that the allotment would invite adverse criticism, the allotment orders were issued.

G Mr. Ghulam Ahmad Mir in his application, addressed to the Minister, stated that due to the escalation of extremist violence in Kashmir Valley in the recent years, it has become difficult to lead a normal life in the Valley and as such earning a livelihood has become very difficult. He further stated that the family was forced to sell some of the ancestral property. He added that despite being a Graduate he could not get regular
H employment. He also stated in the application that he was an active social

worker and had been promoting the nationalist cause in the Valley due to which he and his family have been facing constant threats from the militants and extremists in the Valley. The Minister passed the following order on the application:

"Office of the Minister of State for (P&NG)

****

Placed below is an application of Shri Ghulam Ahmad Mir for allotment of a Retail Outlet for MS-HSD. The applicant has stated that he is a graduate from Jammu and Kashmir, who has been forced to migrate from Kashmir as result of militant threats to his life. The applicant has also stated that he has no regular source of income for maintaining his family.

Submitted for kind orders.

Sd/-
(G. Gurucharan)
PS to MOS (P&NG)
23/9

Minister

I have examined the application carefully. The applicant is an unemployed graduate from Jammu & Kashmir trying to settle in Delhi. The applicant is an active social worker espousing the nationalist cause for which reason he and his family have become a target of militants in the Valley. The applicant has not been able to obtain any suitable employment in Delhi and is finding it difficult to support his immediate family in Delhi and his parents in Jammu. The case deserves sympathetic consideration. Therefore an 'A' site Retail Outlet for MS-HSD in the Union Territory of Delhi is allotted to Shri Ghulam Ahmad Mir S/o Haji Gh. Hassan Mir r/o 71-D, Pocket 'K', Sheikh Sarai-II, New Delhi.

Orders may be issued accordingly.

Sd/-
(Capt. Satish Sharma)
Minister of State"

While processing the Minister's order the office put up the following note on the file :

"Ref. note above. Sh. G.A. Mir, has furnished his bio-data vide pp 3-4/C. In his bio-data he has stated that he working as Member of Oil Selection Board and is getting Rs. 250 per sitting of the Board as honorarium.

2. In view of the above, file is put up for orders whether we may issue sanction to Oil Company for award of RO dealership, to Sh. G.A. Mir as per sanction letter placed below if approved."

Despite the above quoted note, the allotment order was issued. Mr. Kelkar in his affidavit has stated that Shri Mir is a member of the Oil Selection Board for Delhi and Chandigarh.

Mrs. Neena Nautiyal addressed a three lined application to the Minister. It is stated in the application that she is an educated lady and belong to Scheduled Tribe Community. Being an unemployed, she wished to instal a retail outlet in the Union Territory. Delhi. The following order was passed by the Minister :

"Office of the Minister of State (P&NG)

****

Placed below is an application of Smt. Neena Nautiyal for allotment of a Retail Outlet for MS-HSD. The applicant has stated that is an educated unemployed lady from Scheduled Tribe community.

Submitted for kind orders.

Sd/-
(G. Gurucharan)
PS to MOS (P&NG)
19/8

Minister

I have examined the application carefully. The applicant is an educated lady and belongs to Scheduled Tribe community. The

applicant is unemployed and has no regular source of income. The case deserves sympathetic consideration. Therefore, a Retail Outlet for MS-HSD in the Union Territory of Delhi is allotted to Smt. Neena Nautiyal r/o B-399, Gali No. 19, Bhajanpura, Delhi. A

Orders may be issued accordingly.

B

Sd/-
(Capt. Satish Sharma)
Minister of State"

While processing the Minister's order the office put up the following note : C

"Ref. above Smt. Neena Nautiyal has furnished her bio-data vide pp 8-7/C wherein she has stated that her occupation is agriculture and her and her husband's income is 25,000 & 18,000 per annum respectively. In this connection it is stated that it happens from her bio-data that she is the wife of Sh. Ravi Sharan Nautiyal who is a member of OSB-Punjab. D

2. In view of the above, file is put up for orders whether we may issue sanction to Oil Company for setting up a RO dealership in favour of Smt. Neena Nautiyal." E

The allotment letter dated 7th October, 1994 was issued to Neena Nautiyal. It is admitted in the affidavit of Mr. Kelkar that Neena Nautiyal is the wife of R.S. Nautiyal, Member, Oil Selection Board, Punjab.

Arun Kumar Gupta in his application stated that he passed BSc. in Production Engineering in the year 1970 and worked as Project Engineer in the Haryana State Cooperative Supply and Marketing Federation Ltd. at Chandigarh from 1976 to 1989 when he was forced to tender resignation on political considerations when the Haryana Government was headed by Shri Devi Lal. It is further stated that since then he was unemployed and as such the application for grant of petrol pump. The application was directly dealt with by the Minister and his Private Secretary in the following manner : F G

"Office of the Minister of State
(P&NG) H

A **********

Placed below is an application of Shri Arun K. Gupta for allotment of Retail Outlet. The applicant has stated that he is a professional who has not been able to find a regular employment and is finding it difficult to make ends meet.

B

Submitted for kind orders.

Sd/-
(G. Gurucharan)
PS to MOS (P&NG)
C 22/X/93

Minister

I have examined the application carefully. The applicant is a
D graduate in Production Engineering and is without any regular employment. The case deserves sympathetic consideration. Therefore, a Retail Outlet for MS-HSD is allotted to Shri Arun K. Gupta, s/o Shri Harbans Lal r/o H.No. 68, Sector 8-A, Chandigarh at Sector-20 C, Chandigarh.

E Orders may be issued accordingly.

Sd/-
(Capt. Satish Sharma)
Minister of State"

F While processing the above order, Mr. S.K. Singh, Under Secretary in the Ministry wrote on the file as under :

"A retail outlet dealership has been allotted to Shri Arun Kumar Gupta s/o Sh. Harbans Lal, At Chandigarh under discre-
G tionary powers of Govt. vide MOS's order at p-1/n and Government sanction at p-2/c.

2. Since the allottee has not mentioned anything about his father and since a similar named person is working as Chairman of one of the Oil Selection Boards, IOC was asked to check the detail
H from the allottee. A report now received from IOC is placed at pp

5-3/c for perusal. *It may be seen therefrom that the father of the allottee Shri Harbans Lal is a Retd. judge of the Punjab and Haryana High Court and practising Senior Advocate in the Supreme Court at New Delhi, and also functioning as the Chairman of the Oil Selection Board for Haryana.*

3. *It is humbly submitted that such allotments will invite adverse public criticism.*

Sd/-
(S.K. SINGH)
US(M.II)/6.12.93"

Letter of intent was issued to Mr. Arun Kumar Gupta on December 9, 1993. Mr. Kelkar in his affidavit has stated that Arun Kumar Gupta is the son of Justice Harbans Lal Gupta (retd), who at that time was Chairman of the Oil Selection Board, Haryana.

Satya Bahin, Ex. Member of Parliament and member of the Oil Selection Board for Haryana recommended the application of Dharmesh Kumar for allotment of petrol pump. It was stated in the recommendation that Dharmesh Kumar's father died few years back, they are poor and his mother is suffering from Cancer. The Minister allotted the petrol pump by the following order:

"Office of the Minister
of State (P&NG)
****

"Placed below is an application of Shri Dharmesh Kumar for allotment of a Retail Outlet for MS-HSD. The applicant has stated that he is an educated youth from Scheduled Tribe whose father had passed away while in Government service. The applicant has also stated his mother who had been trying to support her family is also afflicted by Cancer which has put the family in difficult circumstances.

Submitted for kind orders.

Sd/-
(G. Gurucharan)

A PS. to MOS (P&NG)
9.11.

Minister

I have examined the application carefully. The applicant is an
B unemployed youth whose father's as sudden demise had prevented from completing his education. The applicant's mother who had been the sole bread-winner for the family is also afflicted with Cancer which has put the family in straitened circumstances. The applicant has also not been able to obtain suitable employment.
C The case deserves sympathetic consideration. Therefore, a Retail Outlet for MS-HSD at Ferozabad-Shikohabad Road, near Makhanpur, Uttar Pradesh is allotted to Shri Dharmesh Kumar s/o Late Shri Johari Lal (Amin) r/o H.No. 20, Katra Mohammad Mah, Gandhi Marg, Shikohabad, Firozabad, Uttar Pradesh.

D Orders may be issued accordingly.

Sd/- 9/11
(Capt. Satish Sharma)
Minister of State"

E In his affidavit filed before this Court Dharmesh Kumar stated that he is "neither a family member nor dependent on Satya Bahin. The deponent is not closely related to Satya Bahin."

Leela Devi in her application stated that her husband expired on 25th January, 1994. Two clerks of lawyers killed her husband in the premises of
F Patiala House. It is further stated that she is a housewife with no means of income to feed herself and her family since the death of her husband. The Minister allotted the petrol pump by the following order:

"Office of the Minister of State
(P&NG)
G **********

Placed below is an application of Smt Leela Devi for allotment of a Retail Outlet for MS-HSD. The applicant has stated that her husband was murdered and ever since his death her family is left
H without any regular source of livelihood.

Submitted for kind orders.

Sd/
(G. Gurucharan)
PS to MOS (P&NG)
19/5/95

Minister

I have examined the application carefully. The applicant is a widow whose husband was murdered. The applicant has no regular income to support herself and her family. The case deserves sympathetic consideration. Therefore, a Retail Outlet for MS-HSD at NOIDA, UP is allotted to Smt. Leela Devi W/o. Late Shri Krishan Swaroop r/o. H. No. B-412/A, Sector No. 19, NOIDA, UP.

Orders may be issued accordingly.

Sd/
(Capt. Satish Sharma)
Minister of State"

The material on the file shows that the late husband of Leela Devi was a dismissed employee of Post and Telegraph Department. He had six sons and a house on Kalibari Marg. Late Husband of Leela Devi was living away from the family for 7-8 years prior to his death. Mr. Kelkar in his affidavit has stated that Leela Devi is the relative of the driver of the Minister. The affidavit filed by Leela Devi and the documents attached with the affidavit read with Kelkar's affidavit clearly show that Leela Devi is the mother of Nand Kishor who was working as driver of Capt. Satish Sharma. Mr. Kelkar in his affidavit has stated that "Smt. Leela Devi happens to be a relative of the driver of the Minister". Least we can say is that Mr. Kelkar should have known that Leela Devi was Minister's driver's mother.

Poda Rajasekhar has, in his application, stated that he completed his B.Com in 1980 and in spite of his best efforts he could not settle in regular employment. His father was serving as an Inspector of Customs and Central Excise. He expired in January 1981. His mother, who was a teacher, retired on 19.4.1993. He finds it difficult to cope with the present circumstances. The Minister allotted the pertol pump by the following order :

"OFFICE OF THE MINISTER OF STATE
(P&NG)
****

Placed below is the application of Shri Poda Rajasekhar r/o. 8-3-897/6 Nagarjuna Nagar, Hyderabad (A.P.). The applicant has stated that he is an educated unemployed person who has the responsibility of looking after his mother as well as a cousin, who is mentally retarded. He has stated that besides his best efforts, he has not been able to settle in any regular employment. He has prayed that a retail outlet dealership for MS—HSD may be allotted to him at Banjara Hills, Secunderabad (A.P.).

For kind orders.

Sd/-
(G. GURUCHARAN)
PS TO MOS (P&NG)
23.7.93

Minister

I have examined the application carefully. The applicant's case is genuine in view of the adverse financial circumstances that the family finds itself in. It is a fit case for sympathetic consideration. Accordingly a retail outlet dealership for MS-HSD is allotted to Shri Poda Rajasekhar at Banjara Hills, Secunderabad (A.P.).

Orders may be issued immediately.

Sd/-
(CAPT. SATISH SHARMA)
MOS (P&NG)"

Mr. Kelkar in his affidavit has stated that "Poda Rajasekhar is a relative of Shri Gurucharan, Private Secretary to the Minister".

Madhuri Safaya has stated in her application that she is a native of Kashmir. She is a young lady and has been rendered homeless due to the increasing militancy in the Valley. Due to sudden migration to Delhi she has not been able to complete her education. On these grounds she

requested the Minister to allot her a pertol pump. The Minister readily obliged her by the following order :

"Office of the Minister
of State (P&NG)
****

Placed below is an application of Ms. Madhuri Safaya for allotment of Retail Outlet for MS-HSD. The applicant has stated that she belongs to Kashmir and her family has migrated to Kashmir. The applicant has also stated that she has not been able to get a suitable job and is without a regular source of livelihood.

Submitted for kind orders.

Sd/-
(G. Gurucharan)
PS to MOS (P&NG)
12.10

Minister

I have examined the application carefully. The applicant is a young lady whose family has migrated from Kashmir and are dependent on their relatives for sustenance. The applicant has not been able to obtain a suitable job for herself and is without any regular source of income. The case deserves sympathetic consideration. Therefore, a Retail Outlet for MS-HSD in the National Capital Territory of Delhi is allotted to Ms. Madhuri Safaya r/o. B-6/1, Vasant Vihar, New Delhi.

Orders may be issued accordingly.

Sd/-
(Capt. Satish Sharma)
Minister of State"

Mr. Kelkar has confirmed in his affidavit that Madhuri Safaya is related to B.N. Safaya, Addl. Private Secretary to the Minister.

Monika Malla in her application stated that her family was forced to leave Kashmir due to the militant activities. Her family had to dispose of

A the property at a loss and all the savings has already been spent. She has to support her parents who are not keeping good health. On these grounds she requested the Minister for the allotment of pertol pump. The Minister passed the following order :

"Office of the Minister of State
B (P&NG)
****

Placed below is an application of Ms. Monica Malla for allotment of a Retail Outlet for MS-HSD. The applicant has stated that she is young lady from Kashmir whose family has been forced to
C migrate to Delhi due to growing militancy. The applicant has also stated that she has exhausted their family's savings and are finding it difficult to sustain themselves in Delhi.

Submitted for kind orders.

D Sd/-
(G. Gurucharan)
PS to MOS (P&NG)
12.10

E *Minister*

I have examined the application carefully. The applicant is a young lady whose family had migrated to Delhi owing to militant activities of the extremists. The applicant's family has no source of livelihood and she has not been able to obtain any suitable employ-
F ment. The case deserves sympathetic consideration. Therefore, a Retail Outlet for MS-HSD in the National Capital Territory of Delhi is allotted to Ms. Monica Malla c/o Smt. Labroo r/o. D-1/54, Vasant Vihar, New Delhi.

Orders may be issued accordingly.

G Sd/-
(Capt. Satish Sharma)
Minister of State"

Mr. Kelkar has stated in his affidavit that Monica Malla is related to the
H wife of B.N. Safaya, Addl. Private Secretary to the Minister.

Daya Rani stated in her application that she is a housewife of a low paid employee having four school going children. It was difficult to live with the meagre salary of her husband. She wanted to share the responsibility of her husband and as such requested the Minister to allot her a petrol pump. The Minister obliged her by passing the following order :

"Office of the Minister of State
(P&NG)
****

Placed below is an application of Smt. Daya Rani w/o. Shri H.R. Verma for allotment of a Retail Outlet for MS-HSD. The applicant has stated that she has a family of four school going children and is finding it difficult to make ends meet with the income being earned by her husband.

Submitted for kind orders.

Sd/-
(G. Gurucharan)
PS to MOS (P&NG)
10.10.94

Minister

I have examined the application carefully. The applicant is a housewife whose family is facing difficult financial circumstances. The case deserves sympathetic consideration. Therefore, a Retail Outlet in the Union Territory of Delhi is allotted to Smt. Daya Rani w/o. Shri H.R. Verma r/o. C-183, Albert Square, Ramakrishna Ashram Marg, Gole Market, New Delhi.

Orders may be issued accordingly.

Sd/-
(Capt. Satish Sharma)
Minister of State"

Shri S.K. Singh, Under Secretary, while processing the Minister's order noted on the file as under :

A *"Smt. Daya Rani, the allottee is the wife of Shri Hari Ram Verma who is working in this Ministry as an Assistant and presently posted to Minister's Office.* His annual income from pay and allowances during 1993-94 is reported Rs. 52,925. However, the allottee has shown the annual income as Rs. 36,000 which is factually not correct. It seems that she has shown only the take-home pay after deductions. It is for consideration whether the sanction letter placed blow as per Orders of MOS recorded at p-1/n may be issued.

S/d-
(S.K. SINGH)
US (M. II)/25.10.94"

Allotment order was issued to Daya Rani on 31st October 1994. Mr. Kelkar has stated in his affidavit that Daya Rani is wife of H.R. Verma, Personal Assistant to the Addl. Private Secretary (B.N. Safaya) to the Minister.

Vijaya Nair has stated in her application that she is a young housewife with a large family to support. She has studied up to B.A. level. The meagre income of her husband could not sustain their liabilities. She requested the Minister to allot her a pertol pump which was done by the following order :

"Office of the Minister of State
(P&NG)
****

Placed below is the application of Smt. Vijaya Nair. The applicant is a young educated unemployed person with the responsibility of looking after a family which has a meagre income. The applicant has stated that despite best efforts she has been unable to obtain suitable job. She has, therefore requested that as a special case she may be allotted a Retail Outlet MS-HSD in the Union Territory of Delhi.

For kind orders.

Sd/-
(G. Gurucharan)

PS to MOS (P&NG) A
23.7.93

Minister

I have examined the application carefully. The applicant is an educated unemployed housewife whose family circumstances is B one of considerable financial difficulty. The applicant has also prayed that she has the necessary drive and initiative to run a Retail Outlet. This is a fit case to be considered sympathetically. Accordingly, a Retail Outlet for MS- HSD is allotted to Smt. Vijaya Nair, 2213, Lodi Road Complex, New Delhi-110003, in the Union Territory of Delhi as a special case. C

Orders may be issued accordingly.

Sd/-
(Capt. Satish Sharma) D
Minister of State"

Mr. Kelkar has stated in his affidavit that Vijaya Nair is related to D.V. Pillai, Addl. Private Secretary to Minister.

All the 15 allotments - discussed above - have been made by Minister E in a stereotyped manner. The applications have not been officially received by the Petroleum Ministry. There is no receipt - entry on any of the applications. The applicants seem to have approached the Minister directly. None of the applications have been dealt with in any of the branches of the Ministry. There is nothing on the record to indicate that the Minister kept any criteria in view while making the allotments. How the applicants F came to know about the availability of the petrol pumps is not known. No advertisement was made to invite the applications. There is nothing on the record to show that any other method inviting applications was adopted. There is no indication in the allotment-orders or anywhere in the record to show that the Minister kept any guidelines in view while making these G allotments. The allotments have been made in a cloistered manner. The Petrol pumps - public property - have been doled out in a wholly arbitrary manner. This Court in *Ramana Dayaram Shetty* v. *International Airport Authority of India and Others.*, [1979] 3 SCC 489, held as under :

"It must, therefore, be taken to be the law that where the H

A Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with
B standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational relevant and non-discriminatory standard or norm and if the Government departs from such standard or norms in any particular case or cases, the action
C of the Government would be liable to be struck down."

The allotments have been made by the Minister either on the ground of poverty or unemployment. Assuming that the allottees belong to either of these two categories then how the Minister has selected them out of
D millions of poor and unemployed in this country. As mentioned above no criteria was fixed, no guidelines were kept in view, none knew how many petrol pumps were available for allotment, applications were not invited and the allotments of petrol pumps were made in an arbitrary and discriminatory manner.

E We may examine these allotments from another angle which has very serious repercussions. Six of the allottees are related to various officials working with the Minister. Leela Devi is the mother of Minister's driver. Poda Rajasekhar is a relation of G. Gurucharan, Private Secretary to the Minister. Madhuri Safaya and Monika Malla are related to B.N. Safaya,
F Addl. Private Secretary to the Minister. Daya Rani is the wife of H.R. Verma, Personal Assistant to B.N. Safaya and Vijaya Nair is the wife of D.V. Pallai, Addl. Private Secretary. Two of the allottees are related to the politicians. Sarbjot Singh is the son of Buta Singh who was Home Minister and at the relevant time was Cabinet Minister heading the Civil Supplies
G portfolio. Benjamin K. Hollohan is the son of Shri K. Hollahan, Minister in the State of Nagaland. Remaining seven allottees are either members of the Oil Selection Boards or their relations. Shaukat Hasan Abidi is the son of Justice S.H. Abidi (Retd.), who was the Chairman of the Oil Selection Board, Uttar Pradesh. Similarly, Arun Kumar Gupta is the son of the Justice Harbans Lal Gupta (Retd.) who was the Chairman of Oil Selection
H Board, Haryana. Pradeep Kumar is the son of Krishna Swaroop, who was

Member of Oil Selection Board for Delhi and Chandigarh. Neena Nautiyal is the wife of R.S. Nautiyal, who was member of Oil Selection Board, Punjab. Dharmesh Kumar was the recommendee of Satya Bahin, Ex. Member of Parliament and Member of the Oil Selection Board for Haryana. Shiv Balak Passi and Ghulam Ahmad Mir were themselves members of the Oil Selection Board. It is obvious that Capt. Satish Sharma was personally interested in making allotments of petrol pumps in favour of all these 15 persons. He made allotments in favour of relations of his personal staff under the influences of the staff on wholly extraneous considerations. The allotments to the sons of Ministers were only to oblige the Ministers. The allotments to the members of the Oil Selection Boards and their/chairmen's relation have been done to influence them and to have favours from them. All these allotments are wholly arbitrary, nepotistic and are motivated by extraneous considerations.

The Government today - in a welfare State - provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licences etc. Government distributes largesses in various forms. A Minister who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the peoples' property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people. We have no hesitation in holding that Capt. Satish Sharma in his capacity as a Minister for Petroleum and Natural Gas deliberately acted in a wholly arbitrary and unjust manner. We have no doubt in our mind that Capt. Satish Sharma knew that the allottees were relations of his personal staff, sons of Ministers, sons/relations of Chairmen and members of the Oil Selection Boards and the members of the Oil Selection Boards themselves. The allotments made by him were wholly *mala fide* and as such cannot be sustained.

We are further of the view that Capt. Satish Sharma acted in a wholly biased manner inasmuch as he unfairly regarded with favour the cases of 15 allottees before him. The relevant circumstances available from record and discussed by us leave no manner of doubt in our mind that Capt. Satish Sharma deliberately acted in a biased manner to favour these allottees and as such the allotment orders are wholly vitiated and are liable to be set aside.

A The orders of the Minister reproduced above read : "the applicant has no regular income to support herself and her family", "the applicant is an educated lady and belongs to scheduled tribe community", "the applicant is unemployed and has no regular source of income", "the applicant is an uneducated, unemployed scheduled tribe youth without regular
B source of livelihood", "the applicant is a housewife whose family is facing difficult financial circumstances" etc. etc. There would be literally millions of people in the country having these circumstance or worse. There is no justification whatsoever to pick up these persons except that they happen to have won the favour of the Minister on *mala fide* considerations. None of these cases fall within the categories placed before this Court in writ
C petition (civil) No. 886/93 title *Centre for public interest Ligation* v. *Union of India & Anrs.,* decided on March 31, 1995 *but even* if we assume for argument sake that these cases fall in some of those or similar guidelines the exercise of discretion was wholly arbitrary. Such a discretionary power which is capable of being exercised arbitrarily is not permitted by Article
D 14 of the Constitution of India. While Article 14 permits a reasonable classification having a rational nexus to the objective sought to be achieved, it does not permit the power to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice among the members
E belonging to the same class or category is based on reason, fair play and non arbitrariness. It is essential to lay down as a matter of policy as to how preferences would be assigned between two persons falling in the same category. If there are two eminent sportsmen in distress and only one portal pump is available, there should be clear, transparent and objective criteria/procedure to indicate who out of the two is to be preferred. Lack
F of transparency in the system promotes neptosism and arbitrariness. It is absolutely essential that the entire system should be transparent right from the stage of calling for the applications upto the stage of passing the orders of allotment. The names of the allottees, the orders and the reasons for allotment should be available for public knowledge and scrutiny. Mr. Shanti
G Bhushan has suggested that the petrol pumps, agencies etc. may be allotted by public auction - category-wise amongst the eligible and objectively selected applicants. We do not wish to impose any procedure on the Government. It is a matter of policy for the Government to lay down. We, however, direct that any procedure laid down by the Government must be
H transparent, just, fair and non-arbitrary.

This Court in a *The Centre for Public Interest Litigation* case (supra) has endorsed the guidelines submitted by the Attorney General for allotment of petrol pumps, gas agencies etc. The Court in that case did not have before it the actual manner of exercise of discretion by the Minister in the allotment of pumps/agencies. The allotment orders which are now before the Court clearly indicate that leaving the authorities to enjoy absolute discretion even within the guidelines would inevitably lead to gross violation of the constitutional norms when the persons for allotment are picked up arbitrarily and discriminatory.

This Court as back as in 1979 in *Ramana Shetty's* case (supra) held "it must, therefore, be taken to be the law....." that even in the matter of grant of largesses including award of jobs, contracts, quotas and licences, the Government must act in fair and just manner and any arbitrary distribution of wealth would violate the law of the land. Mr. Satish Sharma has acted in utter violation of the law laid-down by this Court and has also infracted Article 14 of the Constitution of India. As already stated a minister in the Central Government is in a position of a trustee in respect of the public property under his charge and discretion. The petrol pumps/gas agencies are a kind of wealth which the Government must distribute in a *bona fide* manner and in conformity with law. Capt. Satish Sharma has betrayed the trust reposed in him by the people under the Constitution. It is high time that the public servants should be held personally responsible for their *mala fide* acts in the discharge of their functions as public servants. This Court in *Lucknow Development Authority* v. *M.K. Gupta,* (1994) 1 Supreme Court Cases 243, approved "Misfeasance in public offices" as a part of the Law of Tort. Public servants may be liable in damages for malicious, deliberate or injurious wrong- doing. According to Wade "There is, thus, a tort which has been called misfeasance in public office and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury". With the change in socio-economic outlook, the public servants are being entrusted with more discretionary power even in the field of distribution of Government wealth in various forms. We take it to be perfectly clear, that if a public servant abuses his office either by an act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action may be maintained against such public servant. No public servant can say "you may set-aside an order on the ground of *mala fide* but you cannot hold me personally liable". No public servant can arrogate to himself the power to act in a manner which is

A arbitrary.

For the reasons indicated above, we conclude that the orders passed by Capt. Satish Sharma, the then Minister of State for Petroleum and Natural Gas, Government of India, allotting petrol pumps to Sarbjot Singh, Benjamin K. Hollohon, Syed Hasan Shaukat Abidi, Shiv Balak Passi, B Pradeep Kumar, Ghulam Ahmad Mir, Neena Nautiyal, Arun Kumar Gupta, Dharmesh Kumar, Leela Devi, Poda Rajasekhar, Madhuri Safaya, Monika Malla, Daya Rani and Vijaya Nair are arbitrary, discriminatory, *mala fide*, wholly illegal and as such are liable to be quashed.

We, therefore, hold and direct as under :

C

1. The orders - reproduced in earlier part of this judgment - allotting petrol pumps to the above mentioned fifteen persons are hereby quashed.

2. The allocation, allotment of the petrol pumps/retail outlet D dealerships by the Government of India, Indian Oil Corporation Ltd. or any other corporation in the names of the above said fifteen persons shall stand cancelled with immediate effect.

3. Most of these 15 persons have not as yet commissioned the E petrol pumps. Those who have commissioned the petrol pumps and are running the same shall stop operating the petrol pumps and running the said business with effect from October 31, 1996. The Government of India/Oil Corporation (concerned) shall take over the petrol pump premises from these persons within ten days thereafter. The Oil Corporation shall have the market-value of the F site and the construction thereon, determined in a fair and just manner before October 31, 1996.

