

UNION OF INDIA
v.
SHANKAR LAL SONI & ANR.
(Civil Appeal No. 4578 of 2006)

DECEMBER 8, 2009*

[HARJIT SINGH BEDI AND J.M. PANCHAL, JJ.]

Administrative Law:

Concessions provided by Railways and Airlines to senior citizens – Subjected to certain conditions – Conditions challenged – HELD: A concession being given on the basis of administrative policy, no beneficiary thereof has a right to insist on a particular condition – Further, it is open to the authorities to withdraw the concessions altogether – Courts should not interfere in such matters on the premise that some of the conditions imposed were not justified – Public Interest Litigation – Letter Petition.

In a letter petition, which was taken up as a public interest litigation by a Division Bench of the High Court, it was stated that while granting concessions to senior citizens by Airlines, the condition to purchase the ticket 7 days prior to the journey and a stay of two nights at the outgoing destination, nullified the concessions. The High Court directed the Airlines to give concessions without the twin conditions. Direction was also issued to Railways to extend the benefit of concession to senior citizens on changing class of journey, extension of journey etc. irrespective of the fact that the transaction occurs at railway reservation counter or the railway ticketing window at railway station. Certain directions pertaining to railway safety were also given. Aggrieved, the Union of India and the Airlines filed the appeals. During the

* Judgment Recd on 16.4.2010

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A hearing before the Supreme Court, it was pointed out that some of the conditions challenged before the High Court were later waived, and the matter before the Supreme Court remained largely academic.

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Allowing the appeals, the Court

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HELD: 1.1. No person has a right to insist that the concession granted by a carrier, be it the Railways or the Airlines or the Road Transport Corporation, should be with conditions determined by that person. It has not been disputed that it would be open to the authorities to withdraw the concessions altogether and in some cases, as in the case of Jet Airways, the concessions given to the senior citizens have been modified. [Para 9] [600-A-C]

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1.2. Keeping in view the financial impact of the grant of concessions to senior citizens, as reflected in the judgment, it can safely be assumed that they result in substantial loss to carriers. Concessions are granted on the basis of administrative policy. A concession based on an administrative decision *de hors* a statute, as in the instant case, stands on a yet weaker footing. Courts should not interfere in such matters on the premise that it was of the opinion that some of the conditions were not justified, as that is a decision for the administrators on an examination of the various facets before them and the inputs they receive from various sources. The judgment of the High Court is completely unsustainable and is set aside. [Para 10, 12 and 14] [600-F-H; 601-A-B; 603-G]

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Ram Singh Vijay Pal Singh and Ors. vs. State of U.P. and Ors. 2007 (5) SCR 1060 = (2007) 6 SCC 44; *Balco Employees' Union (Regd) v. Union of India & Ors.* (2001) 5 Suppl. SCR 511 = (2002) 2 SCC 333; *Netai Bag vs. State of W.B.* (2000) 8 SCC 262, relied on.

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1.3. As regards the directions made by the High

Court with regard to safety measures to be taken by Railways, the matter is left for decision of another Bench of this Court before which the case is pending.[Para 14] [603-F-G]

Udai Chand vs. Shankar Lal and Ors. (1978) 2 SCR 809 = (1978) 2 SCC 209 ; and Taherakhatoon (D) by Lrs. vs. Salambin Mohammad (1999) 1 SCR 901 = (1999) 2 SCC 635, cited.

Case Law Reference:

(2007) 5 SCR 1060 **relied on** **para 6**

(2001) Suppl. 5 SCR 511 **relied on** **para 6**

(1978) 2 SCR 809 **cited** **para 7**

(1999) 1 SCR 901 **cited** **para 7**

(2000) 8 SCC 262 **relied on** **para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4578 of 2006.

From the Judgment & Order dated 9.5.2005 of the High Court of Judicature for Rajasthan Jaipur Bench at Jaipur in D.B. Civil Writ Petition Nos. 1962 & 7162 of 2004.

WITH

C.A. Nos. 4579 & 4580 of 2006.

P.H. Parekh, S. Wasim A. Qadri, A.K. Sharma, Harish Chandra, Savitri Pandey, Ron Bastian, Ashok Bhan, Subhash Kaushik, S.N. Terdol, Anil Katiyar, B. Krishna Prasad, K.S. Prasad, Chanchal Kumar Ganguli, U.A. Rana, Sakesh Kumar, Rameshwar Prasad Goyal, Shakun Sharma, Rukhmani, Parul Negi, Sameer Parekh, P.V. Yogeswaran for the appearing parties.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI J. 1. This judgment will dispose of the three appeals before us. The facts relating to these appeals are as under:-

2.1. On 15th October, 2004, one Mr. C.K. Garg, a Senior Advocate in Jaipur wrote a letter to Hon'ble Mr. Justice S.K. Keshote, a Judge of the Jaipur Bench of the Rajasthan High Court complaining that though senior citizens were entitled to Airlines tickets on concession, certain conditions had been imposed thereon in fact nullified the concessions. The two conditions that were complained of by Mr. Garg were:-

(i) that the Airlines required that a senior citizen applying for a concessional ticket had to do so 7 days in advance of the journey; and

(ii) that the senior citizen was required to stay a minimum of 2 days at the outgoing destination in order to be eligible for the return ticket.

It appears that this matter was taken up as a Public Interest Litigation by a Division Bench of the High Court and notice was issued to the Airlines i.e. Jet Airways and the Indian Airlines, to the Union of India and to the Indian Railways though no relief had been claimed against the last two. On issuance of notice several replies were filed by the respondents controverting the pleas made by the petitioner and also justifying the imposition of the conditions. It was pointed out that the conditions were justified on account of the administrative and financial constraints which went with the concessions and as a concession could not be claimed as matter of right, it was open to the respondents to impose any condition on the concession so granted. We have been told during the course of arguments that some of the conditions which had been complained of have in fact been removed subsequently and the present exercise is largely academic insofar as Jet Airways is concerned inasmuch that the direction for the tickets being booked seven days in advance has since been withdrawn. The Division Bench

A by its judgment dated 9th May, 2005, which has been
impugned in the present set of appeals, issued certain
directions to Jet Airways, Indian Airlines and the Indian
Railways with regard to the concessions and extended the
scope of the public Interest Litigation yet further on the basis
of a news item published in the 'Dainik Bhaskar' a local Hindi
daily newspaper on 2nd March, 2005, reporting the death of
four children who had been run over by a speeding train and,
accordingly, issued certain directions pertaining to railway
safety as well. The Division Bench found that the condition of
7 days prior purchase and the condition of a stay two nights at
the outgoing destination was, in its considered opinion,
unreasonable. Consequently, the Airlines were directed to give
concessions to senior citizens without insisting on the twin
conditions of purchasing tickets 7 days in advance and calling
upon them to stay at least two nights at the outgoing
destination.

2.2. The question of the Railways was then taken up and
it was directed that the conditions placed by the Railways with
regard to the purchase of concessional tickets at the Railway
ticketing window at the railway station alone and restrictions on
a change of the class of ticket or extension of journey etc. were
again unjustified and it was directed as under:-

"We are of the opinion that Railway should extend
the benefit of concession to a senior citizen on changing
class of journey, extension of journey etc. irrespective of
the fact whether the transaction occurs at railway
reservation counter or at the railway ticketing window at
railway station or in a train during journey"

2.3. As already indicated, certain directions were also
given with regard to making life safer for those who lived
alongside the railway track on the basis of the news item
published in the 'Dainik Bhaskar'

3. At the very outset, Mr. P.H. Parekh, the learned senior
counsel representing the newly added respondent—the

A Consumer Education and Research Society has pointed out
that the Railway safety matter was already pending before
another Bench of this Court in Writ Petition No. 162 of 2001
filed under Article 32 of the Constitution of India in the case of
*Consumer Education & Research Centre V. Union of India
& Anr.* We are therefore, of the opinion that the directions
issued by the Division Bench in the impugned judgment with
regard to the safety measures to be taken by the Railways
should be left for decision by the other Bench. We are thus left
with the question of concessions alone.

4. Mr. S. Wasim A. Qadri, the learned counsel
representing the Union of India in C.A. No. 4578 of 2006, Mr.
U.A. Rana, representing the Jet Airways and Mr. K.S. Prasad
representing the Indian Airlines in C.A. No. 4580/2006 have
argued on behalf of the appellants whereas Mr. Shankarlal
Soni, respondent-in-person in C.A. 4578/2006 and Dr. Manish
Singhvi representing Mr. C.K Garg, the contesting respondent
No. 1 in C.A. No. 4580 of 2006, have argued on behalf of the
respondents. We have also heard Mr. P.H. Parekh, the learned
senior counsel representing the Consumer Education and
Research Society.

5. It has been pointed out by the learned counsel for the
appellants that the judgment of the High Court proceeded on a
completely fallacious basis as a concession given to senior
citizens was with certain conditions and it was not for the court
to interfere and decide as to what was more appropriate with
regard of these matters. It has also been pointed out that policy
matters were matters of administrative law and best left to the
administration and could not be a cause for interference by the
court unless they could be said to be totally arbitrary or violative
of some statute or Law and as the concessions given were on
the basis of the guidelines issued by the Airlines, there was
absolutely no justification for the court's interfere in the matter.

6. The learned counsel have also relied upon *Ram Singh
Vijay Pal Singh and other v. State of U.P. And Others* (2007)

6 SCC 44, *BALCO Employees' Union (Regd.) v. Union of India and Others* (2002) 2 SCC 333 to support their submissions.

7. Mr. Shankar Lal Soni, appearing in person has raised several preliminary submissions challenging the very competence of the appeal inasmuch that the Union of India was not authorised to file an appeal on behalf of the Indian Railways; that the High Court had not been impleaded as a party and that the ground of the Special Leave petition were vague as the prayer clause did not indicate as to the relief claimed from this Court. He has also pointed out that though directions had been issued against the Rajasthan State Road Transport Corporation, the Corporation had not filed a Special Leave petition which effectively meant that it had accepted the judgment of the High Court. He has submitted (as held by this Court) in *Udai Chand v. Shankar Lal and Other* (1978) 2 SCC 209 and *Taherakhatoon (D) by Lrs. v. Salambin Mohammad* (1999) 2 SCC 635, that it was open to this court even revoke the leave granted in a case where no cause for the grant of leave had been made out.

8. Dr. Singhvi, the learned counsel for the respondents has also urged that it was rather unfair that a concession granted with one hand was being taken away by the other and that a duty lay on all citizens of this country to ensure a comfortable, happy and healthy life to its senior citizens and any condition laid down by the appellants had to stand the test of reasonableness and in this view of the matter there was no error in the order of the High Court. Mr. Parekh has further pointed out that subsequent to the judgment of the High Court the Airlines as well as the Railways had waived some of the conditions which had been challenged by the writ petitioner respondents and the matter was, therefore, largely academic at this stage.

9. We have heard the learned counsel for the parties at very great length and gone through the record that their assistance. It cannot for a moment be doubted that a

A concession granted by a carrier be it the Railways or the Airlines or the Road Transport Corporation is a concession only and no person is entitled to insist that the concession should be with conditions determined by that person. It has not been disputed before us that it would be open to the authorities to withdraw the concessions altogether and in some cases, we are told such, as in the case of Jet Airways, the concessions given to the senior citizens have been modified. Once it is held that no beneficiary of a concessions has a right to insist on a particular condition or conditions, the very basis for the judgment of the High Court disappears. We have quoted from the operative portions of the High Court judgment and find that no reasons have been given as to why the Court found that some of the conditions imposed were not justified. It appears that the courts proceeded only on the basis of its subjective satisfaction to arrive at the conclusion that the conditions were not to the benefit of senior citizens ignoring the basis nature of a concession given on the basis of administrative policy and ignoring the effect that they could have on the concessionaries.

10. Mr. Prasad has referred us to the reply filed by the Indian Airlines before the High Court pointing to the financial impact of the grant of concessions to senior citizens for the years 2001 to 2003-2004. The facts are indeed revealing:-

Year	Financial Impact (Rs. In Crores)
2000-2001	37.97
2001-2002	39.38
2002-2003	43.07
2003-2004	25.39

The figures pertaining to other Airlines have not been provided but we can safely assume that they too would result in substantial loss to them as well. We have also gone through the judgment cited by the learned counsel. The basis issue that has

been decided in these cases is that it is not for the Court, be it the High Court or the Supreme Court, to interfere in matter of policy as that is a decision for the administrators on an examination of the various facets before them and the inputs they receive from various sources. In *Ram Singh Vijay Pal Singh And Others* (Supra) this Court quoted with approval from the judgment in *Netai Bag v. State of W.B.* (2000) 8 SCC 262 in the following words:

12. In *Netai Bag v. State of W.B.*¹ this Court held as under in para 20 of the Report: (SCC p. 275)

"20 The Government is entitled to make pragmatic adjustment and policy decision which may be necessary or called for under the prevalent peculiar circumstances. The court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or wiser or more scientific or logical. In *State of M.P. v. Nandlal Jaiswal*² it was held that the policy decision can be interfered with by the Court only if such decision is shown to be patently arbitrary, discriminatory or mala fide. In the matter of different modes, under the rule of general application made under the M.P. Excise Act, the court found that the four different modes, namely, tender, auction, fixed licence fee or such other manner were alternative to one another and any one of them could be resorted to."

11. The Court also relied on the judgment of this court in BALCO Employees Union's case and observed:-

"In the well-known case of *BALCO Employees' Union (Regd.) v. Union of India*³ a three—Judge Bench summarised the law on the point as under: (SCC p. 335c-f)

In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may results in the shift in focus or change in

A economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court.
B It is neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.

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Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for then courts to consider whether a wiser or better one can be evolved. In matters relating to economic issues, the Government has, while taking a decision, right to 'trial and error' as long as both trial and error are bona fide and within limits of authority. For testing the correctness of a policy the appropriate forum is parliament and not the courts"

and finally concluded:-

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"16 The Writ petitioners have absolutely no legal right to claim that the shopes, godowns or sheds be transferred to them on hire-purchase basis In these circumstances at all be granted and the write petition was rightly dismissed."

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12. The very basis of this judgment is that a decision to grant a certain concession or a certain benefit and the conditions for their grant are a matter for the administrators alone and the court should not interfere in the matter on the premise that it was of the opinion that some of the conditions imposed were not justified. A concession based on an administrative decision de hors a statue as in this case stands

on a yet weaker footing.

13. Mr. Shankar Lal Soni has emphasised that the Special Leave petition at the instance of the Union of India was not maintainable. We find absolutely no merit in this plea for the simple reason that as a Party before the High Court it was open to the Union of India to file a Special Leave petition in the matter. Likewise, We find absolutely no justification as to why the leave which has already been granted by this Court should be revoked as we are of the opinion that the impugned judgment was palpably unjustified and erroneous. Mr. Soni has not seriously come to the merits of the case and has raised technical pleas which, in the case of a public Interest Litigation, initiated by the court on the basis of a newspaper report, are untenable. He not been able to point out any material circumstance which could justify the maintenance of the impugned judgment.

14. As already indicated above, Dr. Singhvi has emphasised on the duty cast on all of us to ensure a comfortable and happy life to senior citizens. There can be no doubt as to this obligation but in such matters emotion and passion cannot form the basis for decisions. As already noted at the very beginning, certain directions had been issued by the Division Bench of the High Court in the impugned judgment with regard to the safety measures that should be taken by the Railway Administration. In the light of the fact that this matter is already before another Bench, We make no comment and leave it for decision of that Bench. Insofar the present appeals are concerned, the judgment of the High Court is completely unsustainable. We, accordingly, allow the appeals, set aside the judgment of the High Court and dismiss the writ petitions.

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

R.P. Appeals allowed

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AKLOO AHIR
v.
STATE OF BIHAR
(Criminal Appeal No. 836 of 2009)

MARCH 11, 2010*

[HARJIT SINGH BEDI AND C.K. PRASAD, JJ.]

Penal Code, 1860:

ss. 302/34 and 307 – The fire stated to have been shot by accused-appellant missed the target – The fire shot by co-accused hit the victim resulting into his death – Conviction of accused-appellant u/s 307 – Conviction of eight others u/s 302/34 – Six of the accused acquitted by High Court – Appeal by the accused convicted u/s 307 – HELD: There is absolutely no suggestion whatsoever in the prosecution evidence of pre-concert or proof of a prior meeting of minds between the appellant and his co-accused – There is admittedly evidence to show that there was animosity between some of the accused and the complainant party but in the light of the fact that the accused against whom the animosity had been suggested have been acquitted, this fact does not in any way come into play against the appellant – It has also to be noticed that the accused were all living in close proximity – The possibility, therefore, that they were attracted to the place of incident on account of noise and did not come together with a pre-planned objective to commit murder cannot be ruled out – In any way, there is no evidence to suggest that there was any prior meeting of minds – Conviction of the appellant u/s 302/34 IPC is not called for – In the light of the fact that the appellant had fired a shot which missed its target his conviction u/s 307 has, therefore, to be maintained – Sentence is, however, reduced from ten years to five years.

* Judgment Recd. on 24.4.2010

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal A
No. 836 of 2009.

From the Judgment & Order dated 29.10.2003 of the High Court of Patna in Crl. Appeal No. 36 of 2000.

P.S. Mishra, Upendra Mishra, Dhruv Kr. Jha, Thagat B
Harshvardhan, Pavan Kumar, Pawan Kr. Sharan for the Appellant.

Ritesh Kr. Choudhary (for Gopal Singh) for the Respondent. C

The following Order of the Court was delivered

O R D E R

This appeal by way of special leave arises out of the following facts: D

At about 5.00 p.m. on 10th January 1981 Kishore Bhagat had returned home along with his father after feeding their cattle. As they were entering the door of the house Garju Ahir one of the accused (since deceased) emerged from the North side and asked Kishore Bhagat to return his fodder machine. Kishore Bhagat, however, refused to do so on which Garju fired a shot at him which did not hit its target. Appellant Akaloo Ahir, thereafter, came from the same direction and fired another shot at Kishore Bhagat which too missed its target. Following this attack, Suresh Singh and Brij Mohan Ahir too came there and Suresh Singh handed over a cartridge to his companion who fired a shot with his gun which hit Kishore Bhagat on his chest and stomach killing him at the spot. Several other accused armed with traditional weapons, thereafter, attacked Kishore Bhagat and caused several injuries to him as well and having done so the accused ran away from the spot leaving the dead body at the place where it had fallen. E
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On the completion of the investigation the accused Brij Mohan Ahir was charged for the offence under Sec.302 of the H

A IPC whereas the others were charged under Sec.302/34 of the IPC. Garju Ahir and Akaloo Ahir, the present appellants, were charged under Section 307/34 of the IPC and under Sec.27 of the Arms Act as well. The Court of Sessions in the course of its judgment held that the prosecution story had been proved beyond doubt and that all the accused other than Garju Ahir (who had died during trial) were liable to conviction and sentence for the offences under which they have been charged. The matter was, thereafter, taken in appeal to the High Court and the High Court partly reversed the judgment of the trial Court holding that as the accused who had been armed with traditional weapons had not caused any injuries in the light of the statement of the Doctor, they were entitled to acquittal. The appeal filed by Suresh Singh, Brij Mohan Ahir and Akaloo Ahir was, however, dismissed. The present appeal has been filed in this Court only at the instance of Akaloo Ahir. C
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Mr. P.S. Mishra, the learned senior counsel has raised only one argument during the course of hearing. He has pointed out that from the facts it had emerged that the appellant could not have been roped in with the aid of Sec.34 of the IPC for the offence of murder as there was no evidence to suggest any common intention along with the two co-accused who had committed the murder. He has pointed out that there were four sets of accused, the first being Garju Ahir, since deceased, the second Akaloo Ahir, the appellant herein, the third Suresh and Brij Mohan Ahir and finally the others six accused who had been acquitted by the High Court. He has further submitted that even assuming that the appellant was guilty of having fired a shot at Kishore Bhagat which had missed the target, the sentence of R.I. of ten years imposed under Sec.307/34 should be reduced. E
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G The learned State counsel, Mr. Ritesh Chaudhary, has, however, submitted that the facts revealed that the accused had all come together pursuant to their common intention to kill Kishore Bhagat and his father and to settle once for all the animosity between them. He has accordingly submitted that the H

judgment of the High Court needed to be affirmed.

The facts as are relevant have been given above. We find absolutely no suggestion whatsoever in the prosecution evidence of pre-concert or proof of a prior meeting of minds between the appellant herein and his co-accused. There is admittedly evidence to show that there was animosity between some of the accused and the complainant party but in the light of the fact that the accused against whom the animosity had been suggested have been acquitted, this fact does not in any way come into play against the present appellant.

It has also to be noticed that the accused were all living in close proximity to each other and could have been attracted to the spot on account of the noise that had been raised on account of the first attack by Garju Ahir. It has come in evidence that both parties were residents of Pokhra Tola which consisted only of 25 houses, all bunched up together. The possibility therefore that they had been attracted to the place of incident on account of noise and had not come together with a pre-planned objective to commit murder cannot be ruled out. It has been suggested by Mr. Chaudhary that Akaloo Ahir and Brij Mohan Ahir had come out from the same heap of straw which showed a pre-planned attack and a prior meeting of minds.

We, however, see from the evidence of PW.5 Rama Shankar Yadav an eye witness, that there were two different heaps of straw near the place and the two accused had come out from behind different heaps. In any way there is no evidence to suggest that there was any prior meeting of minds. We are, therefore, of the opinion that the conviction of the appellant under Sec. 302/34 of the IPC is not called for. In the light of the fact that the appellant had fired a shot which missed its target his conviction under Sec. 307 has, therefore, to be maintained. The sentence is, however, reduced from ten years to five years.

With this modification the appeal is dismissed.

R.P.

Appeal dismissed.

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RAJ KUMAR SHIVHARE

v.

ASSISTANT DIRECTOR, DIRECTORATE OF
ENFORCEMENT & ANOTHER
(Civil Appeal No. 3221 of 2010)

APRIL 12, 2010

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

Constitution of India, 1950 – Article 226 – Writ petition – Against interim order of Tribunal in a case under FEMA – Maintainability of – Held: In view of s. 35 which confers appellate jurisdiction on High Court, writ petition is not maintainable – When a statutory forum is created by law for redressal of grievance, writ petition not maintainable ignoring statutory dispensation – Right of appeal, being a creature of a statute, its nature, ambit and width has to be determined from the statute itself – No statutory interpretation is warranted to widen or restrict it – Foreign Exchange Management Act, 1999, s. 35 – Interpretation of Statutes.

Words and Phrases :

‘Any’ – Meaning of, in the context of s. 35 of Foreign Exchange Management Act, 1999.

Pursuant to a notice u/s. 3(c) of Foreign Exchange Management Act, 1999 (FEMA), penalty was imposed on the appellant-accused, and the confiscated money was disposed of according to Section 13(2). In appeal, the Appellate Tribunal by interim order refused to dispense with the pre-deposit of penalty by the appellant. Against the order of the Tribunal, appellant filed writ petition. High Court rejected the petition, holding that it did not have the territorial jurisdiction to decide the matter. Hence the appeal.

Dismissing the appeal, the Court

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HELD: 1. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a Writ Petition should not be entertained ignoring the statutory dispensation. In the instant case, High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-bye by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, fell into a manifest error by not appreciating the aspect of the matter. It has however dismissed the Writ Petition on the ground of lack of territorial jurisdiction. In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal u/s. 35 of Foreign Exchange Management Act, 1999 subject to the limitations contained therein. A writ petition in the facts of this case is therefore clearly not maintainable. [Paras 34 and 39] [621-B-C; 623-B-C]

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statute, its nature, ambit and width has to be determined from the statute itself. When the language of the statute regarding the nature of the order from which right of appeal has been conferred is clear, no statutory interpretation is warranted either to widen or restrict the same. [Para 32] [620-F-G]

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3. A reading of Section 35 of FEMA makes it clear that jurisdiction has been clearly conferred on the High Court to entertain an appeal within 60 days from 'any decision or order of the appellate authority'. But such appeal has to be on a question of law. The proviso empowers the High Court to entertain such an appeal after 60 days provided the High Court is satisfied that the appellant was prevented by sufficient cause from appealing earlier. It is not correct to say that u/s. 35 only appeals from final order can be filed. The Section clearly says that from 'any decision or order' of the Appellate Tribunal, appeal can be filed to the High Court on a question of law. [Paras 21, 22 and 23] [671-B-E]

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Thansingh Nathmal and Ors. vs. The Superintendent of Taxes, Dhubri AIR 1964 SC 1419; Mafatlal Industries Ltd. and Ors. vs. Union of India and Ors. (1997) 5 SCC 536, followed.

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Titaghur Paper Mills Co. Ltd. and Anr. vs. State of Orissa and Anr. AIR 1983 SC 603, relied on.

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Seth Chand Ratan vs. Pandit Durga Prasad (D) By Lrs. and Ors. (2003) 5 SCC 399; Monotosh Saha vs. Special Director, Enforcement Directorate and Anr. (2008) 12 SCC 359; Kusum Ingots and Alloys Ltd. vs. Union of India and Anr. (2004) 6 SCC 254; Ambica Industries vs. Commissioner of Central Excise 2007 (6) SCC 769, distinguished.

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L. Chandra Kumar vs. Union of India and Ors. (1997) 3 SCC 261, referred to.

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4. The word 'any' in the context of s. 35 would mean 'all'. This Section confers a right of appeal on any person aggrieved. A right of appeal, it is well settled, is a creature of statute. It is never an inherent right, like that of filing a suit. A right of filing a suit, unless it is barred by statute, as it is barred here u/s. 34 of FEMA, is an inherent right but a right of appeal is always conferred by statute. While conferring such right, statute may impose restrictions, like limitation or pre-deposit of penalty or it may limit the area of appeal to questions of law or sometime to substantial questions of law. Whenever such limitations are imposed, they are to be strictly followed. But in a case where there is no limitation on the nature of order or decision to be appealed against, as in this case, the right of appeal cannot be further curtailed by Supreme Court on the basis of an interpretative exercise. Under Section 35 of FEMA, the legislature has conferred a right of

appeal to a person aggrieved from ‘any’ ‘order’ or ‘decision’ of the Appellate Tribunal. Of course such appeal will have to be on a question of law. In this context the word ‘any’ would mean ‘all’. [Para 24] [617-E-H; 618-A]

Lucknow Development Authority vs. M.K. Gupta (AIR) 1994 SC 787, relied on.

Satyanarain Biswanath vs. Harakchand Rupchand AIR 1955 Calcutta 225; *Jokhiram Kaya vs. Ganshamdas Kedarnath* AIR 1921 Cal 244, referred to.

Beckett vs. Sutton 51 Law Journal 1882 Chancery Division 432; *Ellerine Bros. (Pty) Ltd. and Anr. vs. Klinger*, 1982 (2) AER 737, referred to.

Black’s Law Dictionary, referred to.

5. The Court gives liberty to the appellant, if so advised, to file an appeal before an appropriate High Court within the meaning of Explanation to Section 35 of FEMA. [Para 50] [626-B]

Case Law Reference:

51 Law Journal 1882 Chancery

Division 432 Referred to. Para 25

1982 (2) AER 737 Referred to. Para 26

AIR 1955 Calcutta 225 Referred to. Para 27

AIR 1921 Cal 244 Referred to. Para 27

(AIR) 1994 SC 787 Relied on. Para 28

(1997) 3 SCC 261 Referred to. Para 33

AIR 1964 SC 1419 Followed. Para 36

AIR 1983 SC 603 Relied on. Para 38

A 1997 (5) SCC 536 Followed. Para 39
 2003 (5) SCC 399 Distinguished. Para 42
 (2008) 12 SCC 359 Distinguished. Para 45
 (2004) 6 SCC 254 Distinguished. Para 47
 2007 (6) SCC 769 Distinguished. Para 48

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3221 of 2010.

C From the Judgment & Order dated 24.9.2008 of the High Court of Delhi at New Delhi in W.P. No. 6527 of 2008.

Vijay Hansaria, Sneha Kalita, R.K. Sinha and D.K. Sinha for the Appellant.

D P.P. Malhotra, ASG, Ranjana Narayan and B.K. Prasad for the Respondents.

The Judgment of the Court was delivered by

E **GANGULY, J.** 1. Leave granted.

2. This appeal arises out of the Division Bench judgment of the High Court of Delhi in WP No. 6527/2008 filed by the appellant-Rajkumar Shivhare.

F 3. A Writ Petition was filed challenging the order dated 17.7.2008 of the Appellate Tribunal for Foreign Exchange, Janpath, New Delhi, (hereinafter ‘the Tribunal’), on various grounds with which this Court is not concerned. By that order, the Tribunal refused to dispense with the pre-deposit of penalty by the appellant and the concluding portion of that order is:

H “...Therefore, the application for dispensation of pre-deposit of penalty is dismissed and rejected but the appellant is permitted to deposit full amount of penalty within thirty days from the date of receipt of the order failing

which the appeal will be dismissed on this ground alone. The appeal is fixed for hearing on 4th September, 2008". A

4. The facts of the case in brief are as follows:

The appellant, along with another person, were issued a notice dated 12.1.2005 under Section 3(c) of the Foreign Exchange Management Act, 1999 (FEMA) for receiving unauthorized payments worth Rs.5 crores under instructions from persons living outside India in connection with his illegal cricket betting operation. He was also asked to explain why the amount of Rs.1 lac, confiscated during search from his residence, should not be credited to the account of the Central Government under Section 13(2) of FEMA, 1999. B C

5. As the charges were proved against him, a penalty of Rs.2 crores was imposed on him and the confiscated money was disposed of according to Section 13(2) vide order dated 29.02.2008. D

6. On appeal to the Appellate Tribunal under Section 19(2) of the Act, the Tribunal passed the order dated 17.7.2008, the concluding portion whereof is quoted above. E

7. Then, a writ petition came to be filed challenging the order dated 17.7.2008.

8. The High Court, without going into the merits of the petition, accepted the preliminary objection raised by the respondent that the High Court of Delhi did not have territorial jurisdiction to decide the matter. High Court of Delhi rejected the writ petition on that ground and gave liberty to approach the appropriate High court. F G

9. While dismissing the writ petition, on the ground that it lacked territorial jurisdiction, the High Court relied on the decision of this Court rendered in *Ambica Industries vs. Commissioner of Central Excise*, (2007) (6) SCC 769, on the interpretation of Section 35 of FEMA. H

10. The High Court in its judgment gave the following reasoning: A

"The position is analogous to that of the Union Government. The statement that the Union Government is located throughout every part of Indian Territory and hence can be sued in any Court of the country, brooks no cavil. This does not, however, inexorably lead to the consequence that a litigant can pick and choose between any Court as per his caprice and convenience..." B

11. It held that in exercising its powers under Article 226, a High Court must consider that the person, Authority or Government is located within its territories or a significant part of the cause of action has arisen within its territories. It referred to *Ambica Industries* (supra) again where this Court held that C

".....the aggrieved person is treated to be the *dominus litis*, as a result whereof, he elects to file the appeal before one or the other High Court, the decision of the High Court shall be binding only on the authorities which are within its jurisdiction. It will only be of persuasive value on the authorities functioning under a different jurisdiction. If the binding authority of a High Court does not extend beyond its territorial jurisdiction and the decision of one High Court would not be a binding precedent for other High Courts or courts or tribunals outside its territorial jurisdiction, some sort of judicial anarchy shall come into play. An assessee, affected by an order of assessment made at Bombay, may invoke the jurisdiction of the Allahabad High Court to take advantage of the law laid down by it and which might suit him and thus he would be able to successfully evade the law laid down by the High Court at Bombay. ... D E F G

It would also give rise to the problem of forum shopping.For example, an assessee affected by an assessment order in Bombay may invoke the jurisdiction of the Delhi High Court to take advantage of the law laid H

down by it which may be contrary to the judgments of the High Court of Bombay". A

12. High Court also relied on the Explanation (a) to Section 35 of FEMA, which states that "High Court", to which an appeal from an order of the Appellate Tribunal under Section 35 of the Act lies, means "the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain". B

13. Though High Court dismissed the writ petition on the issue of territorial jurisdiction, it missed a rather fundamental issue which is discussed hereunder. C

14. At the commencement of the hearing, this Court questioned the very maintainability of the Writ Petition against an order of the Tribunal in view of the provisions of Section 35 of FEMA. D

15. The Learned Counsel for the appellant sought to answer this query by contending that (a) the remedy under Section 35 of FEMA is only against a final order, (b) this question was not raised before the High Court, (c) the writ jurisdiction of the High Court is part of the basic structure of the Constitution and such jurisdiction cannot be ousted in view of Section 35 of FEMA, (d) all the High Courts in India, are entertaining writ petitions challenging an interim order passed by such Tribunals. E F

16. In our judgment, none of the answers given by the learned counsel are tenable for the reasons discussed below.

17. FEMA is a complete Code in itself. The long title of FEMA would indicate that the same is an "Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India". G

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A 18. The Act has seven Chapters and 49 Sections and out of which, Chapter V, which deals with adjudication and Appeal, contains detailed provisions starting from Sections 16 to 35, thus spanning 20 Sections. A rule styled as the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 have been framed in exercise of powers under Section 46 read with sub-section (1) of Section 16, sub-section (3) of Section 17 and sub-section (2) of Section 19 of FEMA. B

C 19. It is thus clear that Chapter V of FEMA, read with the aforesaid rules, provides a complete network of provisions adequately structuring the rights and remedies available to a person who is aggrieved by any adjudication under FEMA.

D 20. The statutory scheme under Section 34 of FEMA is to exclude the jurisdiction of the Civil Court in express terms. Section 35, which calls for interpretation in this case, runs as follows:

E "35. Appeal to the High Court.-Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order:

F Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

G Explanation.-In this section "High Court" means – (a) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and

H (b) where the Central Government is the aggrieved party,

the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.

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21. A reading of Section 35 makes it clear that jurisdiction has been clearly conferred on the High Court to entertain an appeal within 60 days from 'any decision or order of the appellate authority'. But such appeal has to be on a question of law.

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22. The proviso empowers the High Court to entertain such an appeal after 60 days provided the High Court is satisfied that the appellant was prevented by sufficient cause from appealing earlier.

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23. The argument that under Section 35 only appeals from final order can be filed has been advanced on a misconception of the clear provision of the Section itself. The Section clearly says that from 'any decision or order' of the Appellate Tribunal, appeal can be filed to the High Court on a question of law.

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24. The word 'any' in this context would mean 'all'. We are of this opinion in view of the fact that this Section confers a right of appeal on any person aggrieved. A right of appeal, it is well settled, is a creature of Statute. It is never an inherent right, like that of filing a suit. A right of filing a suit, unless it is barred by Statute, as it is barred here under Section 34 of FEMA, is an inherent right (See Section 9 of the Civil Procedure Code) but a right of appeal is always conferred by Statute. While conferring such right Statute may impose restrictions, like limitation or pre-deposit of penalty or it may limit the area of appeal to questions of law or sometime to substantial questions of law. Whenever such limitations are imposed, they are to be strictly followed. But in a case where there is no limitation on the nature of order or decision to be appealed against, as in this case, the right of appeal cannot be further curtailed by this Court on the basis of an interpretative exercise. Under Section

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35 of FEMA, the legislature has conferred a right of appeal to a person aggrieved from 'any' 'order' or 'decision' of the Appellate Tribunal. Of course such appeal will have to be on a question of law. In this context the word 'any' would mean 'all'.

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25. Justice Chitty in *Beckett vs. Sutton* (51 Law Journal 1882 Chancery Division 432) had to interpret "any decree or order" in Section 1 of the Trustee Extension Act, 1852 and His Lordship held:-

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"..the words of the section are as wide as possible, and appear to me to apply adopting the language the Legislature has used – to "any decree or order" by which the Court directs a sale".

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26. The word 'any dispute' is somewhat akin to 'any order' or 'any decision'. Any dispute, occurring in Section 51 of Arbitration Act 1975, has been interpreted to have a wide meaning to cover all situations where one party makes a request or demand and which is refused by the other party [See *Ellerine Bros (Pty) Ltd and another vs. Klinger*, 1982 (2) AER 737].

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27. Justice Bachawat, while in Calcutta High Court, in the case of *Satyanarain Biswanath vs. Harakchand Rupchand*, reported in AIR 1955 Calcutta 225, interpreted the word 'any' in Rule 10 of Bengal Chamber of Commerce, Rules of the Tribunal of Arbitration. Construing the said rule, the learned Judge held that the word 'any' in Rule 10 means one or more out of several and includes all and while doing so the learned Judge relied on an old decision of the Calcutta High court in the case of *Jokhiram Kaya vs. Ganshamdas Kedarnath*, AIR 1921 Cal 244 at page 246. This Court is in respectful agreement with the aforesaid view of the learned Judge.

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28. In Black's Law Dictionary the word 'any' has been explained as having a 'diversity of meaning' and may be "employed to indicate all and every as well as some or one and

its meaning in a given Statute depends upon the context and subject matter of Statute". The aforesaid meaning given to the word 'any' has been accepted by this Court in *Lucknow Development Authority vs. M.K. Gupta* [(AIR) 1994 SC 787]. While construing the expression "service of any description" under Section 2(o) of Consumer Protection Act, 1986 this Court held that the meaning of the word 'any' depends upon the context and the subject matter of the Statute and held that the word 'any' in Section 2(o) has been used in wider sense extending from one to all (para 4 at page 793 of the report). In the instant case also when a right is conferred on a person aggrieved to file appeal from 'any' order or decision of the Tribunal, there is no reason, in the absence of a contrary statutory intent, to give it a restricted meaning.

29. Therefore, in our judgment in Section 35 of FEMA, any 'order' or 'decision' of the Appellate Tribunal would mean all decisions or orders of the Appellate Tribunal and all such decisions or orders are, subject to limitation, appealable to the High Court on a question of law.

30. In a case where right of appeal is limited only from a final order or judgment and not from interlocutory order, the Statute creating such right makes it clear [See Section 19 of the Family Courts Act, 1984] which is set out below:

"(19). Appeal

(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [or from

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A an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

B PROVIDED that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991]

C (3) Every appeal under this section shall be preferred within a period of thirty days from the date of judgment or order of a Family Court.]

(Emphasis supplied)

D 31. Similarly, under Section 104 of the Code of Civil Procedure read with Order XLIII Rule 1 thereof, it has been indicated from which interlocutory order an appeal will lie. But it has been made clear that no Second Appeal from such order will lie [See Section 104 Sub-section (2) of the Code].

E But in Debt Recovery Tribunal Act, as in FEMA, an appeal lies from an interlocutory order and this has been made clear in Section 20(1) of the Act.

F 32. By referring to the aforesaid schemes under different Statutes, this Court wants to underline that the right of appeal, being always a creature of a Statute, its nature, ambit and width has to be determined from the Statute itself. When the language of the Statute regarding the nature of the order from which right of appeal has been conferred is clear, no statutory interpretation is warranted either to widen or restrict the same.

G 33. The argument that writ jurisdiction of the High Court under Article 226 of the Constitution is a basic feature of the Constitution and cannot be ousted by Parliamentary legislation is far too fundamental to be questioned especially after the judgment of the Constitution Bench of this Court in *L. Chandra Kumar vs. Union of India and others* -[(1997) 3 SCC 261].

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However, that does not answer the question of maintainability of a writ petition which seeks to impugn an order declining dispensation of pre-deposit of penalty by the Appellate Tribunal.

34. When a statutory forum is created by law for redressal of grievance and that too in a fiscal Statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go bye by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating the aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

35. No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since High Court itself is the appellate forum.

36. Reference may be made to the Constitution Bench decision of this Court rendered in *Thansingh Nathmal and others vs. The Superintendent of Taxes, Dhubri*, reported in AIR 1964 SC 1419, which was also a decision in a fiscal law. Commenting on the exercise of wide jurisdiction of the High Court under Article 226, subject to self imposed limitation, this Court went on to explain:

“The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. *Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the*

A *Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.”*

(Emphasis added)

B 37. The decision in *Thansingh* (supra) is still holding the field.

C 38. Again in *Titaghur Paper Mills Co. Ltd. and another vs. State of Orissa and another* [AIR 1983 SC 603] in the background of taxation laws, a three judge Bench of this Court apart from reiterating the principle of exercise of writ jurisdiction with the time-honoured self imposed limitations, focused on another legal principle on right and remedies. In paragraph 11, at page 607 of the report, this Court laid down:

D “It is now well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Water Works Co. v. Hawkesford* [1859] 6 C.B (NS) 336 at page 356 in the following passage:

F “There are three classes of cases in which a liability may be established founded upon statute.... But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it...the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.” The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspaper Ltd.* [1919] AC 368 and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant and Co.*

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[1935] AC 532 and *Secretary of State v. Mask and Co.* AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine".