4. Each of the commissioned petrol pumps, taken over by the Government/Oil Corporation (concerned) and the built-up area along with the site (whether lease-hold or owned by the original G allottee) shall be disposed of by way of public auction. The original allottees may also participate in the auction. The petrol pump shall be allotted to the highest bidder. The said allottee shall run the petrol pump on the original terms and conditions. He shall have all the rights in respect of the site and the construction thereon as H the original allottee had on the date of auction. Out of the auction

money the value of the site and the construction as determined by the Oil Corporation shall be paid to original allottee and the remaining money shall go to the Government coffer. On receipt of the said amount the original allottee shall cease to have any right or interest in the site and the construction thereon. If the successful bidder is the original allottee, he shall pay the difference between the auction money and the value of the site and construction as determined by the Oil Corporation.

5. Capt. Satish Sharma shall show-cause within two weeks why a direction be not issued to the appropriate police authority to register a case and initiate prosecution against him for criminal breach of trust or any other offence under law. He shall further show-cause within the said period why he should not, in addition, be made liable to pay damages for his *mala fide* action in allotting petrol pumps to the above mentioned fifteen persons.

We place on record our appreciation for Mr. H.D. Shourie, who, very ably, assisted us in this matter. He shall be entitled to costs which we quantify as rupees fifty thousand. The cost shall be paid by Capt. Satish Sharma personally.

Before parting with this judgment, we may mention about Civil Writ Petitions Numbers 4003/95 and 4430/95 which are pending before the Delhi High Court. In the said petitions, allotment of petrol pumps/gas agencies to various other persons during the period 1992-93, 1993-94 1994-95 and 1995-96 have been challenged. Transfer petition No. 127/96 has been filed in this Court seeking transfer of those writ petitions from Delhi High Court to this Court. We have issued notice in the transfer petition and have stayed further proceedings before the High Court in the writ petitions. Various affidavits have been filed on behalf of the Ministry of Petroleum & Natural Gas. Mr. Devi Dayal, Joint Secretary of the Ministry, in his affidavit dated March 26, 1995, has stated that in 1995-96 petroleum products agencies were allotted to 99 persons under the discretionary powers of the Government. It is further stated that orders on file have been made allotting petrol pumps/agencies to 61 more persons. An affidavit filed by Mr. Srinivasan, Advocate supporting the transfer petition gives a long list of persons who are related to the then Prime Minister/Ministers and other VIPs and who have been allotted petrol pumps and gas agencies. Mr. Devi Dayal, Joint Secretary in the Ministry of Petroleum has filed another affidavit dated

April 18, 1996 in reply to the affidavit of Mr. Srinivasan. Para 6 of the affidavit is as under :

> "As regards the list of allottees mentioned in paras 3 to 6 and the alleged relationship with the Prime Minister, other Ministers, V.I.Ps., M.P.s/M.L. As., etc., it is to submit that enquiries have been made through the Oil Companies from the allottees, who have replied through affidavits. The comments of the Ministry, on the basis of above enquiry and records, are contained in Annexure - I to this affidavit."

Annexure 1 with the affidavit shows that gas agencies were allotted to six relations of the then Prime Minister, an agency to a son of the OSD in Prime Minister's office, LPG dealership to daughter-in-law of the OSD to the then Minister of Petroleum, a petrol pump to the real brother of Chandraswamy (Nemi Chand Jain), LPG distributorship to brother of Shri Bhagwan Shri Satya Sai Baba, LPG dealership to Manju Devi, wife of private secretary to additional private secretary of Capt. Satish Sharma, a petrol pump to wife of V.K. Aggarwal, additional private secretary, Minister of Law, RO dealership to Rakesh Saluja, son of R.L. Saluja, who was employed in the Ministry of Petroleum till June, 1993, RO dealership to Prathiba Singh related to Shri Kalapnath Rai, RO dealership in January, 1995 to Kanti Lal Bhuriya, who at that time was Minister for Tribal Welfare in the Madhya Pradesh Government, a gas agency to the son-in-law of Mr. G. Ganga Reddy, Member of Parliament and various others.

Since the two writ petitions, mentioned above, are pending before the High Court wherein the allotments made to all the persons mentioned above and others, have been challenged, it is not necessary for us to transfer the writ petitions to this Court. We vacate the stay order granted by this Court and dispose of the transfer petition. We direct the Registry of this Court to send all the affidavits filed by the parties in the transfer petition along with annexures to the High Court. We have no doubt that the High Court shall examine the issues involved in the writ petitions and shall also go into the validity of the allotment to petrol pumps/gas agencies to various persons, after hearing them, in accordance with law. We request the High Court to expedite the hearing of the petitions.

M.K. Petition disposed of.

PERIASAMI AND ANR. A

v.

STATE OF TAMIL NADU

SEPTEMBER 25, 1996

[DR. A.S. ANAND AND K. T. THOMAS, JJ.] B

Criminal Law :

Evidence Act, 1872 : Sections 101 and 105.

Burden of Proof—Benefit of general exception—Right to private defence—Availing of—Held : Initial burden on prosecution to prove that accused committed the offence charged against—Presumption regarding absence of circumstances bringing the case within the exception does not displace the traditional burden of the prosecution—Accused can discharge the burden by "preponderance of probabilities" unlike the prosecution—But there is no presumption that an accused is the aggressor in every case of homicide. C D

Penal Code, 1860 : Sections 96 to 106, 302 and 304.

Homicide—Accused being aggressor—Presumption—Held : No presumption that the accused is the aggressor in every case of homicide—Benefit of reasonable doubt that the deceased party was the aggressor would be extended to the accused no matter that he did not adduce any evidence in that direction. E

Section 96—Private defence—Specific plea—Absence of—When examined under S.313 Cr. P.C. Held: Not enough to denude the accused of the right if the same can be made out otherwise—Criminal Procedure Code, 1973, S.313 and Section 154. F

FIR Delay in lodging of—Witness gave information of incident to local village administrative officer who went to the spot to ascertain the truth and, after verification of the correctness of the information, recorded his statement—Held : Possibility o f deliberations and confabulations cannot be ruled out—But this is not enough to vitiate the entire testimony of the witness—Assurance can be obtained from other evidence regarding the truth of his version. G

Section 162—Inquest report—Statement of witness—Recorded H

A *in—Held: Prohibited by S.162—Such a statement could not be used for any purpose except to contradict its author.*

The appellants-accused were acquitted by the Sessions Court of the offence under Section 302/34 of the Indian Penal Code, 1860. However, the High Court set aside the acquittal and convicted the accused under Section
B **302/34 IPC. Hence this appeal.**

According to the prosecution, on the morning of the occurrence day deceased in association with four other persons (including PW-1 and PW-2) was working in a field. By about 9.30 a.m. deceased alone went to a
C **nearby plantain grove to ease himself. After a little while PW-1 and PW-2 heard the squeal of a pig followed by the yells of the deceased PW-1 and PW-2 rushed to the place and then they saw the first appellant inflicting a blow on the neck of the deceased with a billhook and the second appellant stabbing him with a spear on the chest. Deceased fell down but first appellant cut him on the neck with the billhook two or three times more.**
D **Assailants thereafter took to their heels. Deceased succumbed to his injuries within an hour. In the quest report the time of death of the deceased was recorded as 10.30 p.m. where as the death actually took place at 9.30 a.m.**

E **PW-1 went to the local village administrative officer (PW-8) and informed him of the incident. PW-8 went to the spot of occurrence and verified the correctness of the information furnished by PW-1 After returning to his office PW-8 recorded the statement of PW-1 which was forwarded to the Police Station. FIR was prepared on its basis and during investigation appellants were arrested.**
F

On behalf of the accused persons it was contended that there was delay in lodging of the FIR, and that the deceased was the aggressor and the accused had the right of private defence although no such specific plea was taken by them.

G

Disposing of the appeal, this Court

HELD : 1. Section 105 of the Evidence Act, 1872 prescribes a rule of burden of proof. The burden is on the accused to prove the existence of circumstances bringing his case within any of the exceptions and the Court
H **shall presume the absence of such circumstances." The said rule does not**

whittle down the axiomatic rule of burden (indicated in Section 101) that the prosecution must prove that the accused has committed the offence charged against. The traditional rule that it is for prosecution to prove the offence beyond reasonable doubt applies in all criminal cases except where any particular statute prescribes otherwise. The legal presumption created in Section 105 with the words "the Court shall presume the absence of such circumstances" is not intended to displace the aforesaid traditional burden of the prosecution. It is only where the prosecution has proved its case with reasonable certainty that the court can rest on the presumption regarding absence of circumstances bringing the case within any of the exceptions. This presumption helps the court to determine on whom is the burden to prove facts necessary to attract the exception and an accused can discharge the burden by 'preponderance of probabilities' unlike the prosecution. But there is no presumption that an accused is the aggressor in every case of homicide. If there is any reasonable doubt, even from prosecution evidence, that the aggressor in the occurrence was not the accused but would have been the deceased partly, then benefit of that reasonable doubt has to be extended to the accused, no matter he did not adduce any evidence in that direction. [764-H; 765-A-D]

Partap v. *State of U.P.*, [1976] 2 SCC 798 and *Yogendra Morarji* v. *State of Gujarat*, followed.

Dahyabhai Chhaganbhai Thakkar v. *State of Gujarat*, AIR (1964) SC 1563, relied on.

2. Although the appellants have not stated, when examined under Section 313 of the Criminal Procedure Code, 1973, that they had acted in exercise of their right of private defence yet absence of such a specific plea in the statement is not enough to denude them of the right if the same can be made out otherwise. [764-G]

3. The local village administrative officer (PW-8) did not take down the statement of PW-1 when it was made to him, but he went to the spot to ascertain the truth of account given by PW-1. There was the possibility for deliberations and confabulations. However, this is not enough to vitiate the entire testimony of PW-1. Assurance can be obtained from other evidence regarding the truth of his version. [763-C-D]

Meghraj Singh v. *State of U.P.*, [1994] 5 SCC 188, relied on.

A **4. The recital in the inquest report regarding the time of death of the deceased as 10.30 P.M. has no utility whatsoever because the said recital in the inquest report is only a reproduction of what the witnesses would have told the investigating officer. It falls within the sweep of the interdict contained in Section 162 and hence could not be used for any purpose (except to contradict its author). The mere fact that such a recital found** B **a place in the inquest report is not enough to save it from the prohibition provided in the Section. [736-F-G]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 346 of 1993.

C

From the Judgment and Order dated 7.12.92 of the Madras High Court in Crl. A No. 489 of 1991.

S. Siva Subramaniam, V.G. Pragasam, R. Nedumaran, (R. Ayyam Perumal) for the Appellants.

D

V. Krishnamurthy for the Respondent.

The Judgment of the Court was delivered by

E **THOMAS, J.** We have pronounced the verdict in this appeal on 29.8.1996 by altering the conviction of the two appellants to the offence under section 304 part I read with section 34 of the IPC and sentencing them each to rigorous imprisonment for seven years. However, we reserved our reasons thereof and hence we now state the reasons as under :

F First appellant (Periasamy) and second appellant (Ramaswamy) were prosecuted along with one Murugesam for offences under section 302/34 IPC on the allegation that they with common intention to murder deceased Ranganathan attacked him with billhook, spear and lathi at about 9.30 a.m. on 12.6.1989. Sessions Court acquitted all the three accused, but the High Court of Madras, on appeal by the State, set aside the acquittal G and convicted the two appellants under section 302/34 IPC. The other accused Murugesan was, however, convicted only under section 324 IPC. Appellants have filed this appeal under section 2 of the Supreme Court (Enlargement of Criminal Appellate) Jurisdiction Act 1970.

H Prosecution story, in brief, is the following :–

Periasamy (first appellant) is the son and Murugesan is the nephew of Ramaswamy (second appellant). About five years prior to the murder, second appellant's daughter Mallika was indecently assaulted by deceased Ranganathan for which there was a criminal case and Ranganathan was convicted in that case. A couple of years thereafter the plantain crops of deceased Ranganathan were destroyed by the goats of second appellant over which there was some altercation between them. Thus, bad blood existed between the deceased and second appellant's family.

On the morning of the occurrence day deceased Ranganathan in association with four other persons (including PW1 and PW2) engaged themselves in the work of shifting an oil engine to a field for irrigation purposes. By about 9.30 a.m. deceased Ranganathan alone went to a nearby plantain grove to ease himself. After a little while PW1 and PW2 heard the squeal of a pig followed by the yells of Ranganathan. PW1 and PW2 rushed to the place and then they saw the first appellant inflicting a blow on the neck of Ranganathan with a billhook and the second appellant stabbing him with a spear on the chest. When deceased tried to escape he was assaulted by Murugesan with lathi. Second appellant again stabbed him with the spear. Deceased fell down but first appellant cut him on the neck with the billhook two or three times more. Assailants thereafter took to their heels. Deceased Ranganathan succumbed to his injuries within an hour.

PW1 went to the local village administrative officer (PW-8) and informed him of the incident. PW-8 went to the spot of occurrence and verified the correctness of the information furnished by PW1. After returning to his office PW8 recorded the statement of PW-1 (Ext.P-1) which was forwarded to Velur Police Station. FIR was prepared on its basis and during investigation appellants were arrested. On completion of the investigation the police charge- sheeted the appellants and Murugesam arraying them as Al, A2 and A3, respectively.

PW1 and PW2 are the only eye witnesses examined by the prosecution. PW5 (Gunasekharan) deposed that PW2 rushed to his house soon after the occurrence and told him of what the three accused did to the deceased and that he went to the spot with PW 2 and found his brother badly mauled. He made efforts to remove the injured to the hospital but his brother died before reaching the hospital. PW6 said that she saw the

A three accused running away from the scene with the weapons. PW7 said that he over-heard some pedestrians mumbling between each other that these three accused had given cut blows to the deceased and a little later he saw the accused washing themselves and cleaning the weapons beneath a bridge. PW7 further said that he over-heard a conversation as between the accused that the weapons should be concealed and that they should consult a legal practitioner at Selam.

Learned Sessions Judge declined to place reliance on the testimony of any of the above witnesses. The delay in registering the FIR, and a recital found in the inquest report showing the time of death of the deceased as 10.30 in the night on 12.6.1989 were highlighted by the learned Sessions Judge.

High Court of Madras, in reversal of the order, found the evidence of PW1 and PW2 trustworthy. Learned Judge also placed reliance on the testimony of PW5, PW6 and PW7. However, Court did not accept the prosecution version that the third accused Murugesan had common intention to murder the deceased. Hence, the appellants were convicted and sentenced as aforesaid.

Shri Siva Subramaniam, learned senior counsel who argued for the appellants has taken us through the material evidence and advanced several contentions, main among them is that the High Court ought not have lightly interferred with the acquittal passed by the trial court. Alternatively, he argued that the conviction should not, in any view of the matter, have gone beyond the offence of culpable homicide not amounting to murder.

After going through the evidence of PW6 and PW7 we too are not impressed by their testimony. We are in agreement with the learned Sessions Judge that no credit can be given to their evidence. But the evidence of PW1 and PW2 stands on a different footing.

The first hurdle which stands in the way of accepting PW-1's evidence is the delay involved in preparing the FIR. PW8 did not take down the statement of PW1 when it was made to him, but he went to the spot to ascertain the truth of account given by PW1. There was the possibility for deliberations and confabulations. In this context, we may refer to the observations made by one of us (Dr. Anand J.) in *Meghraj Singh* v. *State*

of U.P., [1994] 5 SCC 188.

> "The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons if any, used, as also the names of the eye witnesses if any. Delay in lodging the FIR often results in embellishment, which is a creature of an after thought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story."

However, the above weakness attached to Ext. P-1 is not enough to vitiate the entire testimony of PW-1. We have to see whether assurance can be obtained from other evidence regarding the truth of this version.

PW-2 also said that he saw the appellants striking the deceased with the weapons when he went to the scene along with PW1. His evidence is consistent with the testimony of PW-1. It is appropriate, in this context, to refer to PW-5 (Gunasekharan) who is the brother of the deceased. He said that by about 9.30 A.M. PW2 ran to his house and told him that the three accused had dealt blows on Ranganathan with billhook, spear and stick. PW-5 then rushed to the scene and saw the deceased lying badly mauled. The witness, then narrated the efforts made to take his injured brother to the hospital and how the efforts failed. The testimony of PW-5 inspires confidence. It renders the version of PW-2 also believable.

The recital in the inquest report regarding the time of death of the deceased as 10.30 P.M. on 12.6.1989 has no utility whatsoever now. Firstly, because the said recital in the inquest report is only a reproduction of what witnesses would have told the investigating officer. It falls within the sweep of the interdict contained in section 162 of the Code of Criminal Procedure (for short 'the Code') and hence could not be used for any purpose (except to contradict its author). The mere fact that such a recital found a place in the inquest report is not enough to save it from the prohibition provided in the section. Secondly, even otherwise we are satisfied that the time 10.30 P.M. shown in the inquest report is only a mistake for 10.30 A.M. and hence no implication would flow out of such an error.

A Learned counsel contended that evidence of the eye witnesses is in conflict with the medical evidence and hence the sessions Judge has rightly discarded it. Both eye-witnesses (PW1 and PW-2) said that first appellant inflicted three cuts with the billhook on the neck, but only one incised injury was noted by the doctors on the neck of the deceased. The description of that injury in the post-mortem certificate is this :

B

> "An incised wound 20cm x 10cm x 19cm over the left side of the neck extending from the left side of the clavicle to the nape of the neck. Muscles and blood vessels were cut. Cervical vertebra cut at C5."

C

When Dr. Ilango (PW-3) was asked in cross-examination whether such injury can be caused in one cut he answered in the affirmative. But no question was put to the doctor whether the said injury could as well have been the result of multiplicity of cuts on the same situs. Looking at the width of the injury as 10 cm. extending from left clavicle upto the nape D of the neck having a depth of 19 cm. involving blood-vessels and also the 5th cervical vertibra, we have no difficulty in countenancing the possibility of multiple blows with a billhook resulting in that injury.

We, therefore, concur with the conclusion of the High Court that E appellants have inflicted the fatal injuries on the deceased with lethal weapons and find no conflict between the occular testimony and the medical evidence.

We shall now deal with the alternative contention advanced by Sri Siva Subramaniam, learned senior counsel, that the offence would not go F above section 304 part 1 of the IPC. This contention is made on the premise that deceased was the aggressor in the incident and hence appellant had initial right of private defence though they would have exceeded that right. We may point out that appellants have not stated, when examined under section 313 of the Code, that they have acted in exercise of such right. Of course, absence of such a specific plea in the statement is not enough to G denude them of the right if the same can be made out otherwise.

While dealing with the said alternative contention we have to bear in mind section 105 of the Evidence Act. A rule of burden of proof is prescribed therein that the burden is on the accused to prove the existence H of circumstances bringing the case within any of the exceptions "and the

Court shall presume the absence of such circumstances." The said rule does not whittle down the axiomatic rule of burden (indicated in section 101) that the prosecution must prove that the accused has committed the offence charged against. The traditional rule that it is for prosecution to prove the offence beyond reasonable doubt applies in all criminal cases except where any particular statute prescribes otherwise. The legal presumption created in section 105 with the words, " the Court shall presume the absence of such circumstances" is not intended to displace the aforesaid traditional burden of the prosecution. It is only where the prosecution has proved its case with reasonable certainty that the court can rest on the presumption regarding absence of circumstances bringing the case within any of the exceptions. This presumption helps the Court to determine on whom is the burden to prove facts necessary to attract the exception and an accused can discharge the burden by 'preponderance of probabilities' unlike the prosecution. But there is no presumption that an accused is the aggressor in every case of homicide. If there is any reasonable doubt, even from prosecution evidence, that the aggressor in the occurrence was not the accused but would have been the deceased party, then benefit of that reasonable doubt has to be extended to the accused, no matter he did not adduce any evidence in that direction.

The above legal position has been succintly stated by Subbarao J. (as he then was) in a case where an accused caused pleaded the exception under section 84 IPC *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*, AIR 1964 SC 1563 :

> "The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused death with the requisite intention described in S.299 of the Penal Code. This general burden never shifts and it always rests on the prosecution
>
> .....
>
> If the material placed before the court, such as, oral documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of "prudent man", the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself."

In *Partap* v. *The State of Uttar Pradesh*, [1976] 2 SCC 798 a three judges bench was considering a case where the accused failed to adduce evidence to establish the exception under section 95 IPC. It was held that even if the accused failed to establish his plea, in a case where prosecution has not established its case beyond reasonable doubt against the appellant on an essential ingredient of the offence of murder, the plea of right of private defence cannot reasonably be ruled out from prosecution evidence the benefit of it must go to the accused. In *Yogendra Morarji* v. *The State of Gujarat*, AIR (1980) SC 660 another bench of three judges of this Court dealt with section 105 of the Evidence Act and observed thus :

> "Notwithstanding the failure of the accused to establish positively the existence of circumstances which would bring his case within an Exception, the circumstances proved by him may raise a reasonable doubt with regard to one or more of the necessary ingredients of the offence itself with which the accused stands charged. Thus there may be cases where, despite the failure of the accused to discharge his burden under section 105 the material brought on the record may, in the totality of the record may, in the totality of the facts and circumstances of the case, be enough to induce in the mind of the Court a reasonable doubt with regard to the *mens rea* requisite for an offence under section 299 of the Code."

Keeping the above legal position in mind, we scrutinised the evidence to ascertain whether the deceased could have been the aggressor. Neither PW1 nor PW2 could say how the occurrence stated. The possibility that before they reached the place, some events would have already taken place cannot be ruled out. PW1 and PW2 over-heard the squeal of a pig. They also over-heard the sound of a quarrel. When they reached the scene they saw the carcass of a slain pig lying nearby. The motive suggested by the prosecution was sufficient for the deceased as well to entertain animus towards second appellant. Further, both sides would have confronted with each other on that morning abruptly without any prior knowledge or inkling that deceased might go to the plantain grove at the crucial time for answering the call of nature.

The above circumstances are broad enough to instil reasonable doubt in our mind that accused would have picked up a quarrel with the second

appellant and then the other events had followed. Law entitles the appellants to have benefit of that reasonable doubt concerning the begining part of the occurrence and renders them liable for culpable homicide not amounting to murder. A

The above are our reasons to alter the conviction to section 304 part 1 of IPC and for imposing sentence of rigorous imprisonment for seven years on each of them. B

V.S.S. Appeal disposed of.

A ASHOK KAPIL

v.

SANA ULLAH (DEAD) AND ORS.

SEPTEMBER 25, 1996

B [KULDIP SINGH AND K.T. THOMAS, JJ.]

Rent control and Eviction—U.P. Urban Buildings (Regulation of Letting, rent and Eviction) Act 1972—Sections 3 and 16—Building—Allotment—Objected by the landlord—Since roofless structure not to be considered C *as a building—Held, concurrent finding of the fact that structure was a roofed building when it fell vacant and the roof of the building was pulled down by the landlord subsequently, thereby rendering it a roofless structure- A building, even after losing the roof can continue to be a building in its general meaning—Taking recourse to such general meaning in the present context would help to prevent a mischief—Liberal interpretation of law is necessary to prevent* D *a wrong doer from taking advantage of his own wrong.*

MAXIMS

"Nullus Commodum Capere Potest de Injuria Sua Propria" (No man E *can take advantage of his own wrong)—One of salient tenets of equity—Held, Respondent cannot secure the assistance of a court of law for enjoying the fruit of his own wrong.*

Sana Ullah, the father of contesting respondents was the landlord of the suit premises. D was the tenant and on the expiry of his tenancy, the F **appellant applied to the District Magistrate for allotment of suit premises in his name. The landlord raised objections that the structure was not a "building" as it had no roof then. But his objections were rejected and the District Magistrate found that the structure was still a building and passed an order of allotment in the name of the appellant.**

G **On a revision petition to the District Judge, the case was remanded back to the District Magistrate for arriving at certain findings on facts. Finally it was found that the building was a roofed structure when D vacated it, but subsequently its tin roofs were dismantled by the owner of the building and the structure remained roofless even on the date of** H **allotment order. The District Magistrate passed an allotment order and**

the appellant occupied the building. A

In the revision, the District Judge confirmed the allotment order holding that the District Magistrate had jurisdiction to allot such a structure.

A writ petition filed in the High court by the landlord was allowed B and the allotment order was quashed. The High Court was of the opinion that the legislature did not confer power of allotment in respect of a construction which ceased to be a building at the time of allotment and hence the order of allotment made in favour of appellant was set aside. The High Court took the view that an order of allotment under section 16 C of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972 can be made only in respect of a building and not with respect to a construction which was a building at the time when it was vacated but subsequently ceased to the so. Hence this appeal.

Allowing the appeal, this Court D

HELD : 1.1. It is clear from the definition of 'Building' under section 3(1) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972, that any structure without roof cannot fall within the ambit of the definition. The factual position is that the structure remained a roofed E building when it became vacant but the roof was later dismantled by the owner. So as on the date of allotment order it remained roofless. If the crucial date is the date of allotment order, the structure was not a building as defined in the Act. But, the respondent cannot be assisted by a court of law to take advantage of the mischief committed by him. The maxim, "*Nullus Commodum Capere Potest de injuriea sua propria*" (No man can take F advantage of his own wrong) is one of the salient tenets of equity. Hence, in the normal course, respondent cannot secure the assistance of a court of law for enjoying the fruit of his own wrong. [772-F-H]

1.2. Jurisdiction of the District Magistrate is in respect of a building G which is either vacant or which "has fallen vacant" or is about to fall vacant as per Section 16(1), If a structure was a building as per the definition at the time when it fell vacant, the District Magistrate, no doubt, gets jurisdiction to initiated proceedings for passing allotment order. [773-F]

2.1. If the District Magistrate has commenced exercising jurisdiction H

under Section 16 of the Act, in respect of a building which answered the description given in the definition of Section 3 (i), he would well be within his jurisdiction to proceed further notwithstanding the intervening development that the building became roofless. A liberal interpretation to prevent a wrong doer from taking advantage of his own wrong is necessary. A building even after losing the roof, can continue to be a building in its general meaning. Taking recourse to such general meaning in the present context would help to prevent a mischief. [774-D-E]

Victoria City **v.** *Bishop of Vancourer Island*, **(1921) AC 384, referred to.**

Stroud's "Judicial Dictionary" **(Vol. I 5th edn);** *Black's Law Dictionary* **(5th edn), referred to.**

2.2. The structure without roof will cease to be building as per Section 3(i) of the Act. But a roofless structure can still continue to be building outside the fixed borders of the definition. Section 3 of the Act prefaces with the words "unless the context otherwise requires". Thus the legislature, which fixed contours for different expressions through the definition clauses has also provided sufficient play at the joints for contextual adaptations. Contextual variations are not impermissible under the act if such variations are necessary to achieve the object of the enactment. Outside the definition in Section 3 of the Act the word "building" need not necessarily be a roofed structure for even roofless structures are sometimes, used a buildings in certain circumstances. [773-G-H; 774-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 527 of 1979.

From the judgment and order dated 4.12.78 of the Allahabad High Court in C.M.W.P. No. 524 of 1976.

M.C. Dhingra and P.K. Jain for the Appellant.

Satish Chandra and J.P. Goyal R.P. Goyal and S.K. Jain for the Respondents.

The Judgment of the Court was delivered by

THOMAS, J. The controversy between the parties in this appeal has

narrowed down to a very short question. A building became roofless before "allotment order" was passed under Section 16(1) of U.P. Urban Buildings [Regulation of Letting, Rent and Eviction] Act, 1972 (for short' the Act). The question now remains in this appeal is : should the structure have necessarily bean a roofed one on the date of allotment order? A

A summary of facts, out of which the said question has emerged, is given below : B

A building situated at Meerut City owned by the contesting respondents' father (Sana Ullah) was let out to one Deep Chand Gupta for a period of 5 years. On the expiry of lease period i.e. 3.8.1974. Deep Chand Gupta surrendered vacant possession of the building to the landlord. On 20.8.1974, the present appellant moved an application before the District Magistrate (who is the competent authority for passing allotment order under the Act) for allotment of the said premises to him. Sana Ullah filed his objections on 3.9.1974, in which he contended, inter alia, that the structure was not a "building" inasmuch as it had no roof then. The District Magistrate found that the structure was still a building and hence appellant was entitled to its allotment. The case had thereafter passed through a chequered career. District Judge (the revisional authority under the Act) remanded the case on two occasions to the District Magistrate for arriving at certain findings on facts. Finally it was found that the building was a roofed structure when Deep Chand Gupta Vacated it, but subsequently its tin roofs were dismantled by the owner of the building and that the structure remained roofless even on the date of allotment order. Nevertheless, allotment order was passed by the District Magistrate. Pursuant thereto the appellant occupied the building. In the revision learned District Judge held that District Magistrate had jurisdiction to allot such a structure to the tenant and confirmed the allotment order. C D E F

Landlord filed a writ petition before the Allahabad High Court challenging the aforesaid order. The High Court declined to interfere with the finding on facts that the roof of the building was removed by the appellant after Deep Chand Gupta vacated the premises but took the view that "an order of allotment under Section 16 can be made only in respect of a building and not with respect to a construction which was a building at the time when it was vacated but subsequently ceased to be so." According to the learned Single Judge "as the legislature did not confer power of G H

A allotment in respect of a construction which ceased to be a building at the time of allotment the order of allotment made in favour of respondent 4 was liable to be set aside." Writ petition was hence allowed and the allotment order was quashed. The said judgment of the Allahabad High Court is now being challenged in this appeal by special leave.

B Before we proceed to consider the question set out earlier we may observe that learned counsel for the respondents assailed the concurrent finding of fact that roof of the building was pulled down by the landlord. But we made it clear that in view of the clear finding made by the District Magistrate and the learned District Judge on that issue and in view of the C fact that High Court declined to disturb that finding, we would not go into that aspect in this appeal.

"Building" is defined in Section 3(i) of the Act thus ;

> "building, means a residential or non-residential roofed structure D and includes -
>
> (i) any land (including any garden), garages and out-houses, appurtenant to such building;
>
> E (ii) any furniture supplied by the landlord for use in such building;
>
> (iii) any fittings and fixtures affixed to such building for the more beneficial enjoyment thereof".

It is clear from the definition that any structure without roof cannot F fall within the ambit of the definition of building. Here the factual position is this : The structure remained a roofed building when it became vacant but the roof was later dismantled by the owner. So on the date of allotment order it remained roofless.

G If the crucial date is the date of allotment order, the structure was not a building as defined in the Act. But can the respondent be assisted by a court of law to take advantage of the mischief committed by him? The maxim "*Nullus commodum copere potest de injuria sua propria*" (No man can take advantage of his own wrong) is one of the salient tenets of equity. Hence, in the normal course, respondent cannot secure the assistance of a H court of law for enjoying the fruit of his own wrong.

While considering the question whether District Magistrate would cease to have jurisdiction to pass allotment order in respect of a roofless structure we may refer to the relevant provisions of the Act.

Chapter III of the Act contains a fasciculus of provisions (Sections 11 to 19) dealing with allotment etc. under the heading "Regulation of Letting". Section 11 prohibits the letting of any vacant building except in pursuance of an allotment order issued under Section 16. Section 12 enumerates cases in which there would be deemed vacancy of buildings. Section 13 declares that if any person occupies a building which fell vacant otherwise than under an order of allotment he would be deemed to be an unauthorised occupant of the building. Section 15 casts an obligation on the landlord as well as the tenant to give notice of vacancy of the building to the District Magistrate. (Landlord has to give such notice within 7 days of the occurrence of such vacancy, whereas the tenant has to give the notice within 15 days prior to the date of vacancy.) Section 16(1) reads thus :

> "16(1). Allotment and release of vacant building. - (1) Subject to the provisions of the Act, the District Magistrate may by order -
>
> (a) require the landlord to let any building which is or has fallen vacant or is about to fall vacant, or a part of such building but not appurtenant land alone, to any person specified in the order (to be called an allotment order);"

Jurisdiction of the District Magistrate, therefore, is in respect of a building which is either vacant or which "has fallen vacant" or is about to fall vacant. If a structure was a building as per the definition at the time when it fall vacant, the District Magistrate, no doubt, gets jurisdiction to initiate proceedings for passing allotment order, but would he lose jurisdiction merely because the structure became roofless subsequently? No doubt, if we go by the definition in section 3(1) *stricto sensu*, the structure without roof will cease to be building. But a roofless structure can still continue to be building outside the fixed borders of the definition. It is now necessary to notice that section 3 of the Act, which contains all the definition clauses, prefaces with the words "unless the context otherwise requires". Thus the legislature, which fixed contours for different expressions through the definition clauses has also provided sufficient play at the joints for contextual adaptations. In order words, contextual variations are not impermissible under the Act if such variations are necessary to achieve

A the object of the enactment. Outside the definition in section 3 of the act the word "building" need not necessarily be a roofed structure for even roofless structures are, sometimes, used as buildings in certain circumstances.

B *Stroud's "Judicial Dictionary"* (Vol. I of the 5th edn.) states that "what is a building must always be a question of degree and circumstances". Quoting from *Victoria City* v. *Bishopo of Vancouver Island,* (1921) AC 384, at P.390, the celebrated lexicographer commented that "the ordinary and natural meaning of the word building includes the fabric and the ground on which it stands". In *Black's Law Dictionary* (5th edn.) the meaning of C the building is given as "a structure or edifice in closing a space within its walls, and usually, but not necessarily, covered with a roof" (emphasis supplied). The said description is recognition of the fact that roof is not a necessary and indispensable adjunct for a building because there can be roofless buildings. So a building, even after losing the roof, can continue to be a building in its general meaning. Taking recourse to such general D meaning in the present context would help to prevent a mischief.

The upshot is, if the District Magistrate has commenced exercising jurisdiction under Section 16 of the Act, in respect of a building which answered the description given in the definition in Section 3(i), he would E well be within his jurisdiction to proceed further notwithstanding the intervening development that the building became roofless. We are inclined to afford such a liberal interpretation to prevent a wrong doer from taking advantage to his own wrong.

F We, therefore, allow this appeal and set aside the judgment of the Allahabad High Court. There will be no order as to costs.

However, considering the importance of the locality in which the building is situate and the palpably low rent which appellant is now paying, we have no doubt, in the interest of justice, the appellant should pay higher G rent. After hearing the counsel on both sides regarding this aspect, we fix the monthly rent of the building at Rs. 500. Appellant shall pay rent at the enhanced rate from 1.8.1996 onwards.

M.K. Appeal allowed.

H

ADAIR DUTTA AND CO. INDIA PVT. LTD. A

v.

THE APPROPRIATE AUTHORITY, INCOME TAX DEPARTMENT

SEPTEMBER 25, 1996 B

[KULDIP SINGH AND K.T. THOMAS, JJ.]

Income Tax Act, 1961 :

Chapter XX-C, ss. 269 UD and 269 UE (1)—Purchase by Central Government of immovable property agreed to be sold—Vesting of property in Central Government free from encumbrances—Held, in case agreement stipulates the property to be sold free from all encumbrances or certain encumbrances, then the vesting in Central Government would be free from such encumbrances. C

D

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 : Building belonging to Central Government—Whether excluded from the purview of the Act—Matter remitted back to High Court for decision.

The appellant-company was tenant in a building situate in the city of Madras. The owner of the building entered into an agreement to sell the building. The appropriate authority under Chapter XX-C of the Income Tax, 1961, on coming to know of the agreement, ordered the Central Government to purchase the said building for the same consideration as shown in the agreement, in accordance with S.269 UD (1) of the Act. The appellant was informed that the building stood vested in the Central Government by virtue of s.269 UE (1) of the Act free from all encumbrances, and it was required to surrender possession of the building. E F

The appellant filed a writ petition before the High Court on the grounds that in view of the decision in the case of *C.B. Gautam whereby the expression "free from all encumbrances" in sub-section (1) of s. 269-UE had been struck down, only the right of the erstwhile owner of the building vested with the Central Government without affecting the leasehold right of the appellant; and that the appellant's right in the building was protected by the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The High Court dismissed the writ petition holding that the agree-** G H

A ment provided for a sale free from all encumbrances; and that the provisions of the T.N. Act did not afford any protection to the appellant. Aggrieved, the Company filed the present appeal.

It was contended for the appellant that though the T.N.Act excluded government building from its purview, such exclusion was confined to
B buildings owned by the State Government and not to those owned by Central Government.

Disposing of the appeal, this Court

C HELD : 1. In *C.B. Gautam** though the Constitution Bench has struck down the words "free from all encumbrances" in sub- section (1) of s.269-UE of the Income Tax Act, 1961, it approved the distinction that in case the agreement for sale contains the stipulation to the effect that the property would be sold free from all encumbrances or certain encumbrances then the vesting in the Central Government would be free from such
D encumbrances. In the instant case, the agreement for sale executed by the erstwhile owner, regarding the property in question,contained a stipulation that the property would be sold free of all encumbrances. [780-A]

**C.B. Gautam* v. *Union of India & Ors.*, [1983] 1 SCC 78, explained and followed.

E

2.1. The Constitution Bench in *C.B. Gautam* considered whether the vesting in central Government would affect monthly tenancies, and held that such tenancies would continue even on an order for purchase by Central Government being made under s.269 UD (1), but such tenants
F would lose the protection given to tenants under the rent protection laws because such laws are not made applicable to properties owned by the Central Government and their tenancies could be terminated by the Central Government. [781-C-D]

C.B. Gautam v. *Union of India & Ors.*, [1983] 1 SCC 78, referred to.

G

Tata Consulting Engineers & Anr. v. *Union of India & Ors.*, (1994) 206 ITR 237, disapproved.

2.2. However, in C.B. Gautam the situation where monthly tenancy is protected by a rent control legislation was not before the Court. The
H question regarding application of T.N. Act to buildings owned by the

Central Government must be considered afresh by the High Court and, therefore, the matter is remitted to the High Court for disposal of the writ petition accordingly. [781-H; 782-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1109 of 1995.

From the Judgment and Order dated 20.1.94 of the Madras High Court in W.P. No. 9946 of 1989.

Jaydeep Gupta, Ujjwal Banerjee, Rajesh Srivastava and H.K. Puri for the Appellant.

B.B. Ahuja and S. Rajappa and S.N. Terdol for the Respondent.

The Judgment of the Court was delivered by

THOMAS, J. Whether a *bona fide* statutory tenant has the right to continue in possession even after an order of purchase was made under Section 269 UD(1) in Chapter XX-C of the Income Tax Act, (for short 'the Act'), is the question sought to be raised in this appeal. According to the appellant the answer to the said question must be in the affirmative.

A brief sketch of the facts :

The appellant - a Private Limited Company - is tenant on the ground floor of a building situate on the Mount Road (now called Anna Salai), Madras. On 30.3.1989, owner of the building entered into an agreement with another person for sale of the building, for a sum of Rs.26 lacs. The Appropriate Authority, constituted under Chapter XX-C of the Act, on coming to know of the aforesaid agreement initiated proceedings, in exercise of its powers under the said Chapter for purchase of the building. He ordered the building to be purchased by the Central Government for the same consideration as shown in the agreement in accordance with Section 269 UD(1) of the Act. Appropriate Authority then issued a communication to the appellant informing it that the building stood vested in the Central Government by virtue of Section 269-UE(1) of the Act free from all encumbrances with effect from 22.6.1989. The appellant was requested to surrender possession of the building. A writ petition was filed before the High Court of Madras Challenging the said communication had the subsequent request. A Division Bench of the Madras High Court dismissed

A the writ petition. This appeal by special leave has been filed against the judgment of the Division Bench.

The two sub-sections of Section 269-UE of Chapter XX-C of the Act which are relevant for this appeal are quoted below :

B "269-UE. Vesting of property in Central Government. - (1) Where an order under sub-section (1) of Section 269-UD is made by the appropriate authority in respect of an immovable property referred to in sub-clause (i) of clause (d) of Section 269-UA, such property shall, on the date such order, vest in the central Government free
C from all encumbrances.

(2) The transfer or any other person who may be in possession of the immovable property in respect of which an order under sub-section (1) of Section 269-UD in made, shall surrender or deliver possession thereof to the appropriate authority or any other person
D duly authorised by the appropriate authority in this behalf within fifteen days of the service of such order on him."

The contention of the appellant before the Madras High Court was two-fold. First is that as the constitution Bench of this Court in *C.B Gautam* v. *Union of India & Ors.*, [1983] 1 SCC 78, has struck down the expression
E "free from all encumbrances" in sub-section (1) of Section 269-UE, what was vested with the Central Government is only the right of the erstwhile owner of the building without affecting the leasehold right of the appellant. Second is that appellant's right in the building has been protected by the Tamil Nadu (Lease and Rent Control) Act, 1960 (for short 'the T.N. Act')
F and as such his statutory right cannot be by-passed through the vesting process.

Division Bench of Madras High Court repelled both contentions. Learned Judges pointed out that the transferor has stipulated in the agreement for sale dated 30.3.1989 (which led to the action taken by the
G Appropriate Authority) that the transfer of the premises shall be free from all encumbrances and then held : "when the agreement in this case provides for a sale free of all encumbrances, the property agreed to be sold would also vest in the Central Government free of such encumbrances. Only in a case where the agreement does not provide that he sale would be free from
H all encumbrances, the encumbrance holder of leases in possession may not

be obliged to deliver possession of the property". Regarding the second contention the High Court pointed out that even otherwise the provisions of the T.N. Act do not afford any protection to the tenants of the buildings owned by Central Government.

The Constitution Bench of this Court has struck down the words "free from all encumbrances" in sub-section (1) of Section 269-UE of the Act. The material portion of the judgment is extracted below :

> "In view of the express provision in section 269-UE that the property purchased would vest in the Central Government 'free from all encumbrances' it is not possible to read down the section as submitted by learned Attorney General. In the result, the expression 'free from all encumbrances' in sub-section (1) of Section 269-UE is struck down and subsection (1) of Section 269- UE must be read without the expression 'free from all encumbrances' with the result the property in question would vest in the Central Government subject to such encumbrances and leasehold interests as are subsisting thereon except for such of them as are agreed to be discharged by the vendor before the sale is completed."

However, the Bench approved the distinction that in case the agreement for sale contains the stipulation to the effect that the property would be sold free from all encumbrances or certain encumbrances then the vesting in the Central Government would be free from such encumbrances. The following passage in the judgment makes the position clear :

> "As we have stated earlier where an agreement for sale provides that the property is intended to be sold free of all encumbrances or leasehold rights, the order for purchase of such property under Section 269-UD(1) in the said Chapter would result in the said property vesting in the Central Government free of such encumbrances or leasehold interests. In such a case the holders of the encumbrances and leasehold interests would have to obtain their compensation from the amount awarded as the purchase price to the owner of the property. This appears to be a fair construction because in such a case the apparent consideration can be expected to include the value of such leasehold interests or encumbrances....."

A It was not disputed before us that the agreement for sale executed by the erstwhile owner, regarding the property in question, contained a stipulation that the property would be sold free of all encumbrances. However, learned counsel tried to get support for this contention from a decision of the Karnataka High Court in *Tata Consulting Engineers and Another* v. *Union of India and Others*, (1994) 206 ITR 237, wherein it has B been observed that "the Supreme Court did not specifically consider a case where ignoring or suppressing the fact that the premises were in the occupation of a monthly tenant who had not agreed to vacate, the agreement of sale, without referring to such tenancy, provided for delivery of vacant possession at the time of sale. Chapter XX-C also does not provide C for a case where the agreement of sale contained an incorrect information regarding possession, that is agreeing to deliver vacant possession even though vacant possession could not be delivered having regard to the fact that the premises were in the occupation of a bona fide tenant". The Karnataka High Court concluded that "on the facts and circumstances set D out above, in so far as the tenant is concerned, the term of the sale agreement providing for delivery of vacant possession should be read down as only providing for delivery of vacant possession of the remaining portions of the premises."

E The said view of the learned single judge of the Karnataka High Court is not in consonance with the reasoning of this Court in *C.B. Gautam* (supra). The position has been clearly stated by this Court in the judgment as follows :

> F "The holders of the encumbrances and leasehold interests which would be destroyed in this manner can be said to be persons interested as contemplated in clause (e) of sub- section (2) of Section 269-UA. In this connection, we may refer to sub-section (5) of Section 269-UE which declares that nothing in the said section which deals with the vesting of property in the Central Government shall operate to discharge the transferor or any other G person (not being the Central Government) from liability in respect of any encumbrances on the property and notwithstanding anything contained in any other law for the time being in force, such liability may be enforced against the transferor or such other person. This provision makes it amply clear that in the case we H have just referred to the encumbrance holder or the holder of the

> leasehold rights could claim the fair value of his encumbrance or the leasehold interest out of the amount paid on account of the purchase price to the owner of the immovable property acquired by the Central Government under Section 269-UD."

In this context we may point out that the Constitution Bench in *C.B. Gautam* (supra) considered whether such vesting in the Central Government would affect monthly tenancies. The following observation has been made regarding that aspect :

> "As far as monthly tenancies are concerned, they do not pose any difficulty because monthly tenants are also lessees in law although their right is a very limited one. If the agreement to sell does provide for vacant possession or the determination of monthly tenancies such tenancies would continue even on an order for purchase by the Central Government being made by the appropriate authority concerned under Section 269-UD(1); but such tenants would lose the protection given to tenants under the rent protection laws *because such laws are not made applicable to properties owned by the Central Government with the result that their tenancies could be terminated by the Central Government.*"
>
> (emphasis supplied)

Learned counsel for the appellant, however, contended that the T.N. Act applies even to buildings owned by the Central Government and hence the aforesaid observation cannot apply to the tenancy rights protected by the said Act. We agreed that the Constitution Bench has not considered the situation were the monthly tenancy is protected by a rent control legislation. No doubt, learned judges have stated in the impugned judgment that "in relation to such statutory tenancy rights there is no protection as such available, as the rent control laws are inapplicable to properties owned by the Central Government and such tenancies could be terminated by the Government".

The aforesaid finding in the impunged judgment is also challenged in this appeal. Learned counsel contended that though the T.N. Act excludes government buildings from its purview such exclusion is confined to buildings owned by the State Government because of the definition contained in the T.N. Act for the word "government" as meaning "State

A Government".

We think that the question regarding application of T.N. Act to buildings owned by the Central Government must be considered afresh by the High Court in view of the aforesaid contention. We, therefore, set aside the judgment under challenge and remit this case to the High Court for B disposal of thse writ petition afresh in the light of the observations made above.

G.N. Appeal disposed of.

SURJA RAM

v.

STATE OF RAJASTHAN

SEPTEMBER 25, 1996

[G.N. RAY AND G.T. NANAVATI, JJ.]

Indian Penal Code, 1960 :

Ss. 302 and 307—Accused committed murder of his brother, brother's two minor sons and his aunt—Attempted to commit murder of his brother's wife and daughter—Attack by accused, in cool and calculated manner, in dead hours of night when his victims were asleep—Absence of provocation immediately before or even proximately before the murders—Conviction by trial court—Death sentence passed by trial court confirmed by High Court—Held—Crime committed by accused falls in category of rarest of rare cases for which extreme penalty of death is fully justified.

Sentence—Accused committed four murders of his relations in cool and calculated manner—Held, for deciding to award just and appropriate sentence, aggravating and mitigating factors and circumstances in which the crime has been committed are to be balanced—Fact that accused was not convicted on any previous occasion is not a mitigating factor in favour of accused that would out weight all aggravating factors and circumstances in which murders had been committed—Death penalty awarded by trial court and confirmed by High Court upheld.

The appellant-accused was prosecuted for committing murders of his brother, two minor sons of the said brother, and his aunt (bua) and for attempting to murder his brother's wife and daughter. The prosecution case was that the accused and his two brothers had been residing in one compound in their separate portions. A partition of joint property amongst the brothers was effected. There arose some land dispute amongst the brothers about 6-7 months prior to the occurrence, but the said dispute was said to have been sorted out. About 5-6 days prior to the occurrence, the accused wanted to erect barbed fencing in the compound, but the proposal was protested by his brother 'R'. On the fateful night at about 12.30 a.m. when all were in their sound sleep, 'D' another brother of the accused, woke up on hearing the cries or 'S', the daughter of 'R'. He came out and saw the

A accused, armed with a kassi, assaulting 'S' who suffered serious injuries on her neck, 'D' and the wife of the accused challenged the accused, who ran away. The wife of 'R' was found lying seriously injured and his aunt was found dead in the courtyard. Inside the room, 'R' and his one son were found lying dead, and his other son 'N' critically injured. 'N' succumbed to injuries shortly thereafter. The two injured, namely, the wife and the B daughter of 'R', were taken to the hospital where on being treated both of them survived.

The trial court found the accused guilty of the charges and sentenced him to death under 302 IPC, life imprisonment and a fine of Rs. 2,000 under C s. 307 IPC, and rigorous imprisonment for 10 years and a fine of Rs. 1,000 under s. 450 IPC. The High Court dismissed the appeal filed by the accused, and confirmed the death sentence awarded by the trial court. Aggrieved, the accused filed a special leave petition through his counsel and a jail petition. The special leave petition was dismissed as regards the order of conviction, but notice was issued to the State on the question of sentence passed D against the accused.

It was contended for the appellant-accused that it was not fit case calling for awarding extreme penalty of death sentence; the appellant due to the land dispute and the quarrel with the deceased over erecting the barbed fence in the compound, suddenly became very much enraged and E lost normal frame of mind, and the offences committed by the appellant in such uncontrolled framed of mind could not be categorised as rarest of rare case.

Dismissing the appeal and the jail petition, this Court

F Held : 1.1. It has been indicated by the trial court that the accused was in full senses and had committed the murders of four close relations one after the other and also attempted to commit murder of his brother's wife and daughter in a cool and calculated manner. He did not even feel remorsed and being quite alive to the enormity of the crime committed by G him he escaped from the place of occurrence. [796-E-F]

1.2. From the evidence adduced, it is clearly revealed that the accused, in a cool and calculated manner, intended to wipe out the entire family of his brother. In that end in view, he selected the most opportune moment, namely dead of night when his brother and other members of his H family would remain asleep so that they would be absolutely helpless and

not capable to give any defence to save themselves. He did not even spare his old aunt and brutally murdered her. In order to ensure death, the accused chose to cut vital part of the body, namely, the neck, by a sharp cutting weapon (kassi) when his victims were asleep. [796-A-B]

1.3. In the instant case, there is absence of any provocation. There is nothing on record to indicate that the accused had any occasion to reasonably feel aggrieved for any unjust and improper conduct on the part of the deceased brother. The joint lands had been partitioned long back; and the dispute between the accused and the deceased in respect of only one killa of land had been sorted out 8-10 months prior to the incident. Thereafter no fresh incident took place to give any occasion to the accused to feel aggrieved. The quarrel, which took place 5-6 days prior to the incident when the deceased brother objected to the proposal to put a barbed fencing, cannot be reasonably held to be a cause for being temperamentally upset and for enter- taining so much wrath and spirit of vengeance as may impel a men of normal composure and frame of mind to run amock and perpetrate ghastly murders of such magnitude. There is no evidence to indicate that in view of such quarrel there had been any aftermath and further dispute and resentment between the deceased and the accused either immediately before or even proximately before the occurrence. [795-H; 796-A]

2.1. For deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced in a dispassionate manner. The fact that the appellant was not convicted for any other offence on any previous occasion, can hardly be considered as a mitigating factor in favour of the appellant that will outweigh all the aggravating factors and circumstances in which the crime of murders had been committed. The murders had been committed very brutally and mercilessly, of absolutely innocent person, namely, the aunt and two minor sons of his brother, with whom there was no occasion to come in conflict and to entertain any grudge or ill-feeling. [796-F-G]

2.2. Punishment must also respond to the society's cry for justice against the criminal. While considering the punishment to be given to the accused, the Court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered

with such mercy as the criminal may justly deserve, but also to the rights of the victims of the crime to have the assailant appropriately punished and the society's reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused. [797-C-D]

2.3. In the facts and circumstances of the case, the crime committed by the accused falls in the category of rarest of rare cases for which extreme penalty of death is fully justified. There is no reason to interfere with the sentence of death awarded against the appellant since confirmed by the High Court. [797-E]

Shankar **v.** *State of Tamil Nadu,* **[1994] 4 SCC 479;** *Jasnuona Bharat Singh & Others* **v.** *State of Gujarat,* **[1994] 4 SCC 353;** *Dhanarijoy Chatterjee* **v.** *State of West Bengal,* **[1994] 2 SCC 220 and** *Ravji @ Ram Chandra* **v.** *State of Rajasthan,* **JT (1995) 8 SC 520, referred to.**

Dennis Lounde Mcoautha **v.** *State of California,* **(402) U.S. 183 L. Ed. II 711, referred to.**

Jagmohan Singh **v.** *State of UP,* **AIR (1973) SC 947;** *Shiv Mohan Singh* **v.** *State,* **AIR (1977) SC 949;** *Bachan Singh* **v.** *State,* **[1980] 2 SCC 684;** *Shashi Nayar* **v.** *Union of India & Ors.,* **[1992] SCC Crl. 24 and** *Anshad & Ors.* **v.** *State of Karnataka,* **[1994] 4 SCC 381, cited.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1727 of 1996 Etc.

From the Judgment and Order dated 18.1.96 of the Rajasthan High Court In D.B.Crl.A.No. 265 of 1995.

Rajiv Dutta for the Appellant.

K.S. Bhati, M.K. Singh and Ms. Kusum Sharma for the Respondent.

The Judgment of the Court was delivered :

G.N. RAY, J. Leave granted.

The appellant Surja Ram was convicted by the learned Additional Sessions Judge, Hanumangarh in Sessions Trial No. 28 of 1991 for the

offence under Section 302 IPC for murdering his real brother Raji Ram's two sons Naresh and Ramesh and Niko Bai their Bua, and for an offence under Section 307 IPC for attempting to murder Sudesh, the daughter of Raji Ram nd Phoola Devi the wife of Raji Ram also for offence under Section 450 IPC for committing house trespass in order to commit offence punishable with imprisonment for life. The learned Additional Sessions Judge awarded death sentence against the said accused Surja Ram for the offence of murder. He was sentenced to suffer imprisonment from life and a fine of Rs. 2,000, in default of payment of fine, further rigorous imprisonment for three months for the offence under Section 307 IPC and he was also sentenced to suffer rigorous imprisonment for ten years and fine of Rs. 1,000, in default of payment of fine, to suffer further rigorous imprisonment for one month for the offence under Section 450 IPC.