39. In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal under Section 35 of FEMA, subject to the limitations contained therein. A writ petition in the facts of this case is therefore clearly not maintainable. Again another Constitution Bench of this Court in *Mafatlal Industries Ltd. and others vs. Union of India and other* [(1997) 5 SCC 536], speaking through Justice B.P. Jeevan Reddy, delivering the majority judgment, and dealing with a case of refund of Central Excise Duty held:

"So far as the jurisdiction of the High Court under Article 226 — or for that matter, the jurisdiction of this Court under Article 32 — is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment" (para 77 page 607 of the report).

40. In the concluding portion of the judgment it was further held:

"The power under Article 226 is conceived to serve the ends of law and not to transgress them" [Para 108 (x), p. 635].

41. In view of such consistent opinion of this Court over several decades we are constrained to hold that even if High Court had territorial jurisdiction it should not have entertained

A a writ petition which impugns an order of the Tribunal when such an order on a question of law, is appealable before the High Court under Section 35 of FEMA.

B 42. Learned counsel for the respondents relied on a judgment of this Court in *Seth Chand Ratan vs. Pandit Durga Prasad (D) By Lrs. and Ors.* – (2003) 5 SCC 399. Learned counsel relied on paragraph (13) of the said judgment which, inter alia, lays down the principle, namely, when a right or liability is created by a Statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. However, the aforesaid principle is subject to one exception, namely, where there is a complete lack of jurisdiction of the tribunal to take action or there has been a violation of rules of natural justice or where the tribunal acted under a provision of law which is declared ultra vires. In such cases, notwithstanding the existence of such a tribunal, the High Court can exercise its jurisdiction to grant relief.

E 43. In the instant case none of the aforesaid situations are present.

F 44. Therefore, principle laid down in the *Ratan's* case (supra) applies in the facts and circumstances of this case. If the appellant in this case is allowed to file a writ petition despite the existence of an efficacious remedy by way of appeal under Section 35 of FEMA this will enable him to defeat the provisions of the Statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fees or deposit of some amount of penalty or fulfillment of some other conditions for entertaining the appeal. (See para 13 at page 408 of the report). It is obvious that a writ court should not encourage the aforesaid trend of by-passing a statutory provision.

H 45. Learned counsel for the appellant relied on a decision of this Court in *Monotosh Saha vs. Special Director,*

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Enforcement Directorate and Anr. – (2008) 12 SCC 359. That was a decision entirely on different facts. In that decision *Saha* preferred an appeal before the appellate tribunal with a request for dispensing with requirement of pre-deposit, but the tribunal directed the deposit of 60% of the penalty amount before entertaining the appeal. When an appeal was preferred before the High Court under Section 35 of the FEMA, the same was dismissed by the High Court holding that no case for hardship was made out either before the tribunal or before it. In the background of those facts, this Court observed that since pursuant to this Court's interim order Rs.10 lacs have been deposited with the Directorate, the appellant was directed to furnish further such security as may be stipulated by the tribunal and directed that on such deposit tribunal is to hear the appeal without requiring further deposit.

46. It is obvious from the aforesaid discussion that in *Monotosh Saha* (supra) proper procedure was followed by filing an appeal under Section 35. On that this Court made certain observations. The said decision is, therefore, not relevant to the facts and circumstances of the case in hand.

47. Learned counsel for the appellant also relied on a decision of this Court in *Kusum Ingots and Alloys Ltd. vs. Union of India and Anr.* – (2004) 6 SCC 254. That was a decision on the question of “part of the cause of action” under Article 226 (2) of the Constitution. Since this Court is of the opinion that the writ petition itself is not maintainable for the reasons discussed above, the question of part of cause of action is not relevant. So the aforesaid decision is not attracted to the points in issue in this case.

48. The decision in *Ambica Industries* (supra) is also on the question of part of cause of action under Article 226 (2) of the Constitution of India. For the aforesaid reasons, the decision in *Ambica Industries* (supra) is not of much relevance in the facts of the case in hand.

49. For the reasons discussed above, this Court is of the opinion a writ petition is not ordinarily maintainable to challenge an order of the Tribunal. We, therefore, dismiss the appeal, of course for reasons which are different from the ones given by the High Court in dismissing the writ petition.

50. In view of this Court's jurisdiction under Article 136 of the Constitution, we give liberty to the appellant, if so advised, to file an appeal before an appropriate High Court within the meaning of Explanation to Section 35 of FEMA and if such an appeal is filed within a period of thirty days from today, the appellate forum will consider the question of limitation sympathetically having regard to the provision of Section 14 of the Limitation Act and also having regard to the fact that the appellant was bona-fide pursuing his case under Article 226 of the Constitution before the Delhi High Court and then its appeal before this Court.

51. With the aforesaid direction, the appeal is dismissed. The parties are left to bear their own costs.

K.K.T. Appeal dismissed.

ASSISTANT COMMISSIONER, COMMERCIAL TAX
DEPARTMENT, WORKS CONTRACT & LEASING, KOTA

v.

M/S. SHUKLA & BROTHERS
(Civil Appeal No. 3289 of 2010)

APRIL 15, 2010

[S.H. KAPADIA AND SWATANTER KUMAR, JJ.]

Judgment – Reasoned order/judgment – Need for – Held: Reasoned judgment is indispensable part of basic rule of law – Recording of reasons is an essential feature of dispensation of justice – Courts should record reasons for its conclusions to enable the appellate or higher courts to understand the controversy in its correct perspective and to exercise their jurisdiction in accordance with law – A judgment without reasons causes prejudice to the affected party and hampers proper administration of justice – Litigant has a legitimate expectation of knowing reasons for rejection of his claim – Requirement of recording reasons is applicable with greater rigor to the judicial proceedings – Reasons for an order ensures and enhances public confidence – Reasoned orders are required both passed at admission stage or at the final hearing – On facts impugned judgment was not reasoned, hence remitted to High Court – Principle of Natural justice – Administration of Justice – Principle of legitimate expectation – Code of Civil Procedure, 1908 – O. 14 r. 2 r/w O. 20 r. 1 – Rajasthan Sales Tax Act, 1994.

An assessment order was set aside by appellate authority as well as Tax Board. Revision petition against the same was dismissed by High Court.

In appeal to this Court, appellant-Revenue contended that High Court dismissed the Revision in a cryptic order without giving any reasons.

Partly allowing the appeal and remitting the matter to High Court, the Court

HELD: 1. It would have been desirable if the High Court would have recorded some reasons for rejecting the Revision Petition preferred by the Department. Despite heavy quantum of cases in Courts, it would neither be permissible nor possible to state as a principle of law, that while exercising power of judicial review on administrative action and more particularly judgment of courts in appeal before the higher court, providing of reasons can never be dispensed with. [Paras 8 and 9] [636-D; 636-E-G]

S.N. Mukherjee v. Union of India (1990) 4 SCC 594, relied on.

2. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastise. Thus, it will not be far from absolute principle of law that the courts should record reasons for its conclusions to enable the appellate or higher courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the Court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To sub-serve the purpose of justice delivery system, therefore, it is essential that the Courts should record reasons for its conclusions, whether disposing of the case at admission stage or after regular hearing. [Para 11] [637-D-G]

3. Recording of reasons is an essential feature of

A dispensation of justice. A litigant who approaches the court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment. [Para 12] [637-H; 638-A-C]

Mc Dermott International Inc. v. Burn Standard Co. Ltd. and Ors. (2006) SLT 345; *Gurdial Singh Fijji v. State of Punjab* (1979) 2 SCC 368; *State of Maharashtra v. Vithal Rao Pritirao Chawan* (1981) 4 SCC 129, relied on.

F 4. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The

A distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders. [Para 13] [638-D-G]

B *Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr.* AIR 1976 SC 1785, relied on.

C 5. The requirement of recording reasons is applicable with greater rigor to the judicial proceedings. The orders of the court must reflect what weighed with the court in granting or declining the relief claimed by the applicant. [Para 17] [640-H; 641-A]

D *M/s. Pipe Arts India Pvt. Ltd. v. Gangadhar Nathuji Golamare* 2008 (6) Maharashtra Law Journal 280; *State of Uttaranchal v. Sunil Kumar Singh Negi* (2008) 11 SCC 205, relied on.

“Administrative Law” by H.W.R. Wade 7th Edition, referred to.

E 6. A litigant has a legitimate expectation of knowing reasons for rejection of his claim/prayer. It is then alone, that a party would be in a position to challenge the order on appropriate grounds. Besides, this would be for the benefit of the higher or the appellate court. As arguments bring things hidden and obscure to the light of reasons, reasoned judgment where the law and factual matrix of the case is discussed, provides lucidity and foundation for conclusions or exercise of judicial discretion by the courts. Reason is the very life of law. When the reason of a law once ceases the law itself generally ceases. Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dis-

satisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. The court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever precise they may be. [Para 20] [650-F-H; 651-A-C]

Wharton's Law Lexicon, referred to.

7. When reasons are announced and can be weighed, the public can have assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under justice dispensation system. [Para 21] [651-C-E]

8. It may not be very correct in law to say, that there is a qualified duty imposed upon the courts to record reasons. Procedural law and the established practice, in fact, imposes unqualified obligation upon the courts to record reasons. There is hardly any statutory provision under the Income Tax Act or under the Constitution itself requiring recording of reasons in the judgments but it is unequivocally settled that the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order XIV Rule 2 r/w Order XX Rule 1 CPC requires that, the court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the Court. [Para 21] [651-E-G]

9. By practice adopted in all courts and by virtue of judge made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and,

A in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. [Para 22] [651-H; 652-A-B]

B 10. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher court. Absence of reasons thus would lead to frustrate the very object stated hereinabove. [Para 22] [652-C-D]

C 11. In the instant case, it cannot be doubted that challenge was raised to the order of the Rajasthan Tax Board before the High Court on alleged questions of law as well as mixed question of law and fact. The plea that the respondent had not manufactured the shutters from the tax paid raw material and also that the contract in question was not impartible but a consequential item for completion of the contract required examination by the High Court. It is true that requirement of stating reasons for judicial orders necessarily does not mean a very detailed or lengthy order, but there should be some reasoning recorded by the Court for declining or granting relief to the petitioner. The purpose, is to make the litigant aware of the reasons for which the relief is declined as well as to help the higher Court in assessing the correctness of the view taken by the High Court while disposing off a matter. May be, while dealing with the matter at the admission stage even recording of short listening dealing with the merit of the contentions raised before the High Court may suffice, in contrast, a detailed judgment while matter is being disposed off after final hearing, but in both events, it is imperative for the High

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Court to record its own reasoning however short it might be. [Para 23] [652-E-H; 653-A-B]

Case Law Reference:

(1990) 4 SCC 594 **relied on.** **Para 10**

AIR 1976 SC 1785 **relied on.** **Para 13**

(2006) SLT 345 **relied on.** **Para 14**

(1979) 2 SCC 368 **relied on.** **Para 15**

(1981) 4 SCC 129 **relied on.** **Para 16**

2008 (6) Maharashtra **relied on.** **Para 18**

Law Journal 280

(2008) 11 SCC 205 **relied on.** **Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3289 of 2010.

From the Judgment & Order dated 29.2.2008 of the High Court for Rajasthan, Bench at Jaipur in S.B. Sales Tax Revision Petition No. 92 of 2007.

Abhishek Gupta, Milind Kumar, Jatinder Kumar Bhatia (NP) for the Appellant.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Delay condoned.

2. Leave granted.

3. The present appeal under Article 136 of the Constitution of India is directed against the Judgment dated 29th February, 2008 passed by the High Court of Judicature for Rajasthan Bench at Jaipur in S.B. Sales Tax Revision Petition No.92 of 2007, and in exercise of its power under Section 86 of Rajasthan Sales Tax Act 1994 (for short 'the Act'). The

A impugned Order reads as under:-

“After having carefully gone through the material on record, since after due consideration proper discretion has already been used by the Deputy Commissioner (Appeals) as also Rajasthan Tax Board, in the facts and circumstances, no further interference is called for by this Court.

The revision petition is dismissed accordingly as having no merits.”

4. The Learned Counsel appearing for the appellant, Assistant Commissioner of Income Tax has argued that Order passed by the High Court does not record any reasons for dismissing the Revision Petition preferred by the Department. According to the Learned Counsel, various contentions raised as grounds in the Revision Petition and two questions of law formulated by the Department for consideration in the High Court while impugning the judgment of the Rajasthan Tax Board, Ajmer have not been reverted to by the High Court, resulting in serious prejudice caused to the present petitioner. On merits as well, challenge has been raised to the Order of the Tax Board as well as that of the Order of the High Court.

5. It may be necessary for that to refer to the basic facts giving rise to the present appeal. The respondent claimed to be a contractor who has obtained impartible contract of constructing 400 shops in JP Market, Chhota Talab, Kota. As per the contract the shops were to be handed over to Cloth Merchant Association, Kota. The respondent had received Rs.95, 26, 276.00 in the year 1997-98 and Rs.22, 38, 026.00 in the year 1998-99. The assessing authority formed an opinion and recorded a finding that the shutters and doors were not manufactured from tax paid raw material in impartible contract and as such shutter was excluded from labour charges in the above years, and levied tax, interest, penalty and surcharge upon the respondent. The order of the assessing authority

A dated 19th July, 2000 and 22nd February, 2001 respectively
were challenged by the respondent before the Deputy
Commissioner (Appeals), Kota and intended that if the shutters
were not installed in the shops, then as per the contract the
shops would not have deemed to be complete. Relying upon
the judgments of the Supreme Court in *Gannon Dunkerley &* B
Co. (Madras) Ltd. - State of Madras [AIR 1958 SC 560] as well
as *State of Rajasthan vs. Man Industrial Corporation* [(2003)
7 SCC 522] it was contended that in an impartible work contract
as per the terms of that contract, the material has been used
in work contract and there was no contract for manufacturing
shutters. Thus on account of execution of impartible work
contract, the property was immovable and tax could not be
levied thereon. C

D 6. The appeal preferred by the respondent was accepted
by the Deputy Commissioner vide his Order dated 23rd
February, 2002. This Order was assailed in appeal by the
Department before the Rajasthan Tax Board which also came
to be rejected vide Order dated 18th October, 2003. The Board
accepted the plea of the respondent that the shutters and doors
were manufactured from tax paid raw material in a work
contract, therefore, could not be the goods transferred for the
purposes of levy of tax, holding the same not justifiable to set
aside the levy of tax, penalty, interest or surcharge. Aggrieved
from the Order of the Board dated 23rd February, 2002, the
appellant filed Tax Revision before the High Court and *inter alia* F
and raised the following questions of law:-

A. Whether the Rajasthan Tax Board Ajmer was justified
in dismissing the appeal of the petitioner in the facts and
as mentioned above? G

B. Whether the iron rolling shutters & doors were fixed by
the assessee on the shops are taxable or not, when no tax
was paid by the assessee on the construction of iron rolling
shutters and doors? H

A 7. As is evident from the facts narrated in the Revision
Petition and the grounds raised besides raising the question
of law, a factual controversy was also raised going to the very
root of the case, that the rolling shutters & doors fixed by the
respondent on the shops were not manufactured of tax paid
material. Thus, question of law, mixed questions of law and
facts were not examined by the High Court in some detail, but
as already noticed, by one line order the Revision Petition was
dismissed. During the course of hearing, we were informed that
arguments were also addressed with reference to judgments
of this Court which were also cited before the Board. However
we find no mention thereof in the impugned Order. It was also
contended that similar questions do arise in number of other
cases, thus it was expected of the High Court to deal with the
contentions rather than pass a cryptic order. C

D 8. We do find that there is substance in the contention
raised on behalf of the petitioner before us. It would have been
desirable if the High Court would have recorded some reasons
for rejecting the Revision Petition preferred by the Department.

E 9. The increasing institution of cases in all Courts in India
and its resultant burden upon the Courts has invited attention
of all concerned in the justice administration system. Despite
heavy quantum of cases in Courts, in our view, it would neither
be permissible nor possible to state as a principle of law, that
while exercising power of judicial review on administrative
action and more particularly judgment of courts in appeal before
the higher Court, providing of reasons can never be dispensed
with. The doctrine of *audi alteram partem* has three basic
essentials. Firstly, a person against whom an order is required
to be passed or whose rights are likely to be affected adversely
must be granted an opportunity of being heard. Secondly, the
concerned authority should provide a fair and transparent
procedure and lastly, the authority concerned must apply its
mind and dispose of the matter by a reasoned or speaking
order. This has been uniformly applied by courts in India and
abroad. H

10. The Supreme Court in the case of *S.N. Mukherjee v. Union of India* [(1990) 4 SCC 594], while referring to the practice adopted and insistence placed by the Courts in United States, emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said “administrative process will best be vindicated by clarity in its exercise”. To enable the Courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review. This Court with approval stated:-

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“the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.”

11. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastise. Thus, it will not be far from absolute principle of law that the Courts should record reasons for its conclusions to enable the appellate or higher Courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the Court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To sub-serve the purpose of justice delivery system, therefore, it is essential that the Courts should record reasons for its conclusions, whether disposing of the case at admission stage or after regular hearing.

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12. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with

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A law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment. Now, we may refer to certain judgments of this Court as well as of the High Courts which have taken this view.

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13. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders. In the case of *Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr.* [AIR 1976 SC 1785], the Supreme Court held as under:-

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“6.If courts of law are to be replaced by administrative

A authorities and tribunals, as indeed, in some kinds of
cases, with the proliferation of Administrative Law, they
may have to be so replaced, it is essential that
administrative authorities and tribunals should accord fair
and proper hearing to the persons sought to be affected
by their orders and give sufficiently clear and explicit
reasons in support of the orders made by them. Then
alone administrative authorities and tribunals exercising
quasi-judicial function will be able to justify their existence
and carry credibility with the people by inspiring confidence
in the adjudicatory process. The rule requiring reasons to
be given in support of an order is, like the principle of audi
alteram partem, a basic principle of natural justice which
must inform every quasi-judicial process and this rule must
be observed in its proper spirit and mere pretence of
compliance with it would not satisfy the requirement of law.
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14. In the case of *Mc Dermott International Inc. v. Burn
Standard Co. Ltd. and Ors.* (2006) SLT 345, the Supreme
Court clarified the rationality behind providing of reasons and
stated the principle as follows:-

“... Reason is a ground or motive for a belief or a course
of action, a statement in justification or explanation of
belief or action. It is in this sense that the award must state
reasons for the amount awarded.

The rationale of the requirement of reasons is that
reasons assure that the arbitrator has not acted
capriciously. Reasons reveal the grounds on which the
Arbitrator reached the conclusion which adversely affects
the interests of a party. The contractual stipulation of
reasons means, as held in *Poyser and Mills' Arbitration in
Re*, 'proper adequate reasons'. Such reasons shall not only
be intelligible but shall be a reason connected with the
case which the Court can see is proper. Contradictory
reasons are equal to lack of reasons. . . .”

A 15. In *Gurdial Singh Fijji v. State of Punjab* [(1979) 2 SCC
368], while dealing with the matter of selection of candidates
who could be under review, if not found suitable otherwise, the
Court explained the reasons being a link between the materials
on which certain conclusions are based and the actual
conclusions and held, that where providing reasons for
proposed supersession were essential, then it could not be held
to be a valid reason that the concerned officer's record was
not such as to justify his selection was not contemplated and
thus was not legal. In this context, the Court held –

C “... “Reasons” are the links between the materials on which
certain conclusions are based and the actual conclusions.
The Court accordingly held that the mandatory provisions
of Regulation 5(5) were not complied with by the Selection
Committee. That an officer was “not found suitable” is the
conclusion and not a reason in support of the decision to
supersede him. True, that it is not expected that the
Selection Committee should give anything approaching
the judgment of a Court, but it must at least state, as briefly
as it may, why it came to the conclusion that the officer
concerned was found to be not suitable for inclusion in the
Select List.”

16. This principle has been extended to administrative
actions on the premise that it applies with greater rigor to the
judgments of the Courts. In *State of Maharashtra v. Vithal Rao
Pritirao Chawan* [(1981) 4 SCC 129], while remanding the
matter to the High Court for examination of certain issues raised,
this Court observed:

G “. . . It would be for the benefit of this Court that a speaking
judgment is given”.

17. In the cases where the Courts have not recorded
reasons in the judgment, legality, propriety and correctness of
the orders by the Court of competent jurisdiction are challenged
in absence of proper discussion. The requirement of recording

reasons is applicable with greater rigor to the judicial proceedings. The orders of the Court must reflect what weighed with the Court in granting or declining the relief claimed by the applicant. In this regard we may refer to certain judgments of this Court.

18. A Bench of Bombay High Court in the case of *M/s. Pipe Arts India Pvt. Ltd. V. Gangadhar Nathuji Golamare* [2008 (6) Maharashtra Law Journal 280], wherein the Bench was concerned with an appeal against an order, where prayer for an interim relief was rejected without stating any reasons in a writ petition challenging the order of the Labour Court noticed, that legality, propriety and correctness of the order was challenged on the ground that no reason was recorded by the learned Single Judge while rejecting the prayer and this has seriously prejudiced the interest of justice. After a detailed discussion on the subject, the Court held:-

“The Supreme Court and different High Courts have taken the view that it is always desirable to record reasons in support of the Government actions whether administrative or quasi judicial. Even if the statutory rules do not impose an obligation upon the authorities still it is expected of the authorities concerned to act fairly and in consonance with basic rule of law. These concepts would require that any order, particularly, the order which can be subject matter of judicial review, is reasoned one. Even in the case of *Chabungbambohal Singh v. Union of India and Ors.* 1995 (Suppl) 2 SCC 83, the Court held as under:

“His assessment was, however, recorded as “very good” whereas qua the appellant it had been stated unfit. As the appellant was being superseded by one of his juniors, we do not think if it was enough on the part of the Selection Committee to have merely stated unfit, and then to recommend the name of one of his juniors. No reason for unfitness, is reflected in the proceedings, as against what

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earlier Selection Committees had done to which reference has already been made.”

In the case of *Jawahar Lal Singh v. Naresh Singh and Ors.* (1987) 2 SCC 222, accepting the plea that absence of examination of reasons by the High Court on the basis of which the trial Court discarded prosecution evidence and recorded the finding of an acquittal in favour of all the accused was not appropriate, the Supreme Court held that the order should record reasons. Recording of proper reasons would be essential, so that the Appellate Court would have advantage of considering the considered opinion of the High Court on the reasons which had weighed with the trial Court.

In the case of *State of Punjab and Ors. v. Surinder Kumar and Ors.* [(1992) 1 SCC 489], while noticing the jurisdictional distinction between Article 142 and Article 226 of the Constitution of India, the Supreme Court stated that powers of the Supreme Court under Article 142 are much wider and the Supreme Court would pass orders to do complete justice. The Supreme Court further reiterated the principle with approval that the High Court has the jurisdiction to dismiss petitions or criminal revisions in limini or grant leave asked for by the petitioner but for adequate reasons which should be recorded in the order. The High Court may not pass cryptic order in relation to regularisation of service of the respondents in view of certain directions passed by the Supreme Court under Article 142 of the Constitution of India. Absence of reasoning did not find favour with the Supreme Court. The Supreme Court also stated the principle that powers of the High Court were circumscribed by limitations discussed and declared by judicial decision and it cannot transgress the limits on the basis of whims or subjective opinion varying from Judge to Judge.

In the case of *Hindustan Times Ltd. v. Union of India and*

Ors. [(1998) 2 SCC 242], the Supreme Court while dealing with the cases under the Labour Laws and Employees' Provident Funds and Miscellaneous Provisions Act, 1952 observed that even when the petition under Article 226 is dismissed in limini, it is expected of the High Court to pass a speaking order, may be briefly.

Consistent with the view expressed by the Supreme Court in the afore-referred cases, in the case of *State of U.P. v. Battan and Ors.* [(2001) 10 SCC 607], the Supreme Court held as under:

“The High Court has not given any reasons for refusing to grant leave to file appeal against acquittal. The manner in which appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order. The absence of reasons has rendered the High Court order not sustainable.”

Similar view was also taken by the Supreme Court in the case of *Raj Kishore Jha v. State of Bihar and Ors.* JT 2003 (Supp.2) SC 354.

In a very recent judgment, the Supreme Court in the case of *State of Orissa v. Dhaniram Luhar* (2004) 5 SCC 568 while dealing with the criminal appeal, insisted that the reasons in support of the decision was a cardinal principle and the High Court should record its reasons while disposing of the matter. The Court held as under:

“8. Even in respect of administrative orders Lord Denning, *M.R. In Breen v. Amalgamated Engg. Union* observed:

“The giving of reasons is one of the fundamentals

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of good administration.” In *Alexander Machinery (Dudley) Ltd. v. Crabtree* it was observed: “Failure to give reasons amounts to denial of justice.” “Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.” Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the “inscrutable face of the sphinx”, it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The “inscrutable face of the sphinx” is ordinarily incongruous with a judicial or quasi-judicial performance.”

Following this very view, the Supreme Court in another very recent judgment delivered on 22nd February, 2008, in the case of *State of Rajasthan v. Rajendra Prasad Jain* Criminal Appeal No. 360/2008 (Arising out of SLP (Crl.) No. 904/2007) stated that “reason is the heartbeat of every conclusion, and without the same it becomes lifeless.”

Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request. Either of the parties to the lis has a right of appeal and, therefore, it is essential for them to know the considered opinion of the Court to make the

remedy of appeal meaningful. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Courts. It is not only desirable but, in view of the consistent position of law, mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be. Brevity in reasoning cannot be understood in legal parlance as absence of reasons. While no reasoning in support of judicial orders is impermissible, the brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled canon of legal jurisprudence that the Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law. Whether or not, such judicial discretion has been exercised in accordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before the higher Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article, Blackrobed Bureaucracy Or Collegiality Under Challenge, (42 MD.L. REV. 766, 782 (1983), observed as under:-

“My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the Court that a bare signal of affirmance, dismissal, or reversal does not.”

The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone can explain the cause which led to passing of the final order. Whether

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an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the reasons for rejection of its contention is a legitimate expectation on the part of the litigant. Another facet of providing reasoning is to give it a value of precedent which can help in reduction of frivolous litigation. Paul D. Carrington, Daniel J Meador and Maurice Rosenberg, Justice on Appeal 10 (West 1976), observed as under:-

“When reasons are announced and can be weighed, the public can have assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy Court, the reasons are an essential demonstration that the Court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid.”

The reasoning in the opinion of the Court, thus, can effectively be analysed or scrutinized by the Appellate Court. The reasons indicated by the Court could be accepted by the Appellate Court without presuming what weighed with the Court while coming to the impugned decision. The cause of expeditious and effective disposal would be furthered by such an approach. A right of appeal could be created by a special statute or under the provisions of the Code governing the procedure. In either of them, absence of reasoning may have the effect of negating the purpose or right of appeal and, thus, may not achieve the ends of justice.

It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on September 13, 2002 in relation to Judgment Writing. Describing that some judgment could be complex, in distinction to routine judgments, where one requires deeper thoughts, and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of the judgment, he said,

“The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written: -

(1) to clarify your own thoughts;

(2) to explain your decision to the parties;

(3) to communicate the reasons for the decision to the public; and

(4) to provide reasons for an appeal Court to consider.”

Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In *Alexander Machinery (Dudley) Ltd. v. Crabtree* 1974 ICR 120, the Court went to the extent of observing that “Failure to give reasons amounts to denial of justice”. Reasons are really linchpin to administration of justice. They are link between the mind of the decision taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher Court. Reasons are the soul of the decision and its absence would render the order open to judicial chastism. The consistent judicial opinion is that every order determining rights of the parties in a Court of law ought not to be recorded without supportive reasons. Issuing reasoned order is not only beneficial to the higher Courts but is even of great utility for providing public understanding of law and imposing self-

A discipline in the Judge as their discretion is controlled by well established norms. The contention raised before us that absence of reasoning in the impugned order would render the order liable to be set aside, particularly, in face of the fact that the learned Judge found merit in the writ petition and issued rule, therefore, needs to be accepted. We have already noticed that orders even at interlocutory stages may not be as detailed as judgments but should be supported by reason howsoever briefly stated. Absence of reasoning is impermissible in judicial pronouncement. It cannot be disputed that the order in question substantially affect the rights of the parties. There is an award in favour of the workmen and the management had prayed for stay of the operation of the award.

D The Court has to consider such a plea keeping in view the provisions of Section 17-B of the Industrial Disputes Act, where such a prayer is neither impermissible nor improper. The contentions raised by the parties in support of their respective claims are expected to be dealt with by reasoned orders. We are not intentionally expressing any opinion on the merits of the contentions alleged to have been raised by respective parties before the learned single Judge. Suffice it to note that the impugned order is silent in this regard. According to the learned Counsel appearing for the appellant, various contentions were raised in support of the reliefs claimed but all apparently, have found no favour with the learned Judge and that too for no reasons, as is demonstrated from the order impugned in the present appeals.”

G 19. The principles stated by this Court, as noticed supra, have been reiterated with approval by a Bench of this Court in a very recent judgment, in *State of Uttaranchal v. Sunil Kumar Singh Negi* [(2008) 11 SCC 205], where the Court noticed the order of the High Court which is reproduced hereunder:-

H “I have perused the order dated 27.5.2005 passed by

Respondent 2 and I do not find any illegality in the order so as to interfere under Article 226/227 of the Constitution of India. The writ petition lacks merit and is liable to be dismissed.”

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and the Court concluded as under:-

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“In view of the specific stand taken by the Department in the affidavit which we have referred to above, the cryptic order passed by the High Court cannot be sustained. The absence of reasons has rendered the High Court order not sustainable. Similar view was expressed in *State of U.P. v. Battan*¹. About two decades back in *State of Maharashtra v. Vithal Rao Pritirao Chawan*² the desirability of a speaking order was highlighted. The requirement of indicating reasons has been judicially recognised as imperative. The view was reiterated in *Jawahar Lal Singh v. Naresh Singh*³.

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In *Raj Kishore Jha v. State of Bihar*⁴ this Court has held that reason is the heartbeat of every conclusion and without the same, it becomes lifeless.

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“8. ... Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;....”

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In the light of the factual details particularly with reference to the stand taken by the Horticulture Department at length

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1. (2001) 10 SCC 607.

2. (1981) 4 SCC 129.

3. (1987) 2 SCC 222.

4. (2003) 11 SCC 519.

* As observed in *State of Orissa vs. Dhaniram Lunar* (2004) 5 SCC 568.

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in the writ petition and in the light of the principles enunciated by this Court, namely, right to reason is an indispensable part of sound judicial system and reflect the application of mind on the part of the court, we are satisfied that the impugned order of the High Court cannot be sustained.”

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19. Besides referring to the above well-established principles, it will also be useful to refer to some text on the subject. H.W.R. Wade in the book “Administrative Law, 7th Edition, stated that the flavour of said reasons is violative of a statutory duty to waive reasons which are normally mandatory. Supporting a view that reasons for decision are essential, it was stated:-

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“.....A right to reasons is, therefore, an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man’s sense of justice...

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.....Reasoned decisions are not only vital for the purposes of showing the citizen that he is receiving justice: they are also a valuable discipline for the tribunal itself.....”

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20. We are not venturing to comment upon the correctness or otherwise of the contentions of law raised before the High Court in the present petition, but it was certainly expected of the High Court to record some kind of reasons for rejecting the revision petition filed by the Department at the very threshold. A litigant has a legitimate expectation of knowing reasons for rejection of his claim/prayer. It is then alone, that a party would be in a position to challenge the order on appropriate grounds.

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Besides, this would be for the benefit of the higher or the appellate court. As arguments bring things hidden and obscure to the light of reasons, reasoned judgment where the law and factual matrix of the case is discussed, provides lucidity and foundation for conclusions or exercise of judicial discretion by the courts. Reason is the very life of law. When the reason of a

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law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dis-satisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever concise they may be.

21. We would reiterate the principle that when reasons are announced and can be weighed, the public can have assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice dispensation system. It may not be very correct in law to say, that there is a qualified duty imposed upon the Courts to record reasons. Our procedural law and the established practice, in fact, imposes unqualified obligation upon the Courts to record reasons. There is hardly any statutory provision under the Income Tax Act or under the Constitution itself requiring recording of reasons in the judgments but it is no more *res integra* and stands unequivocally settled by different judgments of this Court holding that, the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order XIV Rule 2 read with Order XX Rule 1 of the Code of Civil Procedure requires that, the Court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the Court.

22. By practice adopted in all Courts and by virtue of judge

A made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. In the case of Alexander Machinery (Dudley) Ltd. (supra), there are apt observations in this regard to say "failure to give reasons amounts to denial of justice". Reasons are the real live links to the administration of justice. With respect we will contribute to this view. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher Court. Absence of reasons thus would lead to frustrate the very object stated hereinabove.

D The order in the present case is as cryptic as it was in the case of *Sunil Kumar Singh Negi* (supra). Being a cryptic order and for the reasons recorded in that case by this Court which we also adopt, the impugned order in the present appeal should meet the same fate.

E 23. In light of the above principles, now we will revert back to the facts of the present appeal. It cannot be doubted that challenge was raised to the order of the Board before the High Court on alleged questions of law as well as mixed question of law and fact. The contention that the respondent had not manufactured the shutters from the tax paid raw material and also that the contract in question was not impartible but a consequential item for completion of the contract required examination by the High Court. In light of the judgments referred to and relied upon by the parties including the judgment of this Court, it is true that requirement of stating reasons for judicial orders necessarily does not mean a very detailed or lengthy order, but there should be some reasoning recorded by the Court for declining or granting relief to the petitioner. The purpose, as already noticed, is to make the litigant aware of the reasons for which the relief is declined as well as to help

the higher Court in assessing the correctness of the view taken by the High Court while disposing off a matter. May be, while dealing with the matter at the admission stage even recording of short reasoning dealing with the merit of the contentions raised before the High Court may suffice, in contrast, a detailed judgment while matter is being disposed off after final hearing, but in both events, in our view, it is imperative for the High Court to record its own reasoning however short it might be.

24. We are unable to find any infirmity in the arguments advanced on behalf of the Department, that no reasons have been recorded for rejecting the contentions raised, this legal infirmity has, in fact, prejudicially affected the case of the appellant before us. The judgment of the High Court must speak for itself to enable the higher Court to do complete and effective justice between the parties.

25. For the reasons afore-recorded we set aside the order dated 29th February, 2008 and remit the case to the High Court with a request to hear the case de novo and pass appropriate order in accordance with law. To that extent the appeal is allowed.

26. There shall be no order as to costs.

K.K.T. Appeal partly allowed.

A ASSISTANT COMMERCIAL TAXES OFFICER
v.
M/S. KANSAI NEROLAC PAINTS LTD.
(Civil Appeal No. 3288 of 2010)

APRIL 15, 2010

[S.H. KAPADIA AND SWATANTER KUMAR, JJ.]

Rajasthan Sales Tax Act, 1994 – s. 78(2) and (5) – Issue as regard imposition of penalty in terms of s. 78(5) on account of not giving material particulars in form ST 18 A – Penalty set aside by appellate authority as also Tax Board – Revision petition – Dismissed by High Court without recording any reasons – On appeal, held: Records and facts clearly show that High Court erred in law in not recording any reasons – Thus, order of High Court is unreasoned and suffers from the infirmity of non-application of mind – Order of High Court set aside and the case remitted back to High Court.

Certain goods were transported from one place to another. The Customs Enforcement Department intercepted the vehicle and found that the goods were transferred by stock transfer but the declaration form ST 18A was completely blank. The Department treating the consignment under the category of incomplete documents in terms of s. 78(2) of the Rajasthan Sales Tax Act, 1994 imposed penalty in terms of s. 78(5) of the Act. The appellate authority as also the State Tax Board set aside the penalty imposed upon the owner of goods. The Department filed revision petition. The High Court disposed of the revision petition without giving reasons. Hence, the present appeal.

Partly allowing the appeal, the Court

HELD: 1.1. The High Court has not recorded its own

A reasoning for dismissing the revision petition in accordance with law. It would have certainly been more appropriate for the High Court to examine the matter at some length and deal with the arguments/grounds raised in the petition before it. [Para 9] [659-C]

B 1.2. In the case of **Guljag Industries*, this Court had held that the object of s. 78(5) of the Rajasthan Sales Tax Act, 1994 was to remedy the loss of revenue and where Form ST 18A/18C was duly signed but without giving material particulars, would automatically attract levy of penalty for breach of Section 78 (2) of the Act. The modus operandi of the owner of goods did indicate *mens rea*. In **Bajaj Electricals Ltd's* case, this Court explained the expression 'person in charge of the goods' with reference to the declaration Form ST 18A prescribed under Rule 53 of the Rajasthan Sales Tax Rules, 1995 and substitution of this expression by 'the owner of the goods or person in charge of the goods' by amending Act 7 of 2002. The modus operandi adopted by the consignee of not giving material particulars in Form ST 18-A would by itself meet the object of *mens rea*. [Para 9] [659-D-G]

F 1.3. The records and the facts clearly show that the High Court erred in law in not recording any reasons for rejecting the respective contentions raised before the Court. Thus, the order of the High Court is unreasoned and suffers from the infirmity of non-application of mind. The order of High Court is set aside and the case is remitted to the High Court with a request to hear the case *de novo* and pass appropriate order in accordance with law. [Paras 9 and 10] [660-A-B]

G **Guljag Industries v. Commercial Tax Officer (2007) 7 SCC 269*; **Assistant Commercial Taxes Officer v. Bajaj Electricals Ltd. (2009) 1 SCC 308, Referred to.*

A Case Law Reference:
(2007) 7 SCC 269 Referred to. Paras 6,9
(2009) 1 SCC 308 Referred to. Para 9

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3288 of 2010.

C From the Judgment & Order dated 17.12.2007 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Civil Sales Tax Revision No. 282 of 2007.

C A.P. Sahay and Jatinder Kumar Bhatia for the Appellant.

The Judgment of the Court was delivered by

D **SWATANTER KUMAR, J.** 1. Delay condoned.

D 2. Leave granted.

E 3. We may notice necessary facts giving rise to the present appeal. Vehicle No. RJ-19G-3661 was carrying 'parchun' materials and in addition 377 pieces of drum bucket paints. These goods were transported from Ughna (Surat) to Jodhpur under Bilty No. 014951 dated 17.06.1997 issued by M/s. Deshbandhu Transport Company and the goods were consigned to M/s. Goodlass Nerolac Paints Limited. This vehicle was intercepted and checked by the Customs Enforcement Department (for short 'the Department'). The competent authority during the course of the enquiry found that the nerolac paint buckets were transferred by stock transfer but the declaration form ST 18A was completely blank. Treating the consignment under the category of incomplete documents in terms of Section 78(2) of the Rajasthan Sales Tax Act, 1994 (for short 'the Act') and forming an opinion that there was an intention to commit evasion of tax, a notice to show cause was issued that why penalty be not imposed. Reply thereto was filed by the owner of goods. Finding the reply without any merit and

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rejecting the same, the competent authority vide its order dated 23.06.1997 imposed a penalty of Rs.1, 24, 920/- in terms of Section 78(5) of the Act. This order of the competent authority was challenged in appeal by the owner of goods before the Deputy Commissioner (Appeals), Commercial Taxes-II, Jaipur which, vide order dated 03.11.2003, allowed the appeal and held that the penalty against the owner of the goods could not be imposed as there was no intention to commit evasion of tax and thus set aside the order of the lower authority. The Department challenged this order before the Rajasthan Tax Board, Ajmer Bench (for short 'the Board'), on different grounds.

4. The appeal preferred by the Department came to be dismissed by the order of the Board dated 04.04.2005. The Board, while setting aside the order, expressed the view that prior to 22.03.2002 penalty could not be imposed on the owner of the goods under Section 78(5) of the Act besides that there was no intention to commit any evasion of tax.

5. Aggrieved by the order of the Board, the Department preferred revision petition under Section 86 of the Act before the High Court of Judicature for Rajasthan at Jodhpur, and after stating the facts, the Department raised, inter alia, the following important questions of law:-

“(i) Whether mens rea to evade the tax on the part of the dealer is a necessary ingredient for imposition of penalty u/s 78(5) of the Act of 1994, for violation of provisions of Section 78(2) of the Act of 1994?