Against such convictions and sentences, the accused Surja Ram preferred D.B Criminal Appeal No. 265 and 266 of 1995 before the Rajasthan High Court (Jodhour Bench). The said appeals were heard along with D.B. Criminal Murder Reference No. 1 of 1995 by the Rajasthan High Court and by the impugned common judgment dated January 18, 1996, the High Court dismissed both the appeals preferred by the accused Surja Ram and confirmed the death sentence passed against him.

Surja Ram filed S.L.P. (Crl.) No. 744 of 1996 through a learned counsel against his convictions and sentences before this Court. He also sent another special leave petition from Jail to the Registry of this Court which has been numbered as D. No. 1007 of 1996. His special leave petition was dismissed by this Court after hearing the learned counsel so far as the order of convictions passed against the said accused is concerned but notice was issued to the State of Rajasthan limited only on the question of sentences to be passed against the accused for his convictions for the offences aforesaid.

Mr. Rajiv Dutta, the learned counsel appearing for the accused appellant Surja Ram has submitted that it is not a fit case calling for awarding extreme penalty of death sentence because sufficient grounds warranting such extreme penalty by holding it as one of the rarest of rare cases are not present. Mr. Dutt has submitted that certain facts, relevant for the consideration of appropriate punishment to be awarded against the accused appellant, should be noted.

A The accused appellant and his two brothers Dalip Ram and the deceased Raji Ram has been living in one compound (Ahata) in their respective residential unit. The accused appellant used to reside in the middle portion of the said compound and the deceased Raji Ram and Dalip Ram used to reside respectively on the northern and southern side of the side compound. The parents of the accused and his brothers were B residing in punjab. There had been partition of joint property amongst the brothers. On such partition the accused and Dalip Ram each got 13 killa of land and the deceased Raji Ram got 14 killa.

There was some land dispute amongst the brothers about 6 to 7 C months prior to the said incident of murder but such dispute is stated to have been sorted out at the intervention of Sarpanch Chandra Pal.

About 5 or 6 days prior to the incident, the accused expressed the desire to erect wire fencing in the compound but the deceased Raji Ram D protested against such proposal of the accused.

The prosecution case as proved by the evidences adduced in the trial, is that on August, 7, 1990 at about 9.00 P.M., the members of the family of the deceased Raji Ram retired after taking their dinner. The informant Dalip Ram, who is the other brother of the deceased and the wife of Dalip E Ram were sleeping in their courtyard. Raji Ram and his two sons Naresh and Ramesh were sleeping in the outer room of his residential unit. Raji Ram's wife Phoola Devi, her daughter Sudesh and Raji Ram's father's sister Niko Bai were sleeping in their courtyard. It the courtyard of Surja Ram the wife of the accused Imarti was also sleeping. After taking meal, F the appellant went out of the house. At about 12.30 A.M., Dalip Ram heard the cries or sudesh, when he came out, he saw in the light that the accused Surja Ram was standing with a kassi in his hand and was assaulting Sudesh. Dalip Ram and the wife of the accused Imarti challenged the accused and the accused had ran away. It has been proved that Sudesh has suffered severe injuries on her neck and she fell down in the courtyard and Niko G and Phoola were also found lying seriously injured. Niko was, however, found dead and Phoola was gasping for life. When Dalip Ram went inside the room, he found that Raji Ram and his son Naresh were lying dead and the other son Ramesh though alive, was critically injured. The said Ramesh, however, died shortly thereafter and Sudesh and Phoola were taken in a H jeep and admitted in the hospital at Sangaria. On being treated in the

hospital both of them survived. A

In awarding the sentence of death against the accused-appellant, the learned Additional Sessions Judge noted that :

(a) The accused had committed extremely barbaric and heinous crime of causing murder of four persons and also attempted to murder the B other two who, though seriously injured, providentially survived.

(b) The accused committed murder of his own real brother, two minor sons of his brother and also his Bua. Although the accused also attempted to kill the daughter and the wife of his brother, they, being C seriously injured, luckily survived.

(c) The accused committed the murder of the said persons and also attempted to murder the other two close relations while all the said victims ware defenceless as they were asleep then and therefore, had no opportunity to save themselves or resist the attack. D

(d) The accused attempted to kill Phoola his brother's wife by cutting her neck and being critically injured, she remained unconscious for about 15 days and hovered between life are death but luckily survived. Attempt was also made to kill the daughter of his brother by cutting her neck with kassi but she also luckily survived. E

(e) The intention of the accused was only to murder all the said persons because the inflicted injuries on the neck of all the said persons with a sharp cutting weapon (kassi).

(f) The accused ensured that male member in the family of his F brother Raji Ram was alive. As a matter of fact, he attempted to wipe out the whole family of Raji Ram but the widow and the daughter of Raji Ram survived even though they suffered serious injuries on their necks by the kassi blows inflicted by the accused.

G

(g) There was no instigation or provocation for causing the said murders of four very close relations and attempting to cause murders of the other two persons.

(h) For some land dispute which was settled six months before and the dispute and altercation over a small incident of putting the barbed wire H

A in the compound of the residential complex which had also taken place 2 to 3 days before the incident, the accused in cool and calculated manner attacked all the said persons when they were sleeping in their house and were utterly helpless in resisting attacks made on them.

(i) The previous and the subsequent conduct of the accused clearly
B revealed that he was mentally alert for which he selected the opportune moment to commit the said murders when the victims were asleep and after committing the crime escaped from the scene of crime.

(j) There was complete absence of any feeling of remorse of the
C accused.

The learned Additional Sessions Judge after indicating the aforesaid aggravating factors in the commission of the crime to the finding that there was absence of any mitigating factor in favour of the accused and the heinous act of murder of four persons including on old aunt and two minor
D sons of his real brother and attempting also to kill his brother's wife and her daughter in a most cool and calculated manner by ensuring that none of the victim could offer any resistance because they were asleep at the time of being attacked, constituted the offence committed by the accused as one of the rarest of rare cases for which the extreme penalty of death
E was warranted.

The learned Judge held that the death sentence *per se* was not unconstitutional as has been held by this Court in *Jagmohan Singh* v. *State of U.P.,* AIR (1970) SC 947; *Shiv Mohan Singh* v. *State,* AIR (1977) SC 949; *Bachan Singh* v. *State,* [1980] 2 SCC 684; *Shashi Nayar* v. *Union of*
F *India and Others,* [1992] SCC Crl. 24.

Mr. Dutta, the learned counsel for the accused-appellant has submitted that though the appellant has committed a very serious crime by killing his own brother, his two minor sons and his Bua when they were asleep and he also attempted to kill his brother's wife and brother's
G daughter, the appellant did not act with cruelty or in a barbaric manner and also did not torture anyone of them before committing the murder of attempting to cause murder. The learned counsel has submitted that though it is extremely unfortunate that the appellant committed the said ghastly murders of his brother and its two minor sons and the old aunt and
H also attempted to kill brother's wife and daughter, it should be kept in mind

that the appellant felt deeply aggrieved against the conduct of his brother Raji Ram on account of dispute with him in land matter and the recent quarrel which he had with the deceased for not allowing the appellant to put fending as desired by him, in the compound of their residential complex. The appellant unfortunately fell victim to his deep seeded ill feeling towards his brother and members of the family of the said brother and lost his normal frame of mind for which he could not restrain himself and being made with rage and being actuated by an urge for vengeance, murdered the said persons and attempted to murder the other two.

The learned counsel for the appellant has further submitted that life once put to end can never be brought back. It is, therefore, essentially necessary to give a very careful and serious consideration as to whether such extreme penalty of death which will put an end of the life of the accused, should be awarded in a case or not. The learned counsel has also submitted that the number of persons murdered though a relevant consideration in weighing the gravity or a crime is not the only consideration in selecting the extreme penalty for murder and unless the crime perpetrated by an accused can safely be placed in the category of rarest of rare cases, the extreme penalty to death should not be awarded. In support of such contention, the learned counsel for the appellant has referred to a decision of this Court in *Anshad and Others* v. State of Karnataka, [1994] 4 SCC 381.

The learned counsel for the appellant has further submitted that the facts and circumstances of the case do not reveal that the accused was a maniac or otherwise blood-thirsty with a high degree of propensity to commit murder of innocent persons. On the contrary, the accused is a poor agriculturist who was not booked for any crime. Unfortunately, for the said land dispute and the quarrel with the deceased in connection with putting of a barbed fence in the domestic house, the appellant suddenly became very much enraged and lost the normal frame of mind and control over his passions. In such uncontrolled frame of mind, he decided to murder his brother and his family members so as to but an end of any dispute with them for ever. Such act though very heinous and extremely lamentable, cannot be categorised as rarest of rare cases. The learned counsel has submitted that the accused attacked each of the victim with a sharp cutting instrument 'kassi' and inflicted injuries on the neck of each of the victim so that the death could be hastened. There was no tendency on his part to

A subject any of the victim to any cruel treatment or tortura before killing them. In the aforesaid circumstances, the learned Additional Sessions Judge and the High Court should not have awarded the extreme penalty of death against the appellant The appellant should be given a chance to reform himself in jail and regent for his crime during long span of imprison-
B ment for life and thereafter to be a useful member in the society. He has, therefore, submitted that the death penalty should be set aside by commuting the sentence to the sentence of imprisonment for life.

The learned counsel for the State, however, opposed the submissions of the learned counsel for the appellant that the crime committed by the
C accused did not constitute a rarest or rare cases for which the extreme penalty of death is warranted. It has been submitted by the learned counsel for State that all the brothers had specific share of the land on partition of joint property and they had been enjoying their respective share of land. There is nothing on record to indicate that peaceful enjoyment of the land
D allotted to the share of the accused was sought to be interfered with by the deceased who was none else but his real brother. On the contrary, it has been proved that there was a dispute between the brothers in respect of only one killa of partitioned land. Such dispute was also sorted out at the intervention of the Sarpanch of the village several months back. Hence,
E there was no just cause for nursing any aggrieved feeling and sense of injustice meted out to him in the hands of the said brother. There was minor dispute between the deceased and the accused 5 to 6 days before the date of the incident when the accused wanted to put a barbed fencing on a portion of their residential complex and the deceased protested
F against such intention of the accused. In a domestic life, such petty discord and dissension often happen. For such a petty discord, there cannot be any of occasion of any man of normal composure to lose control of his senses and to become so enraged as to commit murder of brother and his two minor sons and an old aunt and to attempt to murder the brother's wife and daughter unless he is a person of cruel nature and absolutely men
G minded. Even if it is assumed that because of such dispute, the appellant had felt aggrieved and became enraged, the murders had not been committed immediately after the occurrence when the accused might have lost normal fr. ıe of mind. The incident of dispute in connection with putting of fencing had taken place several days before the date of commission of
H murders. It is quite evident that the accused did not commit said crime

under a grave and sudden provocation and in a fit of emotional set back out being determined to wipe out the entire family of his brother, he selected the most opportune moment to commit the said ghastly murders at dead of night when the brother and the members of his family were fast asleep and were completely helpless to put up any defence. A

The learned counsel for the State has also submitted that even if the accused had occasion to feel aggrieved against his brother either on account of the land dispute, though in fact no such dispute was then existing, or account of resistance given by the brother in not allowing the accused to put a fencing in their residential complex, there was no occasion for the accused to kill two innocent minor sons of his brother who were asleep at the time of murder. Similarly, there was not occasion to kill the old aunt and also to attempt to kill the brother's wife and the brother's daughter when they where also asleep and completely defenceless. The brother's wife and daughter were given serious injuries by the sharp cutting instrument on their necks and it was due to extreme good luck that they ultimately survived after prolonged medical treatment in the hospital. The learned counsel for the State has submitted that such act of murders and attempt to murder had not been committed on account of any grave or sudden provocation but the same had been committed in a cool and calculated manner with clear and definite intention to wipe out each member of the family of his real brother. Such act on the part of the accused has been rightly categorised by the learned Additional Sessions Judge and also by the High Court as one of the rarest of rare cases of murder. The learned counsel has submitted that the said act of extreme brutality in committing the murder of helpless innocent persons it bound to shock the conscience of the society and the cry of the society for justice and just punishment to the criminal cannot be met by showing any sympathy to the accused, when there is no real mitigating factor in favour of the accused. He has, therefore, submitted that on interference is called for against the capital sentence awarded against the accused. B C D E F

After giving our anxious consideration to the facts and circumstances of the case, it appears to us that for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced in a dispassionate manner. Such act of balancing is indeed a difficult task, it has been very aptly indicated in *Dennis Lounde Mcoautha* G H

A v. *State of California,* 402 U.S. 183 L. Eo II 711 that no formula of a full proof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime of murder. In the absence of any full proof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to
B the consideration of gravity of crime of murder, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitable distinguished.

In *Shanker* v. *State of Tamil Nadu,* [1994] 4 SCC 479, this Court has
C indicated that the choice as to which one of the two punishments provided for murder is a proper one in a given case depend upon the particular circumstances of that case and the Court has to exercise its discretion judicially and on well-recognised principles after balancing all the mitigating or aggravating circumstances of the case.

D In *Jasnuona Bharat Singh and Others.* v. *State of Gujarat,* [1994] 4 SCC 353, it has been held by this Court that in the matter of death sentence, the Courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal in achieving the avowed object of law
E by imposing appropriate sentence. It is expected that the courts would operate the sentencing system as to impose such sentence with reflects the conscience of the Society and the sentencing process has to be stern where it should be.

In *Dhananjoy Chatterjee* v. *State of West Bengal,* [1994] 2 SCC 220,
F this Court has observed that shockingly large number of criminals go unpunished thereby increasing encouraging the criminals and in the ultimate making, justice suffer by weakening the system's credibility. The imposition of appropriate punishment is the manner in which the Court response to the society's cry for justice against the criminal. Justice
G demands that courts should impose punishment befitting the crime so that that courts reflect public abhorrence of the crime. The Court must not only keep in view the right of the criminal but also the rights of the victim of the crime and the society at last while considering the imposition of appropriate punishment.

H Similar view has also been expressed in *Ravji @ Ram Chandra* v.

State of Rajasthan, JT (1995) 8 SC 520. It has been held in the said case that it is the nature and gravity or the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal. If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

In the instant case, there is absence of any provocation. There is no material on record from which it can be reasonably held that the accused had any occasion to reasonably feel aggrieved for any unjust and improper conduct on the part of the deceased brother. It has transpired from evidence adduced that joint lands had been partitioned long back amongst the brothers and each of the brothers including the deceased and the accused had been possessing his respective allotted lands. There was an occasion for difference and dispute between the accused and the deceased in respect of only one kills of land but such dispute had been sorted out at the intervention of the Sarpanch of the village about eight to ten months before the incident. After that no fresh incident had taken place in recent past for which there was any occasion for the accused to feel aggrieved concerning his landed property. From the evidence it transpires that all the three brothers had been residing in separate portion within their residential compound or Ahata. A few days before the incident, there was a quarrel between the accused and the deceased when the accused intended to put a barbed fencing on a portion of their residential complex out the deceased objected to such course of action. Such incident cannot be reasonably held to be a cause for being temperamentally upset and for entertaining so much wrath and spirit of vengeance as may impel a man of normal composure and frame of mind to run amock and perpetrate ghastly murders of such mignitude. There is no evidence to indicate that in view of such quarrel happening a few days prior to the incident there had been any aftermath and further dispute and resentment between the deceased and the accused

A either immediately before or even proximately before the incident of murders and attempts to commit murders. From the evidence adduced, it is clearly revealed that the accused, in a cool and calculated manner intended to wipe out the entire family of his brother. In that and in view, he selected the most opportune moment, namely, dead of night when his brother and other members of this family would remain asleep so that they would be absolutely helpless and not capable to give any defence to save themselves, in order to ensure death, the accused chose to out vital part of the body, namely, the neck by a sharp cutting weapon (kassi) when his victims were asleep. He, therefore, succeeded in murdering his brother Raji Ram and his two minor sons by cutting their necks without any resistance from them. He did not even spare the poor old aunt and brutally murdered her by cutting her neck when she was asleep. In order to wipe out the whole family of his brother, the accused also attempted to murder the brother's wife and the brother's daughter when they were also asleep. Both the brother's wife and the daughter were critically injured by accused by cutting their necks. The wife of the brother, as a matter of fact, hovered between life and death and remained unconscious for a number of days but out of sheer luck she could survive. The daughter of the brother also luckily survived after being seriously injured when her neck was also cut by giving a number of injuries in and around the neck. It has been indicated by the learned Additional Sessions Judge that the accused was in full senses and committed the murders of four close relations one after the other and also attempted to commit murder of his brother's wife and daughter in a cool and calculated manner. He did not even feel remorsed and being quite alive to the enormity of the crime committed by him he escaped from the place of occurrence.

It is true that the appellant was not convicted for any other offence on any previous occasion. Such fact can hardly be considered as a mitigating factor in favour of the appellant that will outweigh all the aggravating factors and circumstances in which the crime of the murders had been committed. The murders had been committed very brutally and mercilessly of absolutely innocent persons, namely, the Bua and two minor sons of his brother with whom there was no occasion to come in conflict and to entertain any grudge or ill feeling. Even if it is assumed that there was still some property dispute between the brothers despite sorting out of such dispute at the intervention of the Sarpanch, for such common place property dispute between brothers particularly when the accused was not dispos-

sessed from the possession and enjoyment of his demarcated landed property by the deceased brother, it cannot be reasonably held that the accused had a genuine cause to feel aggrieved for injustice meted out to him in the hands of his deceased brother which may impel him to cause the murder of his brother. In any event, there could not be any cause to take a decision to wipe out the entire family of the brother in a very cruel manner when being asleep they were absolutely helpless. The members of the family of his brother were absolutely innocent and two of them were even minors. Such murders and attempt to commit murders in a cool and calculated manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent person. Punishment must also respond to the society's cry for justice against the criminal. While considering the punishment to be given to the accused, the Court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered with such mercy as the criminal may justly deserve, put also to the rights of the victims of the crime to have the assailant appropriately punished and the society's reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused. In the facts and circumstances of the same, we are of the view, that the crime committed by the accused falls in the category of rarest of rare cases for which extreme penalty of death is fully justified, we, therefore, find no reason to interfere with the sentence of death awarded against the appellant since confirmed by the High Court. This appeal and the jail petition being numbered as D. No. 1007/96 stand dismissed.

A B C D E F

R.P. Appeal dismissed.

A J.K. INDUSTRIES LTD. ETC. ETC.

v.

THE CHIEF INSPECTOR OF FACTORIES AND BOILERS AND ORS. ETC. ETC.

B SEPTEMBER 25, 1996

[DR. A.S. ANAND AND K.T. THOMAS, JJ.]

Labour Laws—Factories Act 1948—Sections 2(n) proviso (ii) (as amended in1987); 6(1)(e); 7; 7-A and 100(2) (omitted in 1987)—Factory C *owned and run by a company—Occupier—Person in ultimate control of the affairs of the factory or only a director—Application for renewal or grant of factory licence—Direction by the Chief Inspector of factories—Only a director of the company is responsible and not any employee even otherwise nominated by the Board of Directors—Held, is a valid direction—In the case* D *of a company, which owns a factory, it is only one of the directors of the company who can be notified as the occupier of the factory for the purposes of the Factories Act and the company cannot nominate any other employee to be the occupier of the factory—When the company fails to do so notify the Inspector of factories shall be at liberty to proceed against any one of the Directors of the company, treating him as the deemed occupier of the factory* E *for prosecution and punishment in case of any breach or contravention of the provisions of the factories Act or for offences committed under it—Proviso (ii) to Section 2(n) of the Factories Act is intravires the substantive provision of Section 2(n) of the factories Act.*

F *Words & Phrases :*

'Occupier'—Meaning of—In the context of Factories Act 1948—Person who is in the ultimate control of the affairs of the factory—Held, person could be a company or a partnership or an association of persons or an individual.

G *Interpretation of Statute :*

Statute Law—Proviso—Proper mode of interpretation of—Held, a Section and the proviso thereto must be construed as a whole each throwing light on the rest—Proviso (ii) is no ultra-vires the main provision of Section (2) of the Factories Act—There is not conflict at all between the main provision of H *Section 2(n) and proviso (ii) thereto.*

Strict liability—The persons punishable under the provision of Section 92 of the Factories Act are occupiers and managers—Held, Section 92 contemplated a joint liability of the occupier and the manager for any offence committed irrespective of the fact as to who is directly responsible for the offence—The offence under the factories Act are strict statutory offences for which establishment of mens rea is not an essential ingredient—The omission or commission of the statutory breach is itself an offence.

Constitution of India—Articles 14, 19(1)(g); 21 and 141—Constitutionality of Proviso (ii) to Section 2(n) of the Factories Act—Held, valid and not ultravires of Articles 14, 19(1)(g) and 21—It is not fair and proper to read a sentence from Supreme Court's judgment divorced from its context and to build up a case treating that sentence to be completed law on the subject.

The petitioners/appellants desirous of renewal of the registration of licence of their factories filed applications with the Chief Inspector of Factories, (the respondent). The respondent rejecting the applications of the appellants directed them to make an application duly signed by the director of the company in his capacity as the occupier of the factory and that a nominee of the Board of Director, other than a Director, of the Company could not make such an application us an occupier. According to the respondent, section 2(n) with its proviso (ii) of the factories Act, 1948 as amended by Amending Act of 1987, provides that in case of a company, which owns the factory, the company cannot nominate any one of its employees or officers, except a director of the company, as the occupier of the factory.

The appellants challenged the correctness of that direction in the High Court by way of a Writ Petition. The High Court dismissed the Writ Petition and held that the nomination of an occupier to be made by the company under proviso (ii) to Section 2(n) of the Factories Act, 1948 as amended by Amending Act of 1987 can only be that of *director* and of no other officers or employee of the factory or the company which owns the factory. Hence these appeals.

Dismissing the appeals, this court

HELD : 1.1. There is nothing unreasonable in fixing the liability of a *director* of the company and making him responsible for compliance with the provisions of the Act and the rules made thereunder and laying down

A that it there is contravention of the provisions of the Act or an offence is committed under the Act, the *notified* director, and in the absence of the notification, any one of the directors of the company, shall be liable to be prosecuted and shall be liable to be punished as the *deemed* occupier. "A law has to be judged for its constitutionality by the generality of cases it
B covers and not by the freaks and exceptions it martyres." [836-G-H]

R.S. Joshi v. *Ajit Mills,* AIR (1977) SC 2279, relied upon.

M/S. Bhatia Metal Containers Pvt. Ltd. and Anr. v. *The State of Uttar Pradesh,* (1990) II LLJ 534; *Standard Industries Ltd. and Anr. Etc. Etc.* v.
C *The State of Madhya Pradesh & Others,* (decided on 15.11.1995); *Ashok Leyland Ltd.* v. *The State of Rajasthan,* (decided on 1.11.1991 by Rajasthan High Court); *Jaipur Syntex Ltd. and Others.* v. *State of Rajasthan and Others,* (1991) LLR 380; *Champaran Sugar Co. Ltd.* v. *Union of India & Ors.,* (decided on 3.5.1988 by Patna High Court), approved.

D *W.S. Industries (India) Ltd. and Another* v. *The Inspector of Factories, Bangalore & Ors.,* (1991) II LLJ 480; *Kirloskar Pneumatic Company Ltd.* v. *V.A. More and Others,* (1993) I, LLJ 805; *Indo Flaglabes Ltd. and Anr. and Straw Products Ltd. and Anr.* v. *Chief Inspector of factories and Boilers and Others,* (1993) 66 FLR 171; *Wimoc Ltd. and Others* v. *The Union of India &*
E *Others,* (1995) FLJ 552; *Ion Exchange India Ltd. Hosur* v. *Deputy Chief Inspector of Factories, Salem,* (1995) LLR 756; *Greaves Ltd. and Anr.* v. *State of West Bengal & Anr.,* (1996) LLR 638, disapproved and overruled.

1.2. Where it is the *company* which owns or runs such a factory, it is the company which has the *ultimate control* over the affairs of the factory,
F and therefore, it would be the *company* which would be the *occupier* of that factory. However, since a *company* is a legal abstraction, it can act only through its agents who in fact control and determine the management and are the centre of its personality. Such agents are generally called the directions being the "directing mind and will" of the company. The *deeming fiction* under proviso (ii), therefore, only clarifies the position where com-
G pany is the occupier of the factory. The legislature by providing the *deeming fiction* under proviso (ii) did not detract from the generality of the main provision under Section 2(n), but only clarified it. The directors are *not* the employees or servants of the company. They manage, control and direct the business of the company as "owners". The Directors are often
H referred to as the "alter ego" of the company. An employee or officer of the

factory or of the company, even it authorised by the board of directors by a resolution to be a person "in the ultimate control of the affairs of the factory" cannot be so. Such an employee only carries out orders from above and it makes no difference that he has given some measures of discretion also and has supervisory control. He can at best be treated to be in the immediate (control) of the affairs of the factory or having *day to day control* over the affairs of the factory, the *ultimate* control being retained by the company itself. The legislature did not designedly use the expression *immediate* or *day to day* or *supervisory* control instead of *ultimate control in the main provision of section 2(n).* [817-A-E]

John Donald Mackenzie and Another v. *The Chief Inspector of Factories, Bihar,* AIR (1962) SC 1351, held applicable.

Oxford advanced *Learner's Dictionary* of current English Encyclopedic Edition (1992); *Collins Dictionary of the English Language; Black's Law Dictionary (Sixth Edition), relied upon.*

1.3. The provisions of Sections 7 and 7A when considered in the light of proviso (ii) to Section 2(n), leave no manner of doubt that it is a statutory obligation under section 7 of the Act after 1987 to nominate the *occupier* before the occupier occupies or beings to use the premises to run the factory and in the case of an existing factory seek the renewal of the licence to continue to operate the factory. It is only when this statutory requirement is fulfilled that the factory would be given the licence or its licence shall be renewed in the case of existing factories.

The option to 'Select' the director who would be the "*occupier*" vests in the Board of Directors and once they notify the name and particulars of a director the Inspector of Factories is left with no discretion to 'pick and choose" *any* other director for prosecution etc. for the breaches committed in the factory or for contravention of any of the provisions of the Act. It is only when the company fails to perform its statutory obligation to notify the name of the director under section 7 of the Factories Act, that the Inspector of Factories may "Choose" any one of the *directors* as the deemed occupier and proceed against him. The area for mischief can, thus, be totally blocked by the company by notifying one of its directors as the occupier in discharge of its statutory obligations enumerated in Section 7 of the Factories Act. The reasonableness of the restriction depends upon the urgency of the evil sought to be controlled. The *possibility* of the power

A being abused is no ground for declaring the provision unconstitutional. Proviso (ii) to Section 2(n) of the Factories Act, there fore, does not offend Article 14 of the Constitution of India. [827-A]

1.4. A proviso to provision in a statute has several functions and while interpreting a provision of the Statute, the Court is required to carefully B scrutinise and find out the real object of the proviso appended to that provision. It is not a proper rule of interpretation of a proviso that the enacting part or the main part of the Section be construed first without reference to the proviso and if the same is found to be ambigous only then recourse may be had to examine the proviso. [824-B-C]

C

An accepted rule of interpretation is that a section and proviso thereto must be construed as a whole each portion throwing light, if need be, on the rest. A proviso is normally used to remove special cases from the general enactment and provide for them specially. Proviso (ii) to section 2(n) of the Act is *intra- vires* the substantive provision of section 2(n) of the D Act. The restriction imposed by proviso (ii) if at all, it may be called a restriction, has, a direct nexus with the object sought to be achieved and is, therefore, a reasonable restriction within the meaning of clause (6) of Article 19. Proviso (ii) to Section 2(n) is thus, not *ultra-vires* Article 19(1)(g) of the Constitution. Proviso (ii) was introduced by the Amending Act, couched in a *mandatory* form - 'any one of the directors *shall* be deemed to E the occupier' - keeping in view the experience gained over the years as to how the directors of a company managed to escape their liability, for various breaches and defaults committed in the factory by putting up another *employee* as a shield and nominating him as an 'occupier' who would willingly suffer penalty and punishment. Proviso (ii) now makes it F possible to reach out to a *director* of the company itself, who shall be prosecuted and punished for breach of the provisions of the Act, apart from prosecution and punishment of the Manager and of the actual offender. There is no conflict at all between the main provision of Section 2(n) and proviso (ii) thereto. Both can be read harmoniously and when so ready in the case a company, the *occupier* of a factory owned by a company would G mean '*any one of the directors of the company who has been notified/identified by the company to have ultimate control over the affairs of the factory and where no such director has been so identified, for the purposes of prosecution and punishment under the Act, the Inspector of factories may initiate proceedings against any one of the Directors as the deemed occupier.*

H [824-C-D; 825-E-H; 826-A-D]

Reserve Bank of India Etc. Etc. v. *Peerless General Finance and Investment Co. Ltd. and Others Etc. Etc.*, [1987] 1 SCC 424; *S. Gopal Reddy* v. *State of Andhra Pradesh*, JT (1996) 6 SC 268; *The Commissioner of Income Tax, Mysore and Ors.* v. *The Indo Mercantile Bank Ltd. & Ors.*, AIR (1959) SC 713, referred to. A

B

2.1. The offences under the Factories Act are not a part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates absolute or strict liability without proof of any *mens rea*. The offence are strict statutory offences for which establishment of *mens rea* is not an essential ingredient. The omission or commission of the statutory breach is itself the offence. 'Absolute offences' are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty. Such offences are generally known as public welfare offences. The rule of strict liability is attracted to the offences committed under the Act and the *occupier* is held vicariously liable alongwith the Manager and the actual offender, as the case my be. Penalty follows *Actus reus*, mens-rea being irrelevant. The legislature has itself taken care to dilute the rigour of Section 92 of Factories Act, by providing an exception to the strict liability rule by lying down a *third party procedure* in section 101 of the Act Section 101 of the Act lays down "third part procedure" as a defence and is in a way an exception to the general rule and enables the *occupier* or the *manager* or the factory, to extricate himself from punishment by establishing that the actual offender is some-one else and giving satisfactory proof of facts as are contemplated by Section 101 (a) and (b). The 'passing on' defence provided in Section 101 of the Act is an accepted form of an exception to the principle of strict liability but its benefit would be available only when the requirements of that section are fully complied with and the court is satisfied about the proof of facts as are contemplated by clauses (a) and (b) of Section 101. The Scheme on Section 101 being that the occupier or manager should be relieved from liability *only* if the actual offender could be brought to court, the presence of the actual offender on whom the burden has been *shifted* by the occupier or the *manager* would be necessary at the time to trial and a period of three months has been prescribed by the Legislature within which the actual offender should ordinarily be brought before the court by the process of law. If that cannot be done, the trial against the occupier or the manager as the case may be, cannot be allowed to be protracted C D E F G H

indefinitely and no fault can be found with this provision. Thus, proviso (ii) to Section 2(n) when considered in relation to section 92 of the Act does not offend Article 21 of the Constitution of India. [835-C-E]

R.S. Joshi **v.** *Ajit Mills,* **AIR (1977) SC 2279;** *Tesco Supermarkets Ltd.* **v. Nattrass, (1972) AC, 153;** *Lennards's Carrying Company Ltd.* **v.** *Asiatic Petroleum Company Ltd.,* **(1915) AC 705;** *M.C. Mehta & Anr.* **v. Union of India and Ors., [1986] 2 SCC 325.**

2.2. *Maneklal Jinabhai Kot* **v.** *State of Gujarat & Ors.,* **[1967] 2 SCR, 507;** *Ward* **v.** *Smith,* **(1913) 3 K B 154;** *State of Gujarat* **v.** *Kansara Manilal,* **AIR (1964) SC 1893,** "*Text Book on Criminal Law*" **(1978) Edn.) - by Prof. Glanville Williams, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4014-4015 of 1993 Etc. Etc.

From the Judgment and Order dated 6.4.93 of the Rajasthan High Court in D.B.C.W.P. No. 1895 of 1989.

Ashok H. Desai, Attorney General, R.K. Jain, R.F. Nariman, V.A. Mohta, Raj Birbal, P.P. Malhotra, S.S. Javali, K.N. Shukla, H.L. Agrawal, Raju Ramachandran, K.K. Lahiri, Ejaz Maqbool, Braj K. Mishra, Ravindra Kumar, Jaideep Gupta, A.T. Patra, Gautam Khaitan for O.P. Khaitan & Co., P.P. Tripathi, Rajesh Kumar Singh, S. Sukumaran, O.C. Mathur, P.N. Misra, S. Misra, P. Pattnaik, A. Mahapatra, Rajeev Sharma, Anand Chandra Swain, Rajiv Tyagi, U.A. Rana, M.K. Mohan, M.J.S. Rupal, Mukul Mudgal, W.A. Qadri, C.V. Subba Rao, R.C. Verma, R.B. Misra, Aruneshwar Gupta, Jaideep Gupta, Ms. Radha Rangaswamy, Mrs. Kirti Mishra, S.K. Agnihotri and B.B. Singh for the appearing parties.

The Judgment of the Court was delivered by

DR. ANAND, J. Leave granted in C.A. No.12552/96 SLP (C) No. 12498/96.

In this batch of cases, both in the writ petitions and in appeals by special leave, short facts, which are not in dispute and are relevant for the discussion hereinafter, are that the chief Inspector of Factories called upon the petitioners/appellants to fil applications seeking renewal of the registra-

tion of licence of their respective factories, signed by a *director* of the company in his capacity as the *occupier* of the factory and stated that a nominee of the Board of Directors, other than a Director, could not make such an application as an occupier. The correctness of that direction/opinion has been put in issue in all these cases. The petitioners/appellants have also called in question the constitutional validity of proviso (ii) to Section 2(n) of the Factories Act, 1948 (hereinafter referred to as 'the Act') as amended by Act 20 of 1987, as violative of Articles 14, 19(1)(g) and 21 of the Constitution of India.

The basic question which requires our consideration is whether in the case of a company which owns or runs the factory, is it only a *director* of the company who can be notified as the *occupier* of the factory within the meaning of proviso (ii) to Section 2(n) of the Act, or whether the company can nominate any other employee to be the *occupier* by passing a resolution to the effect that the said employee shall have 'ultimate control over the affairs of the factory'. If the answer to the question is that in the case of a company, only a *director* can be notified as an *occupier* under the Act, the next question which would require our consideration is about the constitutional validity of proviso (ii) to Section 2(n) of the Act as introduced by the Amending Act of 1987. The answer to these questions would depend upon the interpretation of amended Section 2(n) of the Act. It would, therefore, be appropriate to first notice the provisions of Section 2(n) as it stood prior to the amendment and as it stands today.

Section 2(n) as it stood prior to Amendment of 1987.

"2(n) "occupier" of a factory means the person who has ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory;

Section 2(n) as it is after Amendment of 1987.

"2(n) "Occupier" of a factory means the person, who has ultimate control over the affairs of the factory,

Provided that

(i) in the case of a firm or other association of individuals any

A one of the individual partners or members thereof shall be deemed to be the occupier;

(ii) in the case of a company, any one of the directors shall be deemed to be occupier;

B (iii) in the case of factory owned or controlled by the Central Government or any State Govt. or any local authority, the person or persons appointed to manage the affairs of the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed be the occupier

C :

xxx xxx xxx xxx xxx xxx

Section 2(n) of the Act prior to its Amendment was required to be read along with Section 100 of the Act with a view to determine an *occupier* D under different situations.

Section 100 as it stood prior to the Amendment of 1987.

"100. Determination of occupier in certain cases - (1) Where the occupier of a factory is a firm or other association of in- E dividuals, any one of the individual partners or members thereof may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is punishable :

Provided that the firm or association may give notice to the F Inspector that it has nominated one of its members residing within India to be the occupier of the factory for the purposes of this Chapter and such individual shall so long as he is so resident be deemed to be the occupier of the factory for the purposes of this Chapter until further notice cancelling his nomination is received by the Inspector or until he ceases to be a partner or member of G the firm or association.

(2) where the occupier of a factory is a company, any one of the directors thereof may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is H punishable :

Provided that the company may give notice to the Inspector that it has nominated a director, who is resident within in India, to be the occupier of the factory for the purposes of this Chapter and such director shall so long as he is so resident be deemed to be the occupier of the factory, for the purposes of this Chapter until further notice cancelling his nomination is received by the Inspector or until he ceases to be a director.

Provided further that in the case of a factory belonging to the Central Government or any State Government or any local authority the person or persons appointed to manage the affairs of the factory shall be deemed to be the occupier of that factory for the purposes of this Chapter.

(3) Where the owner of any premises or building referred to in Section 93 is not an individual, the provisions of this Section shall apply to such owner as they apply to occupiers of factories who are not individuals."

Section 100 has since been omitted by Amendment Act 20 of 1987.

There is divergence of opinion between various High Court in the country with regard to the interpretation and scope of proviso (ii) to Section 2(n) of the Act. That conflict also needs to be resolved.

The High Court of Karnataka in *W.S. Industries (India) Ltd. and Another* v. *The Inspector of Factories, Bangalore & Others.*, (1991) II LLJ, 480 opined that it is not necessary that the occupier must be necessarily the owner or the director of the company and if by a resolution some other person is nominated to be the occupier who is declared to be in the ultimate control of the affairs of the factory then that person or officer would be treated as the occupier for the purposes of the Act. The Court said :

"But the main clause provides that occupier shall be one who has ultimate *control of the affairs of the company*. This clause read with the operative provisions of the Act makes it clear that the occupier of a factory could be a person nominated by the board or by the firm notwithstanding the fact that such a partner or director could also be liable and the liability in respect of the operative provisions in respect of such director or partner will have to be established." (Emphasis ours)

A However, the constitutional validity of Section 2(n) was, not dealt with in the above case and it was observed that "it is unnecessary to go into the constitutional validity of the provisions of the Act".

The Bombay High Court in the case of *Kirloskar Pneumatic Company Ltd.* v. *V.A. More & Others,* (1993) I LLJ 805 was also not called upon to B decide the constitutional validity of Section 2(n) of the Act. The question debated before the High Court was whether one of the Directors only should be treated to be an *occupier* within the meaning of Section 2(n) or not. The High Court noticed the deletion of Section 100 by the Amending Act of 1987 and observed that the legislature had carved out an exception C to the main provision by adding second proviso to Section 2(n) of the Act. The learned Judges noticed the judgment of this Court in *John Donald Mackenzie and Another* v. *The Chief Inspector of Factories, Bihar,* AIR (1992) SC, 1351 and opined that the said decision lays down that an occupier of a factory need *not* necessarily be a *Director* and that he can be any other person or employee nominated, as an occupier, by the Board of D Directors.

The Orissa High Court in *Indo Floglabes Limited & Anr. and Strew Products Ltd. and Anr.* v. *Chief Inspector of Factories and Boilers and Others,* (1993) 66 FLR, 171 dealt extensively with the provisions of the Factories Act before and after the 1987 amendment. It relied upon the E judgments of the *Karnataka* and *Bombay High Courts* and went on to hold that an occupier need *not* necessarily be a *director* of the company and that the only requirement is that the person to be nominated as an occupier must have the "ultimate control" over the affairs of the factory.

F The High Court of Guwahati in *Wimco Ltd. & Others* v. *The Union of India & Others,* (1995) FLJ, 552 has followed the judgments of *Karnataka, Bombay* and *Orissa High Courts*. The Court observed :

> "This being the position of law as enunciated by the Karnataka and Bombay High Courts, now let us see whether this is good law as G laid down by these two High Courts a bare reading of Section 2(n) as amended will show that the material part of the section defining an occupier remains unaltered and so a person who has the ultimate control of the factory can be nominated as the occupier, and it also must be borne in mind that always a director may not be in the ultimate control of the factory. It is ultimate control of H the factory which is the touch-stone and not the ultimate control

of the company. A director may live at distance. But the ultimate control of the factory may be left to his Manager as in such case it is the manager who will be deemed to be occupier of factory and advisedly such a person can be nominated as the occupier. Because of certain difficulties, an occupier only would be dependable as such, an occupier of a factory assumes control and responsibility and the legislature enunciated that the occupier should be the person who would be the person responsible to ensure that the provisions of the Act are complied with. The proviso to S. 2((n) is only added to carve out an exception to the Rules that a person who has ultimate control over the affairs of the factory as an occupier. The legislature wanted to have "a say that in case of a company, being the owner of the factory, the director would be deemed to be an occupier....."

The Madras High Court in *ION Exchange India Ltd. (represented by as Manager) Hosur* v. *Deputy Chief Inspector of Factories, Salem (1995) LLR, 756 and the Calcutta High Court in Greaves Ltd. and Another* v. *State of West Bengal and Another,* (1996) LLR, 638, have also, following, the judgments of *Bombay* and *Karnataka High Court* opined that a company which owns or runs a factory can nominate a person other than a director of the company to be an *occupier* of the factory within the meaning of Section 2(n) read with proviso (ii) thereto. None of these High Courts has, however, dealt with the constitutional validity of the provision under consideration.

On the other hand, the High Court of Allahabad in *M/s. Bhatia Metal Containers Pvt. Ltd. and Another* v. *The State of U.P.,* (1990) II LLJ, 534, the High Court of Madhya Pradesh in *Standard Industries Ltd. and Another Etc. Etc.* v. *The State of Madhya Pradesh and Others,* (Misc. Petition No. 3130/91 and Writ petition No. 4419/94 etc. decided on 15.11.95), High Court of Rajasthan in *Ashok Leyland Ltd.* v. *The State of Rajasthan and Others,* (Civil Writ Petition No. 4195/89 decided on 1.11.91) and in *Jaipur Syntex Ltd. and Others* v. *State of Rajasthan and Others,* (1991) LLR, 380 and the High Court of Patna in *Champaran Sugar C. Ltd.* v. *The Union of India and Ors.,* (C.W.J.C. No. 2254/88 decided on 3.5.88) have held that the nomination of an *occupier* to be made by the company under proviso (ii) to Section 2(n) of the Act can only be that of a *director* and of no other officer or employee of the factory or the company which owns the factory.

A Prior to the enactment of the Factories Act, 1948, regulation of labour in factories was governed by the Factories Act, 1934 but as the statement of objects and reasons of the Act of 1948 shows there were various defects and weaknesses in the 1934 Act which came in the way of its effective administration. The provisions of the 1934 Act regarding safety, B health and welfare of workers were found to be inadequate and unsatisfactory. In view of large and growing industrial activity in the country, an overhauling of the factories law became necessary. The Factories Act of 1948 which came into force with effect from 1st of April, 1949 was, enacted to remove some of the shortcomings noticed in the 1934 Act. The 1948 Act is an act to consolidate the law regulating factories. It is a piece of social C welfare legislation enacted primarily with the object of protecting workmen employed in factories against industrial and occupational hazards. It seeks not only to ensure that workers would not be subjected to long hours of strain but also that employees should work in safe, healthy and sanitary conditions and that adequate precautions are taken for their welfare and D safety. The stringent provisions relating to the obligations of the occupiers or managers with a view to protect workers and to secure to them employment in conditions conducive to their health and safety indicate the broad purpose of the Act. The Act and the Rules made thereunder impose numerous restrictions upon the *occupier* or *manager* or the factory to E ensure to workers adequate safeguards for their health and physical well being and to secure to them safe and health conditions at the place of work. The 1948 Act was amended by Act 94 of 1976, with a view to remove some lacunae relating to the definition of 'workers' and for improvement of the provisions in regard to safety of workers and appointment of safety officers and to provide for an enquiry in every case of a fatal accident. Some F difficulties experienced in the administration of the 1948 Act even after the 1976 amendment specially those relating to hours of employment, safety conditions and development of appropriate work culture conducive to safety and health of workers particularly in case of factories which deal with hazardous materials and the escape routes which the employers had G found to shift their responsibilities on some employee or the other and escape punishment and penalty, which were also noticed on certain judgments of this Court, led the Parliament to amend the Act in 1987 which *inter alia* amended Section 2(n), deleted Section 100 and incorporated Section 7, 7A, Chapter IV-A, Section 104 A and Section 106 A, besides H certain other provisions.

Prior to 1987, Section 2(n) of the Act which defined "*occupier of a factory*" had necessarily to be read alongwith Section 100 of the Act to find out an *occupier* under different situations. Sub-section (2) of Section 100 provided that where the *occupier of a factory was a company*, any one of the Directors thereof *may* be prosecuted and punished for any offence under Chapter X for which the occupier of the factory was punishable. Under the proviso to section 100(2), the Company had an *option* to nominate one of its Directors, resident in India, who on such nomination would be deemed to be an *occupier* for purposes of prosecution and punishment under the Act. There was, thus, no compulsion under Section 100(2) that only a director should be nominated as an occupier, even though in the definition of an occupier under Section 2(n), it was provided that an occupier means the person who has the ultimate control over the affairs of the factory and where such affairs are entrusted to a managing agent, such agent shall be deemed to be an occupier. Some of the companies, taking advantage of the *option* as contained in the proviso to Section 100(2) of the Act and noticing the stringent provisions for punishment for breach of some of the provisions of the Act, instead of nominating a *Director*, as the *occupier*, used to nominate some other employee or officer as an occupier of the factory and, thus, whenever any violation of the Act was committed, it was that employee or officer, who was subjected to penalty and punishment and not the *Directors* or any one of them. Thus, by nominating an employee or an officer as the occupier, the directors of the company who are primarily responsible for ensuring safety measures in the factory and taken care of health, hygiene and welfare of the workers being in ultimate control of the management of the company which owns the factory, were able to escape prosecution and punishment even if they were found to be negligent or indifferent to the welfare of the workmen or had failed to provide adequate and proper safety measures in the factory as well as in cases where the breach was found to have been committed with their consent or connivance, or due to lack of diligence on their part. After a tragedy occurred in Delhi by the leakage of chlorine gas, this Court noticed the "escape route" which had been carved out by the Directors of the Company, which own or runs the factory, and voiced its concern and opined that if their was negligence in looking after the safety requirements, in a hazardous industry, in particular, even the Chairman and the Managing Director besides the Board of Directors must be held responsible and

liable (even when they are not the actual offenders) as that alone could ensure, reduction of, if not altogether eliminations of, risk and hazard to workmen. In *M.C. Mehta & Anr.* v. *Union of India & Ors.*, [1986] 2 SCC, 325 it was observed :

"So far as the undertaking to be obtained from the Chairman and Managing Director of Shriram is concerned it was pointed out by Shriram that Delhi Cloth Mills Ltd. which is the owner of Shriram has several units manufacturing different products and each of these units is headed and managed by competent and professionally qualified persons who are responsible for the day to day management of its affairs and the Chairman and Managing Director is not concerned with day to day functioning off the units and it would not therefore be fair and just to require the Chairman and Managing Director to give an undertaking that in case of death or injury resulting on account of escape of chlorine gas, the Chairman and Managing Director would be personally liable to pay compensation. We find it difficult to accept this contention urged on behalf of Shriram. We do not see any reason why the Chairman and/or Managing Director should not be required to give an undertaking to be personally liable for payment of compensation in case of death or injury resulting on account of escape of chlorine gas, particularly when we find that according to the reports of various expert committees which examined the working of caustic chlorine plant, there was considerable negligence in looking after its safety requirements and in fact, considerable repair and renovation with and installation of safety devices had to be carried out at a fairly heavy cost in order to reduce the element of risk or hazard to the community. We may however make it clear that the undertaking to be given by the Chairman and/or Managing Director may provide that no liability shall attach to the Chairman and/or Managing Director if he can show that the escape of chlorine gas was due to an Act of God or vis major or sabotage. *But in all other cases the Chairman or Managing Director must hold himself liable* to pay compensation. *That alone in our opinion would ensure proper and adequate maintenance of safety devices and instruments and operation of the caustic chlorine plant in a manner which would considerably reduce, if not eliminate, risk or hazard to the workmen and to the people living in the vicinity*".

(Emphasis ours)

It was, thereafter, that the Parliament stepped in and passed the Amendment Act 20 of 1987 which as already noticed, besides amending the definition of an *occupier* under Section 2(n) of the Act by addition of various provisos thereto also made some more significant changes in the Act. The statement of objects and reasons of Amendment Act 20 of 1987, reads :

"Statement of Objects and Reasons"

(1) The Factories Act, 1948, provides for the health, safety, welfare and other aspects of workers in factories. The Act is enforced by the State Governments through their Factory Inspectorates. The Act also empowers the State Governments to frame rules, so that the local conditions prevailing in the State are appropriately reflected in the enforcement. The Act was last amended in 1976 for strengthening the provisions relating to safety and health at work, extending the scope of the definition of "workers", providing for statutory health surveys, and requiring appointment of safety officers in large factories.

(2) After the last amendment to the Act, there has been substantial modernization and innovation in the industrial field. Several Chemical Industries have been come up which deal with hazardous and toxic substances. This has brought in its strain problems of industrial safety and occupational health hazards. It is, therefore, considered necessary that the Act may be appropriately amended, among other things to provide specifically for the safeguards to be adopted against use and handling of hazardous substances by the occupiers of factories and the laying down of emergency standards and measures. The amendments would also include procedures for siting of hazardous polluting industries to ensure that hazardous and polluting industries are not set up in areas where they can cause adverse affects on the general public. Provision has also been made for the workers' participation in safety management.

(3) Opportunity has been availed of to make the punishments provided in the Act stricter and certain other amendments found necessary in the implementation of the Act."

It is in this background that we shall consider the scope and validity

A of Section 2(n) of the Act as amended in 1987. According to the definition of the 'occupier' under Section 2(n), an occupier means a *person* who is in 'ultimate control of the affairs of the factory'. Though the word 'person' has not been defined under the Act, but under Section 3(42) of the general Clauses Act, a *person* has been defined to include a *company* or *association* or *body of individuals*, whether incorporated or not. Such a *person*, under B Clause 2(n) of the Act, therefore, could be a *company* or a *partnership* or an *association of persons* or an *individual*. Where the factory is owned or run by a company, it would be that *company* which would be the *occupier* of the factory. Under Section 100, as it stood originally, where the *occupier of the factory was a company*, any one of the directors *may* be prosecuted C and punished and the company could give a notice identifying such a director. It was, therefore, as already noticed, *optional* for the company to notify a *director* as the occupier. The company could *nominate* any other officer or employee also as occupier. The Amending Act of 1987 eliminated altogether section 100 and instead introduced into Section 2(n) D various provisos and in proviso (ii) provided a deeming fiction, as to what would happen if the occupier was a company. Criminal liability in case of a default would primarily attach to the company, as the occupier of the factory and, therefore, it has been provided that in the case of a company, any one of the directors of the company *shall be deemed to be* the occupier. To remove the ambiguity and ensure that a mere 'authorisation' by the E Board of Directors of any of its *employees or officers*, by a resolution, to be the occupier was not allowed to defeat the object of the Act, particularly in matters of punishment and penalty, the Parliament also enacted Sections 7 and 7A of the Act by the Amending Act of 1987.

F Section 7(1) of the Act reads as under :

> 7(1) The occupier shall, at least fifteen days before he beings to occupy or use any premises as a factory, send to the Chief Inspector a written notice containing -
>
> G (a) the name and situation of the factory;
>
> (b) the name and address of the occupier;
>
> (bb) the name and address of the owner of the premises or building (including the precincts thereof) referred to in section 93 :
>
> H

(c) the address to which communication relating to the factory may be sent :

(d) the nature of the manufacturing process -

(i) carried on in the factory during the last twelve months in the case of factories in existence on the date of commencement of this Act, and

(ii) to be carried on in the factory during the next twelve months in the case of all factories;

(e) the total rated horse power installed or to be installed in the factory, which shall not include the rated horse power of any separate stand-by plant;)

(f) the name of the manager of the factory for the purposes of this Act :

(g) the number or workers likely to be employed in the factory :

(h) the average number of workers per employed during the last twelve months in the case of a factory in existence on the date of the commencement of this Act :

(i) such other particulars as may be prescribed.

7A. *General duties of the occupier.* - (1) Every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory.

(2) Without prejudice to the generality of the provisions of sub-section (1), the matters to which such duty extends, shall include -

(a) the provision and maintenance of plant and systems of work in the factory that are safe and without risk of health;

(b) the arrangements in the factory for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

A (c) the provision of such information, instruction, training and supervision as are necessary to ensure the health and safety of all workers at work;

(d) the maintenance of all places of work in the factory in a condition that is safe and without risks to health and the
B provision and maintenance of such means of access to and egress from, such places as are safe and without such risks;

(e) the provision, maintenance or monitoring of such working environment in the factory for the workers that is safe,
C without risks to health and adequate as regards facilities and arrangements for their welfare at work.

(3) Except in such cases as may be prescribed, every occupier shall prepare, and, as often as may be appropriate, revise, a written statement of his general policy with respect to the health and safety
D of the workers at work and the organisation and arrangements for the time being in force for carrying out that policy; and to bring the statement and any revision thereof to the notice of all the workers in such manner as may be prescribed."

E Under Section 7, a notice is required to be given to the Chief Inspector, disclosing the name of the *occupier at least fifteen days before he occupies or begins to use any premises as a factory*. It also requires the disclosure of the *name of the owner of the premises or building* and the *name* and *particulars* of the *Manager*. Section 7A prescribes the duties of the occupier. The provisions of Section 7 and 7A when considered in the light
F of proviso (ii) to Section 2(n), leave no manner of doubt that it is a statutory obligation under section 7 of the Act after 1987 to nominate the *occupier* before the occupier occupies or begins to use the premises to run the factory and to the case of an existing factory seek the renewal of the licence to continue to operate the factory. It is only when this statutory require-
G ment is fulfilled that the factory would be given the licence or its licence shall be renewed in the case of existing factories. The argument of the learned counsel for the appellants/petitioners that the expression "*person*" in Section 2(n) implies only *individual* does not bear scrutiny, when construed in the case of a company, a firm of partners or an association of
H persons. Where it is the *company* which owns or runs such a factory, it is

the company which has the *ultimate control* over the affairs of the factory, and, therefore it would be the *company* which would be the *occupier* of that factory. However, since a *company* is a legal abstraction, it can act only through its agents who in fact control and determine the management and are the centre of its personality. Such agents are generally called the directors being the "directing mind and will" of the company. The *deeming fiction* under proviso(ii), therefore, only clarifies the position where company is the occupier of the factory. The legislature by providing the *deeming fiction* under proviso (ii) did not detract from the generality of the main provision under Section 2(n), but only clarified it. The directors are *not* the employees or servants of the company. They manage, control and direct the business of the company as "owners" (Section 291 of the Companies Act). The Directors are often referred to as the "alter ego" of the company. Where the company owns or runs a factory, it is the company which is in the *ultimate control of the affairs of the factory* through its Directors. An employee or officer of the factory or of the company, even if authorised by the board of directors by a resolution to be a person "in the ultimate control of the affairs of the factory" cannot be so. Such an employee only carries out orders from above and it makes no difference that he has been given some measure of discretion also and has supervisory control. He can at best be treated to be in the *immediate control* of the affairs of the factory or having *day to control* over the affairs of the factory, the *ultimate* control being retained by the company itself. The legislature did not designedly use the expression *immediate* or *day to day* or *supervisory* control instead of *ultimate* control in the main provision of Section 2(n).