(ii) Whether the blank declaration form ST-18A with the goods in transit by itself attracts the provisions of penalty under Section 78(5) of the Act of 1994 for violation of the provisions of Section 78(2) of the Act of 1994?

(iii) Whether the learned Tax Board has erred in law in holding that prior to 22.3.2002 the penalty u/s 78(5) of the Act of 1994 for violation of Section 78(2) of the Act of 1994

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could not have been imposed against the owner of the goods?

(iv) Whether the findings arrived at by the learned Tax Board are contrary to law and facts and perverse?

(v) Any other question of law which this Hon'ble Court considers just and proper in the facts and circumstances of the case may also be decided.”

6. The High Court vide its order dated 17.12.2007 dismissed the revision petition. This order is impugned by the Assistant Commercial Taxes Officer in the present appeal under Article 136 of the Constitution of India. The primary challenge before us is that the High Court has not recorded any reason for rejecting the revision petition of the appellant despite the fact that the matter was argued at length and various questions of law were raised before the High Court. We may also notice that in the grounds taken before us, various questions of fact and law have been raised and it is specifically urged that the impugned judgment of the High Court is contrary to the principles stated by this Court in the case of *Guljag Industries v. Commercial Tax Officer* [(2007) 7 SCC 269], where the Court has held that the form should be complete in all respects and should be supported by requisite declaration/ documents.

7. It will be more appropriate to reproduce the order impugned in the present appeal at this stage itself:-

“Heard learned counsel for the petitioner.

The Tax Board set aside the penalty imposed upon the owner of the goods in a transaction which took place prior to 22.3.2002.

After going through the reasons given by the Tax Board, I do not find any illegality in the impugned order passed by the Tax Board.

Consequently, this revision petition, having no merits, is hereby dismissed.” A

8. As already noticed, the principal challenge raised before us is that the High Court has disposed of the matter by a cryptic order and has not given any reason for rejecting the revision petition preferred by the Department. It is urged that the questions raised in the revision petition were likely to arise in a number of cases and as such it was expected of the High Court to deal with the contentions raised in some elaboration. B

9. We have noticed that the High Court has not recorded its own reasoning for dismissing the revision petition in accordance with law. It would have certainly been more appropriate for the High Court to examine the matter at some length and deal with the arguments/grounds raised in the petition before it. Be that as it may, another aspect of the matter which this Court has to take note of is that, in the case of *Guljag Industries* (supra) to which one of us (Kapadia J.) was a party, this Court had held that the object of Section 78(5) of the Act was to remedy the loss of revenue and where Form ST 18A/18C was duly signed but without giving material particulars, would automatically attract levy of penalty for breach of Section 78 (2) of the Act. It was also stated in the judgment that this modus operandi of the owner of goods in that case did indicate mens rea. This principle was further explained and was finally settled in a subsequent judgment of this Court in *Assistant Commercial Taxes Officer v. Bajaj Electricals Ltd.* [(2009) 1 SCC 308] to which again one of us (Kapadia J.) was a party. In this case the Court explained the expression “person in charge of the goods” with reference to the declaration Form ST 18A prescribed under Rule 53 of the Rajasthan Sales Tax Rules, 1995 and substitution of this expression by “the owner of the goods or person in charge of the goods” by amending Act 7 of 2002. The Court also reiterated with approval the dictum in relation to the presence of mens rea in such cases holding that modus operandi adopted by the consignee of not giving C
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A material particulars in Form ST 18-A would by itself meet the object of mens rea.

The records and the above noticed facts clearly show that the High Court erred in law in not recording any reasons for rejecting the respective contentions raised before the Court. We have also noticed that some of the judgments of this Court referred by the Department and/or by the owner of goods have not been referred to, much less, commented upon in accordance with law. Thus, we have no option except to say that the order of the High Court is unreasoned and suffers from the infirmity of non-application of mind. B
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10. For the reasons afore-recorded, we set aside the order dated 17.12.2007 and remit the case to the High Court with a request to hear the case de novo and pass appropriate order in accordance with law. To that extent the appeal is allowed. There shall be no order as to costs. D

N.J. Appeal partly allowed.

THE AMRAVATI DISTRICT CENTRAL CO-OPERATIVE BANK LTD. A

v.

UNITED INDIA FIRE AND GENERAL INSURANCE CO. LTD. B

(Civil Appeal No. 3307 of 2010)

APRIL 15, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Contract of Insurance: *Insurance policy – Interpretation of – Excess clause of the policy stipulated that for each and every loss under contingency 1, 2 and 3, insurer would bear Rs.11500 for each loss but under contingency 4, insurer would bear 25% of the loss or Rs.11500/- whichever was higher – Employee of insured committed series of embezzlements which were covered by contingency 4 – Arbitrator held that the amount embezzled had to be aggregated and insurer could not apply excess clause to each and every loss separately – Held: Arbitrator interpreted the excess clause wrongly – Insured has to bear 25% of the amount embezzled (or 11500/- whichever is higher) in regard to each and every embezzlement, and not by aggregation of the embezzlements – Deeds and documents.* C D E

Words and phrases: *Term “Excess” in the Excess clause of the insurance policy – Meaning of.* F

The respondent-insurer issued an insurance policy insuring the appellant-Bank against losses caused by acts or omission of Bank’s employees. In terms of the “Excess clause” of the policy, the insured was to bear the amount of excess stipulated in the Schedule in respect of each and every loss if the loss was under contingencies 1, 2 or 3 of the Insurance Policy. In respect of losses under contingencies 4 or 5, the insured was to G

A bear 25% of the amount of the loss or the amount of excess stipulated in the Schedule whichever was higher. Contingency 4 covered loss of money or securities by reason of dishonest or criminal act of any employee of the insured wherever committed and whether committed directly or in connivance with others. B

An employee of the Bank committed series of embezzlements. The Bank claimed indemnity from the insured in terms of the policy for a sum of Rs.3.58 lacs embezzled by the said employee. Insurer assessed the reimbursable loss was Rs.29000. Bank did not agree to the assessed amount and referred the matter to arbitration. Insurer did not participate in the arbitration proceedings. The arbitrator proceeded *ex-parte* and made an award. The arbitrator found that there were series of embezzlements by the employee, which were connected together by a common *modus operandi*. The arbitrator held that in all Rs.3.44 lacs was embezzled by various accounts of Bank’s constituents with the Bank. The arbitrator held that these losses were covered under contingency (4) of the policy. He noted that proviso (1) of the policy referring to Excess Clause used the words “each and every loss” when referring to losses under contingencies 1, 2 or 3 but did not use the said words when referring to losses under contingency (4). Therefore, the Arbitrator held that the insurer could not apply the Excess clause to each and every loss separately; that having regard to the terms of the policy, the amounts embezzled had to be aggregated; and that out of the total loss, the Bank had to bear 25% and the insurer was liable to pay the balance. The Arbitrator thus deducted 25% from Rs.3.44 lacs and made an award directing the insurer to pay Rs.2.58 lacs to the Bank. G

Civil Court upheld the award and dismissed the petition under Section 30 of the Act for setting aside the H

award and directed that the award be made a rule of the court. On appeal, High Court remitted the matter to arbitrator for deciding claim afresh holding that the arbitrator ought to have considered each item of embezzlement separately and could not aggregate the embezzled amounts for arriving at the claim. Hence the appeal.

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Dismissing the appeal, the Court

HELD: 1.1. "Excess" clauses are commonly used in Insurance contracts. In insurance parlance, the term "Excess" in the Excess clause in the policy refers to "that part of the amount of loss, under each claim, which is not covered by the policy" or the "amount that the policy holder has, by agreement, to bear or contribute to each insurance claim". [Para 10] [673-D]

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General Assurance Society Ltd. v. Chandumull Jain AIR 1966 SC 1644; *Oriental Insurance Co. Ltd v. Sony Cheriyan*, 1999 (6) SCC 451, relied on.

Central Bank v. New India Assurance Co.Ltd. AIR 1981 Bombay 397, referred to.

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Philadelphia National Bank v. Price (1938) 2 All ER 199, referred to.

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1.2. It is no doubt true that the first part of Proviso (1) uses the words "each and every loss" while referring to the losses covered by contingencies 1, 2 and 3 and does not specifically repeat the said words in the second part of Proviso (1) relating to Contingency 4. But a careful reading of the Excess clause shows that the non-repetition of the words was not because the intention was to apply those words only to losses under contingencies 1, 2, and 3, but because the structure of the sentence did not require repetition of the words and the context

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showed that the words were applicable even to losses under contingency 4. In respect of each and every loss under Contingencies 1, 2 and 3, the Insurer had to bear the amount of excess stipulated in the Schedule, that is at the flat rate of Rs.11, 500/-. But in regard to each and every loss under Contingency 4, the Insured had to bear 25% of the amount of the loss or the amount of excess (Rs.11, 500/-) stipulated in the Schedule, whichever was higher. Proviso (1) was divided into two parts only to differentiate between the quantum that had to be borne by the Insured in respect of each and every claim. It was therefore necessary to identify each act of embezzlement by the employee in regard to each account, as the loss on account of each embezzlement formed a separate claim. The Bank was to bear 25% of the amount embezzled (or 11500/- whichever is higher) in regard to each and every embezzlement, and not by aggregation of the embezzlements. If in regard to each act, the amount embezzled was less than Rs.11, 500/- the Bank had to bear the entire amount and no part had to be borne by the Insurer. Only where a single act of embezzlement was in excess of Rs.11, 500/-, the Insurer's liability would arise. As the matter falls under Contingency (4), the Insurer has to bear 25% of the each and every claim or Rs.11, 500/- whichever is higher on DAR. [Paras 13 and 15] [675-D-F; 675-G-H; 676-A-B; 678-A-B; 678-F-G]

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1.3. The award of arbitrator is liable to be set aside as there is a clear error apparent on the face of the award. The award is a speaking award. It extracts the relevant clauses of the insurance policy including the excess clause. It then proceeds to put an interpretation thereon which is contrary to the express words of the contract and opposed to the well recognised insurance policies and principles. Hence the award was rightly set aside by the High Court. If the amount of each and every embezzlement had been separately recorded in the

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award of the Arbitrator, the court could have calculated the amount that was due, instead of remitting the matter to the Arbitrator for fresh decision. But that was not possible, as the particulars were not available. If however the appellant is not interested in proceeding afresh before the arbitrator after all these years and is willing to accept Rs.29000/- offered by the insurer, it may inform the insurer accordingly in which event, the insurer shall pay the same to the appellant-Bank if it had not already been paid. [Paras 16, 17, 18] [678-A-D; 678-H]

Case Law Reference:

AIR 1981 Bombay 397 referred to	Para 7
AIR 1966 SC 1644 relied on	Para 9
1999 (6) SCC 451 relied on	Para 9
(1938) 2 All ER 199 referred to	Para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3307 of 2010.

From the Judgment & Order dated 18.2.2008 of the High Court of Bombay, Nagpur Bench in First Appeal No. 581 of 1990.

Gagan Sanghi, J.B. Kant, Rameshwar Prasad Goyal for the Appellant.

Ravi Bakshi, Rajeev Kumar Bansal, Akshay K. Ghai, Sanjeev Bansal, Ruby Khan for the Respondent.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Leave granted. Heard the learned counsel.

2. In pursuance of a Banker's Indemnity Insurance Proposal dated 1.7.1976 from the appellant ('Bank'), the respondent

A ('Insurer') issued a Renewal Insurance Policy covering the period 1.7.1976 to 1.7.1977. The policy indemnified and insured the Bank against losses caused by acts or omission of the Bank's employees to a limit of Rs.6 lacs (Basic cover) plus Rs. 9 lacs (cash in safe). The Bank furnished to the Insurer a list of its branches to be covered by the insurance which included Dhamangaon Branch and the names of the employees working in those branches. The operative portion of the policy is extracted below:-

C "THE COMPANY HEREBY AGREES subject to the terms and conditions contained herein or endorsed or otherwise expressed herein that if the Insured shall discover any direct LOSS of Money and/or Securities sustained by the Insured by CONTIGENCIES as provided hereinafter at any time during the period of insurance stated herein or any subsequent period in respect of which the Insured shall have paid or agreed to pay and the company shall have accepted or agreed to accept the premium required for the renewal thereof, the company will indemnify the Insured in respect of all such direct losses but not exceeding,

E (a) the total sum insured hereby in respect of any loss or losses caused by acts or omissions of any one person whether Officer, Clerk or Employee of the Insured or acts or omissions in which such person is concerned or implicated or in respect of any one casualty or event irrespective of the total amount of such loss.

F (b) in any one period of insurance twice the total sum insured hereby in respect of all such losses."

G In lieu of Cover Note No: RENEWAL Policy No:264/52/1/00402

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Schedule

INSURED	NAME: THE AMRAVATI DISTT. CENTRAL COOP. BANK LTD., HEAD OFFICE, ADDRESS: AMRAVATI	Date of Proposal & Declaration 1.7.76
TOTAL SUM INSURED	Rs.6, 00, 000/- (Basic cover) And Rs.9, 00, 000/- (Cash in Safe) H.O. Amravati	PREMIUM Rs. 34, 443/-
EXCESS Rs.11, 500/-	25% on each and every claim or Rs.11, 500/- whichever is higher on D.A.R.	RETRO-ACTIVE DATE (PROVISO 3) - 2 YEARS
PERIOD OF INSURANCE	From 1st July, 1976 to 1st July, 1977	
SPECIAL CONDITIONS	Contingency No.5 of the policy stand deleted.	

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CONTINGENCIES INSURED

1. By reason of any Money and/or Securities for which the Insured are responsible or the custody of which they have undertaken and which now are or are by them supposed or believed to be or at any time during the period of insurance may be in or upon their own premises or upon the premises of their Bankers in any recognised place of safe deposit in India or lodged or deposited in the ordinary course of business for exchange, conversion or registration with the issuers thereof, or with any agents of such issuers or with any person employed to procure or manage the exchange, conversion or registration thereof, being (while so in or upon such premises or so placed, lodged or deposited as aforesaid) lost, destroyed or otherwise made away with by Fire, Burglary, or House breaking, Theft,

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Robbery or Hold-up, whether with or without violence and whether from within or without and whether by the Officers, Clerks or Employees of the Insured or any other person or persons whomsoever.

2. By reason of any Money and/or Securities being lost, stolen, mislaid, misappropriated or made away with, whether due to the negligence or fraud of the officers, Clerks or Employees of the Insured or otherwise, whilst in transit in the hands of such Officers, Clerks or Employees within India, such risk of transit to commence from the moment when the person into whose hands the same may be delivered on behalf of the Insured shall leave the premises at which he receives the same and to continue until delivery thereof at destination.

3. By reason of the payment made whether received over the Counter or through the Clearing House or by Mail in respect of forged or raised Cheques and/or Drafts or (genuine) Cheques and/or Drafts bearing forged endorsements or the establishment of any credit to any customer on the faith of such documents.

4. *By reason of the dishonest or criminal act of any Officer, Clerk or Employee of the Insured with respect to the loss of Money and/or Securities wherever committed and whether committed directly or in connivance with others.*

5. [Deleted]

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PROVISOS

- “1. EXCESS – The Insured shall bear the amount of

excess stipulated in the Schedule in respect of each and every loss if the loss is under Contingencies 1, 2 or 3 insured by the Policy. *In respect of losses under contingencies 4 or 5, the Insured shall bear 25% of the amount of the loss or the amount of excess stipulated in the Schedule whichever is the higher.*"

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(emphasis supplied)

3. An employee of the Bank by name Lodaya working in its Dhamangaon Branch committed a series of embezzlements. On receiving a report dated 28.2.1977 from its Special Auditor about the same, the Bank reported the matter to the police and also to the Insurer. The employee concerned was suspended on 16.3.1977 and eventually dismissed from service on 19.3.1978.

4. The Bank claimed indemnity from the Insurer in terms of the policy in respect of Rs.3, 58, 000/- embezzled by the said employee. After prolonged correspondence, the Insurer informed the Bank that its assessors had assessed the reimbursable loss as Rs.29, 000/- and offered the said sum in full settlement of the claim subject to payment of premium of Rs.538/-. The Bank was not agreeable and that gave rise to a dispute. The Bank sought arbitration and appointed its arbitrator. The Insurer however did not appoint its Arbitrator. Therefore, the Arbitrator appointed by the Bank entered upon the reference as sole arbitrator. In spite of due notice, the Insurer did not participate in the arbitration proceedings.

5. The arbitrator proceeded *ex parte* and made an award dated 17.8.1983. The Arbitrator found that there were a series of embezzlements by Lodaya, which were connected together by a common *modus operandi*. The Arbitrator held that in all a sum of Rs.3, 44, 449/86 was embezzled from the various accounts of Bank's constituents with the Bank, by resorting to

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A forgery. The Arbitrator found that the following amounts were embezzled from the following accounts of account holders/constituents of the Bank :

S.No.	Name of the Account-holders	Amount embezzled
1.	Purohit	44, 615.84
2.	Bhutada	60, 751.80
3.	Mohata	38, 483.84
4.	Kothari	46, 293.24
5.	Roy	8, 423.01
6.	Bhat	57, 506.92
7.	Jasraj Mundhada	1, 916.35
8.	Radhabai Mundhada	1, 911.00
9.	M.Darda	1, 105.15
10.	Kamlabai Darda	2, 216.25
11.	G.H. Darda	3, 210.15
12.	M.S. Coop. Bank	39, 781.26

F The Arbitrator held that these losses were covered under contingency (4) of the policy. He noted that proviso (1) of the policy used the words "each and every loss" when referring to losses under contingencies 1, 2 or 3 but did not use the said words when referring to losses under contingency (4). Therefore, the Arbitrator held that the insurer could not apply the *Excess* clause to each and every loss separately; that having regard to the terms of the policy, the amounts embezzled had to be aggregated; and that out of the total loss, the Bank had to bear 25% and the insurer was liable to pay the balance. The Arbitrator therefore deducted 25% from Rs.3, 44, 449/86 and

made an award directing the insurer to pay Rs.2, 58, 337/40 to the Bank. A

6. The Bank made an application under Sections 14 and 17 of the Arbitration Act, 1940 ('Act' for short) in January, 1984. The Insurer filed a petition under Section 30 of the said Act for setting aside the ex parte award. Both petitions were heard together and the Civil Court by Judgement dated 27.6.1990 upheld the award and dismissed the petition under Section 30 of the Act for setting aside the award and directed that the award be made a rule of the court. B C

7. Feeling aggrieved, the Insurer filed an appeal in the High Court of Bombay. By Judgment dated 18.2.2008 the appeal was allowed, the judgment of the Civil Court and the award of the Arbitrator were set aside and the matter was remitted to the Arbitrator for deciding the claim afresh, after granting due opportunity to both the parties to lead further evidence and submit their statements before the Arbitrator, if they so desired. The High Court following the decision of a learned Single Judge of that Court in *Central Bank v. New India Assurance Co.Ltd.* - AIR 1981 Bombay 397, held that the Arbitrator ought to have considered each item of embezzlement separately and could not aggregate the amounts embezzled by Lodaya at Dhamangaon Branch, for the purpose of arriving at the claim and fixing liability of the insurer. The High Court held that the *Excess Clause* in the policy did not envisage consolidation or aggregation of several losses sustained by the acts of embezzlement by the employee and deduction 25% thereof to arrive at the liability of the insurer, but envisaged the deduction from every claim, that is every single amount embezzled, 25% of the amount embezzled or Rs.11, 500/- whichever was higher, to arrive at the liability of the insurer. D E F G

8. The said judgment is challenged in this appeal by special leave. The appellant submitted that the proviso relating to *Excess* in the Insurance Policy consists of two parts; that the H

A first part requires the Insurer to bear the amount of excess stipulated in the Schedule *in respect of each and every loss*, if the loss was under Contingencies 1, 2 and 3; that if the loss was under Contingency 4, the Insured was required to bear 25% of the amount of the loss or the amount of excess stipulated in the Schedule whichever was higher. It was contended that the use of the words "each and every loss" in the first part of proviso (1) while referring the Contingencies 1, 2 and 3, and the omission to use the said words in the second part thereof when referring to losses under Contingency 4, when considered with the use of the words "insured shall bear 25% of the amount of the loss or the amount of excess stipulated in the Schedule whichever is higher", in regard to losses under contingency (4), would clearly indicate that the 25% of the aggregate of the losses had to be borne by the Bank and the balance had to be paid by the Insurer. As Lodaya had embezzled several amounts and the aggregate of such embezzlements during the period of the insurance, was Rs.3, 44, 449/86, having regard to Proviso (1) of the Insurance Policy, the Bank contended that 25% thereof will have to be deducted therefrom and the Insurer should be made liable to pay the balance of Rs.2, 58, 337/40. It was therefore submitted that the High Court ought not to have set aside the well-reasoned award of the Arbitrator nor remitted the matter for fresh consideration, after nearly a quarter century. B C D E

F 9. What therefore falls for consideration is the interpretation of Proviso (1) of the Insurance Policy. In *General Assurance Society Ltd. v. Chandumull Jain* (AIR 1966 SC 1644) a Constitution Bench of this Court laid down the principle relating to interpretation of Insurance Contracts. This Court held:

G "In interpreting documents relating to a contract of Insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves." H

In *Oriental Insurance Co. Ltd vs. Sony Cheriyan* – 1999 A
(6) SCC 451, this Court held :

“The insurance policy between the insurer and the insured B
represents a contract between the parties. Since the insurer undertakes to compensate the loss suffered by the insured on account of risks covered by the insurance policy, the terms of the agreement have to be strictly construed to determine the extent of liability of the insurer. The insured cannot claim anything more than what is covered by the insurance policy. That being so, the insured has also to act strictly in accordance with the statutory limitations or terms of the policy expressly set out therein.” C

10. “Excess” clauses are commonly used in Insurance contracts. In insurance parlance, the term “EXCESS” in the Excess clause in the policy refers to “that part of the amount of loss, under each claim, which is not covered by the policy” or the “amount that the policy holder has, by agreement, to bear or contribute to each insurance claim”. In other words it limits the liability of the insurer in regard to each claim, only to the amount of loss, in excess of the sum specified in the Excess clause, which the insured has agreed to bear (either himself or by securing other insurance coverage). D

11. Excess clauses in insurance policies have been interpreted in several English decisions. We may refer to one of them. In *Philadelphia National Bank v. Price* reported in (1938) 2 All ER 199, the Court of Appeal was concerned with a case where a policy of insurance indemnified the bank against loss sustained by reason of making advances against forged or invalid documents subject to an excess of \$25, 000 “by each and every loss and occurrence”. Credit facilities were granted by the Bank to a trader on the security of invoices assigned to the bank. Each day, the trader assigned a bundle of invoices and the Bank advanced a sum corresponding to the total of the invoices. The invoices turned out to be false and

A the bank was unable to recover advances of over \$400, 000 in the aggregate, although no single daily loss amounted to more than \$25, 000. The Court of Appeal held that a separate loss had occurred in respect of each day’s advance and the loss cannot be treated as one loss, as each production of documents led to a fresh loss and must be treated as number of losses occasioned by a number of advances. The claim of the Bank was therefore dismissed as loss in each case was below the excess limit of \$25000/-. B

12. A learned Single Judge of Bombay High Court in *Central Bank of India Ltd. v. New India Assurance Co.Ltd.* (AIR 1981 Bombay 397) interpreted the word ‘claim’ in the Excess clause therein, which provided that the Bank shall be considered co-insurer to the extent of 25% subject to the minimum excess of Rs.25000/- for each and every claim. Negating the contention of the Bank that in view of the said clause, its liability as co-insurer was not in respect of each and every loss, but in regard to each claim (that is, the aggregate of several losses which constituted a ‘claim’), the learned Judge held : C

E “The word is of common occurrence in the field of insurance and may mean either the right to make a claim or an assertion of a right. The plain object of the clause, as stated earlier, is to exempt the insurance company from the liability to pay small claims which the Bank has to bear itself. The word, “claim” in this clause means the occurrence of a state of facts which justifies a claim on insurer and does not mean the assertion of a claim on company. In other words, in my judgment, the operation of the Excess Clause is determined by the facts which give rise to the claim and not by the form in which the claim is asserted. F

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H The employer committed several acts of fraud and defalcation and each such separate act caused loss and gave distinct and separate cause of action to the Bank. It is true that all these acts of defalcation were discovered

only on October 18, 1972 but the fact of discovery on one day would not enable the Bank to claim that several acts of defalcation constitute one single or composite loss..... The mere fact that several acts of defalcation were discovered on one day would not lead to the conclusion that several losses under different acts could be treated as one composite loss.

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In accordance with the objects and interpretation of the terms and conditions of the policy, in my judgment, the Bank is liable to be considered as co-insurer to the extent of 25% subject to minimum excess of Rs.25, 000/- in respect of each loss sustained by each set of defalcation by its employee, and it is not permissible to aggregate the total loss for working out of *Excess Clause*.”

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13. It is no doubt true that the first part of Proviso (1) uses the words “each and every loss” while referring to the losses covered by contingencies 1, 2 and 3, and does not specifically repeat the said words in the second part of Proviso (1) relating to Contingency 4. But a careful reading of the shows that the non-repetition of the words was not because the intention was to apply those words only to losses under contingencies 1, 2, and 3, but because the structure of the sentence did not require repetition of the words and the context showed that the words were applicable even to losses under contingency 4. This is also evident from the Schedule to the policy that ‘Excess’ is specified as Rs.11500/- with a further stated “25% of *each and every claim or Rs.11, 500/- whichever is higher on DAR*”. Proviso (1) also reiterates the position, both in regard to contingencies 1, 2 and 3 as also in regard to Contingencies 4 and 5. The difference between the two parts of proviso (1), however, is this: In respect of each and every loss under Contingencies 1, 2 and 3, the Insurer had to bear the amount of excess stipulated in the Schedule, that is at the flat rate of Rs.11, 500/-. But in regard to each and every loss under Contingency 4, the Insured had to bear 25% of the amount of

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A the loss or the amount of excess (Rs.11, 500/-) stipulated in the Schedule, whichever was higher. Proviso (1) was divided into two parts, that is the first part with reference to Contingencies 1, 2 and 3, and the second part in regard to Contingencies 4 (and 5 where it was applicable), only to differentiate between the quantum that had to be borne by the Insured in respect of each and every claim which was a fixed Rs.11, 500/- for each and every loss under Contingencies 1, 2 and 3, whereas it was 25% of the amount of the loss or Rs.11, 500/- whichever was higher in regard to each and every claim under Contingency 4 (and 5).

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14. Having regard to the wording of Proviso (1), in regard to losses referable to Contingencies 1, 2 and 3, the Insured had to bear a fixed amount i.e. Rs.11, 500/- in regard to each and every loss. Therefore the words “25% on each and every claim or Rs. 11, 500/- whichever is higher on DAR” were not applicable in regard to the claims under Contingencies 1, 2 and 3 as what was to be borne in such cases was a fixed flat sum of Rs.11, 500/- per every loss. The said words “25% on each and every claim or Rs.11, 500/- whichever is higher on DAR” applied only in regard to losses referable to Contingencies 4 and 5; and in regard to losses thereunder, what was to be borne by the Insured was 25% of the amount of the loss or the amount of excess stipulated whichever was higher. Therefore, the words “each and every claim” were used in the Schedule with reference to losses under Contingency 4 by describing the *Excess* as “25% on each and every claim or Rs.11, 500/- whichever is higher on D.A.R.” This also clearly shows that the stipulated exemption from indemnity is in regard to each and every loss. We may illustrate the effect of this proviso by the following examples:

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Amount of loss of insured (each claim)	Amount of loss to be borne in case of Contingencies 1, 2 and 3 (Excess is Rs.11, 500)		Amount of loss to be borne in case of Contingency 4 (Excess is 25% of the amount of loss or Rs.11500 whichever is higher)	
	To be borne by Insured	To be paid by Insurer	To be borne by Insured	To be paid by Insurer
Rs.10, 000	10, 000	-	10, 000	-
Rs.11, 500	11, 500	-	11, 500	
Rs.15, 000	11, 500	3500	11, 500	3500
Rs.30, 000	11, 500	18, 500	11, 500	18, 500
Rs.40, 000	11, 500	28, 500	11, 500	28, 500
Rs.46, 000	11, 500	34, 500	11, 500	34, 500
Rs.50, 000	11, 500	38, 500	12, 500	37, 500
Rs.80, 000	11, 500	68, 500	20, 000	60, 000
Rs.1, 00, 000	11, 500	88, 500	25, 000	75, 000

[Note : for any loss upto Rs.46, 000/-, the amount of liability will be the same, whether the loss is under Contingency 1 to 3 or under Contingency 4. But where the loss is more than Rs.46, 000/-, the liability of the insured will remain constant in regard to Contingencies 1, 2 and 3, whereas it will be 25% of the loss in regard to each claim in regard to Contingency No.4.]

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A 15. It is therefore necessary to identify each act of embezzlement by *Lodaya* in regard to each account, as the loss on account of each embezzlement forms a separate claim. The Bank has to bear 25% of the amount embezzled (or 11500/- whichever is higher) in regard to each and every embezzlement, and not by aggregation of the embezzlements. The Arbitrator has stated the total of the amount of embezzlements in regard to each account. He has not given the details of every embezzlement. For example with reference to the account of *Purohit*, the amount embezzled is shown as Rs.44, 615/84. But this does not constitute a single embezzlement. The Arbitrator has stated thus in regard to this account :

“The account of Shri Purohit:

D On 22.6.76 Rs.4700/- were debited to the above T.D. ledger and credited to an account opened in the name of Shri Purohit. The credit slip was prepared by Shri Lodaya, who himself, signed in place of the Agent. Then he withdraw and made away with same of this money. E Similar misdeed was repeated on 3.6.76 (Rs.4000/-) and 7.8.76 (Rs.1110-30).”

F It is thus clear that the amount of embezzlement shown as Rs.44, 615/84 with reference to the account of Purohit is not a single act, but a series of embezzlements. If in regard to each act, the amount embezzled is less than Rs.11, 500/- the Bank had to bear the entire amount and no part had to be borne by the Insurer. Only where a single act of embezzlement was in excess of Rs.11, 500/-, the Insurer’s liability would arise. As noticed above, as the matter falls under Contingency (4), the Insurer will have to bear 25% of the each and every claim or Rs.11, 500/- whichever is higher on DAR.

H 16. The award of the arbitrator is liable to be set aside as there is a clear error apparent on the face of the award. The

award is a speaking award. It extracts the relevant clauses of the insurance policy including the excess clause. It then proceeds to put an interpretation thereon which is contrary to the express words of the contract and opposed to the well recognised insurance practices and principles. Hence the award was rightly set aside by the High Court.

17. If the amount of each and every embezzlement had been separately recorded in the award of the Arbitrator, the court could have calculated the amount that was due, instead of remitting the matter to the Arbitrator for fresh decision. But that is not possible, as the particulars are not available.

18. In view of the above, we uphold the decision of the High Court and dismiss the appeal. If however the appellant is not interested in proceeding afresh before the arbitrator after all these years, and is willing to accept the sum of Rs.29, 000/-, offered by the insurer, it may inform the insurer accordingly in which event, the insurer shall pay the same to the appellant - Bank, if it had not already been paid.

D.G. Appeal dismissed.

A CHATTISGARH STATE ELECTRICITY BOARD
v.
CENTRAL ELECTRICITY REGULATORY COMMISSION
AND ORS.
(Civil Appeal No. 3378 of 2010)

B APRIL 15, 2010

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

Electricity Act, 2003:

C s. 125, proviso – Appeal to Supreme Court – Period of limitation – Application u/s 5 of Limitation Act for condonation of delay of 160 days – HELD: Not maintainable – Electricity Act is a special legislation within the meaning of s.29(2) of Limitation Act – s.5 of Limitation Act cannot be invoked for entertaining an appeal filed against decision of Tribunal beyond the period of 120 days as specified in s.125 of Electricity Act and its proviso – There is no provision in Electricity Act under which Supreme Court can entertain an appeal against an order of Tribunal after more than 120 days – Limitation Act, 1963 – ss. 5 and 29(2).

Appellate Tribunal for Electricity (Procedure, form, fee and record of proceedings) Rules, 2007:

F rr.94(2) and 98(2) r/w s.125 of Electricity Act – Notice of pronouncement of order of Tribunal and ‘communication’ thereof – HELD: In view of r.94(2), the date of pronouncement as notified in the cause list shall be a valid notice of pronouncement of the order – Once order is pronounced after being shown in cause list with title of the case and name of the counsel, the same will be deemed to have been communicated to the parties – Rule 98(2) read in conjunction with s.125, makes it clear that once the factum of pronouncement of the order of the Tribunal is made known

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to the parties and they are given opportunity to obtain a copy thereof, the order will be deemed to have been communicated to the parties and the period of 60 days specified in the main part of s.125 will commence from that date – Electricity Act, 2003 – s.125 – Interpretation of Statutes – Contextual interpretation.

Words and Phrases:

‘Communication’ as occurring in r.98(2) of Appellate Tribunal for Electricity (Procedure, Form, Fee and Record of Proceedings) Rules, 2007 – Connotation of.

The appellant-Chattisgarh State Electricity Board filed the instant appeal on 24.12.2007 challenging the order of the Appellate Tribunal for Electricity passed on 17.5.2007. Along with the appeal, the appellant filed an application for condonation of 160 days’ delay. It was stated in the application that the appellant came to know about the order in July, 2007; that the letter dated 7.6.2007 signed by the Deputy Registrar of the Tribunal on 11.6.2007 informing the appellant that the matter was disposed of on 14.5.2007 could not be treated as communication in accordance with the provisions contained in Chapter XVI of the Appellate Tribunal for Electricity (Procedure, Form, Fee and Record of Proceedings) Rules, 2007. Respondent No. 3, the Madhya Pradesh State Electricity Board resisted the application contending that even according to appellant’s assertion that it came to know about the order in July 2007, in the absence of any explanation by the appellant for remaining silent from July 2007 to December, 2007, the appeal could not be entertained.

The questions for consideration before the Court were: (i) “Whether s.5 of the Limitation Act, 1963 can be invoked by the Supreme Court for allowing the aggrieved person to file an appeal u/s 125 of the Electricity Act, 2003

after more than 120 days from the date of communication of the decision or order of the Appellate Tribunal for Electricity?” and (ii) “What is the date of communication of the decision or order of the Tribunal for the purpose of s.125 of the Electricity Act?”

Dismissing the appeal, the Court

HELD: 1.1. The Electricity Act, 2003 is a self-contained comprehensive legislation, which not only regulates generation, transmission and distribution of electricity but also ensures creation of special adjudicatory mechanism for expeditious adjudication of disputes emanating from operation and implementation of the provisions of the Act. The Act excludes the jurisdiction of civil courts qua an order made by the adjudicating officer. Section 111 provides for an appeal against the order of the adjudicating officer or appropriate commission to the Appellate Tribunal within the period prescribed therein. Section 125 lays down that any person aggrieved by any decision or order of the Tribunal can file an appeal to this Court within 60 days from the date of communication of the decision or order of the Tribunal. Proviso to s.125 empowers this Court to entertain an appeal filed within a further period of 60 days if it is satisfied that there was sufficient cause for not filing appeal within the initial period of 60 days. This shows that the period of limitation prescribed for filing appeals u/ss 111(2) and 125 is substantially different from the period prescribed under the Limitation Act for filing suits etc. The use of the expression ‘within a further period of not exceeding 60 days’ in the proviso to s.125 makes it clear that the outer limit for filing an appeal is 120 days. There is no provision in the Act under which this Court can entertain an appeal filed against the decision or order of the Tribunal after more than 120 days. [Para 11] [696-H; 697-A-D]

1.2. It is evident that the Electricity Act is a special legislation within the meaning of s. 29(2) of the Limitation Act. Therefore, s. 5 of the Limitation Act cannot be invoked by this Court for entertaining an appeal filed against the decision or order of the Tribunal beyond the period of 120 days specified in s.125 of the Electricity Act and its proviso. Any interpretation of s. 125 of the Electricity Act which may attract applicability of s.5 of the Limitation Act read with s.29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to s.125 will become nugatory. [Para 11 and 16] [697-F; 703-C-E]

Hukumdev Narain Yadav v. L.N. Mishra (1974) 2 SCC 133; *Union of India v. Popular Construction Company* 2001 (3) Suppl. SCR 619 = (2001) 8 SCC 470; *Mangu Ram v. Municipal Corporation of Delhi* 1976 (2) SCR 260 = (1976) 1 SCC 392; *Vidyacharan Shukla v. Khubchand Baghel* 1964 SCR 129 = AIR 1964 SC 1099; *Patel Naranbhai Marghabhai v. Dhulabhai Galbabhai* 1992 (3) SCR 384 = (1992) 4 SCC 264; *Singh Enterprises v. Commissioner of Central Excise, Jamshedpur and others* (2008) 3 SCC 70; *Commissioner of Customs, Central Excise v. Punjab Fibres Ltd.* 2008 (2) SCR 861 = (2008) 3 SCC 73; *Commissioner of Customs and Central Excise v. Hongo India Private Limited and another* (2009) 5 SCC 791, relied on.

Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker 1995 (2) Suppl. SCR 1 = (1995) 5 SCC 5, held inapplicable.

2.1. The word 'communication' has neither been defined in the Electricity Act, 2003 nor in the Appellate Tribunal for Electricity (Procedure, Form, Fee and Record of Proceedings) Rules, 2002. Therefore, the same deserves to be interpreted by applying the rule of contextual interpretation and keeping in view the

A language of the relevant provisions. In terms of Rule 98(2), the Deputy Registrar is required to send the case file to the Registry for taking steps to prepare copies of the order and their communication to the parties. If Rule 98(2) is read in conjunction with s. 125 of the Electricity Act, it becomes clear that once the factum of pronouncement of order by the Tribunal is made known to the parties and they are given opportunity to obtain a copy thereof, the order will be deemed to have been communicated to the parties and the period of 60 days specified in the main part of s.125 will commence from that date. Besides, r. 94(2) requires that when the order is reserved, the date of pronouncement shall be notified in the cause list and that shall be a valid notice of pronouncement of the order. Once the order is pronounced after being shown in the cause list with the title of the case and name of the counsel, the same will be deemed to have been communicated to the parties and they can obtain copy through e-mail or by filing an application for certified copy. [Para 18 and 19] [704-C-G; 705-D-E]

E *Assistant Transport Commissioner, Lucknow v. Nand Singh* 1980 (1) SCR 131 = (1979) 4 SCC 19, relied on.

F *Raja Harish Chandra Raj Singh v. Deputy Land Acquisition Officer* 1962 SCR 676 = AIR 1961 SC 1500; *Muthiaha Chettiar v. I.T. Commissioner, Madras* AIR 1951 Madras 2004; *Secretary of State v. Gopiseti Narayanasami* ILR 34 Madras 151; and *Swaminatha v. Lakshmanan* AIR 1930 Madras 490, referred to.

G *Collector of Central Excise, Madras v. M/s. M.M. Rubber and Co., Tamil Nadu* 1991 (3) SCR 862 = (1992) Supp 1 SCC 471, distinguished.

H 2.2. In the instant case, even though the name of the counsel for the appellant was not shown in the cause list of 14.5.2007 i.e., the date on which the impugned order

was pronounced by the Tribunal, the factum of pronouncement was conveyed by the Registry of the Tribunal, which communication was received in the secretariat of the appellant on 21.6.2007. The appellant had come to know about the impugned order on 17.7.2007 from another source i.e., respondent No.5, which had sent communication for payment of FLEE charges. Thus, on 21.6.2007 or at least on 17.7.2007, the appellant had come to know of the order of the Tribunal through proper channel. The preparation of appeal, which bears the date 7.9.2007, is a clinching evidence of the fact that the appellant had not only become aware of the order of the Tribunal, but had obtained copy thereof. The appellant has not offered any tangible explanation as to why the appeal, which was filed only on 24.12.2007, could not be filed for more than three and half months after its preparation. Thus, the appeal having been filed after more than 120 days from the date of communication of the Tribunal's order, cannot be entertained. [Para 24] [713-B-H; 714-A-B]

Case Law Reference:

(1974) 2 SCC 133	relied on	para 12
2001 (3) Suppl. SCR 619	relied on	para 13
1976 (2) SCR 260	relied on	para 13
1964 SCR 129	relied on	para 13
1992 (3) SCR 384	relied on	para 13
(2008) 3 SCC 70	relied on	para 14
2008 (2) SCR 861	relied on	para 14
(2009) 5 SCC 791	relied on	para 15
1995 (2) Suppl. SCR 1	held inapplicable	para 17
1962 SCR 676	referred to	para 20

A	1980 (1) SCR 131	relied on	para 21
	AIR 1951 Madras 2004	referred to	para 22
	ILR 34 Madras 151	referred to	para 22
B	AIR 1930 Madras 490	referred to	para 22
	1991 (3) SCR 862	distinguished	para 23

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3378 of 2010.