The word 'ultimate' in common parlance means last or final. The oxford Advanced Learner's Dictionary of Current English Encyclopedic Edition (1992), defines the word 'ultimate' to mean :

> "beyond which no other exists or is possible; last or final; from which every thing is derived; basic or fundamental; that cannot be surpassed or improved upon; greatest etc."

According to Collins Dictionary of the English Language the word 'ultimate' has been defined as :

> "last; final; elemental; fundamental; basic or essential; highest; furthest or greatest thing."

A According to Black's Law Dictionary (Sixth Edition), the word 'ultimate' means :

"at last, finally or at the end ....."

B There is a vast difference between a person having the *ultimate* control of the affairs of a factory and the one who has *immediate* or *day to day* control over the affairs of the factory. In the case of a company, the ultimate control of the factory, where the company is the owner of the factory, always vasts in the company, through its Board of Directors. The Manager or any other employee, of whatever status, can be nominated by C the Board of Directors of the owner company to have *immediate* or *day to day* or even *supervisory* control over the affairs of the factory. Even where the resolution of the Board of Directors says that an officer or employee, other than one of the directors, shall have the *'ultimate'* control over the affairs of the factory, it would only be a camaflouge or an artful circum- D vention because the *ultimate* control cannot be transferred from that of the company, to one of its employees or officers, except where there is a *complete transfer of the control* of the affairs of the factory. Mechanical recitation of the words of Section 2(n), as a *Mantra*, in a resolution nominating an employee or an officer as the occupier by stating that he shall have "ultimate control over the affairs of the factory", cannot be E permitted to defeat the object of the amendment. The provisions of the Act have to be construed in a manner which would promote its object, prevent its subtle evasion and foil its artful circumvention to suppress the mischief. Though, the expression *ultimate* control was used in Section 2(n) even prior to the 1987 amendment also but read with the proviso to Section F 100(2), it gave an opportunity to the companies owning the factory to dilute the rigour of the provision by not notifying one of its directors to be the occupier and instead nominating some employee or the other to be the "occupier" for purposes of punishment and penalty. The *ultimate* control which vests in an owner and in the case of a company in the Board of Directors cannot be vested in anyone else without *completely transferring* G the control over the factory to that person. The law does not countenance duality of *ultimate* control. If the transfer of the control to another person is not *complete*, meaning thereby that the transferor retains its control over the affairs of the factory, the transferee, whosoever he may be, (except a director of the company, or a partner in a partnership firm) cannot be H considered to be the person having *ultimate control* over the affairs of the

factory notwithstanding what the resolution of the Board states. The litmus test, therefore, is who has the *'ultimate'* control over the affairs of the factory.

The observations of this Court in *Mackenzie's* case (supra) that the "ultimate control over the factory must necessarily be with an owner *unless* the owner has *completely transferred* that control to another person" are significant. Where, a company has "*completely transferred*" that control to another person, it would be that other person, who would have the *ultimate* control over the affairs of the factory to the exclusion of the transferor - company and would be its *occupier*. The High Courts taking the view that in the case of a company, any *person* nominated by the Board of Directors to be in the *ultimate control* of the affairs of the factory would be an *occupier*, whether or not he is a Director of the company, have relied upon the following observation of this Court in *John Donald Mackenzie and Another* v. *The Chief Inspector of Factories, Bihar* (supra) :

> "Undoubtedly the expression 'occupier' is not to be equated with owner. But it must be borne in mind that *the ultimate control over the factory must necessarily be with an owner unless the owner has completely transferred that control to another person*. Whether that was done in the present case would be a question of fact. It was for the petitioners to contend that petitioner No. 1 was the manager of the factory and had the ultimate control thereof to lay before the Chief Inspector of Factories the company had in some manner transferred the entire control of the factory to petitioner No. 1".
>
> (Emphasis supplied)

and from these observations those High Courts have concluded that the law laid down by this Court in *John Donald Mackenzie's* case (supra) is that the occupier of the factory need not *necessarily* be a Director and that any person to whom control has been transferred and who has been given the *entire control* over the affairs of the factory by the company through a resolution can be the *occupier*, even if he is not a director. In our opinion, this is not a correct reading of that judgment, which even otherwise was concerned with the pre-amendment provisions. A brief reference to the facts of that case is, therefore, necessary at this stage. Mackenzie, who was petitioner No. 1 in the writ petition, had described himself as the Manager and *occupier* of Bata Shoe Company's factory at Dhiga in Bihar while

A seeking renewal of the licence of the factory. The Chief Inspector of Factories enquired from the factory whether mackenzie was one of the Directors of the company and pointed out that if he was not a Director, then a fresh application seeking renewal of the factory's licence signed by the *occupier* should be submitted. The Chief Secretary of Bata Shoe
B Company sent a reply to the Chief Inspector of Factories stating therein *that Mackenzie was the person who had been nominated to have the ultimate control of the affairs of the factory* and therefore he was an *occupier* within the meaning of Section 2(n) of the Act and, thus, competent to make an application for seeking renewal of the licence. The Chief Inspector, however, returned the application stating that *if Mackenzie was not a Director,*
C *then a fresh application signed by the Director is* required to be submitted. The Company, thereupon, moved the High Court at Patna for quashing the direction of the Chief Inspector of Factories requiring a *director* only to make the application for renewal of the licence. That petition was, dismissed by the High Court. The company then filed an appeal by special
D leave to this Court. This Court after setting out the definition of an *occupier* under Section 2(n) of the Factories Act went on to consider the correspondence that had been exchanged between the company and the Chief Inspector of Factories, which revealed that Mackenzie had been declared to be an *occupier* without his being a *director* of the company and held :

E "In the circumstances, therefore, the Chief Inspector of Factories was perfectly right in refusing to act on the application signed by Mackenzie and in requiring the factory to file a proper application for renewal of the licence.

F (Emphasis ours)

The appeal was consequently dismissed and the direction of the Chief Inspector of factories was maintained. This Court, thus, did not hold that a company can nominate any of its employee as an *occupier* of the factory, even if he is not a *Director* of the company. The judgment in
G *Mackenzie's* case, therefore, has to be understood in the context in which it was given as otherwise the decision of the Chief Inspector of Factories calling upon Mackenzie (who had been nominated as the *occupier* having 'ultimate control over the affairs of the factory') but was not himself a *director*, to have fresh application signed by the director submitted for
H renewal of the license, would not have been sustained by this Court. It is

not fair or proper to read a sentence from the judgment of this Court, divorced from the complete context in which it was given and to build up a case treating as if that sentence is the complete law on the subject. Judgments of this Court are not to be read in that manner.

Mr. Jain, learned senior advocate drew our attention to an order of a three Judges Bench of this Court in special leave petition No. 4141 of 1979 dated 14.3.1990 to support his submission that the occupier of the factory owned by a company need not necessarily be one of the directors of the company. Their Lordships while dismissing special leave petition No. 4141 of 1979 filed by the State of Orissa against the judgment of that High Court observed :

> "We are of the view that that judgment of the High Court of Orissa in the instant case and that of the Gujarat High Court in *Jyoti Switchgears* v. *Chief Inspector of Factories (34),* Indian Factories and Labour Reports 354, "that the occupier of a factory need not necessarily be either a Director or an owner of the factory is correct". In other words it is open to a Company to nominate a person other than a Director of the Company as an "occupier" of the Company for the purpose of the Factories Act".

The above order, was concerned with the provisions of Section 2(n) as they stood prior to the 1987 amendment, whereunder there was an *option* available to the company, to nominate a person other than a director of the company as an 'occupier' of the company. This order, therefore, cannot advance the case of the appellants\petitioners herein, who are governed by the provisions of Section 2(n) as amended by the Amending Act of 1987.

Thus, we find that after the 1987 amendment, the true import of proviso (ii) to Section 2(n) would be that in the case of a company, which owns the factory, the company cannot nominate any one of its employees or officers, except a director of the company, as the occupier of the factory. In other words, an *occupier* of the factory in the case of a company must necessarily be any one of its *directors* who shall be so notified for the purposes of the Factories Act. Such an *occupier* cannot be any other employee of the company or the factory. This interpretation of an "occupier" would apply to all provisions of the Act, wherever the expression *occupier* is used not merely for the purposes of Section 7 or 7A of the Act.

A Learned counsel for the appellants/petitioners, then, vehemently argued that proviso (ii) to Section 2(n) of the Act is beyond the scope of the main Section. Learned counsel urged that since the principal provision contained in Section 2(n) of the Act is clear, recourse cannot be had to proviso (ii) with a view to expand the ambit of the principal provision. B Learned counsel further argued that proviso (ii) confers absolute, unfettered and unguided powers upon the Inspector of factories to *pick and choose* any one of the directors of company for prosecution and punishment in connection with the breach of any of the provisions of the Act by a *deeming fiction* when that director is himself not responsible for the contravention and proviso (ii) is, therefore, violative of Article 14 of the C Constitution also. It is submitted that there is potential for abuse of power by the Inspector of Factories, both in selecting and in not selecting a director, as an *occupier* for prosecution, punishment and penalty under the Act.

D The learned Attorney general and learned counsel appearing for different States, on the other hand submitted that proviso (ii) to Section 2(n) of the Act does not run counter to the substantive provision and that it is an exception to the main Section and has been enacted with a view to advance the object of the Act and the intention of the legislature and it does not travel beyond the scope of the main section. It is submitted that E the proviso neither offends Article 14 nor the main provision of Section 2(n) of the Act. Mr. Ashok Desai, the learned Attorney General, further submitted that the second proviso to Section 2(n), by making any one of the Directors to be a deemed occupier of the factory owned or run by a company, does not in any manner make the substantive part of the definiF tion clause otiose and that the proviso and the main provision can be harmoniously construed. He submitted that in the case of a company, the main provision of Section 2(n) may be incapable of proper working without the aid of proviso (ii) to the said Section because the *company* itself may not be possible to be prosecuted and sentenced to any term of imprisonment, and hence the necessity of the deeming fiction. The learned Attorney G General submitted that the apprehension expressed by the learned counsel for the petitioners that the Inspector of Factories can pick and choose any director at his whims is not well founded because Section 7 as introduced by the 1987 Amendment Act casts a duty on the company to notify, the name of a director who would be the occupier and once that statutory H obligation is discharged, the Inspector of Factories has no choice but to

prosecute that notified director only. A

Does proviso (ii) to Section 2(n) travel beyond the scope of the main provision or is otherwise violative of Article 14 of the Constitution of India?

In *Reserve Bank of India Etc. Etc.* v. *Peerless General Finance And Investment Co. Ltd. & Others Etc. Etc.,* [1987] 1 SCC 424 dealing with the B principle for interprettion of statutes this Court observed :

> "Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. C Both are important. That *interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted.* With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the D statute-maker, provided bysuch context, its scheme, the sections, clauses, phrases and words may take colour and appear different than the statute is looked at without the glasses provided by the context. With these glasses *we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.* No part of a statute and no word of a statute can be construed E in isolation. Statutes have to be construed so that every word has a place and everything is in its place".
>
> (Emphasis supplied) F

In *S. Gopal Reddy* v. *State of Andhra Pradesh,* JT (1996) 6 SC 268, to which one of us (Anand, J.) was a party it was observed :

> "It is well known rule of interpretation of statutes that the text and the context of the *entire Act* must be looked into while interpreting G any of the expressions used in a statute. The courts must look to the *object* which the *statute seeks to achieve* while interpreting any of the provisions of the Act. A purposive approach of interpreting the Act is necessary."
>
> (Emphasis supplied) H

A It is in the light of the above settled principles that we shall consider the true scope and intent of Section 2(n) with reference to proviso (ii) thereto within the scheme of the Act. Can Section 2(n) stand without proviso (ii) in the case of a company? What is the true function of proviso (ii) to Section 2(n)?

B A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the Court is required to carefully scrutinise and find out the real object of the proviso appended to that provision. It is not a proper rule of interpretation of a proviso that the enacting part or the main part of the Section be construed first without C reference to the proviso and if the same is found to be ambiguous only then recourse may be had to examine the proviso as has been convassed before us. On the other hand an accepted rule of interpretation is that a Section and the proviso thereto must be construed as a whole each portion throwing light, if need be, on the rest. A proviso is normally used to remove special cases from the general enactment and provide for them specially. D

A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but for the proviso would be a part of the main provision. A proviso must, therefore, be considered in relation to the principal matter to which it E stands as a proviso. A proviso should not be read as if providing something by way of *addition* to the main provision which is *foreign* to the main provision itself.

Indeed, in some cases, a proviso, may be an exception to the main provision though it cannot be inconsistent with what is expressed in the F main provision and if it is so, it would be *ultra- vires* of the main provision and struck down. As a general rule in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear, it is desirable to make an effort to give meaning to the proviso with a view G to justify its necessity.

While dealing with proper function of a proviso, this Court in *The Commissioner of Income-Tax, Mysore & Ors.* v. *The Indo Mercantile Bank Ltd. & Ors.,* AIR (1959) SC, 713 opined :

H "The proper function of a proviso is that it qualifies the generality

of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment."

This view has held the field till date .

Let us now examine Proviso (ii) to Section 2(n) to determine whether it is inconsistent with or beyond the main provision of Section 2(n).

By the Amending Act of 1987 it appears that the legislature wanted to bring in a sense of responsibility in the minds of those who have the *ultimate control* over the affairs of the factory, so that they take proper care for maintenance of the factories and the safety measures therein. The fear of penalty and punishment is bound to make the Board of Directors of the company, more vigilant and responsive to the need to carry out various obligations and duties under the Act, particularly in regard to the safety and welfare of the workers. Proviso (ii) was introduced by the Admending Act, couched in a *mandatory* form - 'any one of the directors *shall* be deemed to be the occupier' - keeping in view the experience gained over the years as to how the directors of a company managed to escape their liability, for various breaches and defaults committed in the Factory by putting up another *employee* as a shield and nominating him as the 'occupier' who would willingly suffer penalty and punishment. The state of unemployment in the country being what it is, it is not difficult to "hire" the services of someone only for this "job". Proviso (ii) now makes it possible to reach out to a *director* of the company itself, who *shall* be prosecuted and punished for breach of the provisions of the Act, apart from prosecution and punishment of the Manager and of the actual offender. The proviso, by making one of the directors of the company responsible for proper implementation of the provisions of the Act, to a great extent ensures that more care is taken for the maintenance of the factory and various safety measures prescribed under the Act for the health, welfare and safety of the workers are not neglected. In the case of a company, the main part of Section 2(n) would not be workable unless that provision is read alongwith proviso (ii). The definition of an occupier under Section 2(n) is of general application and different situations have been covered by

A the legislature only in different provisos appended to Section 2(n). These situations were, to a large extent earlier covered by Section 100 of the Act and with the deletion of Section 100, it became imperative to take care of different situations dealt therein, by enacting various provisos to Section 2(n). Of course, the expression "shall be deemed to be an occupier" in
B second proviso to Section 2(n) indicates the creation of a legal fiction but it is wrong to presume that such legal fiction can come into play only were the substantive provision of Section 2(n) is not attracted. As already observed, the substantive provision of Section 2(n) can become workable only in the case of a company, when the same is read alongwith proviso (ii). The deeming provision does not override the substantive provision of
C Section 2(n) but clarifies it. In our opinion, proviso (ii) is not *ultra-vires* the main provision of Section 2(n) and as a matter of fact there is no conflict at all between the main provision of Section 2(n) and proviso (ii) thereto. Both can be read harmoniously and when so read in the case of a company, the *occupier* of a factory owned by a company would mean *'any one of the*
D *directors of the company who has been notified/identified by the company to have ultimate control over the affairs of the factory' and where no such director has been identified, then for the purposes of prosecution and punishment under the Act, the Inspector of Factories may initiate proceedings against any one of the directors as the deemed occupier.*

E The apprehension that on account of Proviso (ii), the Inspector of Factories has acquired 'unguided, unfettered or absolute powers' to pick and choose *any director* of the company for prosecution and punishment is not well funded. Section 7 lays down a mandatory obligation on the factory to notify the name of the 'occupier' for obtaining the licence or seeking
F renewal of the licence of the factory and, therefore, the option to 'select' the director who would be the "*occupier*" vests in the Board of Directors and once they notify the name and particulars of that director, the Inspector of Factories is left with no discretion to 'pick and choose' *any* other director for prosecution etc. for the breaches committed in the factory or for contravention of the provisions of the Act. It is only when the company
G fails to perform its statutory obligation to notify the name of the director under Section 7 of the Act, that the Inspector of Factories may "choose" any one of the *directors* as the deemed occupier and proceed against him. The area for mischief can, thus, be totally blocked by the company by notifying one of its directors as the occupier in discharge of its statutory
H obligations ennumerated in Section 7 of the Act. That apart, the

reasonableness of the restriction depends upon the circumstances obtaining at a particular time and the urgency of the evil sought to be controlled. The *possibility* of the power being abused is no ground for declaring the provision unconstitutional. Proviso (ii) to Section 2(n), therefore, does not offend Article 14 of the Constitution. A

In keeping with the aim and object of the Act which is essentially to safeguard the interests of workers, stop their exploitation, and take care of their safety, hygiene and welfare at their place of work, numerous restrictions have been enacted in public interest in the Act. Providing restrictions in a Statute would be a meaningless formality unless the statute also contains a provision for penalty for the breach of the same. No restriction can be effective unless there is some sanction compelling its observance and the provision for imposition of penalty for breach of the obligations under the Act or the rules made thereunder is a concomitent and necessary incidence of the restrictions. Such a provision is contained in Section 92 of the Act, which contains a general provision for penalties for offences under the Act for which no express provision has been made elsewhere and seeks to lay down uniform penalty for all or any of the offences committed under the Act. The offences under the Act consist of contravention of (1) any provision of the Act; (2) any rules framed thereunder; and (3) any order in writing made thereunder. It comprises both acts of omission and commission. The persons punishable under the Section are *occupiers* and *managers*, irrespective of the question as to who the actual offender is. The provision, is in consonance with the scheme of the act to reach out to those who have the *ultimate* control over the affairs of the factory to see that the requirements for safety and welfare of the employees are fully and properly carried out besides carrying out various duties and obligations under the Act. Section 92 contemplates a joint liability of the occupier and the manager for the offence committed irrespective, of the fact as to who is directly responsible for the offence. The fact that the notified/identified director is ignorant about the 'management' of the factory which has been entrusted to a manager or some other employee and is himself not responsible for the contravention cannot absolve him of his liability. The identified/notified director is held vicariously liable for the contravention of the provisions of the Act, the rules made thereunder or of any order made in writing under it for the offender *company*, which is the occupier of the factory. B C D E F G H

A Mr. Jain, Mr. Nariman and Mr. Tripathi, appearing for the appellants, however, argued that the since Section 92 imposes a liability for imprisonment and/or fine, both on the *occupier* (the notified director) and the *manager* of the factory, jointly and severally, for the contravention of any of the provisions of the Act or any rule made thereunder or of any order in writing given thereunder, irrespective of the fact whether the B *occupier* (the notified director) or *manager, had any mens-rea* in respect of that contravention or that the contravention was not committed by him or was committed by any other person in the factory without his knowledge, consent or connivance, it is an unreasonable restriction. Learned counsel argued that in criminal law, the doctrine of vicarious liability is unknown and if a *director* is to be punished for some thing of which he is not actually C guilty, it would violate his fundamental right as enshrined in Article 21 of the Constitution. It was urged that on account of advancement in science and technology, most of the companies, appoint professionally qualified men to run the factories and nominate such a person to be the 'occupier' of the factory and make him responsible for proper implementation of the D provisions of the Act and it would, therefore, be harsh and unreasonable to hold any *director* of the company, who may be wholly innocent, liable for the contraventions committed under the Act etc. when he may totally ignorant of what was going on in the factory, having vested the *control* of the affairs of the factory to such an officer or employee, by ignoring the liability of that officer or employee. The argument is emotional and attrac- E tive but not sound.

The offences under the Act are not a part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates absolute or strict liability without proof F on any *mens rea*. The offences are strict statutory offences for which establishment of *mens rea* is not an essential ingredient. The omission or commission of the statutory breach is itself the offence. Similar type of offences based on the principle of strict liability, which means liability without fault or mensrea, exist in many statutes relating to economic crimes as well as in laws concerning the industry, food adulteration, preven- G tion of pollution etc. in India and abroad. 'Absolute offences' are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty. Such offences are generally known as public welfare offences. A seven Judge Bench of this Court in *R.S. Joshi* v. *Ajit Mills,* AIR (1977) H SC, 2279 at page 2287 observed :

"Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be proceeded by *mens rea*. The classical view that 'no *mens rea* no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude *mens rea*. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force....."

What is made punishable under the Act is the 'blameworthy' conduct of the *occupier* which resulted in the commission of the statutory offence and not his criminal intent to commit that offence. The rule of strict liability is attracted to the offences committed under the Act and the *occupier* is held vicariously liable alongwith the Manager and the actual offender, as the case may be, penalty follows *actus reus*, *mens- rea* being irrelevant.

As already noticed, there the company owns as factory is the company which is the occupier, but, since company is a legal abstraction without a real mind of its own, it is those who in fact control and determine the management of the company, who are held vicariously liable for commission of statutory offences. The directors of the company are, therefore, rightly called upon to answer the charge, being the directing mind of the company. Dealing with the question of vicarious liability of the *directors* for offences committed by a company, the following observations of Lord Diplock in *Tesco Supernarkets Ltd.* v. *Nattrass,* (1972) Ac, 153, are useful :

"In my view, therefore, the question : *what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural person who by* the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, *are entrusted with the exercise of the powers of the company*. This test is in conformity with the classic statement of Viscount Haldane, Lord Chancellor, in *Lennard's Carrying Company Ltd.* v. *Asiatic Petroleum Company Ltd.*"

(Emphasis supplied)

A The passage of Viscount Haldane, Lord Chancellor, in *Lennard's Carrying Company* v. *Asiatic Petroleum Company Ltd.,* (1915), referred to by Lord Diplock, is as follows :

> My Lords, a corporation is an abstraction. It has no mind of its own; any more than it has a body of its own; its active and directing
B will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person
C may be the board of directors itself, or it may be, and in some companies it is so, that person has an authority co-ordinate with the board of directors given to him under the articles of association....."

We are in complete agreement with the above view propounded by
D Lord Diplock and Viscount Haldane Lord Chancellor and hold that under the Act only one of the directors, the directing mind and will of the company, its alter ego, can be nominated as an *occupier* for the purposes of the Act.

The object of the Act would stand defeated if for the commission of
E strict offences, the identified director, as the deemed occupier of the factory, is not held vicariously liable. An argument similar to the one raised before us regarding the harshness of the provision insofar as an "innocent" director is concerned, was also convassed in *M.C. Mehta'* case (supra). We may excerpt that portion which formulates the question and furnishes the
F answer :

> "So far as the undertaking to be obtained from the Chairman and Managing Director of Shriram is concerned it was pointed out by Shriram that Delhi Cloth Mills Ltd. Which is the owner is Shriram has several units manufacturing different products and each of
G these units is headed and managed by competent and professionally qualified persons who are responsible for the day to day management of its affairs and the Chairman and Managing Director is not concerned with day to day functioning of the units and it would not therefore be fair and just to require the Chairman and Managing Director to give an undertaking that in case of death or injury
H resulting on account of escape of chlorine gas, the Chairman and

Managing Director would be personally liable to pay compensation. We find it difficult to accept this contention urged on behalf of Shriram. We do not see any reason why the Chairman and/or Managing Director should not be required to give an undertaking to be personally liable for payment of compensation in case of death or injury resulting on account of escape of chlorine gas."

We, therefore, find no hesitation in rejecting the argument of learned counsel for the appellants.

It deserves a notice that under the Act, the legislature has itself taken care to dilute the rigour of Section 92 by providing an exception to the strict liability rule by laying down a *third party procedure* in Section 101 of the Act which read :

101. Exemption of occupier of manager from liability in certain cases. - Where the occupier or manager of a factory is changed with an offence punishable under this Act, he shall be entitled, upon complaint duly made by him and on giving to the prosecutor not less than three clear days notice in writing of his intention so to do, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been provided, the occupier or manager of the factory, as the case may be, proves to the satisfaction of the court -

(a) that he has used due diligence to enforce the execution of this Act, and

(b) that the said other person committed the offence in question without his knowledge. consent or connivance, -

that other person shall be convicted of the offence and shall be liable to the like punishment as if he were the occupier or manager of the factory, and the occupier or manager, as the case may be, shall be discharged from any liability under this Act in respect of such offence :

Provided that in seeking to prove as aforesaid, the occupier or manager of the factory, as the case may be, may be examined on oath, and his evidence and that of any witness whom he calls in

his support shall be subject to cross- examination on behalf of the person he charges as the actual offender and by the prosecutor :

Provided further that, if the person charged as the actual offender by the occupier or manager cannot be brought before the Court at the time appointed for hearing the charge, the Court shall adjourn the hearing from time to time for a period not exceeding three months and if by the end of the said period the person charged as the actual offender cannot still be brought before the Court, the Court shall proceeded to hear the charge against the occupier or manager and shall if the offence be proved, convict the occupier or manager."

This section which lays down "third party procedure" as a defence, is in a way an exception to the general rule and enables the *occupier* or the *manager* of the factory, to extricate himself from punishment by establishing that the actual offender is someone else and giving satisfactory proof of facts as are contemplated by Section 101(a) & (b). The principle undertaking Section 101 may well be gathered from the following observations of phillimore J. in *Ward* v. *Smith,* [1913] 3 K.B. 154, while dealing with a somewhat similar provision in England, the learned Judge said :

A *prima facie* liability is imposed upon the occupier or manager from which however he can extricate himself; otherwise he remains liable. The scheme of the Act is first to find the a *de facto* employer. An information may be laid against the occupier. His way or escape is provided for by this section. He may set up a defence not unlike the defence of warranty which the seller of food may set up under the English Sale of Food and Drugs Act. He may show that that the offence was not committed by his fault. To do this he must bring the real offender before the court."

Prof. Glanville Williams in his "*Text Book on Criminal Law*" (1978) End.), while dealing with exception to the strict liability rule opined that the principle of strict liability may be modified by the statute itself and further that the statutes, generally speaking, contain two main types of excuses (i) the third party procedure and (ii) the *no-negligence defence.* Prof. Williams observes at page 954;

"As to the first, some penal statutes provide that when a charge is

brought under them the defendant may bring in any other person (e.g.) a supplier) to whose act or default he alleges that the contravention was due, and shift the blame to him. The defence is sometimes called a "passing on" defence. The most important example are in the Shops Act 1950 (s. 71), the Food and Drugs Act, 1955 (s. 113), the Medicines Act 1968) (s. 121) (this Act replacing the provisions of the 1955 Act with regard to drugs), the weights and Measures Act 1963 (s. 27), and the Factories Act 1961 (s. 161).

The 'passing on' defence provided in Section 101 of the Act is an accepted form of an exception to the principle of strict liability but its benefit would be available only when the requirements of that Section are fully complied with and the Court is satisfied about the proof of facts as are contemplated by clauses (a) and (b) of Section 101.

The provisions of Section 101 are almost identical to the provisions of Section 71 of the Factories Act prior to its amendment, with the difference that under Section 101, a provision for 3 days advance notice to the prosecutor has been added. Under Section 101, after a complaint is made by the Inspector of Factories against the *manager* or *occupier* under Section 92 of the Act for contravention of any of the provisions of the Act, the *manager* or *occupier* is entitled to complain against the *actual offender* before the Court and if he does so, the actual offender is given a notice and brought before the court and the trial then proceeds against *both* the persons complained against, because the Section contemplates both sets of complaints (one filed by the Inspector of Factories and the other by the manager or the occupier) and both the accused (one as named by the Inspector of Factories and the other as named by the Manager or occupier) being brought before the Court at the same time. The carriage of proceedings is with the original complainant (Inspector of Factories) and the onus also lies on him of proving that an offence has been committed. Both the parties complained against (one by the Inspector and the other by the Manager occupier) are entitled to cross-examine the prosecution witnesses at this stage and also lead evidence to disprove the charge. If the prosecution fails to prove the offence, both of them would be acquitted. However, if the offence is proved then the trial court shall record an order to that effect and the *occupier* or *manager* shall be afforded an opportunity to

A extricate himself from the liability provided he can give satisfactory proof of the facts requires by Section 101(a) and (b). The onus of proof, at that stage, is shifted to the *manager* or the *occupier*. He is entitled to call evidence as well as to give evidence himself. The alleged actual offender would have a right to cross-examine the manager or the occupier as the B case may be. He would also be entitled to call evidence. Even where the occupier establishes that the actual offender is the person named by him, he must still prove to the satisfaction of the Court, that he had used due diligence to enforce the execution of the act and that the said other person committed the offence in question without his knowledge, consent or C connivance.

In *State of Gujarat* v. *Kansara Manilal,* AIR (1964) SC, 1893 at 1897 while dealing with the provisions of Section 101 of the Act, this Court opined :

D

> "Where an occupier or a manager is charged with an offence he is entitled to make a complaint in his own turn against any person who was the actual offender and on proof of the commission of the offence by such person the occupier or the manager is absolved from liability. This shows that compliance with the preemptory E provisions of the Act is essential and unless the occupier or manager brings the real offender to book he must bear the responsibility. Such a provision largely excludes the operation of S. 117 in respect of persons guilty of a breach of the provisions of the Act. It is not necessary that mens rea must always be established as has been said in some of the cases above referred to. The F responsibility exists without a guilty mind. An adequate safeguard, however, exists in Section 101 analysed above and the occupier and manager can save themselves if they prove that they are not the real offenders but who, in fact is."

G This judgment has been noticed with approval by a three Judge Bench of this Court in *Maneklal Jinabhai Kot* v. *State of Gujarat & Ors.,* [1967] 2 SCR, 507. We are in respectful agreement with the view that an adequate safeguard has been provided under Section 101, under which, for circumstances mentioned therein, the occupier or manager can absolve H himself from the liability if he can establish to the satisfaction of the Court

that he is not the real offender but it is the other person charged by him who deserves to be punished and that he had been diligent and further that the offence was not committed with his knowledge, consent or connivance. A

Mr. Jain, learned senior counsel, however, argued that since 101 requires that the actual offender must be brought before the Court at the time appointed for hearing the charge or at the latest within a period of three months thereafter and if by the end of that period the actual offender cannot be brought before the Court, the Court would proceed to hear the charge against the occupier or the manager and convict him if the offence is proved, renders the benefit of Section 101 as illusory. We find ourselves unable to agree. The scheme of Section 101 being that the occupier or manager should be relieved from liability *only* if the actual offender could be brought to Court, the presence of the actual offender on whom the burden has been *shifted* by the *occupier* or the *manager* would be necessary, at the time of trial and a period of three months has been prescribed by the Legislature within which the actual offender should ordinarily be brought before the Court by the process of law. If that cannot be done, the trial against the occupier or the manager as the case may be, cannot be allowed to be protracted indefinitely and we find it difficult to see how any fault can be found with this provision. B C D E

Thus, we are of the opinion that proviso (ii) to Section 2(n) when considered in relation to Section 92 of the Act does not offend Article 21 of the Constitution of India either.

That Section 92 is a prefectly valid piece of legislation insofar as it makes the *occupier* or *manager* or a factory guilty of an offence for contravention of any of the provisions of the Act or the rules made thereunder, even if the actual contravention may not have been committed by the *occupier* or the *manager*, is not disputed or doubted before us and, therefore, we are unable to appreciate how the provision contained in proviso (ii) to Section 2(n) can render the said proviso readwith Section 92 invalid or unreasonable or how it offends Article 19(1)(g) of the Constitution by defining an *occupier* to be only the director of the company. F G

Article 19(1)(g) of the Constitution guarantees to a citizen the right to practice any profession or to carry on any occupation, trade or business. H

A This right, however, is subject to Clause (6) of Article 19 which lays down that nothing in sub-clause (g) of Article 19(1) shall affect the operation of any existing law insofar as it imposes or prevents the State from making any law imposing in the interest of the general public reasonable restrictions on the exercise of the right. Clause (6) of Article 19 is intended to B strike a balance between individual freedom and social control. Keeping in view the object of the Act, we must look to the reasonableness of the provision requiring the nomination of a *director* as the occupier of the factory under Section 7 of the Act, with a view to determine whether proviso (ii) to Section 2(n) has a rational nexus with the object which the C legislature seeks to achieve. It was, as already observed, with a view to secure proper and effective enforcement of the provisions of the Act and the Rules made thereunder, that the legislature considered it appropriate to fasten the liability for proper implementation of the Act on one of the *directors* by insisting that in the case of a company, which owns the factory, one of the *directors shall* be deemed to be the *occupier* for all purposes, D including prosecution and penalty in respect of offences committed under the Act. The Legislature has attempted to plug the loopholes, which existed earlier and enabled the *directors* to escape their liability by passing on the buck, as they say, to an employee. It is much too obvious that when top persons of the company are made conscious of their responsibilities and E duties for the implementation of the safety and welfare measures in a factory and to carry out the duties prescribed under the Act, at the pain of punishment in case they choose to overlook, there are much greater chances that proper care would be taken for maintenance of the factory, particularly in regard to the safety measures and welfare of workers.

F There is, therefore, nothing unreasonable in fixing the liability on a *director* of a company and making him responsible for compliance with the provisions of the Act and the rules made thereunder and laying down that if there is contravention of any of the provisions of the Act or an offence is committed under the Act, the *notified* director, and in the absence of G the notification, any one of the directors of the company, shall be prosecuted and shall be liable to be punished as the *deemed* occupier. "A law has to be judged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs." See AIR 1977 S.C., 2279 (supra).

H

The restriction imposed by proviso (ii) if at all, it may be called a restriction, has, a direct nexus with the object sought to be achieved and is, therefore, a reasonable restriction within the meaning of clause (6) of Article 19. Proviso (ii) to Section 2(n) is thus, not *ultra vires* Article 19(1)(g) of the Constitution.

Thus, from the above discussion, it follows that the directions given by the Chief Inspector of Factories to the writ petitioners and the appellants herein to the effect that only a *director* of the company could file an application for renewal of the factory licence (or grant of factory licence), as *occupier* of the factory and that no other employee could make such and application even if nominated by the company as an occupier of the factory, suffers from no infirmity whatsoever.

To sum up our conclusions are :

(1) In the case a company, which owns a factory, it is only one of the *director* of the company who can be notified as the *occupier* or the factory for the purposes of the Act and the company cannot nominate any other employee to be the occupier of the factory;

(2) Where the company fails to nominate one of its directors as the *occupier* of the factory, the Inspector of Factories shall be at liberty to proceed against any one of the *directors* of the company, treating him as the *deemed occupier* of the factory, for prosecution and punishment in case of any breach or contravention of the provisions of the Act or for offences committed under the Act.

(3) Proviso (ii) to Section 2(n) of the Act is *inter-vires* the substantive provision of Section 2(n) of the Act;

(4) Proviso (ii) to Section 2(n) is constitutionally valid and is not *ultra-vires* Articles 14, 19(1)(g) and 21 of the Constitution of India;

(5) The law laid down by the High Courts of Bombay, Orissa, Karnataka, Calcutta, Guwahati and Madras is not the correct law and the contrary view expressed by the High Courts of

A Allahabad, Madhya Pradesh, Rajasthan and Patna is the correct enunciation of law in regard to the ambit and scope of proviso (ii) to Section 2(n) of the Act.

All the writ petitions and the appeals by special leave consequently fail and are, hereby, dismissed. We, however, leave the parties to bear their B own cost.

M.K. Petitions and appeals dismissed.

K. SANKARAN NAIR (DEAD) THROUGH LRS. A

v.

DEVAKI AMME MALATHY AMMA AND ORS.

SEPTEMBER 25, 1996

[N.P. SINGH AND S.B. MAJMUDAR, JJ.] B

Kerala Land Reforms Act, 1963 : Section 6-C (As inserted by Kerala Land Reforms (Amendment) Act, 1979) and Section 74.

Tenancy law—Deemed tenancy—Claim for—Rejection in tenancy proceedings by Courts and Supreme Court—Judgments consequently becoming final—Amendment of Land Reforms Act by Kerala Legislature—Insertion of Section 6-C—Conferment of status of deemed tenant under—Fresh claim for deemed tenancy—Held barred by res judicata. C

Code of Civil Procedure, 1908 : Section 11. D

Res judicata—Tenancy proceedings—Decision rendered by competent Courts regarding tenancy status—Judgments acquiring final—Amendment of Act—Conferment of status of deemed tenant—Fresh claim for deemed tenancy based on amended Act held barred by res judicata. E

Legislature—Power to overule judicial decision—Essential condition for—Unless legislature removes the substratum of foundation of the judgment, it would remain operative and binding.

The respondents (plaintiffs) filed a suit claiming their 5/6th share in the plaint schedule properties as well as for past and future mesne profits. The appellant (defendant No. 2) contested the suit contending that he was a tenant. His case was that by a registered deed dated 10th January, 1969 the suit property was leased out to him by his mother-in-law. The tenancy. Tribunal held that he was not a tenant and the lease deed in his favour was hit by section 74 of the Kerala Land Reforms Act, 1963 which totally barred creation of leases after 1.4.1964. The Tribunal's decision was confirmed by the High Court on 31st March 1978. As the Special Leave Petition filed by appellant was also dismissed by this Court on 28th August, 1978 the question of alleged tenancy of the appellant got concluded against the appellant. F G H

A Consequently the respondents obtained possession from the appellant and filed execution petition for mesne profits on 5th July, 1979. During the pendency of these execution proceedings Kerala Land Rreforms (Amendment) Act, 1979 came into force on 7th July, 1979. By the said amendment Act Section 6-C was inserted in the 1963 Act under which certain lessees were conferred the status of deemed tenants. The appellant's B application to get a fresh reference to the Land Tribunal for deciding his deemed tenancy status under section 6C was rejected by the Executing Court vide its order dated 29th January 1980 on the ground that it was barred by principle of *res judicata*. On revision the High Court by its order dated 7th April, 1980 held that (i) principle of *res judicata* was not ap- C plicable because of the comming into force of a new provision viz. section 6C of the Act; (ii) the lease deed in favour of the appellant was inoperative as the executant was a life estate holder and had no authority to create such a lease under the provisions of the Act.

In appeal to this Court on the question whether the appellant was D entitled to again claim the benefit of deemed tenancy as per section 6C of the Act.

Dismissing the appeal, this Court

HELD : 1. Section 6C of Kerala Land Reforms Act could not be E pressed into service by the original appellant for displacing the binding judgments rendered by the Tribunal, the High Court and this Court in the earlier tenancy proceedings wherein appellants claim for tenancy of the suit land came to be repelled and those judgments have become final and binding and were not in any way legally displaced by any competent piece of F legislation by the Kerala Legislature. Those judgments remained fully operative against the appellant and consequently on the principle of *res judicata* he could not once again re-agitate the question about his tenancy. [850-F-G]

2. There is no question of lack of jurisdiction with the competent G court which earlier decided the plea of tenancy under the very Act as raised by the appellant. Not only the decision was rendered on merits byy competent court but it was confirmed by this Court. The cause of action remained the same, namely status of tenancy of the appellant qua the land and against the plaintifs. In support of the same cause of action the appellant wanted to take advantage of section 6C which fortunately for him was H having no retrospective effect so as to knock off the substratum of the

decisions rendered by the competent courts earlier. [852-B] A

3. It is well settled that Legislature cannot overrule any judicial decision without removing the substratum or the foundation of that judgment by a retrospective amendment of the concerned legal provision. Unless the Legislature by enacting a competent legislative provision retrospectively removes the substratum or foundation of any judgment of B a competent court the said judgment would remain binding and operative and in the absence of such a legislative exercise by a competent legislature the attempt to upset the binding effect of such judgments rendered against the parties would remain an incompetent and forbidden exercise which could be dudded as an abortive attempt to legislatively overrule binding C decisions of courts. [848-E-F]

4. Section 6C, starts with a non obstante clause and seeks to remove the prohibitive effect of Section 74. If that legislative exercise is to succeed effectively, then section 74 should have been either deleted from the Statute D Book with retrospective effect from 1st April 1964 when the Kerala Land Reforms Act, the parent Act, came into force or at least from 1.1.1970 when the Amendment Act, 1969 came on the Statute Book and on which date the concerned person who claimed deemed tenancy under section 6C was required to be in possession of the land. However, the Legislature in its wisdom did not think it fit, while bringing on the Statute Book Section 6C E from 7th July 1979, to either give it retrospective effect from 1.1.1970, or to delete Section 74 retrospectively at least from 1.1.1970 if not from an earlier date of 1st April 1964 when the parent Act itself was brought on the Statute Book. Consequently the non obstante clause introduced in Section 6C for bypassing the final judgments, decrees or orders of any F court against any person remained in the realm of an abortive or an incompetent exercise on the part of the legislature. [847-E-G]

5. Section 74 has operated untouched from the very inception when it saw the light of the day along with other provisions of the Act on 1st April G 1964. Therefore, it effectively supplied a valid legal foundation for the earlier Judgments rendered before 1.1.1970 to operate. That foundation has remained untouched and Section 6C has not tinkered with it. Therefore, earlier judgments as confirmed by this Court against the appellant negativing his plea under the Tenancy Act have remained fully operative and will constitute a valid bar of res judicata against the present plea of the appel- H

A **lant centring round Section 6C. Therefore, the High Court was in error in taking the view that because of section 6C the earlier judgments would not operate as res judicata. Consequently on an entirely a different line of reasoning, the judgment of the High Court is confirmed.**

[853-E-G]

B *Shri Prithvi Cotton Mills Ltd. & Anr.* **v.** *Broach Borough Municipality & Ors.,* **[1970] 1 SCR 388;** *Madan Mohan Pathak & Anr. Etc. Etc.* **v.** *Union of India & Ors.,* **[1978] 2 SCC 50;** *A.V. Nachane & Anr. Etc. Etc.* **v.** *Union of India & Anr.,* **[1982] 1 SCC 205;** *Bhubaneshwar Singh & Anr.* **v.** *Union of India & Ors.,* **[1994] 6 SCC 77;** *Comorin Match Industries (P) Ltd.* **v.** *State of Tamil Nadu,* **[1996] 4 SCC 281 and** *S.R. Bhagwat & Ors.* **v.** *State of Mysore,*
C **[1995] 6 SCC 16, referred to.**

Mathura Prasad Bajoo Jaiswal & Ors. **v.** *Dossibai N.B. Jeejabhoy,* **[1970] 1 SCC 613 and** *Nand Kishore* **v.** *State of Punjab,* **[1995] 6 SCC 614, held inapplicable.**

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1118 of 1981.

From the Judgment and Order dated 7.4.80 of the Kerala High Court in C.R.P. No. 682 of 1980-C.

E K. Sukumaran and K.M.K. Nair for the Appellant.

T.L. Viswanatha Iyer, Shaju Francis and C.N. Sree Kumar, for the Respondents.

F The Judgment of the Court was delivered by

S.B. MAJMUDAR, J. The appellants, who are the heirs of deceased defendant No. 2, have challenged the judgment and order passed by learned Single Judge of the Kerala High Court in Civil Revision Petition No. 602 of 1980. The High Court rejected the contention of the original
G appellant-defendant no. 2, in Original Suit No. 241 of 1974 by which he claimed status of a deemed tenant as per the provisions of Section 6C of the Kerala Land Reforms Act, 1963 as brought on the Statute Book by the Kerala Land reforms (Amendment) Act, 1979 (hereinafter referred to as 'the Act'). Having obtained special leave to appeal under Article 136 of the Constitution of India the present appeal has been filed by the original defen-
H dant no. 2. The respondents herein are the original plaintiffs in the suit.

A few relevant facts leading to these proceedings may be noted at the outset. The respondents-plaintiffs filed Original Suit No. 21 of 1974 in the Court of Subordinate Judge at Trivandrum for partition of respondents' 5/6the share in the plaint schedule properties and for recovering the same from original appellant-defendant no. 2 and the his wife original defendant no. 1 with past and future mesne profits.

The respondent-plaintiffs' case in short was that the suit properties originally belonged to one Krishna Pillai Madhavan Pillai. Said Madhavan Pillai by a settlement Deed of 1945 (1120 M.P.) decided that plaint properties A, B, C Schedule were to remain in possession and enjoyment of Shri Madhavan Pillai, his wife Parvathi Amma and for the benefit of their children and said Parvathi Amma had to remain in possession as life estate holder. That said Madhavan Pillai died in 1955 and his widow Parvathi Amma and his son Krishnan Nair succeeded to his properties. That Kerala Land Reforms Act, Act I of 1964 was brought on the Statute Book on 1st April 1964. Said Krishnan Nair died on 4th January 1968. Said Parvathi Amma by a registered Dead is said to have leased out her properties on 10th January 1969 to her son- in-law, deceased appellant original defendant no. 2. Widow of Shri Krishnan Nair and her children filed the aforesaid suit was plaintiffs nos. 1 and 2 to 5 respectively in the Trial Court for partition and separate possession of their 5/6th share in the plaint schedule properties which were then in possession of original defendant no.2. In the said suit original defendant no. 2 took up the contention that he was a tenant under the Kerala Agrarian Reforms Act. That question was referred to the Tenancy Tribunal under Section 125(3) of the Kerala Land Reforms Act for decision. The Tribunal held that original appellant-defendant no. 2 was not a tenant under the Act and the Lease Dead in his favour was hit by Section 74 of the Kerala Land Reforms Act which totally barred creation of leases after 1.4.1964. The case of oral lease in his favour prior to 1.4.1964 was also found to be not established. The Tribunal's decision was confirmed by the High Court on 31st March 1978. Appellant carried the matter to this Court. Special Leave Petition against the High Court's judgment was also dismissed by this Court on 28th August 1978. Thus the question of alleged tenancy of the appellant under the Lease Deed of 10th January 1969 finally got concluded against the appellant. In the meantime the Trial Court passed preliminary decree on 30th March 1976 and a receiver was appointed who took possession of the suit land from the appellant. Final decree was passed on 27th September 1978.

A Pursuant thereto the respondents obtained possession from the appellant through the receiver. Consequently final decree remained to be executed only for mesne profits and for that purpose the respondent filed Execution Petition against the appellant on 5th July, 1979. Pending these execution proceedings for mesne profits Kerala Land Reforms (Amendment) Act, 1979 was brought on the Statute Book. As per Section 1 sub-section (2) thereof the said Amendment Act was deemed to have come into force on 7th July 1979. By the said Amendment Act Section 6C was inserted in the Kerala Land Reforms Act, 1963. The said provision reads as under :

> "6C. Certain lessees who have made substantial improvements, etc., to be deemed tenants: - Notwithstanding anything contained in section 74, or in any contract, or in any judgment, decree or order of any court or other authority, any person in occupation at the commencement of the Kerala Land Reforms (Amendment) Act, 1969, of the land of another person on the basis of a lease deed executed after the 1st day of April, 1964, shall be deemed to be a tenant if -
>
> (a) he (including any member of his family) did not own or hold land in excess of four acres in extent on the date of execution of the lease deed; and
>
> (b) he or any member of his family has made substantial improvements on the land.
>
> *Explanation.* - For the purposes of this section, improvements shall be deemed to be substantial improvements if the value of such improvements is more than fifty per cent of the value of the land on the date of execution of the lease deed."

The original judgment-debtor defendant no. 2, that is, the original appellant herein, applied on 8th January 1980 in execution proceedings to get a fresh reference to the Land Tribunal for deciding his deemed tenancy status under Section 6C of the aforesaid Amending Act. The respondents-decree holders objected to the said application. By an order dated 29th January 1980 the Executing Court rejected the claim of the appellant for a fresh reference to the Tribunal about his status of deemed tenancy under Section 6C of the Act on the ground that this contention was barred by principles of *res judicata*. The appellant carried the matter in revision

before the High Court. As noted earlier a learned Single Judge of the High Court by her decision dated 7th April 1980 rejected the said revision application taking the view that though the contention of the appellant was not barred by *res judicata* because of the coming into force of a new provision by way of Section 6C of the Act, the Lease Deed in favour of the appellant dated 7th July 1969 was inoperative in law as Parvathi Amma who was a life estate holder had no authority to create such a lease and Chapter II of the Kerala Land Reforms Act, 1963 did not apply to the facts of the present case in view of Section 3(1)(vi) which stated that tenancies in respect of land or of buildings or of both created by persons having only life interest or other limited interest in the land or in the buildings or in both, were not covered by Chapter II of the Act which included Section 6C. It is the aforesaid order of the learned Single Judge of the Kerala High Court that is brought in challenge by the original appellant by way of present proceedings. Pending this appeal original appellant died and his heirs have pursued this appeal.

A short question with which we are concerned in these proceedings is as to whether original appellant-defendant no. 2 was entitled to again claim the benefit of deemed tenancy as per Section 6C of the Act. Even though the learned Single Judge of the Kerala High Court in the impugned judgment has taken the view that this contention is not barred by *res judicata* learned senior counsel for the respondents vehemently contended that the decision of the learned Single Judge deserves to be confirmed on the plea of *res judicata* though even on merits, according to him, the said decision is well sustained. In view of the aforesaid contention of learned senior counsel for the respondents, learned senior counsel for appellant Shri Sukumarn was called upon by us to point out as to how the contention of the appellant for getting benefit of Section 6C cannot be said to be barred by *res judicata* in view of the earlier claim of his tenancy rights qua the very same land had stood finally rejected by this Court on 28th August 1978. Learned senior counsel for the appellant in this connection submitted that when earlier proceedings got terminated before this Court Section 6C was not on the Statute Book. That it was brought on the statute book subsequently with effect from 7th July 1979. Consequently the principles of *res judicata* would not apply to far as this new provision is concerned which gave a fresh right to the appellant to contend that he was entitled to get the benefit under the said new provision. In the light of the aforesaid rival contentions we proceed to resolve this controversy.

A It must at once be stated that if the contention of the appellant for getting benefit of Section 6C of the Act is found to be barred by principles of *res judicata* nothing further would survive in these proceedings and the Judgment of the High Court will have to be confirmed on this ground alone. In order to resolve this controversy between the parties it is necessary to note the background facts leading to the enactment and introduction of Section 6C in the parent Act. Relevant recitals in the Statement of Objects and Reasons for bringing on the Statute Book the aforesaid provision read as under :

> "Difficulty was experienced by the Government in implementing certain important provisions of the Kerala Land Reforms Act, 1963, in accordance with their true spirit and the intention of the Legislature, because of certain decisions of the Kerala High Court. Government have also received representations from a large number of tenants and other persons pointing out the hardship caused to them by the impact of the above judgments. In order to overcome such difficulties and hardship it was considered necessary to amend the Kerala Land Reforms Act suitably. It was also proposed to avail of this opportunity to make certain other amendments which were found necessary for the smooth and speedy implementation of the provisions of the Act. The succeeding paragraphs briefly explain the scope of the more important amendments.
>
> 2. It was brought to the notice of the Government that inspite of the provisions contained in section 74 of the Act, prohibiting the creation of tenancies after the 1st April, 1964 some persons have obtained leases of lands after that date and have effected substantial improvements on such lands. It was considered that it would very hard if such lessees are evicted from their holdings. It was therefore necessary to incorporate a provision to give protection to such persons."

G The aforesaid Statement clearly shows that as per the provisions of Section 74 of the Act no tenancies could be created after 1st April 1964 and thus there was total bar to creation of such tenancies. Consequently the appellant's claim to be a tenant of the land as per the registered Lease Deed dated 10th January 1969 had stood repelled upto this Court. There H cannot be any dispute about the same. In order to infuse life in such void

leases Section 6C was brought on the Statute Book by the Legislature. It is of course true that Section 6C starts with a non obstante clause and recites that notwithstanding anything contained in section 74, or in any contract, or in any judgment, decree or order of any court or other authority, any person in occupation at the commencement of the Kerala Land Reforms (Amendment) Act, 1969, of the land of another person on the basis of a lease deed executed after the 1st day of April 1964 shall be deemed to be a tenant if he satisfies conditions (a) and (b) mentioned in the said Section. It is also true that for applicability of this Section the concerned person who claims deemed tenancy status must be in occupation at the commencement of the Kerala Land Reforms (Amendment) Act, 1969, that is, on 1.1.1970 when that Act came into force and such a person must have been inducted as a lessee under a Lease Deed executed by the lessor after 1st April 1964. But the said non obstante clause in Section 6C can at all have an effect of displacing any final judgments or decrees against such persons if the substratum of such judgments was removed by retrospective amendment of the Act by insertion of Section 6C. It is now well settled that Legislature cannot overrule any judicial decision without removing the substratum or the foundation of that judgment by a retrospective amendment of the concerned legal provision. Section 6C, as we have noted above, starts with a non obstante clause and seeks to remove the prohibitive effect of Section 74. If that legislative exercise is to succeed effectively, then section 74 should have been either deleted from the Statute Book with retrospective effect from 1st April 1964 when the Kerala Land Reforms Act, the parent Act, came into force or at least from 1.1.1970 when the Amendment Act, 1969 came on the statute Book and on which date the concerned person who claimed deemed tenancy under Section 6C was required to be in possession of the land. However the Legislature in its wisdom did not think it fit, while bringing on the Statute Book Section 6C from 7th July 1979, to either give it retrospective effect from 1.1.1970, or to delete Section 74 retrospectively at least from 1.1.1970 if not from an earlier date of 1st April 1964 when the parent Act itself was brought on the Statute Book. Consequently the non obstante clause introduced in Section 6C for bypassing the final judgments, decrees or orders of any court against any person remained in the realm of an abortive or an incompetent exercise on the part of the Legislature. To recapitulate the earlier decision rendered against the appellant could have been effectively displaced by the Legislature by enacting Section 6C if the very foundation or substratum of those earlier judgments was knocked off by the Legisla-

A ture by enacting a competent piece of legislation undertaking any of the following exercise :

1. By retrospectively deleting Section 74 of the Act from 1.4.1964 or at least from 1.1.1970.

B

2. Or alternatively by making Section 6C retrospective from 1.4.1964 or at least from 1.1.1970.

If any of the aforesaid legislative exercises which would have remained within the competence of Kerala State Legislature was actually undertaken C then only the non obstante clause under Section 6C would have effectively and legally operated for bypassing the final judgments against such a person who was to be given benefit of Section 6C. In the absence of any of these eventualities it must be held that by enacting Section 6C the Legislature tried to legislatively overrule binding judgments, against parD ties, which might have become final prior to 7th July 1979. As Section 6C was expressly made operative only from that date, with the result the legal foundation of adverse judgment against the appellant rendered prior to 7th July 1979 could not be effectively whittled down by the sweep of Section 6C. It is now well settled by a catena of decisions of this Court that unless the Legislature by enacting a competent legislative provision retrospectiveE ly removes the substratum or foundation of any judgment of a competent court the said judgment would remain binding and operative and in the absence of such a legislative exercise by a competent legislature the attempt to upset the binding effect of such judgments rendered against the parties would remain an incompetent and forbidden exercise which could be F dubbed as an abortive attempt to legislatively overrule binding decisions of courts. A Constitution Bench of this Court in the case of *Shri Prithvi Cotton Mills Ltd. & Anr.* v. *Broach borough Municipality & Ors.*, [1970] 1 SCR 388 speaking through Hidayatullah, CJ., made the following pertinent observations in this connection :

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> "..... When a legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the legislature must possess H the power to impose the tax, for, if it does not, the action must

ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances." A B

Another Constitution Bench of this Court in *Madan Mohan Pathak and Another Etc. Etc.* v. *Union of India and Others*, [1978] 2 SCC 50 speaking through Bhagwati, J. for himself and Krishna Iyer and Desai, JJ., in para 8 of the Report considered the incompetent attempt made by the Parliament in enacting Life Insurance Corporation (Modification of Settlement) Act, 1976 by which a binding decision of the Calcutta High Court issuing writ of mandamus commanding the Life Insurance Corporation to pay the amount of bonus for the year April 1, 1975 to March 31, 1976 was sought to be nullified. It was held that such an exercise was incompetent. C D

In the case of *A.V. Nachane & Anr. Etc. Etc.* v. *Union of India and Anr.* [1982] 1 SCC 205 a three Judge Bench of this Court referred the aforesaid decision of the Constitution Bench speaking through Bhagwati, J., in para 12 of the Report.