C From the Judgment & Order dated 17.5.2007 of the Appellate Tribunal for Electricity at New Delhi in I.A. No. 4 of 2007 in Appeal No. 21 of 2006.

D Ravi Shankar Prasad, Suparna Srivastava, Ram Swarup Sharma for the Appellant.

C.S. Vaidyanathan, Sakesh Kumar, K.V. Bharathi Upadhyaya for the Respondent.

The Judgment of the Court was delivered by

E **G.S. SINGHVI, J.** 1. Whether Section 5 of the Limitation Act, 1963 (for short, 'the Limitation Act') can be invoked by this Court for allowing the aggrieved person to file an appeal under Section 125 of the Electricity Act, 2003 (for short, 'the Electricity Act') after more than 120 days from the date of communication of the decision or order of the Appellate Tribunal for Electricity (for short, 'the Tribunal') is the question which requires determination in this appeal filed against order dated 17.5.2007 passed by the Tribunal in I.A. No.4 of 2007 in Appeal No.21 of 2006.

G 2. Appellant, Chhattisgarh State Electricity Board was established under Section 58 of the M.P. Reorganization Act, 2000. In a sense, it is a successor of Madhya Pradesh Electricity Board insofar as the State of Chhattisgarh is concerned. A dispute arose between the appellant and

respondent No.3 – Madhya Pradesh State Electricity Board in the matter of payment of FLEE charges to the beneficiaries in the Western Region under the “Frequency Linked Energy Exchange” scheme, which was introduced with effect from 1.6.1992. The FLEE charges were payable to the beneficiaries on the basis of monthly advises issued by Western Regional Electricity Board (renamed as Western Regional Board Committee) (respondent No.5 herein). The matter was considered by respondent No.1 – Central Electricity Regulatory Commission, which passed an order dated 8.12.2005 fixing the liability of the appellant and respondent No.3 in the matter of payment of FLEE charges.

3. The appellant challenged the aforementioned order in Appeal No.21/2006, which was allowed by the Tribunal vide its order dated 14.11.2006. Soon thereafter, respondent No.3 filed IA No.4/2007 for issue of a direction to respondent No.5 to recalculate FLEE charges in accordance with the Tribunal’s order in relation to post-reorganization period. By order dated 17.5.2007, the Tribunal allowed that application and directed respondent No.5 to recalculate FLEE charges in accordance with order dated 14.11.2006.

4. Feeling aggrieved by the last mentioned order of the Tribunal, the appellant filed this appeal on 24.12.2007. Along with the appeal, the appellant filed an application for condonation of 160 days’ delay. The reasons for not filing appeal within the period of 60 days specified in Section 125 of the Electricity Act, as disclosed in the application are as under: -

(i) The impugned order had been pronounced by the Tribunal on 17.5.2007 but the counsel for the appellant did not receive intimation of the said pronouncement and as such he was not aware of the same.

(ii) That the procedure which was being followed by the Tribunal at that time was that the Registry of the Tribunal

A used to telephonically give advance intimation to the counsel of the parties regarding pronouncement of the order.

B (iii) The appellant came to know about the order in July, 2007 when respondent No.5 sent intimation for payment of FLEE charges to the beneficiaries in the Western Region. Thereupon, the appellant informed its counsel about the impugned order who then sent letter dated 26.7.2007 to the Registrar of the Tribunal that intimation regarding pronouncement of the order had not been given to him (the date has been wrongly typed in paragraph 3 of the application as 26.11.2007).

C (iv) Respondent No.3 had filed a review petition against order dated 14.11.2006, which was not decided by the Tribunal along with I.A. No.4 of 2007 and the same was withdrawn on 25.10.2007.

D (v) Thereafter, the impugned order was considered and discussed by the appellant and after obtaining legal opinion, it was decided to file an appeal.

E (vi) In the light of the decision taken by the appellant, the counsel proceeded to prepare the appeal but some delay was caused due to extensive pleadings and voluminous documents.

F 5. In the reply filed on behalf of respondent No.3, it has been averred that the impugned order was communicated by the Deputy Registrar of the Tribunal vide his letter dated 11.6.2007; that the appellant and the respondents before the Tribunal were informed by the said letter that the matter was disposed of on 14.5.2007 and the parties may request for a copy of the order in PDF format through e-mail at registrar-aptel@nic.in or apply for a certified copy and further that the order would also be available in the Tribunal’s website (www.aptel.gov.in). It has been further averred that letter sent

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by the Deputy Registrar of the Tribunal was received by the appellant on 21.6.2007 which was entered in its receipt register at serial No. 2082 and subsequently, the same was received by the office of the Chief Engineer (Commercial) on 29.6.2007. Respondent No.3 has supported this assertion by placing on record photostat copies of the inward register maintained in the office of Secretary of the appellant, which were made available pursuant to an application filed under the Right to Information Act. Respondent No.3 has then relied upon the appellant's assertion that it came to know about order dated 17.5.2007 in July, 2007 and prayed that in the absence of any explanation by the appellant for remaining silent from July, 2007 to December, 2007, the appeal cannot be entertained. As regards the review application, respondent No.3 has averred that the same has no bearing on the appellant's grievance against order dated 17.5.2007 and in the absence of any explanation for the delay after 21.6.2007, the appeal should be dismissed as barred by time.

6. In the rejoinder affidavit filed on behalf of the appellant, it has been pleaded that in the absence of communication of order by the Tribunal in accordance with the provisions contained in Chapter XVI of Appellate Tribunal for Electricity (Procedure, Form, Fee and Record of Proceedings) Rules, 2007 (for short, 'the Rules'), the appeal cannot be dismissed as barred by time. It has then been averred that letter dated 7.6.2007 of the Tribunal, which was signed by Deputy Registrar on 11.6.2007 cannot be treated as communication of order dated 17.5.2007. It has been further averred that letter dated 7.6.2007 was received in the secretariat of the appellant on 25.6.2007 and the same was forwarded to the concerned department on 28.6.2007. In paragraph 6 of the affidavit, it has been averred that officers of the appellant had no knowledge of the impugned order till the receipt of intimation from respondent No.5 in July 2007 regarding payment to the beneficiaries in the Western Region and, thereafter, steps were taken for filing appeal.

7. Shri Ravi Shankar Prasad, learned senior counsel for the appellant argued that even though the appeal was filed after more than 120 days counted from the date of the Tribunal's order and, in terms of proviso to Section 125 of the Electricity Act, this Court can extend the time for filing an appeal up to a maximum of 60 days only, power under Section 5 read with Section 29(2) of the Limitation Act can be exercised for condonation of delay beyond the period of 120 days. In support of this argument, Shri Prasad placed reliance on the judgment of this Court in *Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker* (1995) 5 SCC 5. Learned senior counsel laid considerable emphasis on the fact that by virtue of the impugned order huge liability has been created against the appellant and if the appeal is not entertained, it will suffer irreparable injury.

8. Shri C.S. Vaidyanathan, learned senior counsel appearing for respondent No.3 argued that in view of the plain language of the proviso to Section 125 of the Electricity Act, this Court has no power to extend the period for filing an appeal beyond 120 days and the provisions of the Limitation Act cannot be invoked for negating the legislative intendment to prescribe special limitation for filing an appeal against any decision or order of the Tribunal. Learned senior counsel further argued that letter dated 7.6.2007 sent by Deputy Registrar of the Tribunal informing the parties that the IA was disposed of on 17.5.2007 and they may request for a copy of the order in PDF format through e-mail or apply for a certified copy amounts to communication of the order within the meaning of Section 125 of the Electricity Act read with Rule 98 of the Rules and the appeal filed after more than 120 days from the date of receipt of letter dated 7.6.2007 is liable to be dismissed as barred by time. Learned senior counsel submitted that even if intimation given by the Deputy Registrar of the Tribunal vide letter dated 7.6.2007 is ignored, the appeal is liable to be dismissed because the appellant had become aware of the Tribunal's order on 17.7.2007 i.e., the day on which letter dated 6.7.2007 sent by respondent No.5 was received in the office

of its Secretary. Learned senior counsel submitted that if the period of limitation is counted from 17.7.2007, the appeal could be filed by 15.9.2007 whereas the same was actually filed on 24.12.2007. Learned senior counsel then invited the Court's attention to the memo of appeal and application filed for condonation of delay to show that the same had been prepared on 7.9.2007 but were filed on 24.12.2007 i.e., after more than three and half months. In support of his argument that this Court cannot extend the time beyond 60 days in terms of proviso to Section 125 of the Electricity Act, Shri Vaidyanathan relied upon the judgments of this Court in *Union of India v. Popular Construction Company* (2001) 8 SCC 470, *Singh Enterprises v. Commissioner of Central Excise, Jamshedpur and others* (2008) 3 SCC 70 and *Commissioner of Customs and Central Excise v. Hongo India Private Limited and another* (2009) 5 SCC 791.

9. For deciding the question framed at the threshold of this judgment, it will be useful to notice the relevant statutory provisions.

Electricity Act and the Rules

125. *Appeal to Supreme Court.*— Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908 (5 OF 1908):

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

94. *Pronouncement of order.*—(1) The Bench shall as far as possible pronounce the order immediately after the

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hearing is concluded.

(2) When the orders are reserved, the date for pronouncement of order shall be notified in the cause list which shall be a valid notice of intimation of pronouncement”.

(3) Reading of the operative portion of the order in the open court shall be deemed to be pronouncement of the order.

(4) Any order reserved by a Circuit Bench of the Tribunal may also be pronounced at the principal place of sitting of the Bench in one of the aforesaid modes as exigencies of the situation require.

98. *Transmission of order by the Court Master.*— (1) The Court Master shall immediately on pronouncement of order, transmit the order with the case file to the Deputy Registrar.

(2) On receipt of the order from the Court Master, the Deputy Registrar shall after due scrutiny, satisfy himself that the provisions of these rules have been duly compiled with and in token thereof affix his initials with date on the outer cover of the order. The Deputy Registrar shall thereafter cause to transmit the case file and the order to the Registry for taking steps to prepare copies and their communication to the parties.

106. *Filing through electronic media.* — The Tribunal may allow filing of appeal or petition or application through electronic media such as online filing and provide for rectification of defects by e-mail or net and in such filing, these rules shall be adopted as nearly as possible on and from a date to be notified separately and the Chairperson may issue instructions in this behalf from time to time.

Limitation Act

5. *Extension of prescribed period in certain cases.*— Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908) , may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

29. *Savings.*— (1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 (9 of 1872).

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Sections 25 and 26 and the definition of “easement” in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882 (5 of 1882), may for the time being extend.

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A 10. The Electricity Act was enacted in the backdrop of dismal performance of various state electricity boards and alarming decline in the availability of power necessary for domestic, agricultural and industrial sectors. Before enactment of the Electricity Act, the electricity supply industry was governed by the Indian Electricity Act 1910, The Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The Electricity (Supply) Act, 1948 mandated the creation of electricity board for every state. The state electricity boards had the responsibility of arranging the supply of electricity in the state. Over a period of time, the performance of state electricity boards deteriorated on account of various factors including their inability to take decisions on tariffs in a professional and independent manner. In practice, the state governments started determining tariff and huge concessions were provided to various segments of the consumers, many of which were not deserving. Cross-subsidies had reached unsustainable level. To address this issue and to provide for independent determination of tariffs, the Electricity Regulatory Commissions Act, 1998 was enacted. Under that Act, the Central Government created the Central Electricity Regulatory Commission and most of the state governments created the State Electricity Regulatory Commissions either under the Central Act or under their respective state legislations with a view to implement the policy of encouraging private sector participation in generation, transmission and distribution of electricity and to harmonize and rationalize the provisions of the three Acts, the Electricity Act was enacted. Part II thereof contains provisions under which the Central Government is entitled to prepare the National Electricity Policy and tariff policy, in consultation with the state governments and the Central Electricity Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy. Under the same part, the Central Government can prepare and notify national policies, permitting stand alone systems for rural areas, for rural electrification and for bulk purchase of power and

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management of local distribution in rural areas through panchayat institutions, users' associations, co-operative societies, non-governmental organisations or franchisees. Part III contains provision relating to generation of electricity. Part IV regulates grant of licenses for transmission of electricity, distribution of electricity and trading in electricity. Part V deals with transmission of electricity including inter-state transmission. Part VI deals with distribution of electricity. Part VII contains provision relating to tariff. The provisions contained in Part IX provide for establishment of the Central Electricity Regulatory Authority and its functions and duties and those contained in Part X provide for establishment of the Central and State Electricity Regulatory Commissions and their functions. The Electricity Act also envisages establishment of Tribunal to hear appeals against the orders of adjudicating officers or regulatory commissions (Part XI). In terms of Section 111, any person aggrieved by an order made by an adjudicating officer except the one made under Section 127 or an order made by an appropriate Commission under this Act can prefer an appeal to the Tribunal. The composition of the Tribunal and qualifications prescribed for appointment of Chairperson and Member shows that the legislature intended to create a specialized adjudicatory forum for deciding various disputes emanating from the operation of the Act. Section 125 provides for an appeal to this Court against any order or decision of the Tribunal which can be filed within 60 days from the date of communication of the decision or order of the Tribunal. The limitation placed on the jurisdiction of this Court is that the appeal can be entertained only on one or more of the grounds specified in Section 100 of the Code of Civil Procedure. Proviso to Section 125 empowers this Court to entertain the appeal within a further period not exceeding 60 days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period. In other words, an appeal under Section 125 can be filed within a maximum period of 120 days if this Court is satisfied that there was sufficient cause for not filing the same within 60 days from the

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A date of communication of the decision or order appealed against. Part XII contains provisions relating to investigation leading to assessment of electricity charges payable by the consumer and enforcement of the orders of assessment. It also contains provisions for appeal against the final order passed under Section 126. Part XIV contains provisions to deal with theft of electricity, electric lines and materials, interference with meters and work of licensees and also provides for fiscal penalties and substantive punishments. Section 145 declares that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in Section 126 or an appellate authority referred to in Section 127 or the adjudicating officer appointed under the Act is empowered by or under the Act to determine and no injunction shall be granted in such matters.

D 11. The brief analysis of the scheme of the Electricity Act shows that it is a self-contained comprehensive legislation, which not only regulates generation, transmission and distribution of electricity by public bodies and encourages public sector participation in the process but also ensures creation of special adjudicatory mechanism to deal with the grievance of any person aggrieved by an order made by an adjudicating officer under the Act except under Section 127 or an order made by the appropriate commission. Section 110 provides for establishment of a Tribunal to hear such appeals. F Section 111(1) and (2) lays down that any person aggrieved by an order made by an adjudicating officer or an appropriate commission under this Act may prefer an appeal to the Tribunal within a period of 45 days from the date on which a copy of the order made by an adjudicating officer or the appropriate commission is received by him. Section 111(5) mandates that the Tribunal shall deal with the appeal as expeditiously as possible and endeavour to dispose of the same finally within 180 days from the date of receipt thereof. If the appeal is not disposed of within 180 days, the Tribunal is required to record reasons in writing for not doing so. Section 125 lays down that

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A any person aggrieved by any decision or order of the Tribunal
can file an appeal to this Court within 60 days from the date of
communication of the decision or order of the Tribunal. Proviso
to Section 125 empowers this Court to entertain an appeal filed
within a further period of 60 days if it is satisfied that there was
sufficient cause for not filing appeal within the initial period of
60 days. This shows that the period of limitation prescribed for
filing appeals under Sections 111(2) and 125 is substantially
different from the period prescribed under the Limitation Act for
filing suits etc. The use of the expression 'within a further period
of not exceeding 60 days' in Proviso to Section 125 makes it
clear that the outer limit for filing an appeal is 120 days. There
is no provision in the Act under which this Court can entertain
an appeal filed against the decision or order of the Tribunal after
more than 120 days. The object underlying establishment of a
special adjudicatory forum i.e., the Tribunal to deal with the
grievance of any person who may be aggrieved by an order of
an adjudicating officer or by an appropriate commission with
a provision for further appeal to this Court and prescription of
special limitation for filing appeals under Sections 111 and 125
is to ensure that disputes emanating from the operation and
implementation of different provisions of the Electricity Act are
expeditiously decided by an expert body and no court, except
this Court, may entertain challenge to the decision or order of
the Tribunal. The exclusion of the jurisdiction of the civil courts
(Section 145) qua an order made by an adjudicating officer is
also a pointer in that direction. It is thus evident that the
Electricity Act is a special legislation within the meaning of
Section 29(2) of the Limitation Act, which lays down that where
any special or local law prescribes for any suit, appeal or
application a period of limitation different from the one
prescribed by the Schedule, the provisions of Section 3 shall
apply as if such period were the period prescribed by the
Schedule and provisions contained in Sections 4 to 24
(inclusive) shall apply for the purpose of determining any period
of limitation prescribed for any suit, appeal or application unless
they are not expressly excluded by the special or local law.

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A 12. In *Hukumdev Narain Yadav v. L.N. Mishra* (1974) 2
SCC 133, this Court interpreted Section 29(2) of the Limitation
Act in the backdrop of the plea that the provisions of that Act
are not applicable to the proceedings under the Representation
of the People Act, 1951. It was argued that the words "expressly
excluded" appearing in Section 29(2) would mean that there
must be an express reference made in the special or local law
to the specific provisions of the Limitation Act of which the
operation is to be excluded. While rejecting the argument, the
three-Judge Bench observed:

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C ".....what we have to see is whether the scheme of the
special law, that is in this case the Act, and the nature of
the remedy provided therein are such that the Legislature
intended it to be a complete code by itself which alone
should govern the several matters provided by it. If on an
examination of the relevant provisions it is clear that the
provisions of the Limitation Act are necessarily excluded,
then the benefits conferred therein cannot be called in aid
to supplement the provisions of the Act. *In our view, even
in a case where the special law does not exclude the
provisions of Sections 4 to 24 of the Limitation Act by an
express reference, it would nonetheless be open to the
Court to examine whether and to what extent the nature
of those provisions or the nature of the subject-matter and
scheme of the special law exclude their operation.*"

(emphasis supplied)

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H 13. Section 34(3) of the Arbitration and Conciliation Act,
1996, which is substantially similar to Section 125 of the
Electricity Act came to be interpreted in *Union of India v.
Popular Construction Company* (2001) 8 SCC 470. The
precise question considered in that case was whether the
provisions of Section 5 of the Limitation Act are applicable to
an application challenging an award under Section 34 of the
Arbitration and Conciliation Act, 1996. The two-Judge Bench
referred to earlier decisions in *Mangu Ram v. Municipal*

Corporation of Delhi (1976) 1 SCC 392, *Vidyacharan Shukla v. Khubchand Baghel* AIR 1964 SC 1099, *Hukumdev Narain Yadav v. L.N. Mishra* (supra), *Patel Naranbhai Marghabhai v. Dhulabhai Galbabbhai* (1992) 4 SCC 264 and held:

“12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are “but not thereafter” used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase “but not thereafter” wholly otiose. No principle of interpretation would justify such a result.

16. Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award “in accordance with” sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application “in accordance with” that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that

“where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court”.

This is a significant departure from the provisions of the

A Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to “proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow” (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court’s powers by the exclusion of the operation of Section 5 of the Limitation Act.”

(emphasis supplied)

D **14.** In *Singh Enterprises v. C.C.E., Jamshedpur and others* (supra), the Court interpreted Section 35 of Central Excise Act, 1944, which is *pari materia* to Section 125 of the Electricity Act and observed:

E “The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short “the Limitation Act”) can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days’ time can be granted by the appellate authority to entertain

A the appeal. *The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act.* The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period."

(emphasis supplied)

D The same view was reiterated in *Commissioner of Customs, Central Excise v. Punjab Fibres Ltd.* (2008) 3 SCC 73.

E 15. In *Commissioner of Customs and Central Excise v. Hongo India Private Limited and another* (2009) 5 SCC 791, a three-Judge Bench considered the scheme of the Central Excise Act, 1944 and held that High Court has no power to condone delay beyond the period specified in Section 35-H thereof. The argument that Section 5 of the Limitation Act can be invoked for condonation of delay was rejected by the Court and observed:

F "30. In the earlier part of our order, we have adverted to Chapter VI-A of the Act which provides for appeals and revisions to various authorities. Though Parliament has specifically provided an additional period of 30 days in the case of appeal to the Commissioner, it is silent about the number of days if there is sufficient cause in the case of an appeal to the Appellate Tribunal. Also an additional period of 90 days in the case of revision by the Central Government has been provided. However, in the case of an appeal to the High Court under Section 35-G and

A reference application to the High Court under Section 35-H, Parliament has provided only 180 days and no further period for filing an appeal and making reference to the High Court is mentioned in the Act.

B 32. As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.

E 35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. *In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an*

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express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.”

(emphasis supplied)

16. In view of the above discussion, we hold that Section 5 of the Limitation Act cannot be invoked by this Court for entertaining an appeal filed against the decision or order of the Tribunal beyond the period of 120 days specified in Section 125 of the Electricity Act and its proviso. Any interpretation of Section 125 of the Electricity Act which may attract applicability of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to Section 125 will become nugatory.

17. The judgment in *Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker* (supra) on which reliance has been placed by Shri Ravi Shankar Prasad has no bearing on this case. The issue considered in that case was whether Section 5 of the Limitation Act can be invoked for condoning the delay in filing an appeal under Section 18 of the Kerala Rent Control Act. A two-Judge Bench interpreted Section 18 of the Kerala Rent Control Act and held that even though that section is a special provision, in the absence of any indication of maximum period within which the appeal can be entertained by the Appellate Authority, Section 5 of the Limitation Act would get attracted. It is significant to note that there is no provision in the Kerala Rent Control Act similar to the one contained in proviso to Section 125 of the Electricity Act, Section 34(3) of

A the Arbitration and Conciliation Act and Section 35(1) or 35-H of the Central Excise Act, 1944. Therefore, the ratio of *Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker* (supra) cannot be invoked for declaring that this Court has the power to entertain an appeal under Section 125 of the Electricity Act after 120 days counted from the date of communication of the decision or order of the Tribunal.

18. The next question which requires consideration is as to what is the date of communication of the decision or order of the Tribunal for the purpose of Section 125 of the Electricity Act. The word ‘communication’ has not been defined in the Act and the Rules. Therefore, the same deserves to be interpreted by applying the rule of contextual interpretation and keeping in view the language of the relevant provisions. Rule 94(1) of the Rules lays down that the Bench of the Tribunal which hears an application or petition shall pronounce the order immediately after conclusion of the hearing. Rule 94(2) deals with a situation where the order is reserved. In that event, the date for pronouncement of order is required to be notified in the cause list and the same is treated as a notice of intimation of pronouncement. Rule 98(1) casts a duty upon the Court Master to immediately after pronouncement transmit the order along with the case file to the Deputy Registrar. In terms of Rule 98(2), the Deputy Registrar is required to scrutinize the file, satisfy himself that provisions of rules have been complied with and thereafter, send the case file to the Registry for taking steps to prepare copies of the order and their communication to the parties. If Rule 98(2) is read in isolation, one may get an impression that the registry of the Tribunal is duty bound to send copies of the order to the parties and the order will be deemed to have been communicated on the date of receipt thereof, but if the same is read in conjunction with Section 125 of the Electricity Act, which enables any aggrieved party to file an appeal within 60 days from the date of communication of the decision or order of the Tribunal, Rule 94(2) which postulates notification of the date of pronouncement of the order in the

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cause list and Rule 106 under which the Tribunal can allow filing of an appeal or petition or application through electronic media and provide for rectification of the defects by e-mail or net, it becomes clear that once the factum of pronouncement of order by the Tribunal is made known to the parties and they are given opportunity to obtain a copy thereof through e-mail etc., the order will be deemed to have been communicated to the parties and the period of 60 days specified in the main part of Section 125 will commence from that date.

19. The issue deserves to be considered from another angle. As mentioned above, Rule 94(2) requires that when the order is reserved, the date of pronouncement shall be notified in the cause list and that shall be a valid notice of pronouncement of the order. The counsel appearing for the parties are supposed to take cognizance of the cause list in which the case is shown for pronouncement. If title of the case and name of the counsel is printed in the cause list, the same will be deemed as a notice regarding pronouncement of order. Once the order is pronounced after being shown in the cause list with the title of the case and name of the counsel, the same will be deemed to have been communicated to the parties and they can obtain copy through e-mail or by filing an application for certified copy.

20. In *Raja Harish Chandra Raj Singh v. Deputy Land Acquisition Officer* AIR 1961 SC 1500, this Court considered whether an award made under the Land Acquisition Act, 1894 can be treated to have been communicated on the date of its making. The application filed by the respondent for making reference under Section 18 of the Land Acquisition Act was rejected by the Collector on the ground that the same had been made after more than six months from the date of award i.e., 25.3.1951. The High Court dismissed the writ petition filed by the appellant. This Court noted that no notice of the award was given to the appellant as per the requirements of Section 12(2) and it was only on or about January, 1953 that he received the

information about making of the award. He then filed application on 24.2.1953 for reference. This Court considered the nature of the award made by the Collector under Section 12(2) and held that the period of six months prescribed for making application would commence from the date the award was made known to the party. Paragraph 6 of the judgment which contains discussion on the issue of communication of award reads as under:

“There is yet another point which leads to the same conclusion. *If the award is treated as an administrative decision taken by the Collector in the matter of the valuation of the property sought to be acquired it is clear that the said decision ultimately affects the rights of the owner of the property and in that sense, like all decisions which affect persons, it is essentially fair and just that the said decision should be communicated to the said party.* The knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. *Thus considered the making of the award cannot consist merely in the physical act of writing the award or signing it or even filing it in the office of the Collector; it must involve the communication of the said award to the party concerned either actually or constructively.* If the award is pronounced in the presence of the party whose rights are affected by it it can be said to be made when pronounced. *If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly if without notice of the date of its pronouncement, an award is pronounced and a party is not present the award can be said to be made when it is communicated to the party later. The knowledge of the party affected by the award, either actual or constructive,*

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being an essential requirement of fairplay and natural justice the expression “the date of the award” used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words “from the date of the Collector’s award” used in the proviso to Section 18 in a literal or mechanical way.”

(emphasis supplied)

21. In *Assistant Transport Commissioner, Lucknow v. Nand Singh* (1979) 4 SCC 19, this Court considered a somewhat similar question in the context of filling an appeal under Section 15 of the U.P. Motor Vehicles Taxation Act, 1935. The Allahabad High Court held that the date of the communication of the order will be the starting point for limitation of filing an appeal. While approving the view taken by the High Court, this Court observed as under:

“In our opinion, the judgment of the High Court is right and cannot be interfered with by this Court. Apart from the reasons given by this Court in the earlier judgment to the effect that the order must be made known either directly or constructively to the party affected by the order in order to enable him to prefer an appeal if he so likes, we may give one more reason in our judgment and that is this: It is plain that mere writing an order in the file kept in the office of the Taxation Officer is no order in the eye of law in the sense of affecting the rights of the parties for whom the order is meant. *The order must be communicated either directly or constructively in the sense of making it known, which may make it possible for the authority to say that the party affected must be deemed to have known the order. In a given case, the date of putting the order in communication under certain circumstances may be taken to be the date of the communication of the order*

or the date of the order but ordinarily and generally speaking, the order would be effective against the person affected by it only when it comes to his knowledge either directly or constructively, otherwise not. On the facts stated in the judgment of the High Court, it is clear that the respondent had no means to know about the order of the Taxation Officer rejecting his prayer until and unless he received his letter on October 29, 1964. Within the meaning of Section 15 of the U.P. Motor Vehicle Taxation Act that was the date of the order which gave the starting point for preferring an appeal within 30 days of that date.”

(emphasis supplied)

22. In *Muthiaha Chettiar v. I.T. Commissioner, Madras* AIR 1951 Madras 2004, a two-Judge Bench of Madras High Court considered the question whether the limitation of one year prescribed for filing revision under Section 33-A (2) of the Income Tax Act, 1922 is to be computed from the date when the order was signed by the Income-tax Commissioner or the date on which the petitioner had an opportunity of coming to know of the order. It was argued on behalf of the department that other provisions of the Act have been amended to provide for appeal within specified time to be counted from the date of the receipt of the order sought to be appealed against, but no such amendment was made in Section 33-A and therefore, the period of limitation will start from the date of order. While rejecting the argument, Rajamannar, C.J., referred to earlier decisions in *Secretary of State v. Gopiseti Narayanasami* ILR 34 Madras 151 and *Swaminatha v. Lakshmanan* AIR 1930 Madras 490 and observed:

“.....The only question that we have to decide is as to whether there is anything in the reasoning of the learned Judges in *Secretary of State v. Gopiseti Narayanasami*, 34 Mad. 151 : (8 I.C. 398) & *Swaminatha v. Lakshmanan*, 53 Mad. 491:(A.I.R. (17) 1930 Mad. 490) which makes the

application of the rule laid down by them dependent on the provisions of a particular statute. We think there is none. On the other hand, we consider that the rule laid down by the learned Judges in the above two decisions – & we are taking the same view – is based upon a salutary & just principle, namely that, if a person is given a right to resort to the remedy to get rid of an adverse order within a prescribed time, limitation should not be computed from a date earlier than that on which the party aggrieved actually knew of the order or had an opportunity of knowing the order & therefore, must be presumed to have had knowledge of the order.”

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23. In *Collector of Central Excise, Madras v. M/s. M.M. Rubber and Co., Tamil Nadu* (1992) Supp 1 SCC 471, a three-Judge Bench highlighted a distinction between making of an order and communication thereof to the affected person in the context of Section 35-E (3) and (4) of the Central Excise Act, 1944. The Bench noted the scheme of Section 35, distinction between sub-sections (3) and (4) thereof and held that in case where the order is subject to appeal, the same is required to be communicated to the affected person. Relevant portions of that judgment are extracted below:

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“5. Before we discuss the arguments of the learned counsel, it is necessary to set out some relevant provisions in the Act. Section 35 of the Act provides for an appeal by a person aggrieved by any decision or order passed under the Act by a Central Excise Officer lower than a Collector of Central Excise and that such an appeal will have to be filed “within three months from the date of the communication to him of such decision or order”. Sub-section (5) of Section 35-A requires that on the disposal of the appeal, the Collector (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority and the Collector of Central Excise. Section 35-B provides for a right of appeal to any person aggrieved

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by, among other orders, (1) an order passed by the Collector (Appeals) under Section 35-A and (2) a decision or order passed by the Collector of Central Excise as an adjudicating authority. Such an appeal will have to be filed “within three months from the date on which the order sought to be appealed against is communicated to the Collector of Central Excise or as the case may be the other party preferring the appeal”. The Appellate Tribunal also is required to send a copy of the order passed in the appeal to the Collector of Central Excise and the other party to the appeal.....

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8. At this stage itself we may state that sub-section (4) of the Act provides that the adjudicating authority shall file the application before the Tribunal in pursuance of the order made under sub-section (1) or sub-section (2) “within a period of three months from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority”.

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9. The words “from the date of decision or order” used with reference to the limitation for filing an appeal or revision under certain statutory provisions had come up for consideration in a number of cases. We may state that the ratio of the decisions uniformly is that in the case of a person aggrieved filing the appeal or revision, it shall mean the date of communication of the decision or order appealed against. However, we may note a few leading cases on this aspect.

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10. Under Section 25 of the Madras Boundary Act, 1860 the starting point of limitation for appeal by way of suit allowed by that section was the passing of the Survey Officer’s decision and in two of the earliest cases, namely, *Annamalai Chetti v. Col. J. G. Cloete and Seshama v. Sankara* it was held that the decision was passed when it was communicated to the parties. In *Secretary of State for*

India in Council v. Gopisetti Narayanaswami Naidu Garu A
 construing a similar provision in the Survey and Boundary
 Act, 1897 the same High Court held that a decision cannot
 properly be said to be passed until it is in some way
 pronounced or published under such circumstances the
 parties affected by it have a reasonable opportunity of
 knowing what it contains. "Till then though it may be written
 out, signed and dated, it is nothing but a decision which
 the officer intends to pass. It is not passed so long it is
 open to him to tear off what he has written and write
 something else." In *Raja Harish Chandra Raj Singh v.* C
Deputy Land Acquisition Officer construing the proviso to
 Section 18 of the Land Acquisition Act which prescribed
 for applications seeking reference to the court, a time-limit
 of six weeks of the receipt of the notice from the Collector
 under Section 12(2) or within six months from the date of
 the Collector's award whichever first expires, this Court
 held that the six months period will have to be calculated
 from the date of communication of the award. In *Asstt.*
Transport Commissioner, Lucknow v. Nand Singh
 construing the provision of Section 15 of the U.P. Motor
 Vehicles Taxation Act, it was held that for an aggrieved
 party the limitation will run from the date when the order
 was communicated to him.

11. The ratio of these judgments were applied in
 interpreting Section 33-A(2) of the Indian Income Tax Act,
 1922 in *Muthia Chettiar v. CIT* with reference to a right of
 revision provided to an aggrieved assessee. Section 33-
 A(1) of the Act on the other hand authorised the
 Commissioner to suo moto call for the records of any
 proceedings under the Act in which an order has been
 passed by any authority subordinate to him and pass such
 order thereon as he thinks fit. The proviso, however, stated
 that the Commissioner shall not revise any order under that
 sub-section "if the order (sought to be revised) has been
 made more than one year previously". Construing this
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A provision the High Court in *Muthia Chettiar* case held that
 the power to call for the records and pass the order will
 cease with the lapse of one year from the date of the order
 by the subordinate authority and the ratio of date of the
 knowledge of the order applicable to an aggrieved party
 is not applicable for the purpose of exercising suo moto
 power. Similarly in another decision reported in
Viswanathan Chettiar v. CIT construing the time-limit for
 completion of an assessment under Section 34(2) of the
 Income Tax Act, 1922, which provided that it shall be made
 "within four years from the end of the year in which the
 income, profit and gains were first assessable, " it was
 held that the time-limit of four years for exercise of the
 power should be calculated with reference to the date on
 which the assessment or reassessment was made and not
 the date on which such assessment or reassessment order
 made under Section 34(2) was served on the assessee.

13. *So far as the party who is affected by the order or
 decision for seeking his remedies against the same, he
 should be made aware of passing of such order.
 Therefore courts have uniformly laid down as a rule of
 law that for seeking the remedy the limitation starts from
 the date on which the order was communicated to him
 or the date on which it was pronounced or published
 under such circumstances that the parties affected by it
 have a reasonable opportunity of knowing of passing of
 the order and what it contains. The knowledge of the party
 affected by such a decision, either actual or constructive
 is thus an essential element which must be satisfied
 before the decision can be said to have been concluded
 and binding on him. Otherwise the party affected by it will
 have no means of obeying the order or acting in
 conformity with it or of appealing against it or otherwise
 having it set aside. This is based upon, as observed by
 Rajmanner, C.J. in *Muthia Chettiar v. CIT* "a salutary and
 just principle". The application of this rule so far as the
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aggrieved party is concerned is not dependent on the provisions of the particular statute, but it is so under the general law."

(emphasis supplied)

24. Reverting to the facts of this case, we find that even though the name of the counsel for the appellant was not shown in the cause list of 14.5.2007 i.e., the date on which the impugned order was pronounced by the Tribunal, the factum of pronouncement was conveyed to the parties including the appellant vide letter dated 7.6.2007, which was signed by the Deputy Registrar on 11.6.2007 and they were informed that they can obtain copy through e-mail or make an application for certified copy. Undisputedly, that letter was received in the secretariat of the appellant on 21.6.2007. The appellant had come to know about the impugned order in July 2007 from another source i.e., respondent No.5, which had sent communication for payment of FLEE charges. The communication sent by respondent No.5 was received by the appellant on 17.7.2007. It is, thus, evident that on 21.6.2007 or at least on 17.7.2007, the appellant had come to know through proper channel that the order has been pronounced by the Tribunal in I.A. No.4/2007. It is not clear from the record whether the appellant had applied for certified copy or obtained the one through e-mail, but this much is evident that the appellant did obtain/receive a copy of order dated 17.5.2007. If that was not so, the appellant could not have filed appeal under Section 125 of the Electricity Act. The preparation of appeal, which bears the date 7.9.2007 is a clinching evidence of the fact that the appellant had not only become aware of the order of the Tribunal, but had obtained copy thereof. However, instead of filing appeal within 60 days from the date of receipt of letter dated 7.6.2007 sent by the registry of the Tribunal or the communication sent by respondent No.5, the appellant chose to file appeal only on 24.12.2007 and that too despite the fact that the same was prepared on 7.9.2007. The appellant has

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A not offered any tangible explanation as to why the appeal could not be filed for more than three and half months after its preparation. Thus, there is no escape from the conclusion that the appeal has been filed after more than 120 days from the date of communication of the Tribunal's order and, as such, the same cannot be entertained.

25. In the result, the appeal is dismissed. However, the parties are left to bear their own costs.

R.P. Appeal dismissed.

ASSTT. COMMERCIAL TAX OFFICER
v.
M/S. RIJHUMAL JEEVANDAS
(Civil Appeal No. 3291 of 2010 etc.)

APRIL 15, 2010

[S.H. KAPADIA AND SWATANTER KUMAR, JJ.]

Rajasthan Sales Tax Act, 1994 – Levy of sales tax – Issue whether ‘ballies’ are ‘timber’ attracting higher levy of tax – Decided by authorities in the negative – High Court in revision, confirming the orders – On appeal, held: High Court order was non-speaking and suffered from non-application of mind – Matter remitted to High Court for hearing the case de novo – Administration of Justice.

The issue for consideration in the present case was whether ‘ballies’ can fall under the expression ‘timber’ so as to justify levy of higher sales tax. The appellate authority as well as the Tax Board held that ‘ballies’ are not ‘timber’. Revision petition against the order was dismissed by High Court.

In appeal to this Court, appellant-Revenue contended that the order of the High Court was passed without discussion either on the facts or on the questions of law.

Partly allowing the appeals, and remanding the matter to High Court, the Court

HELD: 1. The orders, besides being cryptic, suffer from basic infirmity of non-application of mind and non-speaking orders in law. Identical orders, though in different revision petitions dealing with different facts, parties and questions of law, running into 4 lines, like the present one, have been passed, even without variation of a coma or a full stop. The order passed by the High

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A **Court is set aside and remanded to the High Court for hearing the case de novo. [Paras 11 and 12] [719-F-G; 720-B]**

B *Assistant Commissioner, Commercial Tax, Department, Works Contract & Leasing, Kota vs. M/s. Shukla and Brothers (2010) 4 SCR 627, relied on.*

Case Law Reference:

C **(2010) 4 SCR 627 Relied on Para 11**
CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3291 of 2010.

From the Judgment & Order dated 7.7.2008 of the High Court of Judicature for Rajasthan at Jaipur Bench at Jaipur in S.B. Sales Tax Revision Petition No. 452 of 2008.

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C.A. Nos. 3292, 3293, 3294, 3295, 3296, 3297, 3298, 3299, 3300, 3301 of 2010.

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Abhishek Gupta, Milind Kumar, Jatinder Kumar Bhatia (NP) for the Appellant.

Puneet Jain, Christi Jain, Eshita Barua, U.N. Goyal, Pratibha Jain for the Respondent.

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The Judgment of the Court was delivered

SWATANTER KUMAR, J. 1. Leave granted.

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2. With the consent of counsel appearing for the parties, the matters are heard for final disposal. By this judgment we will dispose of all the aforementioned appeals as common question of law on somewhat similar facts arises for consideration of this Court in all these appeals. However, for the purpose of brevity and to avoid repetition of facts, we would be referring to the facts of SLP (C) No. 11103 of 2009.

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3. All these aforementioned appeals, though refer to different

respondents, all being timber merchants but the principal question raised in all these appeals is identical, whether the 'ballies' can fall under the expression 'timber' so as to justify levying of higher sales tax.

4. M/s. Rijhumal Jeevandas (hereinafter referred to as 'the assessee') is a concern, trading in 'timber' and its allied products. The Assessing Officer vide his Order dated 17th November, 2000, passed an order of assessment against the assessee wherein he levied tax at the rate of 8% i.e. Rs. 5, 75, 580/- on the 'ballies' which, according to the Department, comes within the category of 'timber' and thus, the tax ought to have been levied at the rate of 12%. On this premise, a notice was issued by the authority for amending the assessing order under Section 37 of the Rajasthan Sales Tax Act, 1994 (for short 'the Act'). Despite service of notice, none had appeared on behalf of the assessee and the differential tax at the rate of 4% was levied totaling to Rs. 23, 023/-. Further, the authorities imposed surcharge of Rs. 2, 763/- and interest of Rs. 26, 302/-, and raised a total further demand of Rs. 52, 088/-.

5. Against the aforesaid order of assessment, the assessee preferred an appeal before the Deputy Commissioner (Appeals), Commercial Tax Department, Kota. The main argument raised was that the order was beyond the purview and scope of Section 37 of the Act. The 'ballies' could not be treated to be covered under the head 'timber' and, as such, the entire demand was vitiated in law.

6. The aforesaid appeal was allowed. The appellate authority found that, the 'ballies' comes under the category of 'goods' and not under the category of 'building goods'. Thus, the differential tax levied by the Tax Assessment Officer, assuming 'ballies' to be 'timber' was not justified. Consequently, the entire demand itself was set aside.

7. The order of the appellate authority dated 18th October, 2006 was challenged by the Assistant Commercial Taxes

A Officer, Ward -III, Circle-B, Kota, before Rajasthan Tax Board, Ajmer which vide its judgment dated 11th June, 2007 found that the 'ballies' are not 'timber' and upheld the view taken by the First Appellate Authority and dismissed the appeals preferred by the Department.

B 8. Aggrieved by the Order of the Rajasthan Tax Board, Ajmer the Department preferred a revision under Section 86 of the Act and besides referring to the facts, the following questions of law were framed for consideration of the High Court :

C "(i) Whether in the facts and circumstances of the matter the order passed by the assessing authority was in any manner inappropriate for the purpose of interference by the appellate authorities ?

D (ii) Whether the Appellate Authorities were justified in interfering with the orders passed by the assessing authority which related to appreciation of entire record and facts ?

E (iii) Whether the appellate authorities justifies in drawing the wrong conclusion while misinterpreting the provisions of the Section 37 of the Act of 1994 which relates to rectification of an order ?

F (iv) Whether the goods/good used and dealt with by the respondent assesses could be classified as not timber so as to enable the respondent assesses to pay tax @ 8% while bally comes in the category of timber wood and upon which the tax is payable @ 12%?"

G 9. This revision petition came to be dismissed by the High Court vide its Order dated 7th July, 2008. The said Order reads as under :

H "After having carefully gone through material on

record, since after due consideration proper discretion has already been used by the Deputy Commissioner (Appeals) as also the Rajasthan Tax Board, in the facts and circumstances, no further interference is called for by this Court.

The revision petition is dismissed accordingly as having no merits.”

10. The present appeals had been preferred by the Department against the order dated 7th July, 2008 passed by the High Court. The primary challenge, to the legality and correctness of the order, is that there is no discussion either on the facts or on the questions of law raised in the revision petition before the High Court and in the argument addressed during the time of hearing of the revision petition.

11. With some regret, we are constrained to notice that the cryptic orders like the above, have not only been passed in the present appeals, but identical orders had even been passed by the High Court in large number of cases from which the appeals have been preferred before this Court. Identical orders, though in different revision petitions dealing with different facts, parties and questions of law, running into 4 lines, like the present one, have been passed, even without variation of a coma or a full stop. It also needs to be noticed that the grounds raised by the Department before us cannot be said to be frivolous or untenable which required discussion by the High Court. The orders, besides being cryptic, suffer from basic infirmity of non application of mind and non-speaking orders in law. This ground need not detain us any further as even in other cases where identical orders were passed, this Court had the occasion to consider the same grounds at some length. Reference, in this regard, can be made to the judgment of the date, the Bench, in the case of *Assistant Commissioner v. M/s Shukla & Brothers* (SLP (C) No. 16466 of 2009) decided on the same day, where after discussing the law at some length, the order passed by the High Court was set aside and the case

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A was remanded to the High Court for hearing the case de novo and passing of an order in accordance with law afresh.

12. In view of the ratio of the case of *M/s. Shukla & Brothers* (supra), which is squarely applicable on the fact and law to the present case, we are constrained to set aside the order passed by the High Court and remand the matter to the High Court for hearing the case de novo. We are compelled to make this direction as it was expected of the High Court to consider the question of law raised before it and express its own opinion/reasons.

13. For the reasons stated above and the reasons recorded in the case of *M/s. Shukla & Brothers* (supra), we hereby set aside the impugned orders of the High Court and remand the matters to the High Court for hearing the same de novo and pass orders in accordance with law. However, in the facts and circumstances of the case, there shall be no order as to costs.

To that extent the appeals are allowed.

E K.K.T. Appeals partly allowed.

M/S. VIJAYA BANK

v.

COMMISSIONER OF INCOME TAX AND ANR.
(Civil Appeal Nos.3286-3287 of 2010)

APRIL 15, 2010

[S.H. KAPADIA AND SWATANTER KUMAR, JJ.]*Income Tax Act, 1961:*

s.36(1)(vii), *Explanation – Deduction under s.36(1)(vii) – Held: With effect from April 1, 1989, mere provision for bad debt would not be entitled to deduction under s.36(1)(vii) – For availing benefit of the deduction, assessee has to write off the debt by debiting the Profit and Loss Account to the extent of provision for bad debt and simultaneously reducing corresponding amount from loans and advances/debtors from the asset side of Balance Sheet – It is not imperative for assessee to close the individual account of each of its debtors in the books.*

The question which arose for consideration in these appeals was whether it was imperative for the assessee-Bank to close the individual account of each of its debtors in its books or a mere reduction in the Loans and Advances or Debtors on the asset side of its Balance Sheet to the extent of the provision for bad debt would be sufficient to constitute a write off.

Allowing the appeals, the Court

HELD: 1.1. Prior to April 1, 1989, the law, as it then stood, was that even in cases in which the assessee made only a provision in its accounts for bad debts and interest thereon and even though the amount was not actually written off by debiting the profit and loss account of the assessee and crediting the amount to the account

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A of the debtor, the assessee was still entitled to deduction under Section 36(1)(vii) of the Income Tax Act, 1961. However, by insertion (with effect from April 1, 1989) of a new Explanation in Section 36(1)(vii), it was clarified that any bad debt written off as irrecoverable in the account of the assessee would not include any provision for bad and doubtful debt made in the accounts of the assessee. Consequently, after April 1, 1989, a mere provision for bad debt would not be entitled to deduction under Section 36(1)(vii). [Paras 6] [727-G-H; 728-A-B]

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Southern Technologies Limited v. Joint Commissioner of Income Tax (2010) 320 ITR 577, relied on.

Vithaldas H. Dhanjibhai Bardanwala vs. CIT (1981) 130 ITR 95 (Guj), referred to.

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1.2. In the instant case, besides debiting the Profit and Loss Account and creating a provision for bad and doubtful debt, the assessee-Bank had correspondingly/simultaneously obliterated the said provision from its accounts by reducing the corresponding amount from Loans and Advances/debtors on the asset side of the Balance Sheet and, consequently, at the end of the year, the figure in the loans and advances or the debtors on the asset side of the Balance Sheet was shown as net of the provision “for impugned bad debt”. After the Explanation, the assessee is required not only to debit the Profit and Loss Account but simultaneously also reduce loans and advances or the debtors from the asset side of the Balance Sheet to the extent of the corresponding amount so that, at the end of the year, the amount of loans and advances/debtors is shown as net of provisions for impugned bad debt. In the circumstances, the assessee was entitled to the benefit of deduction under Section 36(1)(vii) of 1961 Act as there was an actual write off by the assessee in its Books. [Para 7] [729-D-H; 730-A-B]

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1.3. Section 36(1)(vii) of 1961 Act applies both to Banking and Non-Banking businesses. The assessee-Bank has not only been debiting the Profit and Loss Account to the extent of the impugned bad debt, it is simultaneously reducing the amount of loans and advances or the debtors at the year-end. In other words, the amount of loans and advances or the debtors at the year-end in the balance-sheet is shown as net of the provisions for impugned debt. However, what is being insisted upon by the Assessing Officer is that mere reduction of the amount of loans and advances or the debtors at the year-end would not suffice and, in the interest of transparency, it would be desirable for the assessee-Bank to close each and every individual account of loans and advances or debtors as a pre-condition for claiming deduction under Section 36(1)(vii) of 1961 Act. This view has been taken by the Assessing Officer because he apprehended that the assessee-Bank might be taking the benefit of deduction under Section 36(1)(vii) of 1961 Act, twice over. There is no finding of the Assessing Officer that the assessee had unauthorisedly claimed the benefit of deduction under Section 36(1)(vii), twice over. The Order of the Assessing Officer is based on an apprehension that, if the assessee fails to close each and every individual account of it's debtor, it may result in assessee claiming deduction twice over. The matter cannot decide on the basis of apprehensions/desirability. It is always open to the Assessing Officer to call for details of individual debtor's account if the Assessing Officer has reasonable grounds to believe that assessee has claimed deduction, twice over. [Para 8] [730-B-H; 731-A-B]

2. Section 41(4) of 1961 Act, lays down that, where a deduction has been allowed in respect of a bad debt or a part thereof under Section 36(1)(vii) of 1961 Act, then, if the amount subsequently recovered on any such debt

A is greater than the difference between the debt and the amount so allowed, the excess shall be deemed to be profits and gains of business and, accordingly, chargeable to income tax as the income of the previous year in which it is recovered. In the circumstances, the Assessing Officer is sufficiently empowered to tax such subsequent repayments under Section 41(4) of 1961 Act and, consequently, there is no merit in the contention that, if the assessee succeeds, then it would result in escapement of income from assessment. [Para 9] [732-A-D]

Case Law Reference:

**CIT (1981) 130 ITR 95 (Guj) referred to Para 4
(2010) 320 ITR 577 relied on Para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3286-3287 of 2010.

From the Judgment & Order dated 2.4.2009 of the High Court of Karnataka at Bangalore, in Income Tax Appeal Nos. 54 and 55 of 2004.

G. Sarangan, Sanjay Kunur and R.N. Keshwani for the Appellant.

Bishwajit Bhattacharya, ASG, Arijit Prasad, C.V. Subba Rao, Debashis Mukherjee, Ajay Singh and B.V. Balaram Das for the Respondents.

The Judgment of the Court was delivered by

S.H. KAPADIA, J. 1. Leave granted.

2. Whether it is imperative for the assessee-Bank to close the individual account of each of it's debtors in it's books or a mere reduction in the Loans and Advances or Debtors on the asset side of it's Balance Sheet to the extent of the provision

for bad debt would be sufficient to constitute a write off is the question which we are required to answer in these civil appeals? A

3. In these civil appeals, we are concerned with Assessment Years 1993-1994 and 1994-1995. For the Assessment Year 1994-1995, the Assessing Officer disallowed a sum of Rs.7, 10, 47, 161/- which the assessee-Bank had reduced from Loans and Advances or Debtors on the ground that the impugned bad debt had not been written off in an appropriate manner as required under the Accounting principles. According to him, the impugned bad debt supposedly written off by the assessee-Bank was a mere provision and the same could not be equated with the actual write off of the bad debt, as per the requirement of Section 36(1)(vii) of the Income Tax Act, 1961 ['1961 Act', for short] read with Explanation thereto which Explanation stood inserted in 1961 Act by Finance Act, 2001 with effect from 1st April, 1989. The assessee carried the matter in appeal before the Commissioner of Income Tax (A) ['CIT(A)', for short], who opined that it was not necessary for the purpose of writing off of bad debts to pass corresponding entries in the individual account of each and every debtor and that it would be sufficient if the debit entries are made in the Profit and Loss Account and corresponding credit is made in the "Bad Debt Reserve Account". Against the decision of CIT (A) on this point, the Department preferred an appeal to the Income Tax Appellate Tribunal ['Tribunal', for short]. Before the Tribunal, it was argued on behalf of the Department that write off of each and every individual account under the Head `Loans and Advances' or Debtors was a condition precedent for claiming deduction under Section 36(1)(vii) of 1961 Act. According to the Department, the claim of actual write off of bad debts in relation to Banks stood on a footing different from the accounts of the Non-Banking assessee(s), though it was not disputed before us that Section 36(1)(vii) of 1961 Act covers Banking as well as Non-Banking assessees. According to the assessee, once B C D E F G H

A a provision stood created and, ultimately, carried to the Balance Sheet wherein Loans and Advances or Debtors depicted stood reduced by the amount of such provision, then, there was actual write off because, in the final analysis, at the year-end, the so-called provision does not remain and the Balance Sheet at the year-end only carries the amount of loans and advances or debtors, net of such provision made by the assessee for the impugned bad debt. The Tribunal, accordingly, upheld the above contention of the assessee on three grounds. Firstly, according to the Tribunal, the assessee had rightly made a provision for bad and doubtful debt by debiting the amount of bad debt to the Profit and Loss Account so as to reduce the profits of the year. Secondly, the provision account so created was debited and simultaneously the amount of loans and advances or debtors stood reduced and, consequently, the provision account stood obliterated. Lastly, according to the Tribunal, loans and advances or the sundry debtors of the assessee as at the end of the year lying in the Balance Sheet was shown as net of "provisions for doubtful debt" created by way of debit to the Profit and Loss Account of the year. Consequently, the Tribunal, on this point, came to the conclusion that deduction under Section 36(1)(vii) of 1961 Act was allowable. C D E

4. On the question whether it was imperative for the assessee to close each and every individual account and it's debtors in it's Books or a mere reduction in the loans and advances to the extent of the provision for bad and doubtful debt was sufficient, the answer given by the Tribunal was that, in view of the decision of the Gujarat High Court in the case of *Vithaldas H. Dhanjibhai Bardanwala vs. Commissioner of Income Tax, Gujarat*, reported in [1981] 130 ITR 95 (Gujarat), the CIT(A) was right in coming to the conclusion that, since the assessee had written off the impugned bad debt in it's Books by way of a debit to the Profit and Loss Account simultaneously reducing the corresponding amount from Loans and Advances or Debtors depicted on the asset side in the Balance Sheet at F G H

A the close of the year, the assessee was entitled to deduction under Section 36(1)(vii) of 1961 Act. This view was not accepted by the High Court which came to the conclusion by placing reliance on a relied upon judgement in the case of Commissioner of Income Tax & Anr. vs. M/s. Wipro Infotech Limited [See Page 5 of the Paper Book], that, in view of the insertion of the Explanation vide Finance Act, 2001, with effect from 1st April, 1989, the decision of the Gujarat High Court in the case of *Vithaldas H. Dhanjibhai Bardanwala* [supra] no more held the field and, consequently, mere creation of a provision did not amount to actual write off of bad debts, hence, these civil appeals.

5. At the outset, we may state that, in these civil appeals, broadly, two questions arise for determination. The first question which arises for determination concerns the manner in which actual write off takes place under the Accounting principles. The second question which arises for determination in these civil appeals is, whether it is imperative for the assessee-Bank to close the individual account of each debtor in it's Books or a mere reduction in the "Loans and Advances Account" or Debtors to the extent of the provision for bad and doubtful debt is sufficient?

6. The first question is no more res integra. Recently, a Division Bench of this Court in the case of *Southern Technologies Limited vs. Joint Commissioner of Income Tax*, reported in [2010] 320 ITR 577, [in which one of us [S.H. Kapadia, J.] was a party] had an occasion to deal with the first question and it has been answered, accordingly, in favour of the assessee vide Paragraph (25), which reads as under:

"Prior to April 1, 1989, the law, as it then stood, took the view that even in cases in which the assessee(s) makes only a provision in its accounts for bad debts and interest thereon and even though the amount is not actually written off by debiting the profit and loss account of the assessee and crediting the amount to the account of the debtor, the

A assessee was still entitled to deduction under section 36(1)(vii). [See *CIT v. Jwala Prasad Tiwari* (1953) 24 ITR 537 (Bom) and *Vithaldas H. Dhanjibhai Bardanwala vs. CIT* (1981) 130 ITR 95 (Guj)] Such state of law prevailed up to and including the assessment year 1988-89. However, by insertion (with effect from April 1, 1989) of a new Explanation in section 36(1)(vii), it has been clarified that any bad debt written off as irrecoverable in the account of the assessee will not include any provision for bad and doubtful debt made in the accounts of the assessee. The said amendment indicates that before April 1, 1989, even a provision could be treated as a write off. However, after April 1, 1989, a distinct dichotomy is brought in by way of the said

D Explanation to section 36(1)(vii). Consequently, after April 1, 1989, a mere provision for bad debt would not be entitled to deduction under Section 36(1)(vii). To understand the above dichotomy, one must understand 'how to write off'. If an assessee debits an amount of doubtful debt to the profit and loss account and credits the asset account like sundry debtor's account, it would constitute a write off of an actual debt. However, if an assessee debits 'provision for doubtful debt' to the profit and loss account and makes a corresponding credit to the 'current liabilities and provisions' on the liabilities side of the balance-sheet, then it would constitute a provision for doubtful debt. In the latter case, the assessee would not be entitled to deduction after April 1, 1989."

7. One point needs to be clarified. According to Shri Bishwajit Bhattacharya, learned Additional Solicitor General appearing for the Department, the view expressed by the Gujarat High Court in the case of *Vithaldas H. Dhanjibhai Bardanwala* [supra] was prior to the insertion of the Explanation vide Finance Act, 2001, with effect from 1st April, 1989, hence, that law is no more a good law. According to the learned

A counsel, in view of the insertion of the said Explanation in
Section 36(1)(vii) with effect from 1st April, 1989, a mere debit
of the impugned amount of bad debt to the Profit and Loss
Account would not amount to actual write off. According to him,
the Explanation makes it very clear that there is a dichotomy
between actual write off on the one hand and a provision for
bad and doubtful debt on the other. He submitted that a mere
debit to the Profit and Loss Account would constitute a provision
for bad and doubtful debt, it would not constitute actual write
off and that was the very reason why the Explanation stood
inserted. According to him, prior to Finance Act, 2001, many
assesseees used to take the benefit of deduction under Section
36(1)(vii) of 1961 Act by merely debiting the impugned bad debt
to the Profit and Loss Account and, therefore, the Parliament
stepped in by way of Explanation to say that mere reduction of
profits by debiting the amount to the Profit and Loss Account
per se would not constitute actual write off. To this extent, we
agree with the contentions of Shri Bhattacharya. However, as
stated by the Tribunal, in the present case, besides debiting
the Profit and Loss Account and creating a provision for bad
and doubtful debt, the assessee-Bank had correspondingly/
simultaneously obliterated the said provision from it's accounts
by reducing the corresponding amount from Loans and
Advances/debtors on the asset side of the Balance Sheet and,
consequently, at the end of the year, the figure in the loans and
advances or the debtors on the asset side of the Balance Sheet
was shown as net of the provision "for impugned bad debt". In
the judgement of the Gujarat High Court in the case of *Vithaldas
H. Dhanjibhai Bardanwala* [supra], a mere debit to the Profit
and Loss Account was sufficient to constitute actual write off
whereas, after the Explanation, the assessee(s) is now required
not only to debit the Profit and Loss Account but simultaneously
also reduce loans and advances or the debtors from the asset
side of the Balance Sheet to the extent of the corresponding
amount so that, at the end of the year, the amount of loans and
advances/debtors is shown as net of provisions for impugned
bad debt. This aspect is lost sight of by the High Court in it's

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A impugned judgement. In the circumstances, we hold, on the first
question, that the assessee was entitled to the benefit of
deduction under Section 36(1)(vii) of 1961 Act as there was
an actual write off by the assessee in it's Books, as indicated
above.

B 8. Coming to the second question, we may reiterate that
it is not in dispute that Section 36(1)(vii) of 1961 Act applies
both to Banking and Non-Banking businesses. The manner in
which the write off is to be carried out has been explained
hereinabove. It is important to note that the assessee-Bank has
not only been debiting the Profit and Loss Account to the extent
of the impugned bad debt, it is simultaneously reducing the
amount of loans and advances or the debtors at the year-end,
as stated hereinabove. In other words, the amount of loans and
advances or the debtors at the year-end in the balance-sheet
is shown as net of the provisions for impugned debt. However,
what is being insisted upon by the Assessing Officer is that
mere reduction of the amount of loans and advances or the
debtors at the year -end would not suffice and, in the interest
of transparency, it would be desirable for the assessee-Bank
to close each and every individual account of loans and
advances or debtors as a pre-condition for claiming deduction
under Section 36(1)(vii) of 1961 Act. This view has been taken
by the Assessing Officer because the Assessing Officer
apprehended that the assessee-Bank might be taking the
benefit of deduction under Section 36(1)(vii) of 1961 Act, twice
over. [See Order of CIT (A) at Pages 66, 67 and 72 of the
Paper Book, which refers to the apprehensions of the
Assessing Officer]. In this context, it may be noted that there is
no finding of the Assessing Officer that the assessee had
unauthorisedly claimed the benefit of deduction under Section
36(1)(vii), twice over. The Order of the Assessing Officer is
based on an apprehension that, if the assessee fails to close
each and every individual account of it's debtor, it may result
in assessee claiming deduction twice over. In this case, we are
concerned with the interpretation of Section 36(1)(vii) of 1961

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Act. We cannot decide the matter on the basis of A
apprehensions/desirability. It is always open to the Assessing
Officer to call for details of individual debtor's account if the
Assessing Officer has reasonable grounds to believe that
assessee has claimed deduction, twice over. In fact, that
exercise has been undertaken in subsequent years. There is B
also a flip-side to the argument of the Department. Assessee
has instituted recovery suits in Courts against it's debtors. If
individual accounts are to be closed, then the Debtor/
Defendant in each of those suits would rely upon the Bank
statement and contend that no amount is due and payable in C
which event the suit would be dismissed.

9. Before concluding, we may refer to an argument
advanced on behalf of the Department. According to the
Department, it is necessary to square off each individual
account failing which there is likelihood of escapement of D
income from assessment. According to the Department, in
cases where a borrower's account is written off by debiting
Profit and Loss Account and by crediting Loans and Advances
or Debtors Accounts on the asset side of the Balance Sheet,
then, as and when in the subsequent years if the borrower E
repays the loan, the assessee will credit the repaid amount to
the Loans and Advances Account and not to the Profit and Loss
Account which would result in escapement of income from
assessment. On the other hand, if bad debt is written off by
closing the borrower's account individually, then the repaid F
amount in subsequent years will be credited to the Profit and
Loss Account on which the assessee-Bank has to pay tax.
Although, prima facie, this argument of the Department
appears to be valid, on a deeper consideration, it is not so for
three reasons. Firstly, the Head Office Accounts clearly G
indicate, in the present case, that, on repayment in subsequent
years, the amounts are duly offered for tax. Secondly, one has
to keep in mind that, under the Accounting practice, the
Accounts of the Rural Branches have to tally with the Accounts
of the Head Office. If the repaid amount in subsequent years H

A is not credited to the Profit and Loss Account of the Head Office,
which is ultimately what matters, then, there would be a mis-
match between the Rural Branch Accounts and the Head Office
Accounts. Lastly, in any event, Section 41(4) of 1961 Act, inter
alia, lays down that, where a deduction has been allowed in
respect of a bad debt or a part thereof under Section 36(1)(vii)
of 1961 Act, then, if the amount subsequently recovered on any
such debt is greater than the difference between the debt and
the amount so allowed, the excess shall be deemed to be
profits and gains of business and, accordingly, chargeable to
income tax as the income of the previous year in which it is
recovered. In the circumstances, we are of the view that the
Assessing Officer is sufficiently empowered to tax such
subsequent repayments under Section 41(4) of 1961 Act and,
consequently, there is no merit in the contention that, if the
assessee succeeds, then it would result in escapement of
income from assessment. D

10. For the afore-stated reason, we uphold the judgement
of the Tribunal dated 31st July, 2003, and set aside the
impugned judgement of the High Court. Consequently, the
assessee's appeals stand allowed with no order as to costs. E

D.G.

Appeals allowed.

BALATHANDAYUTHAM & ANR.
v.
EZHILARASAN
(Civil Appeal No. 7357 of 2002)

APRIL 16, 2010

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

Indian Succession Act, 1925 – s.63 – Execution of unprivileged Wills – Execution of registered Will by testator– Certain properties bequeathed in favour of his sons and daughters but no property bequeathed to his eldest son-claimant – Suit by one of the beneficiaries – Claimant’s case that the first Will was not genuine and had been revoked by testator by subsequent Wills – First appellate court decreeing the suit in favour of beneficiary holding that the existence of first Will was admitted and the subsequent Wills were not proved – Upheld by High Court – On appeal, held: Subsequent Wills are surrounded by various suspicious circumstances – Claimant failed to discharge its onus of removing the suspicious circumstances surrounding the Wills – Attesting witness of the Wills also not examined – Thus, order of High Court upheld – Evidence Act, 1872 – s. 68.

The father executed a registered Will and bequeathed certain properties in favour of his two sons-respondent and G; and his two daughters. He did not bequeath any property to his eldest son-appellant no.1. The father-testator died on 23.5.1980. Thereafter, the appellant tried to disturb the possession of the respondent. The respondent filed a suit. The appellant contended that the said Will was not genuine and was revoked by testator by another Will dated 25.4.1980 and also thereafter, by another Will dated 02.05.1980. The appellant claimed his rights under the subsequent Wills-Ex.B-19 and Ex.B-20. The trial court dismissed the suit.

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A The first appellate court allowed the appeal and decreed the suit. It held that the existence of the first Will has been admitted and the subsequent Wills were not proved since no attesting witnesses were produced to prove the two subsequent unregistered Wills; and the same were executed when the testator was unwell. The High Court upheld the order. It found that the first Will was executed while the testator was residing with the respondent and his family at place V and the subsequent Wills were executed couple of weeks prior to the death of the testator, at place C where appellant was residing. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1. When a Will is surrounded by suspicious circumstances, the person propounding the Will has a very heavy burden to discharge. Where testator’s mind is feeble and he is debilitated and there is not sufficient evidence as to the mental capacity of the testator or where the deposition in the Will is unnatural, improbable or unfair in the light of the circumstances or it appears that the bequest in the Will is not the result of testator’s free will and mind, the Court may consider that the Will in question is surrounded by suspicious circumstances. [Para 8] [739-G-H; 740-A-C]

F 1.2. Under section 63 of the Indian Succession Act, 1925, the Will has to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence, and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular

form of attestation shall be necessary. Section 68 of the Evidence Act, 1872 further provides if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court is capable of giving evidence. [Para 11] [740-E-H; 741-A-B]

2.1. In the instant case, both the subsequent Wills-Ex.B-19 and Ex.B-20 were allegedly executed by the testator a couple of weeks before his death and when he was made to stay in the house of the 1st appellant. It appears that the attestors of both the said two Wills were all of place C and were strangers to the family. Those two Wills surfaced only at the time when the 1st appellant gave his written statement in 1994 in the suit filed by the respondent. These are suspicious circumstances surrounding Ex.B-19 and Ex.B-20. The High Court also found on analyzing the said facts that there are suspicious circumstances surrounding the execution of Ex.B-19 and Ex.B-20 and they are required to be dispelled by the appellant. The statutory requirements u/s. 68 of the Evidence Act and u/s. 63 of Indian Succession Act are to be fulfilled which have not been done. Not a single attesting witness of Ex.B-19 and Ex.B-20 was examined. [Paras 6 and 7] [739-B-F]

2.2. Both Ex.B-19 & Ex.B-20 are surrounded by various suspicious circumstances. The appellants did not succeed in discharging its onus of removing the suspicious circumstances surrounding Ext B19 & B20. The High Court upheld the finding of the first appellate court that Ex.B-19 and Ex.B-20 have not been proved. The High Court was right in not interfering with those findings in the second appeal as no substantial question of law has been erroneously decided by the first appellate court. Thus, there is no reason to find any error in the

A judgment of the High Court. [Paras 8, 10 and 14] [739-G; 740-F; 742-A-B]

B *H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors AIR 1959 SC 443; Madhukar D. Shende v. Tarabai Aba Shedage (2002) 2 SCC 85; Niranjana Umeshchandra Joshi v. Mrudula Jyoti Rao and Ors. (2006) 13 SCC 433; Savithri and Ors. v. Karthyayani Amma and Ors. (2007) 11 SCC 621, relied on.*

Case Law Reference:

C	AIR 1959 SC 443	Relied on.	Para 8
	(2002) 2 SCC 85	Relied on.	Para 13
	(2006) 13 SCC 433	Relied on.	Para 13
D	(2007) 11 SCC 621	Relied on.	Para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7357 of 2002.

E From the Judgment & Order dated 10.12.2001 of the High Court of Judicature at Madras In S.A. No. 130 of 2000.

V. Prabhakar, R. Chandrachud for the Appellants.

B. Sridhar, K. Ram Kumar for the Respondent.

F The Judgment of the Court was delivered by

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

G 2. The material facts of the case are: Late Mr. M. Ramachandran, the father of the 1st appellant as also of the plaintiff-respondent, had three sons, namely, Balathandayutham (1st appellant), Ezhilarasan (plaintiff-respondent) and one Gnanavoli and two daughters – Kalai Arasi and Isai Amudhu and his wife was Nachiar Ammal. It is not in dispute that Ramachandran acquired certain properties and in his lifetime

he executed a Will which was registered on 25.09.1972. By the said Will he bequeathed certain properties, from the income of which Seva Puja and maintenance of Sri Bala Murugan Temple was to be conducted. In respect of his other properties he bequeathed the same in favour of plaintiff-respondent and his other son Gnanavoli and two daughters and giving his wife life interest.

3. Insofar as the 1st appellant is concerned, no property was bequeathed to him, inter alia, on the ground that after education he was staying apart and had not shown any interest in the family members. The case in the plaint is that since the 1st appellant, the elder brother of the plaintiff-respondent, left the family after his education and married another woman belonging to some other caste without the consent of the parents, no provision in the Will dated 25.09.1972 was made by the testator in favour of the 1st appellant. The testator Ramachandran died on 23.5.1980 and after his death, the plaintiff-respondent was in exclusive possession of the property. At that stage the 1st appellant tried to disturb the possession of the plaintiff-respondent with the help of some anti social elements. This led to the filing of the suit. In the suit, the stand of the 1st appellant was that Will dated 25.09.1972 was not genuine and the said Will had been revoked by Ramachandran by another Will dated 25.4.1980 and also thereafter by another Will dated 2.5.1980. Both the appellants claimed their rights under the so-called subsequent Wills. In his rejoinder, plaintiff-respondent claimed that the so-called subsequent Wills dated 25.4.1980 and 2.5.1980 are fabricated and at the relevant point of time Ramachandran was bedridden and did not have the capacity to execute any Will as he died within a few days thereafter on 23.5.1980. The Trial Court dismissed the suit upholding the contention of the 1st appellant. The First Appellate Court, however, allowed the appeal and decreed the suit. The stand of the 1st appellant herein, before the First Appellate Court, was that Will dated 25.09.1972 was not a

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A genuine one and was revoked by the subsequent Will dated 25.4.1980.

4. On these facts the learned First Appellate Court held, when the execution of a Will asserted by one party is denied by the other party, then the burden is on the party who relies on the Will to prove its execution. But when execution of the Will is not denied then no burden is cast on the party who relies on a Will to prove its execution. Relying on the aforesaid principle, the First Appellate Court held, and in our view rightly, that the existence of the first Will dated 25.09.1972 has been admitted. But the appellants' case is that the same has been revoked. However, there is no attesting witness to prove Ex.B-19 dated 2.5.1980 and Ex.B-20 dated 25.4.1980, which are the two subsequent Wills. The First Appellate Court also noted that it was admitted that the subsequent Will dated 25.4.1980 is an unregistered one and attestors to the said Will were alive even though scribe was not alive. It was also admitted by the appellant that testator was not well for about four months prior to his death. Admittedly Ex.B-19 and Ex.B-20 were allegedly executed when the testator was unwell. On those facts the learned First Appellate Court held that the subsequent two Wills being Ex.B-19 and Ex.B-20 were not proved.

5. The High Court held that the finding given by the First Appellate Court that Ex.B-19 and Ex.B-20 cannot be said to have been proved in view of non-compliance with the mandatory requirement under Sections 68 and 69 of the Indian Evidence Act is a correct finding. The High Court found that the first Will which was executed in 1972 (Ex.A1) was executed while the testator was residing with the plaintiff and his wife and another son in joint family in his residential house at Villupuram but the subsequent two Wills Ex.B-19 and Ex.B-20 were executed at Cuddalore where the 1st appellant was residing. The fact remains that in the first Will no provision was made for the 1st appellant but in the second two Wills provisions were made in favour of the 1st appellant and they

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were allegedly executed when the testator was staying in the house of the 1st appellant. These two Wills were also executed a couple of weeks prior to the death of the testator.

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6. At this juncture, the case made out by the plaintiff-respondent is very relevant. Plaintiff's case is that his father, the testator, went to a temple for attending a function and from there testator was taken by the 1st appellant to Cuddalore and coming to know this fact the plaintiff-respondent went to the house of the 1st appellant and the plaintiff-respondent went there and took the testator back to his house at Villupuram where he was staying all these years and where he ultimately died. Therefore, both the subsequent Wills, namely, Ex.B-19 and Ex.B-20 were allegedly executed by the testator a couple of weeks before his death and when he was made to stay in the house of the 1st appellant. It appears that the attestors of both the aforesaid two Wills were all of Cuddalore and were strangers to the family. Those two Wills surfaced only at the time when the 1st appellant gave his written statement in 1994 in the suit filed by the plaintiff-respondent. According to our judgment, these are suspicious circumstances surrounding Ex. B-19 and Ex.B-20.

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7. The High Court also found on analyzing the aforesaid facts that there are suspicious circumstances surrounding the execution of Ex.B-19 and Ex.B-20 and they are required to be dispelled by the appellant. The statutory requirements under Section 68 of the Evidence Act and under Section 63 of Indian Succession Act are to be fulfilled which have not been done. In this case not a single attesting witness of Ex.B-19 and Ex.B-20 has been examined.

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8. This Court also thinks that in view of the discussion made herein above that both the Ex.B-19 & Ex.B-20 are surrounded by various suspicious circumstances. When a Will is surrounded by suspicious circumstances, the person propounding the Will has a very heavy burden to discharge. This has been authoritatively explained by this Court in the case of

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A *H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors*, AIR 1959 SC 443. Justice P.B. Gajendragadkar, as His Lordship then was, in para 20 of the judgment, speaking for the Three Judge Bench in *H. Venkatachala* (supra) held that in a case where testator's mind is feeble and he is debilitated and there is not sufficient evidence as to the mental capacity of the testator or where the deposition in the Will is unnatural, improbable or unfair in the light of the circumstances or it appears that the bequest in the Will is not the result of testator's free will and mind, the Court may consider that the Will in question is encircled by suspicious circumstances.

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9. Going by this test, as we must, we find that both the Wills, Ex.B-19 & Ex.B-20 are surrounded by suspicious circumstances. The ratio in *H. Venkatachala* (supra) is that in such a situation the Court "would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstance naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts will be reluctant to treat the document as the last Will of the testator." [see page 452]

10. Following the aforesaid principle, this Court is constrained to hold that the appellants did not succeed in discharging its onus of removing the suspicious circumstances surrounding Ext B19 & B20. As such there is no reason for us to find any error in the judgment of the High Court.

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11. In so far as execution of the Will is concerned, under Section 63 of the Indian Succession Act, 1925 it has to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence, and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary

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that more than one witness be present at the same time, and no particular form of attestation shall be necessary. Section 68 of the Indian Evidence Act, 1872 further provides if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court is capable of giving evidence. There is a proviso under Section 68 but we are not concerned with the proviso here.

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12. Commenting on these provisions, this Court in *H. Venkatachala* (supra) laid down that Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. It was further held that Section 63 of Indian Succession Act requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This Section also requires that Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. [see pg 451]

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13. The law thus laid down in *H. Venkatachala* (supra) is still holding field and this Court has followed the same in various other judgments. [See *Madhukar D. Shende v. Tarabai Aba Shedage*, (2002) 2 SCC 85; *Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and others.*, (2006) 13 SCC 433 and *Savithri and Others v. Karthyayani Amma and Others*, (2007) 11 SCC 621]

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14. On consideration of the aforesaid materials, the High

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A Court affirmed the finding of the First Appellate Court that Ex.B-19 and Ex.B-20 have not been proved. The High Court, in our judgment, was right in not interfering with those findings in the second appeal as no substantial question of law has been erroneously decided by the First Appellate Court.

B 15. We also affirm the aforesaid finding of the High Court and dismiss this appeal leaving the parties to bear their own costs.

N.J. Appeal dismissed.

M/S. JINDAL STAINLESS LTD. & ANR.
 v.
 STATE OF HARYANA AND ORS.
 (Civil Appeal No. 3453 of 2002 etc. etc.)

APRIL 16, 2010

**[S.H. KAPADIA, ALTAMAS KABIR, B. SUDERSHAN
 REDDY, P. SATHASIVAM AND SURINDER SINGH
 NIJJAR, JJ.]**

Taxation:

Entry Tax – Validity of Entry Tax enactments – Court being of the view that law laid down by Constitution Bench of Supreme Court in Atiabari Tea Co. and Automobile Transport (Rajasthan) Ltd.**, needs reconsideration, referred the matter to larger Bench, inter alia on the aspects of: Interplay/interrelationship between Article 304(a) and Article 304(b) of the Constitution of India; the significance of the word “and” between Article 304(a) and 304(b); the significance of the non obstante clause in Article 304; the balancing of freedom of trade and commerce in Article 301 vis-à-vis the State’s authority to levy taxes under Article 245 and Article 246 of the Constitution read with the appropriate legislative Entries in the Seventh Schedule, particularly in the context of movement of trade and commerce; whether Article 304(a) and Article 304(b) deal with different subjects? Whether the impugned taxation law to be valid under Article 304(a) must also fulfil the conditions mentioned in Article 304(b) including Presidential assent? Whether the word “restrictions” in Article 302 and in Article 304(b) includes tax laws? Whether validity of a law impugned as violative of Article 301 should be judged only in the light of the test of non-discrimination? Does Article 303 circumscribe Article 301? Whether “internal goods” would come under Article 304(b) and “external goods” under 304(a)? Whether “per se test” propounded in Atiabari’s case should*

or should not be rejected? Whether tax simpliciter constitutes a restriction under Part XIII of the Constitution? Whether the word “restriction” in Article 304(b) includes tax laws? Is taxation justiciable? Whether the “working test” laid down in Atiabari makes a tax law per se violative of Article 301? Inter-relationship between Article 19(1)(g) and Article 301 of the Constitution?”– Constitution of India, 1950 – Articles 19(1)(g), 245, 246, 301, 302, 303, 304(a) and (b) – Supreme Court Rules, 1966 – O. 7, r.2.

**Atiabari Tea Co. Ltd. vs. The State of Assam and Ors. (1961) 1 SCR 809; and **The Automobile Transport (Rajasthan) Ltd. vs. The State of Rajasthan and Ors. (1963) 1 SCR 491 – referred to.*

Supreme Court Rules, 1966:

O. 7, r.2 – Reference to larger Bench – Test – Discussed – Applying the test laid down in Keshav Mills Co..Ltd. and Central Board of Dawoodi Bohra Community**, Court felt that on a number of aspects a larger Bench of Supreme Court needs to revisit the interpretation of Part XIII of the Constitution including various tests propounded in the judgments of the Constitution Bench of this Court in Atiabari Tea Co. and Automobile Transport (Rajasthan) Ltd. – Entry Tax – Precedent – Administration of Justice.*

**Keshav Mills Co..Ltd. vs. Commisioner of Income-tax, Bombay North (1965) 2 SCR 908; **Central Board of Dawoodi Bohra Community and Anr. vs. State of Maharashtra and Anr. (2004) Suppl. 6 SCR 1054 = (2005) 2 SCC 673; and G.K. Krishnan and Ors. vs. State of Tamil Nadu and Ors. (1975) 2 SCR 715 = (1975) 1 SCC 375 – referred to.*

Case Law Reference:

(1961) 1 SCR 809 referred to para 2

(1963) 1 SCR 491 referred to para 2

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(1965) 2 SCR 908 referred to **para 4** A
(2004) Suppl. 6 SCR 1054 referred to **para 5**
(1975) 2 SCR 715 referred to **para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3453 of 2002. B

From the Judgment & Order dated 21.12.2001 of the High Court of Punjab and Haryana at Chandigarh in WP No. 6630 of 2000.