This very question was once again examined by a three member bench of this Court to which one of us N.P. Singh, J., was a party and who spoke for the Bench in the case of *Bhubaneshwar Singh & Anr.* v. *Union of India & Ors.*, [1994] 6 SCC 77. In para 11 of the Report the following pertinent observations were made : E

F

"From time to time controversy has arisen as to whether the effect of judicial pronouncements of the High Court or the Supreme Court can be wiped out by amending the legislation with retrospective effect. Many such Amending Acts are called Validating Acts, validating the action taken under the particular enactments by removing the defect in the statute retrospectively because of which the statute or the part of it had been declared *ultra vires*. Such exercise has been held by this Court as not to amount to encroachment on the judicial power of the courts. The exercise of rendering ineffective the judgments or orders of competent courts by changing the very basis by legislation is a well-known device of validating G H

A legislation. This Court has repeatedly pointed out that such validating legislation which removes the cause of the invalidity cannot be considered to be an encroachment on judicial power. At the same time, any action in exercise of the power under any enactment which has been declared to be invalid by a court cannot be made valid by a Validating Act by merely saying so unless the defect B which has been pointed out by the court is removed with retrospective effect. The validating legislation must remove the cause of invalidity. Till such defect or the lack of authority pointed out by the court under a statute is removed by the subsequent enactment with retrospective effect, the binding nature of the judgment of the C court cannot be ignored."

The same view was once again reiterated by this Court in the case of *Comorin Match Industries (P) Ltd.* v. *State of Tamil Nadu*, [1996] 4 SCC 281. In *S.R. Bhagwat & Ors.* v. *State of Mysore*, [1995] 6 SCC 16, a three Judge Bench speaking through one of us, S.B. Majmudar, J., made the D following observations in para 12 of the Report :

"It is now well settled by a catena of decisions of this Court that a binding judicial pronouncement between the parties cannot be made ineffective with the aid of any legislative power by enacting E a provision which in substance overrules such judgment and is not in the realm of a legislative enactment which displaces the basis or foundation of the judgment and uniformly applies to a class of persons concerned with the entire subject sought to be covered by such an enactment having retrospective effect."

F In view of this settled legal position, therefore, it must be held that Section 6C could not be pressed in service by the original appellant for displacing the binding judgments rendered by the Tribunal, the High Court and this Court in the earlier tenancy proceedings wherein his claim for tenancy of the suit land came to be repelled and those judgments have become final G and binding and were not in any way legally displaced by any competent piece of legislation by the Kerala Legislature. Those judgments remained fully operative against the appellant and consequently on the principle of *res judicata* the appellant could not once again re-agitate the question about his tenancy.

H However, learned senior counsel, Shri Sukumaran, for the appellant

tried to get over this difficulty in the way of the appellant by placing reliance on two decisions of this Court. In *Mathura Prasad Bajoo Jaiswal & Ors.* v. *Dosibai N. B. Jeejeebhoy*, [1970] 1 SCC 613 a three Judge Bench of this Court speaking through J.C. Shah, J., took the view that the doctrine of *res judicata* belongs to the domain of procedure and that a decision on an issue of law will be *res judicata* in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when cause of action is different. He invited our attention specially to para 7 of the Report wherein it is observed that where the law is altered since the earlier decision, the earlier decision will not operate as *res judicata* between the same parties and it was obvious that the matter in issue in a subsequent proceeding was not the same as in the previous proceeding, because the law interpreted is different. These observations will have to be appreciated in the light of the controversy which came up for consideration of this Court. In the aforesaid case the tenant of an open land had tried to get standard rent fixed under the Bombay Rent Act. At that time the land in question was within the territorial jurisdiction of Civil Court. Borivli, Greater Bombay. The learned Civil Judge took the view that Rent Act was not applicable to open lands which were let for construction of residential and business premises. Therefore, the court had no jurisdiction under Section 8 of the Bombay Rent Act to entertain standard rent application. Subsequently the Bombay High Court took a contrary view and held on the proper construction of Section 6 of the Bombay Rent Act that open lands let for construction of buildings for residential and business purposes also were covered by the sweep of Section 6 and the Bombay Rent Act applied to such lands. Taking a clue from the said decision the tenant once again applied for fixation of standard rent before the Court of Small Causes, Bombay as the land by that time had come within the territorial jurisdiction of the Small Causes Court exercising jurisdiction over the Greater Bombay area. Question was whether such an application for fixation of standard rent was barred by *res judicata*. This Court, disagreeing with the view taken by the High Court that there was such a bar, held that when question of jurisdiction independent of the rights of parties was on the anvil the earlier decision would not be *res judicata*. It becomes obvious that the plea for fixation of standard rent would furnish a recurring cause of action and though earlier the Court

might not have jurisdiction under Bombay Rent Act to fix standard rent, if by a subsequent decision of a competent court the Rent Act was found applicable the subsequent application for fixation of standard rent could not be said to be barred by *res judicata* as the cause of action itself would be different in that case being a subsequent and recurring cause of action. The tenant could effectively contend that even though earlier the standard rent could not have been fixed by the Court which held that it had no inherent jurisdiction if subsequently the Court was found to be having such jurisdiction it could fix the standard rent at least prospectively from the date of such fresh application. We fail to appreciate how that decision can be of any avail to the learned senior counsel for the appellant in the facts of the present case. There is no question of lack of jurisdiction with the competent court which earlier decided the plea of tenancy under the very Act as raised by the appellant. Not only the decision was rendered on merits by competent court but it was confirmed by this Court. The cause of action remained the same, namely, status of tenancy of the appellant qua the land and against the plaintiffs. In support of the same cause of action the appellant now wanted to take advantage of Section 6C which unfortunately for him was having no retrospective effect so as to knock off the substratum of the decisions rendered by the competent courts earlier. Consequently the ratio of the decision of this Court in *Mathura Prasad's* case (supra) cannot be of any avail to the appellant on the facts of the present case. Reliance was then placed by learned senior counsel for the appellant on the decision of this Court in the case of *Nand Kishore* v. *State of Punjab*, [1995] 6 SCC 614. In that case the provision under which earlier the appellant was compulsorily retired from service was subsequently found to be unconstitutional. Question was whether thereafter the challenge to compulsory retirement could be effectively levelled by the appellant or not and whether such a challenge was barred by the principles of *res judicata*. Punchhi, J. Speaking for a two member Bench of this Court held that once the constitutionality of the provision was gone into by the Supreme Court and once the provision was struck down the hurdle in the way of the appellant vanished and consequently the suit filed by the appellant challenging the compulsory retirement could not be said to be barred by the principles of *res judicata*. It becomes at once clear that once this Court struck down the concerned rule permitting compulsory retirement of a Government servant the very basis of the earlier judgment upholding such an exercise got knocked off and was totally obliterated from the Statute

Book. Consequently the very foundation of the judgment vanished. Such a judgment would obviously become baseless lacking the very foundation on which it could operate. The very foundation of an earlier judgment can be displaced by either a competent legislature enacting a retrospective provision for that purpose or by a competent court deciding the concerned legal provision on which such judgment is based as *ultra vires* and void. In either case the very foundation and legal substitution of such judgment will vanish retrospectively. In such an eventuality the law could be said to have been totally displaced from the very inception of enactment of such a law and consequently any judgment based on such a non-existing law as found in retrospective could obviously lack efficacy and consequential force of *res judicata*. Learned senior counsel for the appellant could have got effective help from the aforesaid ratio of this judgment if any competent court had struck down Section 74 of the Kerala Land Reforms Act as unconstitutional and had not resorted to the process of prospective overruling if such competent court otherwise do so. But such are not the facts of the present case. Section 74 has operated untouched from the very inception when it saw the light of the day along with other provisions of the Act on 1st April 1964. Therefore, it effectively supplied a valid legal foundation for the earlier judgments rendered before 1.1.1970 . That foundation has remained untouched and Section 6C has not tinkered with it. It must, therefore, be held that earlier judgments as confirmed by this Court against the appellant negativing his plea under the Tenancy Act have remained fully operative and will constitute a valid bar of *res judicata* against the present plea of the appellant centering round Section 6C. The High Court with respect was in error in taking the view that because of Section 6C the earlier judgments would not operate as *res judicata*. Once that conclusion is reached the decision of the High Court will have to be confirmed on this ground alone. Consequently on entirely a different line of reasoning we confirm the judgment of the learned Single Judge of the High Court. In that view of the matter we do not deem it fit to consider the further question whether even if Section 6C operated in favour of the appellant, on merits he would have no case as the lease was created in his favour by a life interest holder. Learned senior counsel for the appellant had a serious grievance about the reasoning adopted by the High Court on this aspect. It is not necessary for us to rest our judgment on consideration of this aspect as no further enquiry in the matter survives for consideration in favour of the original appellant once the earlier judgments are found to operate as *res judicata*

A B C D E F G H

A debarring him from raising such a contention during execution proceedings taken out by the respondents for fixation of mesne profits.

In the result this appeal fails and will stand dismissed in view of our aforesaid findings. In the facts and circumstances of the case there will be no order as to costs.

B

S.S. Appeal dismissed.

SMT. HIMI AND ANR. A

v.

SMT. HIRA DEVI AND ORS.

SEPTEMBER 25, 1996

[N.P. SINGH AND S.B. MAJMUDAR, JJ.] B

Hindu Succession Act, 1956 :

S.14(1) and (2)—Hindu Female having a restricted right to occupy properties flowing from consent terms not created in acknowledgment of any pre-existing right of maintaince-Held, covered by Section 14 (2) and not S.14 (1)—She does not become absolute owner by virtue of provisions of S.14(1). C

One "A" owned agricultural lands and made will of his properties dividing equally the properties between his second wife "B" and daughter from the first wife "C". D

A died on 25th July 1946. "C" filed a civil suit on 5th May, 1947 challenging mutation of property in her step mother's (B's) name and for possession of her half share in the properties as a legatee under her father's will.

E

A compromise was arrived at between the parties. Under the said compromise "C" acknowledged the ownership of half share of "B" pursuant to the will of "A".

It was further agreed that properties comprising of C's half share under her father's will would remain in possession of "B" during her life time but after her death heirs of "C" would be entitled to enter upon the possession of suit properties. F

It was also agreed that during B's life time both the parties will have equal rights over the suit properties.

G

"B" assumed that she had become full owner of the property by virtue of provisions of S.14 (1) of the Act and donated the suit properties by two gift deeds dated 17th April 1970 and 26th August 1970 in favour of "E" and "F" Under these gift deeds apart from her half share in the properties for which there was no dispute she gifted away the other half of properties H

A which belonged to "C" and which half was possessed by her during her life time as per the consent decree.

Donees entered into possession of the property, 'B' died on 4th September, 1971.

B Heirs of 'C' filed suit against donees stating that properties were illegally donated by "B" to the concerned donees.

Trial Court passed a decree for possession in favour of appellants holding that they are heirs of 'C' and that defendants are estopped from C challenging the will as they were bound by admission made by "B", relating to the validity of the will and the half share of "C" in the suit properties.

The Trial Judge further held that 'B' possessed these properties as limited owner as her right flowed from consent decree passed in 1947, and therefore she had a restricted estate not capable of being enlarged into D absolute ownership on account of provisions of S.14 (2) of the Act.

First Appellate Court dismissed the appeal against Judgment of the trial Court.

A Single Judge of the High Court allowed the second appeal holding E that donee was a third party and he was claiming *dehors* the will and as the said will was not proved between the parties and the admission of "B" regarding validity of the will was not binding on "E" Donee. The appellants have preferred the present appeal by special leave.

F The appellants contended that compromise decree dated 6th Nov., 1947 between the step mother and step daughter for the first time conferred a right on "B" to remain in possession of the suit lands which belonged to 'C'. Therefore, the consent decree created a new right in favour of 'B' to remain in possession of 'C's land and consequently Section 14(2) G of the Act, applied and not section 14(1).

Respondents contended that they were not party to consent decree and as the will was not legally proved on record no right in the suit property enured in favour of "C".

H It was further contended that the suit properties were possessed by

'B' when S.14(1) of the Act come into operation and her possession as limited owner matured into full ownership. A

Allowing the appeal, this Court

HELD : 1.1. Suit Filed by 'C' was compromised and "B" accepted right, title and interest of "C" in the suit properties as flowing from the will of her father to the extent of one half share and she agreed to remain in possession of one half share of properties during her life time and on her death "C" or her heir would be entitled to take possession of these properties as full owner thereof. This restricted right was created not in lieu of any pre-existing or antecedent right and the right was conferred on "B" for the first time by 'C'. [863-G-H] B C

1.2. On the facts of present case only section 14(2) would apply and not Section 14(1). [864-A]

Vadda Boyina Tulasamma & Others **v.** *Vadde Boyina Sesha Reddi (Dead) By L.R.'s.,* **AIR (1977) SC 1944, held applicable.** D

2. 'B' was not full owner of Property and she had no right to gift away properties in favour of donees. Donees can not claim any better right than what the donor had in the properties and 'B' could not have conveyed any title of the properties to the donees. [864-D] E

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4845 of 1989.

From the Judgment and Order dated 5.8.88 of the Himachal Pradesh High Court in R.S.A. No. 18 of 1978. F

John J. Zaveri and Harish J. Jhaveri for the Appellants.

Ambrish Kumar for the Respondents.

The Judgment of the Court was delivered by G

S.B. MAJMUDAR, J. The appellants who are the heirs of one Bai Lachhmu, are the original plaintiffs whose suit for possession against the respondent-donees of suit agricultural lands claiming through the donor Bai Utti came to be decreed by the Trial Court and which decree was confirmed by the District Court but who lost before the High Court in H

A Second Appeal and consequently their suit for possession came to be dismissed by the High Court.

A few relevant facts leading to the present proceedings by special leave to appeal under Article 136 of the Constitution of India may be noted at the outset. The suit lands originally belonged to one Bali Ram. Said Bali
B Ram made a Will of his properties dividing equally the suit properties between his second wife Bai Utti and his daughter from the first wife by Lachhmu through whom the appellants claim. The legatees under the said Will of Bali Ram were his second wife and his daughter from the first wife who *inter se* were step-mother and step- daughter respectively.

C

Said Bali Ram died on 25th July 1946. Thereafter Lachhmu claiming her half share in the properties on the basis of the Will of her father Bali Ram filed a Civil Suit on 5th May 1947 against her step-mother Utti challenging the mutation of properties in her name and for enforcing her
D rights under the Will and for possession of her half share in the properties as a legatee under her father's Will. In the said suit between step-daughter plaintiff Bai Lachhmu and step-mother Bai Utti a compromise was arrived on 6th November 1947. Under the said compromise the defendant step-mother acknowledged the ownership of the half share of plaintiff Bai Lachhmu in the suit properties pursuant to the Will of Bali Ram. The
E plaintiff Bai Lachhmu on the other hand agreed that her properties comprising of the half share under her father's Will may remain in possession of Bai Utti during her lifetime but after the death of Bai Utti, plaintiff Bai Lachhmu or her heirs would be entitled to enter upon the possession of the suit properties. It was also agreed between the parties that both the
F parties will have equal rights in the suit properties during the lifetime of Bai Utti, the step mother of the plaintiff. Accordingly Consent Decree was passed. We will refer to the relevant terms of the Consent Decree a little later to resume the narration of events Bai Utti who was permitted during her lifetime to remain in possession of the properties which were accepted
G to be belonging to Bai Lachhmu as per the aforesaid Compromise decree, assuming that she had become full owner of these properties which were allowed to remain in her possession during her lifetime presumably by virtue of Section 14 sub-section (1) of the Hindu Succession Act. 1956 (hereinafter referred to as 'the Act') donated the suit properties by two Gift Deeds dated 17th April 1970 and 26th August 1970 in favour of one
H Bellu Ram and one Budhu respectively. Under these Gift Deeds thus apart

from her half share in the properties for which there was no dispute she also gifted away the other half share of the properties which belonged to Bai Lachhmu and which half share was possessed by her during her lifetime pursuant to the consent decree. Accordingly the respective donees entered upon possession of these properties. Thereafter Bai Utti died on 4th September 1971. The appellants as heirs of Bai Lachhmu filed a Civil Suit against both the donees Bellu Ram And Budhu on 20th January 1972 claiming possession of the properties which according to the appellants belonged to Lachhmu and which were illegally donated by Utti to the concerned donees. The learned Trial Judge after hearing the parties passed a decree for possession on 6th September 1976 in favour of the appellants, holding that they are the heirs of Bai Lachhmu and that the defendants are estopped from challenging the Will as they had claimed their rights under Bai Utti and they were bound by the admission made by Bai Utti relating to the validity of the Will and the right, title and interest regarding the half share of Bai Lachhmu in the suit properties. The learned Trial Judge also held that Bai Utti who was possessed of these properties when the Act came into force possessed them as limited owner but not on account of any pre-existing right in these properties and that her right flowed from the Compromise Decree passed in 1947 and consequently she had a restricted estate not capable of being enlarged into absolute ownership on account of the provisions of Section 14 sub-section (2) of the Act. Appeal preferred against the said decree by the aggrieved defendant came to be dismissed by the First Appellate Court in 19th November 1979. The aggrieved defendant thereafter carried the matter in second appeal before the High Court. A learned Single Judge of the High Court took the view that as defendant Budhu was a third party and a stranger and as was claiming *de hors* the will of Bali Ram and as the said Will was not proved in the litigation between the parties and as the admission of Bai Utti regarding the validity of the Will in the consent decree was not binding on Budhu the suit of the appellants was liable to be dismissed and accordingly the learned Single Judge of the High Court allowed the second appeal and dismissed the suit of the appellants, as noted above. The said judgment and decree of the High Court is brought in challenge by the dissatisfied plaintiffs in this appeal.

Learned counsel for the appellants vehemently contended that the Compromise Decree date 6th November 1947 between the step-daughter Bai Lachhmu, predecessor-in-interest of the appellants on the one hand

A and her step-mother Bai Utti, predecessor-in-interest of the contesting respondents conferred for the first time a right on Bai Utti to remain in possession of the suit lands which belonging to Bai Lachhmu. That the said consent decree which gave life interest to Bai Utti did not acknowledge any pre-existing right of Bai Utti in the properties for maintenance as the step-daughter was not bound to maintain the step-mother. Therefore, the B arrangement between the parties recognised by the consent Decree created a new right in favour of Bai Utti to remain in possession of plaintiff's lands during her lifetime only pursuant to the decree and consequently Section 14 sub-section (2) of the Act applied and not Section 14 sub-section (1). It was next contended that the High Court had totally gone wrong in C holding that the admissions contained in the Consent Decree on the part of Bai Utti were not binding on the respondents who were strangers to the said decree. It was, therefore, contended that the High Court had patently erred in law in interfering with the decree of the Trial Court as rightly confirmed by the first Appellate Court.

D

Learned counsel for the respondents on the other hand submitted that admittedly the contesting respondent-donees were not parties to the Compromise Decree. That even though the Compromise Decree acknowledged the rights of Bai Lachhmu under the Will of her father as the Will was not legally proved on record no right in the suit properties enured in E favour of Bai Lachhmu and consequently the appellants as her heirs also cannot claim any interest in the suit properties. That the suit properties were possessed by Bai Utti when Section 14(1) of the Act came into operation and, therefore, her possession as limited owner matured into full ownership pursuant to Section 14(1) and consequently the suit was rightly F dismissed by the High Court.

Having given our anxious consideration to these rival contentions we find that the High Court was not justified in upsetting the decree for possession as passed by the Trial Court and as confirmed by the First Appellate Court. The reason for reaching this conclusion is obvious. It may G be that in the suit filed by Bai Lachhmu the step-daughter against Bai Utti her step-mother the Will of Bali Ram bequeathing one half share in the properties of the testator in favour of his daughter Bai Lachhmu was seriously disputed. But that dispute was settled and Bai Utti accepted by way of compromise the right, title and interest of Bai Lachhmu in the suit H properties as flowing from the Will of her father. When we turn to the

consent terms dated 6th November 1947 we find the following clear recitals on the part of Bai Utti acknowledging the right, title and interest of Bai Lachhmu in the suit properties :

> "Defendant no. 1 Bai Utti has accepted with regard to the half share in right, title and interest in favour of the plaintiff in the remaining lands, the will dated 20th March 1946 made by Bali, the father of the plaintiff. As regards in the remaining half lands, right, title and interest thereto vests in the defendant no. 1. Both the plaintiff and defendant no. 1 have equal right, title and interest in these lands. However, the possession would remain with the defendant no. 1 and that after her death the plaintiff shall be entitled to take the possession thereof, provided she is alive and if she is not alive, her heirs would be entitled to take the possession. ..... decree may be passed in terms of the conditions of this compromise arrived at between the plaintiff and the defendant no. 1, and the case file be consigned to the Record room.
>
> N.B. : During the lifetime of the defendant no. 1, the plaintiff shall not be entitled to take possession."

In view of these clear recitals in the compromise Decree it becomes clear that Bai Utti who was defendant no.1 in that suit acknowledged the right, title and interest of plaintiff Bai Lachhmu, her step-daughter to the extent of one half share in the suit properties and she agreed to remain in possession of the properties during her lifetime only and it was clearly provided that on her death plaintiff Bai Lachhmu or her heirs would be entitled to take possession of these properties obviously as full owners thereof. Thus only a restricted right to occupy the suit properties was created in the properties belonging to the plaintiff Bai Lachhmu in favour of her step-mother Bai Utti during the latter's lifetime. It is obvious that this life interest was created not in lieu of any pre-existing or antecedent right of Bai Utti for being maintained by the plaintiff Bai Lachhmu, her step-daughter. The step-daughter was not bound to maintain her step-mother under any provisions of law. Nor was there any pre-existing legal right of the step-mother Bai Utti qua these properties. Despite that Bai Utti was permitted to remain in possession of plaintiff Bai Lachhmu's property which was purely by way of a concession to resolve the dispute between the parties. Thus the right to remain in possession of the suit

properties during her lifetime was conferred for the first time on Bai Utti, the step-mother by her step-daughter Bai Lachhmu, the plaintiff in that suit. By these consent terms Bai Utti also acknowledged the right of the plaintiff Bai Lachhmu flowing from her father's Will. This life interest flowing from the consent terms in favour of Bai Utti, therefore, cannot be said to have been created in acknowledgment of any pre-existing right of maintenance. Consequently Section 14 sub-section (1) could not be attracted on the facts of the present case and it is only Section 14 sub-section (2) which applied. Section 14 with its sub-sections reads as under :

> "14. Property of a female Hindu to be her absolute property. - (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> *Explanation.* - In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.
>
> (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

It is no doubt true as decided by this Court in the case of *Vaddeboyina Tulasamma and Others* v. *Vaddeboyina Sesha Reddy (dead) by L. Rs.*, AIR (1977) SC 1944 that sub-section (2) of Section 14 of the Hindu Succession Act is a proviso to sub-section (1) of Section 14. But Section 14 sub-section (1) would apply only if property is acquired by female Hindu in lieu of maintenance or by virtue of any pre-existing right. Bhagwati, J., (as he then was) speaking for himself and A.C. Gupta, J., in the aforesaid decision has made the following pertinent observations in this connection in paras 3 and 4 of the Report :

"Sub-section (1) of Section 14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was subsequently acquired and possessed, she would become the full owner of the property. Sub-section (2) is more in the nature of a proviso or exception to sub-section (1). It excepts certain kinds of acquisition of property by a Hindu female from the operation of sub-section (1) and being in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of woman in Hindu society, it must be construed strictly so as to impinge, as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1), It cannot be interpreted in a manner which would rob sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1).

Sub-section (2) must, therefore, be read in the context of sub-section (1) so as to leave as large a scope for operation as possible to sub-section (1) and so read, it must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre- existing right and such an acquisition would not be within the scope and ambit of sub-section (2),even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property."

Applying the aforesaid settled legal position to the facts of the present case it must be held that the compromise decree for the first time created a right in favour of Bai Utti to remain in possession of the property belonging to Bai Lachhmu only during her lifetime and as that right was conferred for the first time under the consent decree and was not in lieu of any pre-existing right of Bai Utti in Bai Lachhmu's property Section 14 sub-section (2) applied to the facts of the case and not Section 14 sub-section (1). It is difficult to appreciate how.the High Court persuaded itself to hold

A that as the Will was not proved on record and as the donees by claiming the suit properties from the donor Bai Utti were strangers to the consent decree they were not bound by the admission of Bai Utti in the consent decree. It is obvious that the contesting respondents herein who were donees of the properties could not claim a better title to the suit properties that what was available to the donor Bai Utti. If Bai Utti was not the full B owner of the properties she had no right to gift away these properties in favour of the respondent-donees. They could not be said to be strangers to the consent decree, on the contrary, they were claiming through one of the parties to the consent decree, namely, Bai Utti. The obligations flowing from the consent decree and which were binding to the donor Bai Utti C would necessarily bind the donees, namely, the respondents who stepped in the shoes of Bai Utti. They cannot claim any better right than what the donor had in the properties. Once it is held that Bai Utti was not the owner of these properties and she had only a personal right to occupy the properties during her lifetime, she could not have conveyed any title of the D properties to the donees. It is equally difficult to appreciate how the learned Single Judge of the High Court could hold that admissions of the predecessor-in-title of the respondent-donees were not binding on the respondents. For all these reasons, therefore, it must be held that the High Court was in error in interfering with the decree for possession as passed by the Trial Court and as confirmed by the First Appellate Court by E holding that Section 14 sub-section (2) of the Act was not applicable to the facts of the present case and Bai Utti had become the full owner of the suit properties pursuant to the said provision.

In the result this appeal succeeds and is allowed. The judgment and decree of the High Court in R.S.A. No. 18 of 1978 dated 5th August 1988 F is set aside, instead the decree passed in favour of the plaintiffs by the learned Senior Sub-Judge, Kulu on 6th September 1976 and as confirmed by the learned Additional District Judge, Mandi, Himachal Pradesh, on 19th November 1977 in Civil Appeal No. 50 of 1976 is restored. In the facts and circumstances of the case there will be no order as to costs.

G S.S. Appeal allowed.