WITH

S.L.P. (C) No.10003 of 2004	S.L.P. (C) No.10563 of 2004	
S.L.P. (C) No.10007 of 2004	S.L.P. (C) No.10381 of 2004	
S.L.P. (C) No.10129 of 2004	S.L.P. (C) No.10382 of 2004	
S.L.P. (C) No.10133 of 2004	S.L.P. (C) No.10384 of 2004	D
S.L.P. (C) No.10134 of 2004	S.L.P. (C) No.10385 of 2004	
S.L.P. (C) No.10153 of 2004	S.L.P. (C) No.10391 of 2004	
S.L.P. (C) No.10154 of 2004	S.L.P. (C) No.10402 of 2004	E
S.L.P. (C) No.10156 of 2004	S.L.P. (C) No.10403 of 2004	
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S.L.P. (C) No.10164 of 2004	S.L.P. (C) No.10407 of 2004	
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S.L.P. (C) No.10505 of 2004	S.L.P. (C) No.10501 of 2004	
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	S.L.P. (C) No.10567 of 2004	S.L.P. (C) No.11328 of 2004
B	S.L.P. (C) No.10568 of 2004	S.L.P. (C) No.11329 of 2004
	S.L.P. (C) No.10569 of 2004	S.L.P. (C) No.11370 of 2004
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S.L.P. (C) No.19114 of 2007	S.L.P. (C) No.20527 of 2007	
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A	S.L.P. (C) No.21866 of 2007	S.L.P. (C) No.22947 of 2007
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C	S.L.P. (C) No.23609 of 2008	S.L.P. (C) No.23623 of 2008
	S.L.P. (C) No.22083 of 2008	S.L.P. (C) No.24934-25066 of 2007
	S.L.P. (C) No.22084 of 2008	Civil Appeal No.2608 of 2003
	S.L.P. (C) No.22086 of 2008	Civil Appeal No. 2637 of 2003
D	Writ Petition (C) No.221 of 2004	S.L.P. (C) No. 26377 of 2008
	S.L.P. (C) No.22293 of 2009	S.L.P. (C) No. 26543 of 2008
	S.L.P. (C) No.22295 of 2009	S.L.P. (C) No. 26593 of 2008
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	S.L.P. (C) No.22303 of 2009	S.L.P. (C) Nos. 27442-27444 of 2008
	S.L.P. (C) No.22304 of 2009	Civil Appeal No. 2769 of 2000
	S.L.P. (C) No.22306 of 2009	S.L.P. (C) No...CC 2867 of 2009
	S.L.P. (C) No.22307 of 2009	S.L.P. (C) No.29194 of 2008
	S.L.P. (C) No.22308 of 2009	S.L.P. (C) No.29196 of 2008
	S.L.P. (C) Nos.22100-22101 of 2008	S.L.P. (C) No.29763 of 2008
	S.L.P. (C) No.22425 of 2009	S.L.P. (C) No.29764 of 2008
G	S.L.P. (C) No.22428 of 2009	S.L.P. (C) No.30276 of 2008
	S.L.P. (C) No.22707 of 2008	Civil Appeal No.3144 of 2004
	S.L.P. (C) No.22735 of 2008	Civil Appeal No.3145 of 2004
	S.L.P. (C) No.22931 of 2008	Civil Appeal No.3146 of 2004
H		

S.L.P. (C) No.3230 of 2008	Civil Appeal No.5157 of 2004	A
S.L.P. (C) No.3231 of 2008	Civil Appeal No.5158 of 2004	
S.L.P. (C) No.3233 of 2008	Civil Appeal No.5159 of 2004	
Civil Appeal No.4476 of 2000	Civil Appeal No.5160 of 2004	
Civil Appeal No.4651 of 1998	Civil Appeal No.5162 of 2004	B
Civil Appeal No. 4715 of 2008	Civil Appeal No.5163 of 2004	
S.L.P. (C) No. 4720 of 2009	Civil Appeal No.4953 of 2004	
S.L.P. (C) No.3276 of 2009	Civil Appeal No. 4954 of 2004	
Civil Appeal No.3314 of 2001	Civil Appeal No.5041-5042 of 2008	C
Civil Appeal Nos.3381-3400 of 1998	Writ Petition (C) No.512 of 2003	
Civil Appeal No.3454 of 2002	Civil Appeal No.5139 of 2004	
Civil Appeal No.3455 of 2002	Civil Appeal No.5141 of 2004	D
Civil Appeal Nos.3456-3459 of 2002	Civil Appeal No.5142 of 2004	
Civil Appeal No.3460 of 2002	Civil Appeal No.5143 of 2004	
Civil Appeal No.3461 of 2002	Civil Appeal No.5144 of 2004	
Civil Appeal Nos.3462-3463 of 2002	Civil Appeal No.5145 of 2004	E
Civil Appeal No.3464 of 2002	Civil Appeal No.5147 of 2004	
Civil Appeal No.3465 of 2002	Civil Appeal No.5148 of 2004	
Civil Appeal No.3466 of 2002	Civil Appeal No.5149 of 2004	
Civil Appeal No.3467 of 2002	Civil Appeal No.5150 of 2004	F
Civil Appeal No.3468 of 2002	Civil Appeal No.5151 of 2004	
Civil Appeal No.3469 of 2002	Civil Appeal No.5152 of 2004	
Civil Appeal No.3470 of 2002	Civil Appeal No.5153 of 2004	
Civil Appeal No.3471 of 2002	Civil Appeal No.5154 of 2004	G
Civil Appeal No.3592 of 1998	Civil Appeal No.5155 of 2004	
Civil Appeal No.4008 of 2002	Civil Appeal No.5156 of 2004	
Civil Appeal No.4471 of 2000	Civil Appeal Nos.6437-6440 of 1997	H

A	Writ Petition (C) No.66 of 2004	S.L.P. (C) No.9548 of 2009
	S.L.P. (C) No.6831 of 2008	S.L.P. (C) No.10279 of 2009
	S.L.P. (C) No.6914 of 2007	S.L.P. (C) No.16183 of 2009
	S.L.P. (C) No.742 of 2008	S.L.P. (C) No. 9569 of 2004
B	S.L.P. (C) No.746 of 2008	S.L.P. (C) No.747 of 2008
	Civil Appeal No.5164 of 2004	Civil Appeal No.7658 of 2004
	Civil Appeal No.5165 of 2004	S.L.P. (C) No.7914 of 2008
	Civil Appeal No.5166 of 2004	S.L.P. (C) Nos.8053-8077 of 2008
C	Civil Appeal No.5167 of 2004	S.L.P. (C) No.8199 of 2008
	Civil Appeal No.5168 of 2004	S.L.P. (C) No.8204 of 2008
	Civil Appeal No.5169 of 2004	Civil Appeal No.8241 of 2003
	Civil Appeal No.5170 of 2004	Civil Appeal No.8242 of 2003
D	Civil Appeal No.5385 of 2002	Civil Appeal No.8243 of 2003
	S.L.P. (C) No.5407 of 2008	Civil Appeal No.8244 of 2003
	S.L.P. (C) No.5408 of 2008	Civil Appeal No.8245 of 2003
	Writ Petition (C) No.574 of 2003	Civil Appeal No.8246 of 2003
E	Civil Appeal No.5740 of 2002	Civil Appeal No.8247 of 2003
	Civil Appeal No.5858 of 2002	Civil Appeal No.8248 of 2003
	S.L.P. (C) Nos.6148-6152 of 2008	Civil Appeal No.8249 of 2003
	Civil Appeal No.6331 of 2003	Civil Appeal No.8250 of 2003
	Civil Appeal Nos.6383-6421 of 1997	Civil Appeal No.8251 of 2003
	Civil Appeal Nos.6422-6435 of 1997	Civil Appeal No.8252 of 2003
	Civil Appeal No.6436 of 1997	S.L.P. (C) No.9989 of 2004
G	S.L.P. (C) No.9054 of 2007	S.L.P. (C) No.9991 of 2004
	Civil Appeal No.918 of 1999	S.L.P. (C) No.9993 of 2004
	S.L.P. (C) No.9479 of 2004	S.L.P. (C) No.9998 of 2004
	S.L.P. (C) No.9496 of 2004	S.L.P. (C) No.9999 of 2004
H		

S.L.P. (C) No.22309 of 2009	S.L.P. (C) No.28509 of 2009	A	A	S.L.P. (C) No.35753 of 2009	S.L.P. (C) No.15253 of 2008
S.L.P. (C) No.22310 of 2009	S.L.P. (C) No.25797 of 2009			S.L.P. (C) No.26116 of 2009	S.L.P. (C) No.15286-15287 of 2008
S.L.P. (C) No.22311 of 2009	S.L.P. (C) No.22312 of 2009			S.L.P. (C) No.26236 of 2009	S.L.P. (C) No.35754 of 2009
S.L.P. (C) No.9832 of 2004	S.L.P. (C) No.22313 of 2009			S.L.P. (C) Nos.13270-13274 of 2009	S.L.P. (C) No.35755 of 2009
S.L.P. (C) No.9883 of 2004	S.L.P. (C) No.22316 of 2009	B	B	S.L.P. (C) No.30847 of 2009	S.L.P. (C) No.35756 of 2009
S.L.P. (C) No.9885 of 2004	S.L.P. (C) No.22317 of 2009			S.L.P. (C) No.27883 of 2009	S.L.P. (C) No.35757 of 2009
S.L.P. (C) No.9891 of 2004	S.L.P. (C) No.22318 of 2009			S.L.P. (C) No.29597 of 2009	S.L.P. (C) No.245 of 2010
S.L.P. (C) No.9893 of 2004	S.L.P. (C) No.22320 of 2009			S.L.P. (C) No.28775 of 2009	S.L.P. (C) No.247 of 2010
S.L.P. (C) No.9898 of 2004	S.L.P. (C) No.22321 of 2009	C	C	S.L.P. (C) No.33672 of 2009	S.L.P. (C) No.248 of 2010
S.L.P. (C) No.9899 of 2004	S.L.P. (C) No.22322 of 2009			S.L.P. (C) No.31410 of 2009	S.L.P. (C) No.1876 of 2010
S.L.P. (C) No.9901 of 2004	S.L.P. (C) No.22323 of 2009			S.L.P. (C) No.31411 of 2009	S.L.P. (C) No.2459 of 2010
S.L.P. (C) No.9904 of 2004	S.L.P. (C) No.22324 of 2009	D	D	S.L.P. (C) No.31412 of 2009	Civil Appeal No.1956 of 2003
S.L.P. (C) No.9910 of 2004	S.L.P. (C) No.22325 of 2009			S.L.P. (C) No.35585 of 2009	Civil Appeal No.2633 of 2003
S.L.P. (C) No.9911 of 2004	S.L.P. (C) No.19695 of 2009			S.L.P. (C) No.35740 of 2009	Civil Appeal No.2638 of 2003
S.L.P. (C) No.9912 of 2004	S.L.P. (C) No.23227 of 2009			S.L.P. (C) No.36196 of 2009	Civil Appeal Nos.3720-3722 of 2003
S.L.P. (C) No.9950 of 2004	S.L.P. (C) Nos.16757-16760 of 2009	E	E	S.L.P. (C) No.14828 of 2008	S.L.P. (C) Nos.30534-30540 of 2008
S.L.P. (C) No.9964 of 2004	S.L.P. (C) No.22408 of 2009			S.L.P. (C) No.14829 of 2008	S.L.P. (C) No.26572 of 2008
Civil Appeal Nos.997-998 of 2004	S.L.P. (C) No.24149 of 2009			S.L.P. (C) No.14875 of 2008	S.L.P. (C) No.9227 of 2008
S.L.P. (C) No.9976 of 2004	S.L.P. (C) No.36219 of 2009			S.L.P. (C) No.15273 of 2008	S.L.P. (C) No.30533 of 2008
S.L.P. (C) Nos.25399-25400 of 2009	S.L.P. (C) No.36271 of 2009	F	F	S.L.P. (C) No.15274 of 2008	S.L.P. (C) No.30542 of 2008
S.L.P. (C) No.25474 of 2009	S.L.P. (C) No.35742 of 2009			S.L.P. (C) No.15047 of 2008	S.L.P. (C) No.27606 of 2008
S.L.P. (C) No.25467 of 2009	S.L.P. (C) Nos.35743-35746 of 2009			S.L.P. (C) No.15324 of 2008	S.L.P. (C) No.26972 of 2008
S.L.P. (C) No.25157 of 2009	S.L.P. (C) No.35747 of 2009			S.L.P. (C) No.15325 of 2008	S.L.P. (C) Nos.29561-29570 of 2008
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S.L.P. (C) No.25470 of 2009	S.L.P. (C) No.35750 of 2009			S.L.P. (C) No.15327 of 2008	S.L.P. (C) No.5495 of 2009
S.L.P. (C) No.17722/2009	S.L.P. (C) No.35751 of 2009			S.L.P. (C) No.15328 of 2008	S.L.P. (C) No.5371 of 2009
S.L.P. (C) No.25753 of 2009	S.L.P. (C) No.35752 of 2009	H	H	S.L.P. (C) No.15090 of 2008	S.L.P. (C) No.5376 of 2009

S.L.P. (C) No.5381 of 2009	S.L.P. (C) No.6670 of 2009	A
S.L.P. (C) No.5383 of 2009	S.L.P. (C) No.6675 of 2009	
S.L.P. (C) No.5384 of 2009	S.L.P. (C) No.6676 of 2009	
S.L.P. (C) No.15288-15289 of 2008	S.L.P. (C) No.6678 of 2009	
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S.L.P. (C) No.15330 of 2008	S.L.P. (C) No.5395 of 2009	
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S.L.P. (C) No.15335 of 2008	S.L.P. (C) No.5399 of 2009	
S.L.P. (C) No.15337 of 2008	S.L.P. (C) No.5401 of 2009	C
S.L.P. (C) No.22342 of 2008	S.L.P. (C) No.5403 of 2009	
S.L.P. (C) No.25378 of 2008	S.L.P. (C) No.5405 of 2009	
S.L.P. (C) No.26571 of 2008	S.L.P. (C) No.5406 of 2009	
S.L.P. (C) No.25498 of 2008	S.L.P. (C) No.5408 of 2009	D
S.L.P. (C) No.5410 of 2009	S.L.P. (C) No.5409 of 2009	
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S.L.P. (C) No.5412 of 2009	S.L.P. (C) No.6796 of 2009	E
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S.L.P. (C) No.5422 of 2009	S.L.P. (C) No.6953 of 2009	
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S.L.P. (C) Nos.5493-5494 of 2009	S.L.P. (C) No.6682 of 2009	
S.L.P. (C) No.5426 of 2009	S.L.P. (C) No.6683 of 2009	G
S.L.P. (C) No.5883 of 2009	S.L.P. (C) No.6684 of 2009	
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S.L.P. (C) No.6669 of 2009	S.L.P. (C) No.6686 of 2009	H

A	S.L.P. (C) No.6687 of 2009	S.L.P. (C) No.10047 of 2009
	S.L.P. (C) No.6688 of 2009	S.L.P. (C) No.10048 of 2009
	S.L.P. (C) No.6689 of 2009	S.L.P. (C) No.10049 of 2009
	S.L.P. (C) No.6690 of 2009	S.L.P. (C) No.10050 of 2009
B	S.L.P. (C) No.6692 of 2009	S.L.P. (C) No.10051 of 2009
	S.L.P. (C) No.6679 of 2009	S.L.P. (C) No.10053-10054 of 2009
	S.L.P. (C) No.6680 of 2009	S.L.P. (C) No.6693 of 2009
	S.L.P. (C) No.6782 of 2009	S.L.P. (C) No.6694 of 2009
C	S.L.P. (C) No.6785 of 2009	S.L.P. (C) No.6693 of 2009
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	S.L.P. (C) No.6701 of 2009	S.L.P. (C) No.6698 of 2009
D	S.L.P. (C) No.6702 of 2009	S.L.P. (C) No. 6999 of 2009
	S.L.P. (C) No.6703 of 2009	S.L.P. (C) No.6700 of 2009
	S.L.P. (C) No.6704 of 2009	S.L.P. (C) No.7344 of 2009
	S.L.P. (C) No.6705 of 2009	S.L.P. (C) No.7350 of 2009
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	S.L.P. (C) No.6709 of 2009	S.L.P. (C) No.26813 of 2008
	S.L.P. (C) No.6710 of 2009	S.L.P. (C) No.11042 of 2009
	S.L.P. (C) No.6711 of 2009	S.L.P. (C) No.13496 of 2009
	S.L.P. (C) No.6712 of 2009	S.L.P. (C) No. 10952 of 2009
	S.L.P. (C) No.6713 of 2009	S.L.P. (C) No.10954-10956 of 2009
	S.L.P. (C) Nos.6714-6715 of 2009	S.L.P. (C) No....CC 5143/2009
G	S.L.P. (C) No.10040 of 2009	S.L.P. (C) No....CC 5311/2009
	S.L.P. (C) No.10041 of 2009	S.L.P. (C) No.....CC 5803/2009
	S.L.P. (C) No.10042 of 2009	S.L.P. (C) No.10192 of 2009
	S.L.P. (C) No.10045 of 2009	S.L.P. (C) No.9699 of 2009
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S.L.P. (C) No.11603-11611 of 2009	S.L.P. (C) No.15700 of 2008	A	A	S.L.P. (C) No.28583 of 2009	S.L.P. (C) No.19876 of 2008
S.L.P. (C) No.11646 of 2009	S.L.P. (C) No.15711 of 2008			S.L.P. (C) Nos.30746-30845 of 2009	S.L.P. (C) No.20068 of 2008
S.L.P. (C) No.11122 of 2009	S.L.P. (C) No.15845 of 2008			S.L.P. (C) Nos.33663-33665 of 2009	S.L.P. (C) No.21117-21125 of 2008
S.L.P. (C) No.20192 of 2008	S.L.P. (C) Nos.16888-16898 of 2009	B	B	S.L.P. (C) No.35587 of 2009	S.L.P. (C) No.21127 of 2008
S.L.P. (C) No.22195 of 2008	S.L.P. (C) No.14623 of 2009			S.L.P. (C) No.7021-7022 of 2010	S.L.P. (C) No.21506 of 2008
S.L.P. (C) No.14323 of 2009	S.L.P. (C) Nos.17332-17333 of 2009			S.L.P. (C) No.36193 of 2009	S.L.P. (C) Nos.21509 of 2008
S.L.P. (C) No.13611-13612 of 2009	S.L.P. (C) Nos.17394-17396 of 2009	C	C	S.L.P. (C) No.15078 of 2008	S.L.P. (C) No.21510 of 2008
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S.L.P. (C) No.15357 of 2008	S.L.P. (C) No.17492-17498 of 2009			S.L.P. (C) No.18034 of 2008	S.L.P. (C) No. 4387 of 2010
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S.L.P. (C) No.15496 of 2008	S.L.P. (C) No.15723 of 2009			S.L.P. (C) No.18030 of 2008	S.L.P. (C) No.6723 of 2010
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S.L.P. (C) No.15551 of 2008	S.L.P. (C) No.14949 of 2009	G	G	S.L.P. (C) No.34253 of 2009	S.L.P. (C) No.6762 of 2010
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S.L.P. (C) No.15623 of 2008	S.L.P. (C) No.17744 of 2009			S.L.P. (C) No.18850 of 2008	S.L.P. (C) No.7776 of 2010
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S.L.P. (C) No.15666 of 2008				S.L.P. (C) No.18871 of 2008	S.L.P. (C) No.33176 of 2009
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				S.L.P. (C) No.19120 of 2008	S.L.P. (C) No.4511 of 2010
					S.L.P. (C) No.5309 of 2010

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S.L.P. (C) No.19425 of 2008	S.L.P. (C) No.104 of 2010	
S.L.P. (C) No.19460 of 2008	Writ Petition (C) No.11 of 2010	
S.L.P. (C) No.23990 of 2009	Writ Petition (C) No.42 of 2010	B
S.L.P. (C) No.24430 of 2009	Writ Petition (C) No.43 of 2010	
S.L.P. (C) No.24822 of 2009	Writ Petition (C) No.44 of 2010	
S.L.P. (C) No.26509 of 2009	Writ Petition (C) No.46 of 2010	
S.L.P. (C) No.28696 of 2009	Writ Petition (C) No.48 of 2010	C
S.L.P. (C) No.29868 of 2009	S.L.P. (C) No. 6037 of 2010	
S.L.P. (C) No.6811 of 2010	S.L.P. (C) No. 6765 of 2010	
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S.L.P. (C) No.19714 of 2008	Writ Petition (C) No .63 of 2010	D
S.L.P. (C) No.19722 of 2008	S.L.P. (C) No.4102 of 2010	
S.L.P. (C) No.19731 of 2008	S.L.P. (C) No.12739 of 2009	
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S.L.P. (C) No.19802 of 2008	S.L.P. (C) No. 7426 of 20	E

Gopal Subramanian, ASG. Manjit Singh, ASG, Shanti Bhusan, Nagendra Rai, Harish N. Salve, A. K. Ganguli, Dhruv Agarwal, Anoop G. Chaudhary, Rakesh K. Khanna, Jagdeep Dhankar, A. Mariarputham, Rakesh Dwivedi, Rajeev K. Virmani, F.S. Nariman, R.K. Aggarwal, T. R. Andhyarujina, Dr. Debi Pal, A.K . Ganguli, Soli J. Sorabjee, T.L.V. Iyer, K.K. Venugopal, Satish Chandra Mishra, Dr. D.P. Pal, Ravindra Shrivastava, Mahabir Singh, S.B. Upadhyay, Soli J. Sorabjee, Anil Kher, Shambhu Prasad Singh, V. Shekhar, Sunil Kumar, Dr. Devi Prasad Pal, Ashok Saraf, P.P. Rao, Shyam Divan, Ravindra Shrivastava, V.A. Mohta, Ajit Kumar Sinha, Ravindra Shrivastava, Dr. A.M. Singhvi, Kashmiri Lal Goyal, S.K. Bagaria, Dr. Manish Singhvi, Manjit Singh, Shail Kumar Dwivedi, AAG., Ejaz Maqbool, Rajesh Jain, Garima Kapoor, Wasif Gilani, Sakshi Banga, Faraz Khan, A.T.M. Sampath, Ashok Kumar

A	Gupta, Farrukh Rasheed, M. Paikaray, Shantanu Sagar, Smarhar, Abhishek Kumar Singh, Rajesh Pathak, Prema Kumari Singh, B.B. Singh, Abhrotosh Majumdar, M.P. Jena, Ankur Saigal, Bina Gupta, Gaurav Singh, Tripti Ray, Gopal Singh, Vimla Sinha, R. Gopalakrishnan, Vinay Kumar Sharma,
B	Devanshu Kumar Devesh, H.K. Puri, Priya Puri, V.M. Chauhan, S.K. Puri, Rajiv Agnihotri, Rajesh Kumar, Sanjay Grover, Indra Sawhney, Kamini Jaiswal, K.K. Mani, Ankit Swarup, Lakshmi Raman Singh, Mohan Pandey, Kunal Verma, Ankit Dalela, M.A. Krishna Moorthy, U.A. Rana, Minal Majumdar(for Gagrat & Co.), Prabhat Kumar, Alok Sangwan, Naresh Bakshi, Praveen Kumar, Rajiv Agnihotri, P.N. Puri, P.K. Manohar, Manoranjan Paikaray, Rashmi Khanna, Shailja Sinha, Surya Kant, Sunil Kumar Jain, Ajay K. Bhatia, Aneesh Mittal, Bibek Mohanti, P.K. Basu Majumdar, Jagmohan Sharma, Siddharth Jain, Mark Wright, V.N. Koura, Paramjeet Benipal, Aruna Mathur, Amarjeet Singh Girsra, Vimal Dubey (for Arputham, Aruna & Co.), K.R. Sasiprabhu, Kirti Mishra, Mukti Chowdhary, Shantanu Krishna, Preetika Dwivedi, Anant Prakash, Amit Singh, Rahul Dua, Ananda Sen, K.V. Mohan, Mukta Dutta, Sandeep Narain, Rashmi Virmani (for S. Narain & Co.), Sanjay Grover, K.L. Janjani, Roy Abraham, Seema Jain, Vimlesh Kumar, Himinder Lal, P.J. Sahu, P. Shukla, Radha Shyam Jena, Anil Shrivastav, Sushil Kumar Jain, Mr. Tarun Johri, Vijay Kumar, Pankaj Kumar, Vishwajit Singh, Ravinder Narain, Sonu Bhatnagar, Ajay Aggarwal, Kanika Gomber, Mallika Joshi, Rajeshwari Shukla, Rajan Narain, Manoj Kumar Das, Sibho Sankar Mishra, R. Nedumaran, Soumik Ghosal, Shirin Khajuria, Kamakshi S. Mehlwal, Harkesh Chand Aggarwal, B. Vijayalakshmi Menon, Sujata Kurdukar, Harikesh Singh, Kamal Mohan Gupta, S. Nanda Kumar, Jaimon Andrews, Achin Goel, Satish Kumar, Anjali Chauhan, V.N. Raghupathy, Vinoo Bhagat, Ashok Mathur, Dayan Krishnan, Gautam Narayan, Nikhil Nayyar, Nikhil Menon, T.V.S. Raghavendra Sreyas, Romy Chacko, Navneet, (for Corporate Law Group,), Jatinder Kumar Bhatia, Kamalendra Mishra, Kavin Gulati, Rasmi Singh, T. Mahipal, P.V. Dinesh, P.V. Vinod, P.

A Rajesh, T.P. Sindhu, Sacchin Puri, Kaadambari Puri, Abhish Kumar, Shourjyo Mukherjee, T.V. George, Umesh Kumar Khaitan, Sanjeev K. Kapoor, Snehal Kakrania, Avinash Menon, Vishal Gupta, Prateek Jalan, Gopal Krishna Jain, Mihir Kumar, Ajay Bhargava, Vanita Bhargava, Abhijeet Swaroop, Susmit Pushkar (for Khaitan & Co.), Alok Yadav, M.P. Devanath, B Manish Kumar Saran, Ginny J. Rautray, Dhamendra Rautray, Kanchan Kaur Dhodi, S.P. Singh Chauhan, Balaji Srinivasan, Madhusmita Bora, K.K. Lahiri, Puneet Bali, Rohit Sharma, Gaurav Kejriwal, Devashish Bharuka, Devanshu Kumar Devesh, Milind Kumar, Vinay Kumar Sharma, Aarohi Bhalla, C A.M. Prasad, Gunnam Venkateswara Rao, Kapil Mishra, Manoj Kumar Dwivedi, Vandana Mishra, Ashutosh Sharma, Gopal S. Narayanan, Pankaj Bhagat, Dr. Sushil Balwada, Sukumar Pattjoshi, Sudarsh Menon, Akshat Shrivastava, P.P. Singh, Inderjeet Yadav, Anup Jain, Vinay Jain, Dinesh Kumar Garg, S.P. Singh Chauhan, Nikhil Jain, Rakesh Dahiya, Vikram Singh Gulia, Pawan Upadhyay, Santosh Mishra, Param Mishra, Sharmila Upadhyay, Parmanand Pandey, Kamal Mohan Gupta, Amlan Kumar Ghosh, Baby Krishnan, R. Sathish, Aruneshwar Gupta, Nikhil Nayyar, T.V.S. Raghavendra Sreyas, C. Mukund, E P.V. Saravana Raja, Bijoy Kumar Jain, Ranjith K.C., S. Udaya Kumar Sagar, Bina Madhavan(for Lawyer's Knit & Co.), Sanjay Grover, Sonali Jaitley, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma, M.P. Jena, Ankur Saigal, Bina Gupta, Gaurav Singh, Tripti Ray, B. Krishna Prasad, B.Y. Kulkarni, Abhimanyu Mahajan, Shally Bhasin Maheshwari, Anne Mathew, Rishi Maheshwari, C.N. Sree Kumar, E.C. Agrawala, Mahesh Agarwal, Rishi Agrawala, Gaurav Goel, Radhika Gautam, D. Durga Devi, Lakshmi Raman Singh, E.M.S. Anam, Ejaz Maqbool, Gopal Singh, Vimla Sinha, Manish Kumar, H.K. Puri, Priya Puri, V.M. Chauhan, S.K. Puri, Janaranjan Das, G Swetaketu Mishra, P.P. Nayak, Malini Poduval, Ruby Singh Ahuja, Manu Aggarwal, Vedanta Varma, R.N. Karanjawala, Manik Karanjawala, for Karanjawala & Co., M.K. Dua, U.A. Rana, Mrinal(for Gagrat & Co.), Praveen Kumar, Rajiv Agrihotri, Prem Sunder Jha, Sushil Kumar Jain, Sushma Suri, H

A Sunil Kumar Jain, Ajay K. Bhatia, Aneesh Mittal, Bibek A Mohanti, P.K. Basu Majumdar, Jagmohan Sharma, Siddharth Jain, Anurag Dubey, Meenesh Dubey, Anu Sawhney, S.R. Setia, Shrish Kumar Misra, T.G. Narayanan Nair, Prabha Swami, Deba Prasad Mukherjee, R.V. Kameshwaran, Y. B Prabhakara Rao, V.N. Koura, Paramjeet Benipal, Aruna Mathur, Amarjeet Singh Girsra(for Arputham, Aruna & Co.), Puneet Bali, Rohit Sharma, Wills Mathews, D.K. Tiwari, M.K. Michael, Anurag Singh, Shakil Ahmed Syed, S. Janani, Shiv Kumar Suri, M.P. Vinod, Ajay K. Jain, Deepak Prakash, Vijay Pratap Singh, K.S. Rana, B.S. Banthia, B.K. Satija, Roy Abraham, Seema Jain, Vimlesh Kumar, Himinder Lal, Ramesh Babu M.R., P.K. Sahu, P. Shukla, Radha Shyam Jena, Rajiv Tyagi, Chanchal Biswal, Prashant Kumar, L.K. Bhushan, Swati Malik, Rahul Prasanna Dave, Sanjay R. Hegde, A. Rohen Singh, Ramesh K. Mishra, Ramesh S. Jadhav, Vikrant Yadav, D Sanjay Kapur, Vijay Nayar, Rajit Jonaja, Subramonium Prasad, Jay Kishor Singh, Ajay Jain, D.P. Singh, Alka Agrawal, Mr Vinay Kumar Garg, Ex-parte, A. Raghunath, Manoj Kumar Das, Sibo Sankar Mishra, Ravinder Narain, Sonu Bhatnagar, Ajay Aggarwal, Meenakshi Grover, Kamaldeep Dayal, Rahul Chugh, E Raghav Shankar, Kanika Gomber, Mallika Joshi, Rajeshwari Shukla, Rajan Narain, C. Mukund, S. Sukumaran, Anand Sukumaran, Bhupesh Kumar Pathak, Meera Mathur, Azeem H. Laskar, Sachin Das, Abhijit Sengupta, B.V. Deepak(for T.T.K. Deepak & Co.), Kaushik Poddar, Sanjay Jain, Abratosh F Majumdar, R.M. Patnaik, V.K. Sidharthan, Vijay Kumar, Sharad Kapoor, Jagjit Singh Chhabra, Samar Vijay Singh, Jaswant Persoya, Dileep Tandon, R.B. Phookan, Shailesh Madiyal, Neha Pookan, Jagjit Singh Chhabra, Hrishikesh Baruah, Nishant Das, Devashish Baruah, M.L. Gope, Romy Chacko, G C.K. Sasi, Ng. J.R. Luwang, Naveet(for Corporate Law Group.), K. Rajeev, Kavin Gulati, Rashmi Singh, T. Mahipal, S. Thananjayan, Srikala Gurukrishna Kumar, Sanjay Sen, Rana S. Biswas, Achintya Dwivedi, Mridul Chakraborty, Sharmila Upadhyay, Senthil Jagadeesan, T.V. George, Rupesh Kumar, H Gaurav Agrawal, Pawan Shree Agarwal, M.P. Devanath,

A Kanchan Kaur Dhodi, Puneet Bali, Rohit Sharma, Gaurav Kejriwal, Devanshu Kumar Devesh, Milind Kumar, Jogy Scaria, Kaushik Poddar, Tapesh Kumar Singh, Kaushik Poddar, Samir Ali Khan, Prem Prakash, Parijat Sinha, Reshmi Rea Sinha, Vikram Ganguly, Manish K. Bishnoi, Sanjai K. Pathak, Partha Sil, Ghanshyam Joshi, Somiran Sharma, Chiraranjan Addey, V.K. Monga, Raghenth Basant, Liz Mathew, M.T. George, Punit Dutt Tyagi, C.D. Mullherkar, Anupam Singh, Y. Raja Gopal Rao, Dr. I.B. Gaur, Punam Kumari, Kiran Suri, Shibashish Misra, Rajiv Sankar Roy, Pranab Kumar Mullick, Manjula Gupta, Prashant Jha, Satya Mitra Garg, Sanjeeb Panigrahi, Siddhartha Chowdhury, C.D. Singh, Sunny Choudhary, Purshottam S.T., Utsav Sidhu, Sampri Phukan, Filza Moonis, Shoumik Ghoshal, Aditya Singh, Shashank Singh, K. Ramesh, Dr. Indra Pratap Singh, Rajesh Prasad Singh, Nisha Bagchi, Anupam Srivastava, B. Sunita Rao, Jayant Kumar Mehta, Kunal Verma, Anup Jain, Vinay Jain, V. Madhukar, Rajeev Sharma, D. Durga Devi, Vikas Mehta, S.K. Sabharwal, Niraj Sharma, Jai Prakash Pandey, Bishwajeet Dubey, Ambuj Agrawal(for Suresh A. Shroff & Co.), P.V. Yogeswaran, Ratan K. Singh, Nikhilesh Krishnan, Mayank K. Wadhwa, Rauf Rahim, Prabhat Chaurasia, Sacchin Puri, Kaadambari Puri, Neeraj Dubey, Rameshwar Prasad Goyal, Vipin Kumar Jai, Arvind Minocha, A.V. Rangam, Buddy A. Ranganadhan, Sanand Ramakrishnan, Rajeev Mishra, Parmanand Pandey, Aniruddha P. Mayee, Nilkanta Nayak, Rucha A. Mayee, Soumik Ghoshal, Ashwarya Sinha, Shwetabh Sinha, Ambhoj Kumar Sinha, Atul Jha, D.K. Sinha, K.V. Bharathi Upadhyaya, Dr. S.K. Verma, Kunal Verma, Anup Jain, Vinay Jain, Rakhi Ray, Kumud Lata Das, A.S. Bhasme, Brajesh Pandey, Arun Kumar Beriwal, Kunal Verma, Anup Jain, Vinay Jain, Manali Singhal, Abhijat P. Medh, Ruchi Sharma, Kshatrshal Raj, Santosh Sachin, Ajay Choudhary, Ashish Wad(for J.S. Wad & Co.), (for Temple Law Firm.), Asha G. Nair, Ashish Gopal Garg, Shweta Garg, S. Ravi Shankar, Subhalakshmi V.B., Yamunah Nachiar, Ratan K. Singh, Nikhilesh Krishnan, Mayank K. Wadhwa, Rauf Rahim, Prabhat Chaurasia, P.N. Puri, R. Chandrachud, Sunil Roy, Dr. M.V.K.

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A Moorthy, Anisetty Chandramohan, T. Anamika, Ranjana Roy, Abhishek Rao, Sandeep Goyal, Sushma Sharma, Ravindra Bana, Amit Pawan, Vikash Verma, G.N. Reddy, Anitha Shenoy, Manoj Goel, Shuvodeep Roy, Jaiyesh Bakshi for the appearing parties.

B The following order of the Court was delivered by

ORDER

C On 18th December, 2008, when some of the cases in the present batch came for hearing before a Division Bench of this Court to which one of us, Kapadia, J., was a party, the Division Bench of this Court found that some of the High Courts before which the State Entry Tax stood challenged had taken the view that clause (a) and clause (b) of Article 304 of the Constitution of India are independent of each other and that if the impugned law stood saved under Article 304(a) then it need not be tested with reference to clause (b) for determining its validity. Accordingly, on that date, the Division Bench of this Court referred to the Constitution Bench 10 questions, the most important of which being - whether the State enactments relating to levy of entry tax have to be tested with reference to both Article 304(a) and Article 304(b) of the Constitution and whether Article 304(a) is conjunctive with or separate from Article 304(b)? Consequently, the matter stood referred to the Constitution Bench of this Court.

F Accordingly, on 16th March, 2010, the entire batch of cases came for hearing before the Constitution Bench in which the lead matter is *Jindal Stainless Ltd. & Anr. v. State of Haryana & Ors.* When the hearing commenced before the Constitution Bench, we found that the assesseees (original petitioners in the High Courts) are heavily relying upon the tests propounded by a 5-Judge Bench of this Court in *Atiabari Tea Co. Ltd. v. The State of Assam and Ors.*, (1961) 1 SCR 809, which tests subject to the clarification, stood reiterated in the subsequent judgment delivered by a larger Bench of this Court

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A in the case of *The Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan and Ors.*, (1963) 1 SCR 491. In fact, it may be stated that the Constitution Bench of this Court delivered the judgment in *Atiabari Tea Co. Ltd.* (supra) on 26th September, 1960. Soon thereafter, on 4th April, 1961, after hearing arguments in full, a 5-Judge Bench of this Court came to the conclusion that the matter needs to be referred to a larger Bench. In the circumstances, a 7-Judge Bench of this Court decided the matter in *Automobile Transport (Rajasthan) Ltd.* (supra) on 9th April, 1962 reiterating the tests laid down in *Atiabari's* case (supra) subject to one clarification.

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The question, therefore, which we need to answer, in the first instance, before going into the validity of each of the State Laws impugned before us is - Whether after 49 years, this Court should revisit the tests propounded in the earlier decisions in the case of *Atiabari Tea Co. Ltd. and Automobile Transport (Rajasthan) Ltd.* (supra)? At this stage, it may be mentioned that the States whose Entry Tax Laws have been challenged have contended before us that the tests propounded in *Atiabari Tea Co. Ltd. and Automobile Transport (Rajasthan) Ltd.* (supra) have failed to strike a balance between the "freedom of trade and commerce" under Article 301 of the Constitution and the States' authority to levy taxes under Articles 245 and 246 of the Constitution read with the appropriate Legislative Entries in the Seventh Schedule to the Constitution of India. The states, therefore, sought revisiting of the aforesaid two decisions in *Atiabari Tea Co. Ltd. and Automobile Transport (Rajasthan) Ltd.* (supra) by a larger Bench.

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In *Keshav Mills Co. Ltd. v. Commissioner of Income-tax, Bombay North*, (1965) 2 SCR 908 at p. 921, a Constitution Bench of this Court enacted circumstances in which a reference to the larger Bench would lie. It was held that in revisiting and revising its earlier decision, this Court should ask itself whether in the interest of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision

A should be revised? Whether on the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision bearing on the point not noticed? What was the impact of the error in the previous decision on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? According to the judgment in *Keshav Mills* case these and other relevant considerations must be born in mind whenever this Court is called upon to exercise its jurisdiction to review and revisit its earlier decisions. Of course, in *Keshav Mills* case a caution was sounded to the effect that frequent exercise of this Court of its power to revisit its earlier decisions may incidentally tend to make the law uncertain and introduce confusion which must be avoided. But, that is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error. In conclusion, in *Keshav Mills* case, this Court observed that it is not possible to lay down any principles which should govern the approach of the Court in dealing with the question of revisiting its earlier decision. It would ultimately depend upon several relevant considerations.

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In the case of *Central Board of Dawoodi Bohra Community and Anr. v. State of Maharashtra and Anr.*, (2005) 2 SCC 673, a Constitution Bench of this Court observed that, in case of doubt, a smaller Bench can invite attention of Chief Justice and request for the matter being placed for hearing before a Bench larger than the one whose decision is being doubted.

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Applying the tests laid down in the aforesaid two cases, i.e., *Keshav Mills Co. Ltd. and Central Board of Dawoodi Bohra Community* (supra), we find that on number of aspects a larger Bench of this Court needs to revisit the interpretation

A of Part XIII of the Constitution including the various tests propounded in the judgments of the Constitution Bench of this Court in the aforesaid two cases, namely, *Atiabari Tea Co. and Automobile Transport (Rajasthan) Ltd.* (supra). Some of these aspects which need consideration by larger Bench of this Court may be briefly enumerated. Interplay/interrelationship between Article 304(a) and Article 304(b). The significance of the word "and" between Article 304(a) and 304(b). The significance of the non obstante clause in Article 304. The balancing of freedom of trade and commerce in Article 301 vis-a-vis the States' authority to levy taxes under Article 245 and Article 246 of the Constitution read with the appropriate legislative Entries in the Seventh Schedule, particularly in the context of movement of trade and commerce. Whether Article 304(a) and Article 304(b) deal with different subjects? Whether the impugned taxation law to be valid under Article 304(a) must also fulfil the conditions mentioned in Article 304(b), including Presidential assent? Whether the word "restrictions" in Article 302 and in Article 304(b) includes tax laws? Whether validity of a law impugned as violative of Article 301 should be judged only in the light of the test of non-discrimination? Does Article 303 circumscribe Article 301? Whether "internal goods" would come under Article 304(b) and "external goods" under Article 304(a)? Whether "per se test" propounded in *Atiabari's* case (supra) should or should not be rejected? Whether tax simpliciter constitutes a restriction under Part XIII of the Constitution? Whether the word "restriction" in Article 304(b) includes tax laws? Is taxation justiciable? Whether the "working test" laid down in *Atiabari* makes a tax law per se violative of Article 301? Inter-relationship between Article 19(1)(g) and Article 301 of the Constitution? These are some of the questions which warrant reconsideration of the judgments in *Atiabari Tea Co. Ltd and Automobile Transport (Rajasthan) Ltd.* (supra) by a larger Bench of this Court.

In conclusion, we may also mention that though the judgments in *Atiabari Tea Co. Ltd. and Automobile Transport*

A (*Rajasthan) Ltd.* (supra) came to be delivered 49 years ago, a doubt was expressed about the tests laid down in those two judgments even in the year 1975 in the case of *G.K. Krishnan and Ors. v. State of Tamil Nadu and Ors.*, (1975) 1 SCC 375 by Mathew, J., vide para 27, which reads as under:

B "Whether the restrictions visualized by Article 304(b) would include the levy of a non-discriminatory tax is a matter on which there is scope for difference of opinion. Article 304(a) prohibits only imposition of a discriminatory tax. It is not clear from the article that a tax simpliciter can be treated as a restriction on the freedom of internal trade. Article 304(a) is intended to prevent discrimination against imported goods by imposing on them tax at a higher rate than that borne by goods produced in the State. A discriminatory tax against outside goods is not a tax simpliciter but is a barrier to trade and commerce. Article 304 itself makes a distinction between tax and restriction. That apart, taxing powers of the Union and States are separate and mutually exclusive. It is rather strange that power to tax given to States, say, for instance, under Entry 54 of List II to pass a law imposing tax on sale of goods should depend upon the goodwill of the Union Executive." (emphasis supplied)

F For the aforesaid reasons, let this batch of cases be put before Hon'ble Chief Justice of India for constituting a suitable larger Bench for reconsideration of the judgments of this Court in *Atiabari Tea Co. and Automobile Transport (Rajasthan) Ltd.* (supra).

R.P. Referred to Layer Bench.

RAM BABU
v.
STATE OF U.P.
(Criminal Appeal No. 475 of 2008)

APRIL 19, 2010

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

Evidence Act, 1872 – s. 9 – Test identification parade – Relevance of – Held: Identification parade belongs to investigation stage – Its purpose is to test and strengthen trustworthiness of the substantive evidence of a witness in court – Evidence with regard to test identification parade may be used by court for the purpose of corroboration, if adequate precautions are ensured – On facts, accused committed offence of dacoity – Conviction u/s. 395 IPC and sentence of five years rigorous imprisonment by courts below, on basis of identification does not call for interference – Identification of accused established by substantive evidence duly corroborated by test identification parade – Test identification parade does not suffer from any undue and unexplained delay – Grounds on which two accused were given benefit of doubt does not affect the test identification parade or credibility of evidence of prosecution witnesses in the court– Penal Code, 1860 – s. 395.

It is alleged that the appellants and others armed with weapons committed dacoity in a temple and caused injuries to two sadhus. PW-1, PW-2, PW-3 and PW-9-inmates of the temple along with other sadhus were present at the time of the incident. PW 1-mahant lodged an FIR. The investigating officer arrested the accused persons on different dates. Thereafter, the test identification parade was held under the supervision of PW-14-magistrate. Three prosecution witnesses were examined to prove the arrest of the accused. A-1, A-2, A-

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A 4 and A-5 were convicted for the offence u/s. 395 IPC and sentenced to five years rigorous imprisonment. A-3 and A-6 were acquitted. Hence the present appeal.

Dismissing the appeals, the Court

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HELD: 1. As per s. 9 of the Evidence Act, 1872, facts which establish the identity of an accused are relevant. Identification parade belongs to investigation stage and if adequate precautions are ensured, the evidence with regard to test identification parade may be used by the court for the purpose of corroboration. The purpose of test identification parade is to test and strengthen trustworthiness of the substantive evidence of a witness in court. It is for this reason that test identification parade is held under the supervision of a magistrate to eliminate any suspicion or unfairness and to reduce the chances of testimonial error as magistrate is expected to take all possible precautions. [Para 10] [778-F-H; 779-A]

2.1. In the instant case, PW-14 supervised the test identification parade held in District Jail, Mathura on June 4, 1980. He proved identification memos in his deposition. He deposed that all possible precautions were taken in conduct of the test identification parade held on that date. As a matter of fact, there is no challenge to his testimony. Regarding the substantive evidence, all the three appellants-A-2, A-4 and A-5 were identified by PW-3 and PW-9 in the Court. A-2 and A-4 were also identified by PW-2 in the Court. Being inmates, their presence in the temple at the time of incident was natural. All of them were having their food in the chowk at that time. There was sufficient light for enabling them to identify the dacoits is also established. Besides bulbs and tube lights, according to these witnesses, the light was also available from two gas petromaxes. Pertinently, the appellants did not contest the finding recorded by the trial court as well as the High Court in this regard. [Para 11] [779-D-H]

2.2. The prosecution also examined large number of witnesses to adduce link evidence to the effect that right from the arrest of the accused persons till being lodged in jail, the faces of the suspects were kept veiled and nowhere was the opportunity to see them. The trial court gave benefit of doubt to A-3 as the prosecution failed to furnish any explanation as to why he could not be confined in jail or presented before a Magistrate on the day of arrest itself, i.e. April 30, 1980. The trial court found that, although A-3 was arrested on April 30, 1980 at about 6.15 a.m. but he was produced before the Court on the next day despite the fact that Magistrate was available hardly 8 kilometers away. As regards A-6, the trial court was not convinced about the date, time and place of his arrest. The trial court held that from the evidence on record, possibility of his arrest at earlier point of time and at some other place cannot be excluded. The grounds on which A-3 and A-6 were given benefit of doubt does not, in any manner, affect the credibility of the evidence of PW-2, PW-3 and PW-9 in the Court or the test identification parade insofar as A-2, A-4 and A-5 are concerned. These witnesses have identified the appellants not only in test identification parade but also in the Court. The identification of the appellants, thus, is established by substantive evidence duly corroborated by test identification parade. [Para 11] [779-E-H; 780-A-C]

2.3. It cannot be said that as the test identification parade was held belatedly and delay has not been explained sufficiently, the identification of the appellants is rendered doubtful. It is true that A-2 was arrested on April 30, 1980; A-5 on May 6, 1980; and A-4 on May 29, 1980 while the test identification parade was held on June 4, 1980 but the explanation that has been put forth by the prosecution for this delay is that the suspects (9 in number) including the appellants were arrested on different dates and the last of such arrest being of A-4 on

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A May 29, 1980, the test identification parade was held only thereafter. In the facts and circumstances of the case, explanation is acceptable and it cannot be said that test identification parade held on June 4, 1980 suffers from any undue and unexplained delay. [Para 12] [780-D-F]

B 2.4. Ordinarily, this Court does not enter into an elaborate examination of the evidence in a case where the High Court has concurred with the findings of fact recorded by the trial court. There is nothing exceptional in the instant case that may justify departure from this rule. However, on considering the evidence referred to by the appellants, the conclusion recorded by the trial court and confirmed by the High Court does not suffer from any factual or legal infirmity, or was one which could not reasonably be arrived at by those Courts. [Para 13] [780-G-H; 781-A]

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F 2.5. It is not impressing that the incident is of 1980 and the appellants have already undergone half the sentence and their sentence be reduced to already undergone. Dacoity is a daredevil act. Most of the time, a serious crime like dacoity is committed by unknown persons and it is very difficult to trace them and still difficult to secure their conviction. As a matter of fact, looking to the nature of crime and the manner in which the appellants looted temple properties, graver punishment was warranted. In any case, sentence of five years rigorous imprisonment awarded by the trial court and confirmed in appeal by the High Court for the offence u/s. 395 IPC calls for no interference. [Para 14] [781-B-D]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 475 of 2008.

H From the Judgment & Order dated 14.9.2007 of the High Court of Judicature at Allahabad in Criminal Appeal No. 512 of 1981.

WITH

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Crl. A.No. 550 of 2008

Ashok Kumar Sharma, Avinash Jain for the Appellant.

Pramod Swarup, Ravinder Kumar Verma, Alaka Singha, Ameet Singh, Anuvrat Sharma for the Respondent.

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The Judgment of the Court was delivered by

R.M. LODHA, J. 1. These two appeals by special leave arise out of trial of the appellants and three others, namely, Saudan Singh (A-3), Sher Singh (A-6) and Mangal Singh (A-1) for the commission of offence punishable under Section 395 of the Indian Penal Code (for short, 'IPC'). They were alleged to have committed dacoity on April 7, 1980 at or about 9.30 p.m. in a temple – Totadhari Math, Gyan Gudari, Vrindavan, District Mathura. The appellants and A-1 were convicted by the 3rd Additional Sessions Judge, Mathura under Section 395 IPC and sentenced to undergo rigorous imprisonment for a term of five years. A-3 and A-6 were acquitted. The appellants and A-1 challenged their conviction by a common appeal to Allahabad High Court. The High Court vide its judgment dated September 14, 2007 dismissed the appeal. It is from this judgment that one appeal has been preferred by Ram Babu (A-5) and the other by Man Singh @ Mani (A-4) and Jagdish Upadhyay (A-2). We are informed that A-1 had died during the pendency of appeal before High Court.

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2. Vrindavan is a holy and revered place having large number of public religious Maths. Totadhari Math (hereinafter referred to as 'temple') is situate in Mohalla Gyan Gudari. Many silver idols adorn this temple. Ornaments and silver utensils for shringar and puja of the deities were used to be kept in the almirah in his room by the Mahant – Vishwast Sen Acharya. The disciples, students and teacher resided in the temple premises. On April 7, 1980 at about 9.30 p.m., the dacoits (15/

A 16 in number) armed with pistols, guns, knives and lathis entered the temple premises. At that time, in the courtyard (Chowk), Ram Ajour Pathak (PW-1), Jagdish Prasad (PW-2), Sudarshan Prasad (PW-3), Udhav Prasad (PW-9), Brijesh Kumar, Kaladhar Dwivedi, Narotam Kumar and three sadhus, namely, Damodar, Ram Prapan and Madhav Prasad were taking food (Prasad). The dacoits asked them to hand over the keys of the temple and the room where silver idols, ornaments and silver utensils etc. were kept but they feigned ignorance as the Mahant was not in the temple. The dacoits then asked them to stay put in a small room. PW-9 escaped from room where he was confined and managed to reach the roof of the temple. The dacoits broke open the room and almirah and looted the ornaments, silver utensils, cash and other articles like clocks, clothes, etc. They also looted idols made of Astadhatu and silver. After looting the properties, the dacoits ran away towards river Yamuna. Before leaving, the dacoits also caused injuries to Madhav Das and Damodar Das by the butt of the gun. As soon as Mahant reached the temple, PW-1 went to the police station and lodged the first information report at about 10.15 p.m. in the same night against unknown persons.

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3. Kashi Ram – a Sub Inspector commenced investigation immediately thereafter. He visited the place of occurrence and prepared site plan. Madhav Das and Damodar Das who were injured by the dacoits were medically examined on April 8, 1980 at the Government Hospital, Vrindavan. During the course of investigation, the Investigating Officer arrested number of dacoits. On April 29, 1980, A-1 was arrested at 4.30 p.m. On April 30, 1980, A-3 and A-2 were arrested at 6.15 a.m. and 9.00 a.m. respectively. On May 1, 1980, A-6 was arrested at 12.30 p.m. while on May 6, 1980, A-5 was arrested at 2.00 p.m. On May 29, 1980, accused A-4 was arrested at 5.30 p.m. Besides them, three more persons namely, Biro, Chandar and Sundar were also arrested by the Investigating Officer. On June 4, 1980, the test identification parade was held under the supervision of L.P. Gupta (PW-14). Based on the result of the

A identification and the statements recorded under Section 161 of Criminal Procedure Code, a charge-sheet was filed against 7 persons including the present appellants. Biro (A-7) was discharged by the trial judge on August 30, 1980.

B 4. The prosecution examined as many as 35 witnesses. PW-1, PW-2, PW-3 and PW-9 are inmates of the temple and were present at the time of incident. PW-14 is the Special Executive Magistrate under whose supervision test identification parade was conducted. Munna Prasad Srivast (PW-15), Ramesh Chandra (PW-18) and Maharaj Singh (PW-19) were examined to prove the arrest of the accused persons. C Jaipal Singh (PW-10) is the Investigating Officer who conducted investigation after transfer of Sub-Inspector Kashi Ram. Quite a few police constables were examined by way of link evidence to prove that right from the arrest till being lodged in jail, the faces of the suspects were kept veiled and nowhere was the opportunity to see them. D

E 5. The statements of the accused were recorded under Section 313 of Criminal Procedure Code. The accused also produced four witnesses Jagdish Swarup (DW-1), Tejbir Singh Tyagi (DW-2), Purushottam (DW-3) and V.D. Gupta (DW-4) in support of their defence that their identity did not remain secret and they have been falsely implicated.

F 6. The trial court held that guilt of A-1, A-2, A-4 and A-5 for the offence under Section 395 IPC was proved beyond reasonable doubt. The benefit of doubt was given to A-3 and A-6.

G 7. Mr. Ashok Kumar Sharma, learned counsel for the appellants vehemently contended that the evidence against the appellants and A-3 and A-6 who have been acquitted and A-7 who was discharged is identical and if based on that evidence, the identification of A-3 and A-6 was held not established, the said evidence is liable to be rejected in respect of the appellants as well. He would also contend that the test H

A identification parade was held belatedly and delay having not been explained sufficiently, the identification was doubtful and conviction improper. Lastly, learned counsel submitted that the incident took place 30 years back and half the sentence has already been undergone by the appellants and, therefore, B interest of justice would be sub-served if the sentence awarded to the appellants is reduced to already undergone.

C 8. Mr. Pramod Swarup, learned senior counsel for the State supported the judgment of the High Court and submitted that the conviction of the appellants based on identification does not suffer from any legal infirmity warranting interference by this Court.

9. Section 9 of the Evidence Act, 1872 reads:

D “S. 9. *Facts necessary to explain or introduce relevant facts.*—Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.” E

F 10. As per Section 9 of the Evidence Act, facts which establish the identity of an accused are relevant. Identification parade belongs to investigation stage and if adequate precautions are ensured, the evidence with regard to test identification parade may be used by the court for the purpose of corroboration. The purpose of test identification parade is to test and strengthen trustworthiness of the substantive evidence of a witness in court. It is for this reason that test identification parade is held under the supervision of a magistrate to eliminate any suspicion or unfairness and to

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reduce the chances of testimonial error as magistrate is expected to take all possible precautions. A

11. In the present case, PW-14 supervised the test identification parade held in District Jail, Mathura on June 4, 1980. He proved identification memos in his deposition. He B
deposed that all possible precautions were taken in conduct of the test identification parade held on that date. As a matter of fact, there is no challenge to his testimony. Insofar as C
substantive evidence is concerned, all the three appellants (A-2, A-4 and A-5) have been identified by PW-3 and PW-9 in the Court. A-2 and A-4 were also identified by PW-2 in the Court. Being inmates, their presence in the temple at the time of incident was natural. All of them were having their food in the chowk at that time. That there was sufficient light for enabling them to identify the dacoits is also established. Besides bulbs and tube lights, according to these witnesses, the light was also D
available from two gas petromaxes. Pertinently, learned counsel for the appellants did not contest the finding recorded by the trial court as well as the High Court in this regard. The prosecution also examined large number of witnesses to adduce link evidence to the effect that right from the arrest of the accused persons till being lodged in jail, the faces of the suspects were kept veiled and nowhere was the opportunity to see them. The learned counsel for the appellants, however, contended that the evidence against the appellants and A-3, A-6 and A-7 was identical and based on that evidence A-3 and F
A-6 were acquitted and A-7 was discharged and on the same evidence, appellants could not have been legally convicted. Insofar as A-3 is concerned, the trial court gave him benefit of doubt as the prosecution failed to furnish any explanation as to why he could not be confined in jail or presented before a Magistrate on the day of arrest itself, i.e. April 30, 1980. The trial court found that, although A-3 was arrested on April 30, 1980 at about 6.15 a.m. but he was produced before the Court on the next day despite the fact that Magistrate was available hardly 8 kilometers away. As regards A-6, the trial court was H

A not convinced about the date, time and place of his arrest. The trial court held that from the evidence on record, possibility of his arrest at earlier point of time and at some other place cannot be excluded. We are afraid the grounds on which A-3 and A-6 were given benefit of doubt do not, in any manner, affect the credibility of the evidence of PW-2, PW-3 and PW-9 in the Court or the test identification parade insofar as A-2, A-4 and A-5 are concerned. These witnesses have identified the appellants not only in test identification parade but also in the Court. The identification of the appellants, thus, is established by substantive evidence duly corroborated by test identification parade. C

12. We may also consider the contention of the learned counsel for the appellants that as the test identification parade was held belatedly and delay has not been explained sufficiently, the identification of the appellants is rendered doubtful. It is true that A-2 was arrested on April 30, 1980; A-5 on May 6, 1980; and A-4 on May 29, 1980 while the test identification parade was held on June 4, 1980 but the explanation that has been put forth by the prosecution for this delay is that the suspects (9 in number) including the appellants were arrested on different dates and the last of such arrest being of A-4 on May 29, 1980, the test identification parade was held only thereafter. In our view, in the facts and circumstances of the case explanation is acceptable and it cannot be said that test identification parade held on June 4, 1980 suffers from any undue and unexplained delay. F

13. Learned counsel for the appellants took us through the evidence of all the important witnesses. Ordinarily, this Court does not enter into an elaborate examination of the evidence in a case where the High Court has concurred with the findings of fact recorded by the trial court. There is nothing exceptional in the present case that may justify departure from this rule. However, we considered the evidence referred to by learned counsel for the appellants and we do not think that the H

conclusion recorded by the trial court and confirmed by the High Court suffers from any factual or legal infirmity, or was one which could not reasonably be arrived at by those Courts.

14. It was submitted by learned counsel for the appellants that the incident is of 1980 and the appellants have already undergone half the sentence and their sentence be reduced to already undergone. We are not impressed by this submission. Dacoity is a daredevil act. Most of the time, a serious crime like dacoity is committed by unknown persons and it is very difficult to trace them and still difficult to secure their conviction. As a matter of fact, looking to the nature of crime and the manner in which the appellants looted temple properties, graver punishment was warranted. In any case, sentence of five years rigorous imprisonment awarded by the trial court and confirmed in appeal by the High Court for the offence under Section 395 IPC calls for no interference.

15. Both appeals fail and are dismissed.

N.J. Appeals dismissed.

A SAU. LAXMI VERMA
v.
STATE OF MAHARASHTRA AND ORS.
(Civil Appeal Nos. 3411-3412 of 2010)

B APRIL 19, 2010

[P. SATHASIVAM AND DEEPAK VERMA, JJ.]

Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965: s.41(2) – Resignation by Councillor – Procedure – Held: Resignation is to be delivered in person and signed before the Collector – Mere putting initials at certain places scored out in the resignation letter before the Collector would not amount to putting the signatures before the Collector himself – The provision is D mandatory in nature and must be complied in letter and spirit – Election laws.

Respondent 6 was an elected Councillor of Municipal Council. Few days after the elections, he tendered his resignation to the Collector which was duly accepted by the Collector. Thereafter, the Collector proceeded to arrange for fresh elections. Meanwhile, respondent 6 filed revision application before the Additional Commissioner stating that he had in fact not resigned in accordance with law and there was complete violation of sub-section (2) of Section 41 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 and therefore the resignation tendered by him should be held as invalid and inoperative. Meanwhile election programme was announced which specifically mentioned that the election was subject to the decision of pending revision application. Elections were again held and appellant was elected as Councillor and subsequently she was also elected as President of Municipal Council and continued as such. Additional Commissioner allowed

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the revision application of respondent no.6 thereby restoring the status of Municipal Councillor to respondent no.6. Aggrieved appellant filed writ petition, which was dismissed. Hence the appeals.

Dismissing the appeals, the Court

HELD: 1.1. There was no legally valid resignation tendered by Respondent No. 6 and the Collector committed an error in accepting the same as there was not full and complete compliance of the provisions of sub-section (2) of Section 41 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. Section 41(2) of the Act required that a Councillor may resign his office unconditionally at any time by notice in writing in his hand, to be addressed to the Collector. It further required that such resignation was to be delivered in person and signed before the Collector and then only such resignation would be effective. It cannot be disputed that an obligation was created by the Statute to perform it in the manner as provided therein, and in case of its non-compliance, the effect thereof would be rendered redundant and invalid in law. Thus, mere putting initials at certain places scored out before the Collector, would not amount to putting the signatures in the resignation letter before the Collector himself. [Paras 7, 10] [788-C-D; 789-B-C]

1.2. It is true that the Collector admitted that the resignation was typewritten and it was already signed by the Respondent No. 6. On questioning whether it was his own, Respondent No. 6 confirmed that it was his own resignation. Thereafter, Collector took a copy of his resignation back and made corrections in point No. 4 in that resignation and put his initials before him and again handed it over, on which he then put the remark "submitted before me by respondent no. 6". The said statement of the Collector clearly established that in any

A event the same was not signed by Respondent No. 6 in his presence. Thus, it is manifest that there was non-compliance of the provision of Section 41(2) of the Act. The said provision being mandatory in nature should have been complied in letter and spirit. Its non-compliance would automatically lead to irresistible conclusion that the same was not properly and validly accepted resignation of Respondent No. 6 by the Collector. [Para 12] [789-G-H; 790-A-C]

C 1.3. The critical examination of the Photostat copy of the original resignation of Respondent No. 6 makes it abundantly clear that in it certain words were scored out and only at that place, respondent 6 had put his initials, which was already typed resignation, on which he had already put his signature. Thus, there was non-compliance with regard to that part of the Section which required that resignation should be signed in the presence of Collector. [Para 13] [790-A-C]

E *Nazir Ahmad v. King Emperor AIR 1936 Privy Council 253; Rao Shiv Bahadur Singh v. State of V.P. AIR 1954 SC 322; Deep Chand v. State of Rajasthan AIR 1961 SC 1527; Ramachandra Keshav Adke v. Govind Joti Chavare (1975) 1 SCC 559; Union of India v. Gopal Chandra Mishra (1978) 2 SCC 301, referred to.*

F 2. No doubt, it is true that equity swings in favour of the appellant but the law applicable to the facts of the case is certainly against her. Apart from this, it is also to be recalled that fresh elections were held only subject to ultimate result of the Revision Petition filed by Respondent No. 6. Thus, Appellant was fully aware that her fate would ultimately depend on the result of the litigation, which ultimately is decided against her. Thus, looking to the matter from all angles and keeping in mind, strict adherence to the provisions of the Act, there was no valid, proper and legal resignation tendered by

Respondent No. 6 in as much as admittedly, the said resignation dated 29.12.2008 was not signed by Respondent No. 6. [Paras 19, 21, 22] [792-F-H]

Case Law Reference:

AIR 1936 Privy Council 253 referred to Para 17 B

AIR 1954 SC 322 referred to Para 17

AIR 1961 SC 1527 referred to Para 17

(1975) 1 SCC 559 referred to Para 17 C

(1978) 2 SCC 301 referred to Para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3411-3412 of 2010.

From the Judgment & Order dated 6.8.2009 and 26.8.2009 of the High Court of Judicature at Bombay, Nagpur Bench in Wirt Petition No. 3167 of 2009 and LPA No. 349 of 2009 in W.P. No. 3167 of 2009.

Harish N. Salve, Gangan Sanghi, Rameshwar Prasad Goyal for the Appellant.

Vinod A. Bobde, Anil S. Kilor, Satyajit A. Desai, Shushil Karanjkar, Sanjay Kharde, Asha Gopalan Nair, Anagha S. Desai, Vijay Kumar, Makarand D. Adkar, Vishwajit Singh, Arun R. Pednekar, V.N. Raghupathy for the Respondents.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted. Arguments heard.

2. Even though a short but important and crisp question of interpretation of Section 41(2) of Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (hereinafter shall be referred to as the 'Act') arises for our consideration in these Appeals. The provision stands as under:

A "SECTION 41

(1) The term of office of the Councillors shall be co-terminus with the duration of the council.

B (2) A Councillor may resign his office unconditionally at any time by notice in writing in his hand addressed to the Collector and delivered in person and sign before the Collector and then only such resignation shall be effective." (emphasis supplied)

C This particular Sub-section (2) of Section 41 is required to be interpreted by us in this and the connected matter.

3. It is pertinent to mention, prior to amendment carried out sometime in 1994, said Section 41 stood as under:-

D "Resignation of Councillors – (1) A Councillor may resign his office by tendering resignation in writing to the President.

E (2)Such resignation shall be effective on its receipt by the President."

But in these Appeals we are not required to consider it.

4. Facts of the case lie in a narrow compass, which are as under:-

F Respondent No. 6, Rupesh Yogeshwar Dhepe was an elected Councillor of Ward No. 8 of Municipal Council, Achalpur, District Amravati. Election was held sometime in the year 2008. On 18.12.2008, Respondent No. 6 wrote a letter to the Collector, threatening to resign, if certain demands made by him were not fulfilled, within a period of ten days. Since the demands were not fulfilled, on 29.12.2008, he, keeping the promise, tendered his resignation. The Collector held that the resignation was valid and accepted it. On his resignation and acceptance thereof, since the seat fell vacant, Collector

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proceeded to arrange for elections of Ward No. 8, from which Respondent No. 6 was earlier elected and election programme commenced.

5. In the meantime, Respondent No. 6 filed a Revision Application before Additional Commissioner stating therein that he had in fact not resigned in accordance with law and there has been complete violation of Sub-section (2) of Section 41 of the Act. Thus, no fresh election should be conducted. But in the meanwhile election programme was already announced. The election programme so announced specifically mentioned that election was subject to the decision of pending proceedings. In the fresh elections, the present Appellant Laxmi Verma was elected as Councillor and subsequently she was also elected as President of Municipal Council and is continuing as such. The Additional Commissioner decided the Revision Application of Respondent No. 6 by order dated 25.02.2009 holding that the Collector had rightly accepted the resignation of Respondent No. 6. This order was challenged by Respondent No. 6 by filing W.P. No. 1550 of 2009, which was partly allowed and the Additional Commissioner was directed to decide the Revision Application afresh after hearing both parties. Thereafter, the Additional Commissioner allowed the Revision Application filed by Respondent No. 6, set aside the order of Collector, whereby his resignation from the post of Councillor of Municipal Council, Achalpur, was accepted, thereby restoring the status of Municipal Councillor to Respondent No. 6.

6. This order was challenged by the Appellant in W.P. No. 3167/2009, decided by learned Single Judge of the High Court of Judicature at Bombay, Nagpur Bench whereby the Appellant's writ petition came to be dismissed. Not being satisfied with the said order of dismissal, Appellant carried L.P.A No. 349 of 2009 before Division Bench of the said Court, but vide order dated 26.8.2009, the said L.P.A also came to be dismissed. In other words, the resignation tendered by

A Respondent No. 6 was held to be invalid, inconsequential and inoperative. Obviously, the election of Appellant, which was subject to the final result of the lis pending before Additional Commissioner stood set aside.

B 7. We have critically gone through the orders passed by learned Single Judge and Division Bench in L.P.A and are of considered opinion that both had dealt with the matter at length and ultimately came to the conclusion that there has not been full and complete compliance of the provisions of sub-section (2) of Section 41 of the Act. Therefore, there was no legally valid resignation tendered by Respondent No. 6 and the Collector committed an error in accepting the same. According to the Appellant, there is no dispute that resignation letter dated 29.12.2008 was signed by Respondent No. 6 and was presented by him before the Collector. It is further not in dispute that he had also put his initials at the places, scored out by him. Therefore, it should be deemed to be substantial compliance of the aforesaid provision. In other words, it has been argued before us that the Collector was fully justified in accepting the resignation of Respondent No. 6, which was tendered in person to him and on being asked to put initials at certain places scored out, he had done so. Therefore, nothing more was required to be done in the matter and it should be construed as if he had delivered the same in person and signed it himself before the Collector, only then the same was accepted.

F 8. On the other hand, learned Senior Counsel appearing for Respondents contended that mere putting initials at the places scored out in the resignation letter would not tantamount to signing it before the Collector which is pre-requisite for acceptance of the resignation, as contemplated under Section 41 (2) of the Act. Therefore, there was no valid resignation tendered by him, consequently, Additional Commissioner, learned Single Judge and Division Bench committed no error while recording a categorical finding against the Appellant.

H 9. In the light of the aforesaid contentions, we have heard

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learned Senior Counsel, Shri H.N. Salve for Appellant and learned Senior Counsel, Shri Vinod A. Bobde for Respondent No. 6 and Others for State of Maharashtra. A

10. Section 41(2) of the Act referred to herein above requires that a Councillor may resign his office unconditionally at any time by notice in writing in his hand, to be addressed to the Collector. It further requires that such resignation has to be delivered in person and signed before the Collector, then only such resignation shall be effective. Thus, mere putting initials at certain places scored out before the Collector, would not amount to putting the signatures in the resignation letter before the Collector himself. B C

11. In this connection, it is necessary to refer to the letter of the Collector, Amravati dated 03.07.2009 to the Secretary, Urban Development Department, Mumbai. Collector had made the following endorsement which reads as thus:- D

“In connection with the subject referred above, it is hereby submitted that Councillor of Achalpur Municipal Council Ward No. 8 Shri Rupesh Yogeshwarrao Dhepe has tendered resignation of his Municipal Council Membership before me on 29.12.2008. The said letter of resignation was typewritten and he had already signed it. On questioning him whether resignation is his own, it was confirmed that it was his own resignation. Later on Shri Dhepe took the copy of his resignation back and made corrections in point No. 4 in that resignation letter and put his initials before me and again handed it over to me and I put remark on that as “submitted before me by Shri Dhepe”. (Emphasis supplied) E F

12. No doubt, it is true that Collector had admitted that resignation was typewritten and it was already signed by the Respondent No. 6. On questioning whether it was his own, Respondent No. 6 confirmed that it was his own resignation. Thereafter, he took a copy of his resignation back and made H

A corrections in point No. 4 in that resignation and put his initials before him and again handed it over, on which he then put the remark “submitted before me by Shri Dhepe”. The aforesaid statement of the Collector clearly establishes that in any event the same was not signed by Respondent No. 6 in his presence.

B Thus, it is manifest that there has been non-compliance of the provision of Section 41(2) of the Act. The said provision being mandatory in nature should have been complied in letter and spirit. Its non-compliance would automatically lead to irresistible conclusion that the same was not properly and validly accepted resignation of Respondent No. 6 by the Collector. C

13. Photostat copy of the original resignation of Respondent No. 6 dated 29.12.2008 has been filed by the Appellant together with its English translation. Critical examination of the same makes it abundantly clear that in it certain words were scored out and only at that place he had put his initials, which was already typed resignation, on which he had already put his signature. Thus, there was non-compliance with regard to that part of the Section which requires that resignation shall be signed in presence of the Collector. D E

14. Shri H.N. Salve, learned Senior Counsel appearing for Appellant strenuously contended before us that purposive interpretation of the aforesaid provision of law would mean that there has been a substantial compliance of Sub-section (2) of Section 41 of the Act, in as much as there was no denial of the fact of submitting resignation by Respondent No. 6, presenting the same by him to the Collector. On being asked by him to put initials at the places scored out by him, which he did, would be deemed to have been signed by him in presence of Collector. It should, thus, be construed that the same was validly accepted by Collector. He has, therefore, contended that Additional Commissioner in his revisional jurisdiction committed grave error in finding fault in acceptance of the resignation of Respondent No. 6 by the Collector. On the same H

analogy the orders passed by learned Single Judge passed in Appellant's Writ Petition and confirmed by Division Bench in appeal have been attacked.

15. It was further contended by him that the test of tendering resignation as contemplated under Sub-section (2) of Section 41 of the Act was satisfied and the resignation having been accepted, there was no question of holding otherwise. He has also placed reliance on the topic of "Express Requirements And Conditions" from 'Administrative Law', Tenth Edition 2009 of H.W.R. Wade & C.F. Forsyth.

16. He has contended that if the conclusion is reached that on a true construction, non-observance of the condition is fatal to the validity of the action, that condition is said to be 'mandatory'. But if the conclusion is reached that non-observance does not lead to invalidity, the condition is said to be 'merely directory'. He has further contended that sometimes the legislation makes it plain what the effect of non-observance is to be. But more often it does not, and then the Court must determine the true import of the legislation. It is a question of construction, to be settled by looking at the whole scheme and purpose of the Act and by weighing the importance of the condition, the prejudice to private rights, and the claims of the public interest.

17. On the other hand, learned Senior Counsel Shri Vinod A. Bobde placed reliance on the following judgments starting from AIR 1936 Privy Council 253 *Nazir Ahmad vs. King Emperor*, AIR 1954 SC 322 *Rao Shiv Bahadur Singh vs. State of V.P.*, AIR 1961 SC 1527 *Deep Chand vs. State of Rajasthan*, (1975) 1 SCC 559 *Ramachandra Keshav Adke vs. Govind Joti Chavare*, (1978) 2 SCC 301 *Union of India vs. Gopal Chandra Mishra*. However, in the light of the clear provision of the Act which is as clear as day light, it is not necessary to deal with the aforesaid judgments individually and in details.

18. However, after going through the aforesaid Sub-section (2) of Section 41 of the Act, the plain and only conclusion that can be arrived at is that resignation has to be tendered by the Councillor addressed to the Collector. It is to be delivered by him in person and then he has to affix his signature before the Collector on compliance of the aforesaid conditions, then only such resignation shall be effective. It cannot be disputed that an obligation was created by the Statute to perform it in the manner as provided therein, then in case of its non-compliance, the effect thereof would be rendered redundant and invalid in law.

19. Collector himself admitted, in no uncertain terms, that letter of resignation was already typed, on which the signature of Respondent No. 6 was already appearing. He went through the same and only asked him to put his initials at the place scored out in the said resignation. Putting of initials at the place where some portion of resignation was deleted, would neither amount nor can be construed to have been signed in presence of the Collector.

20. It would have been entirely different if the Collector would have asked Respondent No. 6 to authenticate and endorse his own signatures in the resignation at the same place where he had already put his signatures, then of course to some extent arguments advanced by Shri H.N. Salve would have made some point.

21. No doubt, it is true that equity swings in favour of the Appellant but the law applicable to the facts of the case is certainly against her. Apart from the above, it is also to be recalled that fresh elections were held only subject to ultimate result of the Revision Petition filed by Respondent No. 6. Thus, Appellant was fully aware that her fate would ultimately depend on the result of the litigation, which ultimately stood decided against her and further has a seal of approval by us.

22. Thus, looking to the matter from all angles and keeping

A in mind, strict adherence to the provisions of the Act, we are
of the opinion that there was no valid, proper and legal
resignation tendered by Respondent No. 6 in as much as
admittedly, the said resignation dated 29.12.2008 was not
signed by Respondent No. 6 in presence of the Collector which
was mandatorily required to be done. No other point was
argued before us. B

23. In the light of this, we are of the considered opinion
that no case has been made out for interference in the matter.
Appeals are dismissed but with no order as to costs. C

D.G. Appeals dismissed.

A ABU THAKIR AND ORS.
v.
STATE REP. BY INSPECTOR OF POLICE, TAMIL NADU
(Criminal Appeal No. 168 of 2008)

B APRIL 19, 2010
**[B. SUDERSHAN REDDY AND SURINDER SINGH
NIJJAR, JJ.]**

C *Penal Code, 1860: s.302 – Conviction under, based on
evidence of eye witnesses – Challenged on the ground that
presence of prosecution witnesses at the place of incident was
doubtful and there was delay in submitting their evidence
recorded under s.161 Cr.P.C. which would make their
statements unacceptable – Held: The presence of eye
D witnesses at the place of incident was well established by
evidence – Investigating officer explained that delay in
sending the s.161 statements was due to two murders in quick
succession within his jurisdiction of which he was incharge to
maintain law and order – The explanation for delay was
E convincing – Thus, conviction was based on proper
appreciation of evidence – No reason to interfere with the
concurrent findings of facts in exercise of jurisdiction under
Article 136 of the Constitution – Constitution of India, 1950 –
Article 136 – Code of Criminal Procedure, 1973 – s.161 –
F Evidence – Testimony of eye-witnesses.*

*Code of Criminal Procedure, 1973: s.161 – Documents
such as original report, the printed form of FIR, inquest report,
statements of witnesses recorded under inquest and under
s.161 – Importance of requirement of sending these
G documents to the Court without any delay and effect of delay
in sending the documents on prosecution case – Discussed.*

*Witness: Witness to a murder – Response or behavioral
pattern of every person in such situation may not be similar.*

Prosecution case was that the deceased was murdered in pursuance of criminal conspiracy hatched by the appellants and other accused persons to wreck vengeance of the murder of one 'SM' which took place two days prior to the incident. On the fateful day, PW-4 informed, PW-1, brother of the deceased that the deceased and some other persons were quarreling nearby. PW-1 rushed to the place near temple where he found the deceased lying on the ground unconscious with bleeding injuries. PW-5 and PW-28 who were returning from the temple, heard the distress noise and went towards the scene and found deceased lying in pool of blood. Deceased was taken to hospital where he was declared dead. The trial court accepted the case of prosecution and believed the evidence of PWs 2 to 4 and based on their evidence, convicted the appellants under Sections 302, 120B, 148, 341, 147, 302 read with Sections 149 and 109 IPC. The High Court however, confirmed the conviction of the appellants only under Section 302, IPC and acquitted them of the rest of the charges and completely acquitted rest of the accused.

In appeal to this Court, it was contended for the appellants that the presence of PW-2, PW-3 and PW-4 at the place of incident was doubtful; and that there was enormous delay in submitting the statements recorded under Section 161 Cr.P.C. to the Court since they were received by the Court after eleven days of recording the statements.

Dismissing the appeal, the Court

HELD: 1. It was in the evidence of PWs 2 to 4 that after witnessing the ghastly incident of attack, they fled away from the scene of offence due to fear. The response, behavioural pattern of individuals in such a situation differs from person to person and it cannot be said that response of every and any human being would

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be similar on such occasions. May be PWs 2 to 4, were reeling under shock and nervousness. They roamed here and there and reached their respective houses only in the evening after 5 p.m. There was no question put in the cross-examination to PW30-Investigating Officer, as to why he did not examine PWs 2, 3 and 4 immediately at the time of inquest or thereafter. The mere fact that they were not examined during the inquest is of no consequence. It was nobody's case that they were present at the time of inquest and yet their statements were not recorded by the I.O. On these grounds, the presence of PW2 at the scene of occurrence cannot be disbelieved. That apart, the evidence of PWs 2 to 4 that the appellants were the assailants, would get support from the evidence of PWs 5 and 28. While PWs 5 and 28 were returning after worship at the temple, they heard a hue and cry which made them run towards the scene of offence, where they saw three persons running away from the scene of offence. PW5, in the test identification parade, identified appellant No.2. PW 28 whose evidence was more or less same as that of PW5, also identified appellant Nos. 1 and 2 in the test identification parade. There was no reason to disbelieve the evidence of PWs 5 and 28 that they had seen all the three assailants, namely, appellants escaping from the scene of offence. They were all independent witnesses, whose evidence cannot be rejected on any ground whatsoever. [Para 15] [810-G; 811-A-B; 811-C-G]

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2.1. Mere delay in sending the statements of PWs 2 to 4 *per se* would not make their evidence unacceptable unless there is something glaring to doubt their very presence at the scene of offence. As rightly pointed out by the High Court, the evidence of PWs 2 to 4 was so clinching, wherein they had stated in clear and categorical terms that three persons joining together stabbed one individual. That portion of the evidence

remained unshaken. It is true that the assailants were not previously known to PWs 2 to 4. But they later identified the appellants as the persons who stabbed the deceased. [Para 17] [813-B-D]

2.2. There should be speedy despatch of the documents, such as the original report, the printed form of FIR, inquest report and statement of witnesses recorded during inquest and the statements of witnesses recorded under Section 161(3) Cr.P.C. There is no quarrel with that proposition and the importance of requirement of sending the vital documents to the Court without any delay. But the delay may occur due to variety of factors and circumstances. Delay in despatch of the said documents by itself may not be fatal to the prosecution in each and every case. The question as to what is the effect of delay in sending the vital documents to the Court may have to be assessed and appreciated on the facts and circumstances of each case. It is not possible to lay down that delay in despatch of the vital documents in each and every case defeats the prosecution's case. [Para 19] [814-D-G]

Thulia Kali v. The State of Tamil Nadu (1972) 3 SCC 393; Marudanal Augusti v. State of Kerala (1980) 4 SCC 425, distinguished.

2.3. There was delay in sending the statements of PWs 2 to 4 recorded under Section 161, Cr.P.C. The explanation was available on record that the Investigating Officer was also in charge of maintaining law and order in the area that got vitiated after two murders in succession leading to a lot of commotion and communal strife. There was no reason to reject the explanation as to why the statements recorded under Section 161 Cr.P.C. could not be promptly despatched to the Court. It was obviously for the reasons beyond control of the Investigating Officer. [Para 18] [813-H; 814-A-C]

A *Karunakaran Jabamani Nadar In re. 1974 L.W.(Cri) 1190, approved.*

B 2.4. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true, the Court is free to act on it albeit the investigating officer's suspicious role in the case. [Para 21] [815-D-E]

C *State of Karnataka v. K. Yarappa Reddy (1999) 8 SCC 715, relied on.*

D 3. In the light of the direct evidence of PWs 2 to 4, and 8 and 20, the motive part has no significance. Even otherwise, there is enough material available on record that the motive for the murder was in retaliation to the murder of one 'SM' allegedly by a group of persons belonging to an outfit of which the deceased was stated to be a member. There is no reason whatsoever to interfere with the concurrent finding of fact arrived at by the Courts below in order to convict the appellants for the offence punishable under Section 302, IPC. There is no reason to disbelieve the evidence of PWs 2, 3 and 4 along with the evidence of PWs 8 and 20 and the medical evidence. Once the evidence of these witnesses is found acceptable, the inevitable consequence is to confirm the conviction of the appellants under Section 302, IPC. The High Court in its elaborate judgment critically assessed and analyzed every nuance of the evidence and found a clear case against the appellants. The reappraisal of the evidence by the appellate Court did not result in any manifest injustice. The Courts below did not commit any error whatsoever in accepting the evidence available on record. In the circumstances, the appellants miserably failed to make out any case requiring interference under Article 136 of the Constitution. [Paras 22, 23] [815-G-H; 816-A-E]

Case Law Reference:

(1972) 3 SCC 393 distinguished Para 18

(1980) 4 SCC 425 distinguished Para 18

1974 L.W.(Crl) 1190 approved Para 19

(1999) 8 SCC 715 relied on Para 21

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 168 of 2008.

From the Judgment & Order dated 18.12.2006 of the High Court of Judicature at Madras in Crl. A.No. 338 of 2004

N. Natarajan, Ramesh Babu M.R., Latheef for the Appellants.

S. Thananjayan for the Respondent.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. This appeal by special leave arises out of judgment and order dated 18th December, 2006 passed by the High Court of Judicature at Madras, whereby the High Court confirmed the conviction and sentence of the appellants herein under Section 302 of the Indian Penal Code (IPC) while setting aside conviction and sentence under Sections 120B, 148, 341, 147, 302 read with Sections 149 and 109, IPC.

2. The facts in brief, according to the prosecution story, are that on 28th March, 2002 one Murugesan (deceased) was murdered at about 7.30 a.m. on the way leading to Badrakaliamman temple on Kovai Pudur Road in pursuance of a criminal conspiracy hatched by the appellants herein and other accused forming themselves into unlawful assembly so as to wreck vengeance of the murder that took place on 26th March, 2002 of one Sultan Meeran. Before the incident, Kanakaraj (PW 1), brother of the deceased went to the barber

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A shop situated near the place of occurrence to have a shave, where his paternal uncle Subramani (PW 4) told him that the deceased and some other persons were quarrelling at East of Badrakaliamman temple. Immediately, Kanakaraj (PW 1), rushed towards the place of occurrence and found the deceased lying on the ground unconsciously with bleeding injuries. Gopalakrishnan (PW5) and Rathinasamy (PW 28) who were returning from Badrakaliamman temple, on hearing the distress noise ran towards the place of occurrence and found Murugesan (deceased) lying in a pool of blood. They told Kanakaraj (PW 1) that the assailants had fled away after they had attacked the deceased in revenge of earlier murder that took place on 26th March, 2002 of a member of assailants' community. Thereafter within ten minutes Parvathy (PW 6), who owns a fruit vending shop near the temple, told Kanakaraj (PW 1) that earlier in the morning at about 6.30 A.M. she noticed two or three unknown persons near her shop in a car and on a scooter and then proceeding towards temple. In the meanwhile, Ganesan (PW 15) reached at the spot. Thereafter Subramani (PW 4), uncle of Kanakaraj (PW 1), along with Ganesan (PW 15) and others took the injured (deceased) in his car to the Government Hospital, Coimbatore. En route to the hospital, Ganesan (PW 15) gave information about the incident to the concerned police station over his mobile phone. The duty Doctor (PW-21), after examining Murugesan, declared him dead. On the basis of the information given by Ganesan (PW 15), Akbar Khan, Sub-Inspector of Police, Pothanur Police Station (PW 29) reached at the hospital at about 8.45 A.M where he came to know that Murugesan had already died. He examined Kanakaraj (PW 1) and recorded his statement which was registered as Crime No. 271/02 (Ex.P.1). Thereafter the first information report came to be printed as Ex. P.72. Consequent upon the registration of crime, Ramachandran, Inspector of Police, Pothanur Police Station (PW 30) was appointed as Investigating Officer who visited the scene of occurrence at about 10.00 A.M on the very same day and

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prepared the observation mahazar (Ex. P.30), the rough sketch of the crime scene (Ex.P.74) and also recovered material objects including a knife (MO-7) in the presence of Marudhachalam (PW-20) and other witnesses. Thereafter he proceeded to the Government Hospital where, in the presence of panchayatdars and witnesses, prepared inquest report (Ex.P.73) and gave requisition (Ex.P.47) to conduct post mortem. Sundarrajan, Professor, Forensic Science, Coimbatore Medical College Hospital (PW 23) on receipt of Ex. P. 47 conducted post mortem (Ex. P. 48) at 12.25 P.M. and opined that the death was due to haemorrhage and shock resulting from multiple stab injuries over chest and corresponding internal injuries to heart and both lungs.

3. After completion of the investigation, the police filed charge sheet against the appellants and five other co-accused. The prosecution in all examined 30 witnesses (PWs 1 to 30) and got marked 77 documents in evidence. The prosecution also produced material objects which were marked as M.O. 1 to 43.

4. The trial court accepted the prosecution's case and believed the evidence of PWs 2 to 4 and based on their evidence, convicted the appellants herein under Sections 302, 120B, 148, 341, 147, 302 read with Sections 149 and 109, of the Indian Penal Code (IPC) and sentenced to life imprisonment and various other terms of imprisonment to run concurrently. The trial Court also convicted the other accused under various Sections of the IPC. The trial court held that the prosecution proved its case beyond reasonable doubt against the appellants and held them guilty of having entered into a criminal conspiracy, unlawful assembly and committing murder of the deceased. The High court, however, confirmed the conviction of the appellants only under Section 302, IPC and acquitted them of the rest of the charges and completely acquitted rest of the accused.

5. We have heard the learned counsel appearing for the

A appellants as well as for the State and perused the material available on record.

B 6. Shri N. Natarajan, learned senior counsel appearing on behalf of the appellants submitted that the presence of the so called eyewitnesses (PWs 2 to 4) at the scene of offence is highly doubtful. The submission was, their evidence is totally untrustworthy and suffers from material contradictions. It was further submitted that the theory of conspiracy set up by the prosecution was disbelieved by the High Court and on the same analogy, the High Court ought to have totally disbelieved C PWs 2, 3 and 4 and if their evidence is not taken into consideration, there is no other evidence based on which the appellants could be convicted for the charge under Section 302, IPC. It was also submitted that there is enormous delay in D submitting the statements recorded under Section 161, Cr.P.C. to the Court since they were received by the Court after eleven days of recording the statements. The cumulative effect of these factors makes the whole prosecution case doubtful and the appellants are at least entitled to benefit of doubt.

E 7. The learned counsel for the State submitted that the evidence of PWs 2 to 4, is cogent and there is no material contradictions in their evidence even though they were subjected to lengthy cross-examination. All of them have identified the appellants in the test identification parade. Their F presence at the scene of occurrence is very well established by the evidence of Savithri (PW 8), Thangaraj (PW 18) and Marudhachalam (PW 20) and there is no reason to disbelieve their evidence. One of the important circumstances highlighted by the learned counsel for the State was matching of blood G group of the deceased with the blood found on the M.O. 6 series *i.e.*, weapons used in the commission of the offence. Further, the same blood group was found on the clothes recovered from the appellants. The delay in not sending the statements immediately was due to the reason that, in quick succession two murders which were very sensitive in nature,

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took place within the jurisdiction of the Investigating Officer who was also entrusted with the duty to maintain law and order in that area. The submission was that mere delay in sending the statements *per se* would not vitiate the entire prosecution case. The counsel further submitted that the Courts below did not commit any error or illegality in appreciating the evidence. The conviction is based on proper appreciation of the evidence and there is no reason or justification to interfere with the concurrent finding of facts by this Court, so far as the appellants are concerned, in exercise of jurisdiction under Article 136 of the Constitution of India.

8. The Courts below held that the death of Murugesan was homicidal in nature. As per post-mortem report (Ex.P-48), the following ante mortem injuries were found on the dead body:

- (1) Vertically oblique stab injury over front of right side of chest measuring 5 cms x 2.5 cms x entering the right thoracic cavity. The upper outer end of the wound is 6 cms above and medial to right nipple. On dissection the wound passes backwards, medially and downwards in the right third inter costal space cutting the inter costal muscles, vessels, nerves and cutting the fourth rib close to sternum. Then it has caused a stab injury in the underlying anterior aspect of lower part of upper lobe of right lung measuring 2.5 cms x 1 cm x 1.5 cms and exited out in the inner aspect of lower part of right lung measuring 2.25 cms x 1 cm. Then it caused a cut in the right side of front of pericardium measuring 1.75 cms x 1 cm and then caused a stab in the anterior aspect of right ventricle measuring 1.5 cms x 1 cm x cavity deep. Pericardial sac contains 50 ml of blood with clots. Right pleural cavity contains 750 ml of blood with clots. The depth of the wound tract is about 10 cms. The margins of the wound are regular and both ends are pointed.

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- (2) Transversely oblique stab injury over back of left side of upper chest measuring 3 cms x 1 cm x entering the left thoracic cavity. The lower medial end of the wound is 4 cms from the middle of T 3 vertebra. The wound passes forward, downwards and medially through the left third inter costal space causing a stab injury in the posterior aspect of upper lobe of left lung measuring 2 cms x 1 cm x 2 cms. The deepest part ending as a point. Both ends of the wound are pointed and the margins are regular. The length of the wound tract is about 8 cms left pleural cavity contains 400 ml of blood with clots.
- (3) Vertically oblique stab injury over back of right side of upper chest measuring 3 cms x 1 cm x entering the right thoracic cavity. The upper medial end of the wound is 1.5 cms from the middle of T 4 vertebra. The wound passes downwards, laterally and forwards in the fourth right inter costal space cutting the right fourth rib in the posterior aspect and causing a stab injury in the middle lobe of right lung measuring 2.5 cms x 1 cm x 2 cms and the deepest point ending as a point. The length of the wound tract is about 8 cms. Both ends of the wound are pointed and the margins are regular.
- (4) Transversely oblique stab injury over back of left side of upper chest close to midline measuring 3 cms x 1 cm x 3.5 cms deep in the muscle plane. The lower inner end of the wound is close to middle of T3 vertebra. The wound passes downwards, laterally and forwards. Both ends of the wound are pointed and margins are regular.
- (5) Vertically oblique stab injury just below the right side of lower lip measuring 1 cm x 0.5 cms through and through and exiting through the buckle surface of the lower lip on the right side, wound measuring 0.75 x 0.5 cm. The wound passes upwards, backwards

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| <p>and laterally. The length of the wound tract is about 1 cm. The upper inner end of the wound is 1 cm right to midline of chin. The ends of the wound are pointed (both) and the margins are regular.</p> | A | A | <p>upper inter scapular region on the right side measuring 2 cms x 1 cm.</p> |
| <p>(6) Vertically oblique stab injury over the middle third of back of left arm measuring 4.5 cms x 2 cms x 6 cms deep in the muscle plane. The distal outer end of the wound is 8 cms above left elbow. The wound passes upwards, forwards and medially. Both the ends of the wound are pointed and margins are regular.</p> | B | B | <p>(14) Transversely oblique skin deep incised wound over the back of right lower chest measuring 2 cms x 0.5 cms.</p> |
| <p>(7) Oblique stab injury over the posterior aspect of left hip measuring 3 cms x 1 cm x 5 cms deep in the muscle plane. Both ends of the wound are pointed and the margins are regular. The lower outer end of the wound is 7 cms below and behind the left anterior superior iliac spine. The wound passes forwards, upwards and laterally.</p> | C | C | <p>(15) Vertically oblique skin deep incised wound over the upper inter scapular region on the left side measuring 4 cms x 0.5 cm.</p> <p>(16) Vertically oblique skin deep incised wound over the upper inter scapular region on the right side measuring 2 cms x 0.5 cms.</p> |
| <p>(8) An oblique cut injury over left side of upper lip measuring 3 cms x 1 cm x 1 cm muscle deep.</p> | D | D | <p>(17) Transversely oblique skin deep incised wound over the back of left side of upper abdomen measuring 2 cms x 1 cm.</p> |
| <p>(9) An oblique cut injury over left side of lower lip measuring 4 cms x 1 cm x 1 cm muscle deep.</p> | E | E | <p>(18) Transversely oblique skin deep incised wound over the dorsum of right wrist measuring 5 cms x 0.5 cm.</p> <p>(19) Oblique cut injury over the dorsum right hand measuring 5 cms x 1 cm x bone deep.</p> |
| <p>(10) Transversely oblique incised wound over front of upper part of neck just above thyroid cartilage measuring 3 cms x 1 cm x skin deep.</p> | F | F | <p>(20) Another transversely oblique cut injury over the dorsum of right hand close to right index finger measuring 3 cms x 1 cm x bone deep.</p> |
| <p>(11) Oblique incised wound in the middle of right infra clavicular region measuring 1 cm x 0.5 cm x skin deep. The upper inner end of the wound is 6 cms from the medial end of right clavicle.</p> | G | G | <p>(21) Oblique cut injury over the radial aspect of right palm measuring 2 cms x 0.5 cm x 1 cm muscle deep.</p> <p>(22) Oblique cut injury over the medial aspect of lower third of right thigh 5 cms above right knee measuring 7 cms x 2 cms x 1 cm deep in the subcutaneous plane.</p> |
| <p>(12) Transversely oblique skin deep incised wounds four in number in the left sub scapular region measuring 5 cms x 1 cm, 3 cms x 1 cm, 2 cms x 0.5 cm and 1 cm x 0.5 cm.</p> | H | H | <p>(23) Transversely oblique cut injury over the front of upper part of left arm 12 cms below the top of left shoulder measuring 2 cms x 1 cm x 1 cm deep in the muscle plane.</p> |
| <p>(13) Transversely oblique skin deep incised wound over</p> | H | H | <p>(24) Oblique incised wound over the front of upper part</p> |

<p>of left forearm 8 cms below left elbow measuring 3 cms x 0.5 cm x skin deep.</p> <p>(25) Abrasions seen in the following regions:</p> <p>1 cm x 1 cm, 0.5 x 0.5 cm over right side of forehead.</p> <p>3 cm x 0.25 cm over right lateral aspect of lower chest.</p> <p>2 cm x 1 cm, 0.5 cm x 0.5 cm over dorsum of proximal part of right forearm.</p> <p>2 cm x 1 cm over back of right elbow.</p> <p>3 cm x 1 cm, 2 cm x 1 cm over lateral aspect of upper part of right leg.</p> <p>4 cm x 3 cm over lateral aspect of middle third of right thigh.</p> <p>2 cm x 1 cm over the lateral aspect of right hip.</p> <p>7 cm x 4 cm over the lateral aspect of right gluteal region.</p> <p>3 cm x 1 cm just below left mastoid.</p> <p>4 cm x 1 cm and 3 cm x 1 cm over left lateral aspect of neck.</p> <p>3 cm x 1 cm over left supra scapular region.</p> <p>4 cm x 0.5 cm and 1 cm x 1 cm over lateral aspect of upper part of left arm.</p> <p>1 cm x 1 cm over posterior aspect of lower part of left arm.</p> <p>5 cm x 4 cm and 0.5 cm x 0.5 cm over posterior aspect of left elbow.</p> <p>4 cm x 2 cm over lateral aspect of left hip.</p> <p>Multiple tiny scratch abrasions over left knee, lower part of left forearm, right hand, right side of face, left side of forehead, dorsum of nose and over front</p>	<p>A</p> <p>B</p> <p>C</p> <p>D</p> <p>E</p> <p>F</p> <p>G</p> <p>H</p>	<p>A</p> <p>B</p> <p>C</p> <p>D</p> <p>E</p> <p>F</p> <p>G</p> <p>H</p>	<p>of neck.</p> <p>Other findings:</p> <p>Peritoneal cavity empty.</p> <p>Lungs cut section pale.</p> <p>Heart all chambers empty. Coronaries patent.</p> <p>Hyoid bone intact.</p> <p>Stomach contains 150 ml of brown colour fluid without any specific smell. Mucosa pale.</p> <p>Small intestine contains 20 ml bile stained fluid without any specific smell. Mucosa pale.</p> <p>Liver, spleen, kidneys and brain cut section pale.</p> <p>Urinary bladder empty.</p> <p>External genitalia nil injury. Right hydrocele present.</p> <p>9. According to the medical opinion, the death of Murugesan was caused due to excessive haemorrhage and shock on account of multiple stab injuries over chest and corresponding internal injuries to heart and both lungs.</p> <p>10. The short question that arises for our consideration in this appeal is as to whether the courts below committed any manifest error in relying on the evidence of eye witnesses, Natarajan (PW-2), Rajendran (PW-3) and Subramani (PW-4) to convict the appellants for the charge under Section 302, IPC.</p> <p>11. Before analysing the evidence of PWs-2 to 4, let us have a look at the evidence of Savithri (PW 8) whose version is important to appreciate the contention regarding the very presence of PWs - 2 to 4 at the scene of offence.</p> <p>12. PW 8-Savithiri, was residing nearby Badrakaliamman Koil at Kovai Pudur Pirivu and her husband is a transport operator owning a lorry. It is in her evidence that on 28th March, 2002 at about 7 a.m. Natarajan (PW 2) along with two other</p>
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persons came to her house when her husband was away, stating that they have come to know that her husband desired to dispose of his lorry owned by him which they wanted to purchase, and therefore, wanted to have a look at the lorry. The lorry was stationed at a distance of about 30 feet from her house. The distance between the lorry where it was stationed and the footpath was about 20 to 25 feet. That, after finishing her household work, she came out of the house at about 9 a.m. and found that there was a heavy crowd near the footpath. Meanwhile, her husband also reached the home. She was examined on the same evening and she narrated the incident to the police. She was not subjected to any cross-examination by the appellants. Marudhachalam (PW 20) is the husband of PW8-Savithiri. It is in his evidence that he was in deep financial problems and proposed to dispose of his lorry and for that purpose sought the assistance of some brokers including that of Natarajan-PW2. He stated in his evidence that by the time he returned home at about 9 a.m., he saw that there was a crowd at a distance of 50 feet away from his house. He went to the scene of occurrence at about 10 a.m. along with his brother Paramasivam. The police were investigating the matter and the mahazar (Ext. P30) was prepared in which his brother Paramasivam had signed. It is also in his evidence that his wife Savithri (PW8) informed him about Natarajan (PW2) and two others came to inspect the lorry stating that they were interested to purchase the same.

13. Natarajan (PW2), is an automobile broker dealing with the sale and purchase of old trucks and cars. It is in his evidence that his friend Subramani (PW 4), who at the relevant time was doing business in sale and purchase of tomato in wholesale, intended to purchase a lorry and in that connection went to the house of Marudhachalam (PW 20), at Kovai Pudur. At that time, they have heard noise "ayyo amma" and he along with other two went running there and found that three persons were stabbing the deceased repeatedly and the time was 7.00 or 7.30 a.m. It is also in his evidence that one among the accused

A sustained a cut injury on his right wrist. On seeing the incident, they ran away from the place and went to several places. They have reached their house at about 5 p.m. and in the evening at about 8.30 p.m., the Inspector of Pothanur police inquired from him as to what he had seen in the morning of that fateful day. His statement was recorded. Thereafter, he was required to attend the identification parade to be held on 23rd April, 2002 at Salem prison and on that day, he identified the appellants 1 and 2 before the Judicial Magistrate and later identified appellant No.3 in the Court. He further deposed that he is assisted by Rajendran (PW-3) in his business. It is in his evidence that Subramani (PW-4) came to him to purchase a lorry sometime before the incident of the fateful day. He further stated that he knew that one lorry was available for sale with Marudhachalam (PW-20) and in that connection, he along with PWs-2 and 4 visited the residence of PW-20 at about 6.00 A.M. on the day of occurrence for the inspection of the lorry. It is in his evidence that at about 7.00 or 7.30 a.m. when they were verifying the general condition of the lorry, three persons crossed them towards West and ten minutes thereafter, they heard a cry in pain from that side, which made them to run towards that place, where they saw the deceased being stabbed by the accused with the knives in their hands. He specifically stated that one among the three assailants got a cut injury on the right hand. It is worthwhile to mention that he asserted in his statement that he could identify the three assailants which he did in the test identification parade.

14. The evidence of Rajendran-PW3 and Subramani (PW 4) is more or less the same as that of PW2-Natarajan.

15. It is in the evidence of PWs 2 to 4 that after witnessing the ghastly incident of attack, they fled away from the scene of offence due to fear. We are unable to appreciate the criticism levelled by the learned senior counsel appearing for the appellants that if PWs 2 to 4 were really present at the scene of occurrence, nothing prevented them from informing the

A police. The response, behavioural patterns of individuals in such a situation differs from person to person and it cannot be said that response of every and any human being would be similar on such occasions. May be PWs 2 to 4, were reeling under shock and nervousness. They were roaming here and there and as is evident from their evidence, they have reached their respective houses only in the evening after 5 p.m. The further criticism was that they were examined only in the evening of 28th March, 2002 and there is no reason offered by the I.O. for not examining them immediately but only in the night of 28th March, 2002. Be it noted, there was no question put in the cross-examination to PW30-Investigating Officer, as to why he did not chose to examine PWs 2, 3 and 4 immediately at the time of inquest or thereafter. The mere fact that they were not examined during the inquest is of no consequence. It is nobody's case that they were present at the time of inquest and yet their statement was not recorded by the I.O. On these grounds, the presence of PW2 at the scene of occurrence cannot be disbelieved. That apart, the evidence of PWs 2 to 4 that the appellants are the assailants, gets support from the evidence of PWs 5 and 28. While PWs 5 and 28 were returning after worship at the temple, they heard a hue and cry which made them to run towards the scene of offence, where they saw three persons running away from the scene of offence. PW5, in the test identification parade, identified appellant No.2. PW28 (Rathinasamy), whose evidence is more or less same as that of PW5, had also identified appellant Nos. 1 and 2 in the test identification parade held on 23rd April, 2002. It is in the evidence of PWs 5 and 28, that they have seen Murugesan (since deceased) just crossing the temple while they were going into the temple to offer prayers. There is no reason to disbelieve the evidence of PWs 5 and 28 that they have seen all the three assailants, namely, appellants herein escaping from the scene of offence. They are all independent witnesses, whose evidence cannot be rejected on any ground whatsoever.

16. There is no reason to reject or disbelieve the evidence

A of Gopalakrishnan (PW-5) and Rathinasamy (PW-28) altogether as both of them gave similar version in their evidence. Gopalakrishnan (PW-5) who is a resident of Palakadu-Coimbatore road at Kovai Pudur Pirivu road, deposed in his testimony that at about 7.15 A.M. he went to Badrakaliamman temple for worshipping on 28.3.2002 and at the same time Rathinasamy, who is also a resident of the same locality came to the said temple. He further stated that when both of them were returning after worship, Murugesan (deceased) was found crossing the temple. It is in his evidence that at the same time they heard the accused shouting "yesterday you closed one Sultan Meeran, as a retaliation we are closing you now". On hearing the said dialogue, they rushed towards the place of occurrence and found Murugesan lying on the ground in a pool of blood while the assailants were running towards South of the scene of occurrence. He further stated in his evidence that on seeing the said Murugesan lying in a pool of blood, they were shocked and stood there itself for a while. He knew that the deceased Murugesan belonged to RSS and therefore, he alongwith Rathinasamy (PW28) were proceeding to inform Ganesan (PW 15) who was in charge of BJP party in the area and found that Ganesan (PW 15) was coming in the opposite direction. Two or three persons came running along with Ganesan and all of them took the injured Murugesan in a car to the hospital. Subramani (PW 4), uncle of Murugesan was one amongst them.

F 17. Now we proceed to consider the submission of the learned senior counsel that the statements of PWs 2 to 4 (eyewitnesses), though purported to have been recorded on 29th March, 2002, had reached the Court only on 11.4.2002 which according to him makes the whole prosecution story doubtful. In fact, PW30-the Investigating Officer explained that in the case of murder of Sultan Meeran on 26th March, 2002, and the murder of Murugesan (deceased) on 28th March, 2002 in succession, the entire city of Coimbatore and surrounding areas were in a highly disturbed state and widespread

bandobasth was arranged in surrounding areas. Adverting to this aspect of the matter, the High Court in clear and categorical terms, upon reappraisal of the evidence, held that in such a situation, no one could find fault with the Investigating Officer in not sending the statements of PWs 2, 3 and 4 to the Court before 11th April, 2002. Mere delay in sending the statements of PWs 2 to 4 *per se* would not make their evidence unacceptable unless something glaring is brought to our notice to doubt their very presence at the scene of offence. As rightly pointed out by the High Court, the evidence of PWs 2 to 4 is so clinching, wherein they have stated in clear and categorical terms that three persons joining together stabbed one individual. That portion of the evidence remains unshaken. It is true that the assailants were not previously known to PWs 2 to 4. But they have later identified the appellants as the persons who stabbed the deceased.

18. Learned senior counsel relied upon the judgment of this Court in *Thulia Kali vs. The State of Tamil Nadu*¹ and *Marudanal Augusti vs. State of Kerala*² in support of his submission that the delay in sending the statements recorded under Section 161, Cr.P.C. to the Court is fatal to the prosecution's case. *Thulia Kali* deals with importance of timely despatch of the first information report which is an extremely vital and valuable piece of evidence for the purpose of corroborating oral evidence adduced at the trial. In *Marudanal Augusti*, this Court on the facts held that there was a delay of as many as 28 hours in submitting FIR to the Special Magistrate which remained unexplained by the Investigating Officer in spite of being questioned. The Court came to the conclusion that there was no proper explanation as to why there was delay in sending the FIR to the Court. We fail to appreciate as to how those judgments would help the defence in this case since there is no delay in sending the FIR in the present case. There is a delay in sending the statements of PWs 2 to 4

1. (1992) 3 SCC 393.

2. (1980) 4 scc 425.

A recorded under Section 161, Cr.P.C. There is a clear explanation available on record that the Investigating Officer was also in charge of maintaining law and order in the area that got vitiated after two murders in succession leading to a lot of commotion and communal strife. There is no reason to reject the explanation as to why the statements recorded under Section 161 Cr.P.C. could not be promptly despatched to the Court. It was obviously for the reasons beyond control of the Investigating Officer. Nothing is further suggested to accept the theory propounded by the learned senior counsel. It is nobody's case that such statements were not recorded by the Investigating Officer at all. The suggestion made in this regard to PWs 2 to 4 was denied by them.

19. The learned senior counsel placed heavy reliance on judgment of the Madras High Court in *Karunakaran Jabamani Nadar In re.*³ where the Madras High Court underscored the importance of speedy despatch of the documents, such as the original report, the printed form of FIR, inquest report and statement of witnesses recorded during inquest and the statements of witnesses recorded under Section 161(3) of Cr.P.C. There is no quarrel with that proposition and the importance of requirement of sending the vital documents to the Court without any delay. But the delay may occur due to variety of facts and circumstances. Delay in despatch of the said documents by itself may not be fatal to the prosecution in each and every case. The question as to what is the effect of delay in sending the vital documents to the Court may have to be assessed and appreciated on the facts and circumstances of each case. It is not possible to lay down that delay in despatch of the vital documents in each and every case defeats the prosecution's case.

20. We do not find any material on record to accept the submissions made during the course of hearing of this appeal that PW 20, did not own any lorry with him so as to be sold

3. 1974 L.W. (Cri) 1190.

and the said lorry was not stationed nearby the scene of occurrence. We do not find any reason to disbelieve the statement of PWs 8 and 20 in this regard which is clear, categorical and forthcoming which we have discussed in the preceding paragraphs. The submission is accordingly rejected.

21. We may have to deal with yet another submission made by the learned senior counsel for the appellants that the investigation was not fair as there were many missing links in the process of investigation. This submission was made by the learned counsel contending that the investigation does not reveal as to how the Investigating Officer came to know about the presence of PWs 2 to 4 at the scene of occurrence and for recording their statements in that regard. This Court in *State of Karnataka vs. K. Yarappa Reddy*⁴ held that “even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. ... Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true, the Court is free to act on it albeit the investigating officer’s suspicious role in the case”. The ratio of the judgment in that case is the complete answer to the submission made by the learned senior counsel for the appellants.

22. One more submission of the learned senior counsel was that the prosecution failed to establish the motive for committing the crime by the appellants. In the light of the direct evidence of PWs 2 to 4, and 8 and 20, the motive part has no significance. Even otherwise there is enough material available on record in the present case that the motive for the present murder was in retaliation to the murder of one Sultan Meeran allegedly by a group of persons belonging to an outfit of which the deceased was stated to be a member.

4. (1999) 8 SCC 715.

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A 23. We do not find any reason whatsoever to interfere with the concurrent finding of fact arrived at by the Courts below in order to convict the appellants for the offence punishable under Section 302, IPC. We do not find any reason or justification to disbelieve the evidence of PWs 2, 3 and 4 along with the evidence of PWs 8 and 20 and the medical evidence. Once the evidence of these witnesses is found acceptable, the inevitable consequence is to confirm the conviction of the appellants under Section 302, IPC. The High Court in its elaborate judgment critically assessed and analyzed every nuance of the evidence and found a clear case against the appellants. The reappraisal of the evidence by the appellate Court did not result in any manifest injustice. We have looked into the evidence to satisfy ourselves as to whether the Courts below have committed any manifest error in appreciating the evidence available on record and on such scrutiny, we find that the Courts below did not commit any error whatsoever in accepting the evidence available on record. In the circumstances, we hold that the appellants miserably failed to make out any case requiring our interference under Article 136 of the Constitution.

E 24. We accordingly find no merit in the appeal and the same is accordingly dismissed.

D.G. Appeal dismissed.

STATE OF A.P.
v.
HYDERABAD POTTERIES PVT. LTD & ANR.
(Civil Appeal No. 3413 of 2010)

APRIL 19, 2010

[P. SATHASIVAM AND DEEPAK VERMA, JJ.]

Andhra Pradesh Land Grabbing (Prohibition) Act, 1982:

ss. 8(1) and (10) – Application by State Government for declaring the respondents as land grabbers – HELD: Aggrieved person is prima facie required to prove before Special Court that the land is owned by such person and on such proof, the presumption u/s 10 will be attracted and the burden would shift on the respondent to prove that he had not grabbed the land – In the instant case, the Special Court has rightly recorded a finding that prima facie the appellant-State has failed to establish that the title of the land vests in it or that the respondents are land grabbers thereof – Title – Code of Civil Procedure, 1908 – s.11 – Constructive res judicata.

Title:

Entries in revenue record – HELD: May not be sufficient as conclusive proof of title nor can the same be relied on for proof of establishing the title as such – Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 – ss. 8(1) and 10.

Code of Civil Procedure, 1908:

s.11 – Constructive res judicata – Writ petition before High Court arising out of ownership dispute regarding land – Municipal Corporation and State Government arrayed as respondents therein – No plea raised by State that writ petitioners were land grabbers in respect of the said land – Later, State Government filing application u/s 8(1) in respect

A of the same land claiming ownership of the said land and seeking declaration that the respondents (writ petitioners in earlier writ petition) were land grabbers of its land – HELD: The proceedings u/s 8(1) initiated by State Government would be barred by constructive res judicata – Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 – ss. 8(1) and (10).

The State Government filed an application u/s 8(1) of the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 with a prayer that the respondents be declared as land grabbers in respect of 17, 786.5 sq. mtrs. of land. The respondents opposed the application stating that the land was purchased by them under a registered sale deed dated 31.3.1946 and since then they were in possession thereof. The Special Court dismissed the application. The High Court in the writ petition filed by the State affirmed the order of the Tribunal.

Dismissing the appeal filed by the State Government, the Court

HELD: 1.1. Section 10 of the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 makes it clear that an aggrieved person is prima facie required to prove before the Special Court that the land is owned by such person and on such proof, the presumption that the person alleged had grabbed the land would be against the latter and the burden of proving that the land has not been grabbed by him shall be on such person. [Para 7] [822-B-C]

1.2. In the instant case, the sole basis of the appellant-State to claim the land was the entries made in survey records showing that the scheduled property was surveyed and was shown in it as a gap area i.e. un-surveyed area as per the old survey records and as such it could only be declared to be Government land as has been recorded in Column No. 20 of the T.S.L.R. Apart

from the said revenue record and issuance of gazette notification, no other document was filed by the appellant-State to show that the said land belonged to it. It is trite that entry in the revenue record alone may not be sufficient as conclusive proof of title nor can it be relied on for proof of establishing the title as such. [para 20] [826-E-G]

1.3. Looking to the matter in totality and from all angles, it can safely be construed that prima facie the appellant-State failed to establish that the respondents are land grabbers of the land or the title thereof vested in the State. Thus, the Special Court committed no error in drawing presumption in favour of the respondents that they cannot be declared as land grabbers as contemplated u/s 10 of the Act and the prima facie burden which lay on the appellant that the land has been grabbed by the respondents has not at all been discharged. On the other hand, the facts would clearly establish that respondent No.1 purchased the said land from its previous owners whose names had been mutated in the land records and after purchase, respondent No.1's name came to be mutated in the records. Corporation number was allotted to it. It started paying Corporation taxes as well as NALA Tax and electricity dues. Its possession for last more than 60 years had never been disturbed. It had constructed multi-storeyed building on the said land only after obtaining sanction and permission from Municipal Corporation. Thus, the burden which lay on the respondents as contemplated u/s 10 of the Act has fully been discharged. [para 24-25] [827-F-G; 828-A-D]

2. In the earlier writ petition which was filed by the respondents in the High Court, and in which the Municipal Corporation and appellant-State both were parties, the ground of land grabbing was not raised. That writ petition resulted in favour of the respondents. Thus,

it could not be established even in earlier litigation that the land belonged to the State. In fact, the instant proceedings initiated by the appellant u/s 8 of the Act, would be barred by constructive res judicata as envisaged u/s 11 of the Code of Civil Procedure, 1908, even though such a ground was neither taken nor raised before this Court by the respondents. [para 25-26] [828-D-F]

3. In the considered opinion of the Court, no fault can be found either in the judgment and decree of the Special Court or in the judgment and order passed by Division Bench of the High Court, in appellant's writ petition. [para 27] [828-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3413 of 2010.

From the Judgment & Order dated 11.10.2007 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Writ Petition No. 4432 of 2005.

I. Venkata Narayana, C.K. Sucharita and T.V. George for the Appellant.

Vinod A. Bobde, A.K. Narsimha Rao, Rajendra Kumar, K. Ram Kumar, B. Sridhar for (K. Ramkumar & Associates) for the Respondents.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted. Arguments heard. Record perused.

2. On account of illegal and unauthorized grabbing of Urban and Urbanized land in various metropolitan cities, State of Andhra Pradesh in its wisdom thought it fit and appropriate to bring an Act to curb this menace. The Act is known as Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 [hereinafter shall be referred to as the 'Act'].

3. Statement of Objects and Reasons discloses that it had come to the notice of Government that there are organised attempts on the part of certain lawless persons operating individually and in groups to grab either by force, or by deceit or otherwise lands belonging to the Government, a local authority, a religious or charitable institution or endowment, including wakf or any other private person. The Government was further of the view that such land grabbers are forming bogus co-operative housing societies or setting up fictitious claims and are indulging in large scale and unprecedented and fraudulent sales of land through unscrupulous real estate dealers or otherwise in favour of certain section of people, resulting in large scale accumulation of unaccounted wealth. It was felt that public order is likely to be adversely affected. Such unlawful activities of land grabbers had to be arrested and curbed by enacting a special law in that regard.

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4. Keeping the aforesaid objects and reasons, initially, Andhra Pradesh Land Grabbing (Prohibition) Ordinance, 1982, was promulgated by the Governor on 29.6.1982 as at that time State Legislature was not in session. But subsequently, the aforesaid Act came to be passed by the State Legislature.

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5. Section 8 of the said Act deals with procedure and powers of the Special Courts which are to be constituted as required under Section 7 of the Act. A Special Court generally consists of a Chairman and four other members to be appointed by the Government.

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6. Section 10 of the Act which deals with burden of proof, which is required to be considered primarily by us in this appeal, is reproduced hereinbelow:-

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“Where in any proceedings under this Act, a land is alleged to have been grabbed, and such land is *prima facie* proved to be the land owned by the Government or by a private person the Special Court or as the case may be the Special Tribunal shall presume that the person who is

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A alleged to have grabbed the land is a land grabber and the burden of proving that the land has not been grabbed by him shall be on such person”.

B 7. Plain and simple reading of the aforesaid provision would make it abundantly clear that an aggrieved person as contemplated under Section 10 of the Act is *prima facie* required to prove before the Special Court that the land is owned by such person and presumption that such person had grabbed the land would be against him and burden of proving that the land has not been grabbed by him shall be on such person. In the light of aforesaid provisions existing in the Act, we are called upon to examine the correctness, legality and propriety of the judgment and order passed by Division Bench of the High Court of Judicature, Andhra Pradesh at Hyderabad passed in W.P. No. 4432 of 2005 on 11.10.2007, titled *State of Andhra Pradesh vs. Hyderabad Potteries Pvt. Ltd. and Another.*

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Factual matrix of the case lies as under:-

E 8. State of A.P had filed an application under Section 8(1) of the Act before the Special Court, against the Respondents seeking a declaration that they be declared land grabbers in respect of schedule property and consequently to evict them and deliver vacant possession and to further award compensation to the State. The property in question is admeasuring 17, 786.56 square meters of land in T.S. 4/2, Block-B, Ward No. 66 of Bakaram Village, Musheerabad Mandal, Hyderabad District, now said to be in the heart of the city. The case of the Appellant before the Special Court was that in the town survey conducted in respect of Bakaram and Gaganmahal villages in the years 1355 and 1357 faslis equivalent to 1945-1947 respectively and further in the year 1965 and 1971 and on verification of the maps of both villages, it was found that certain extent of area existing between these two villages was left un-surveyed and was not accounted for.

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Consequently, it remained as a gap area. Gap area means un-surveyed land and would be deemed to be Government land.

9. According to Appellant, town survey was conducted by following due procedure as contemplated under A.P. Survey and Boundaries Act, 1923; accordingly a notification was published for fixing up the boundaries. Thereafter, the schedule property admeasuring 19214 sq. meters of land was recorded as Government land in Column No. 20 of the Town Survey Land Register (for short 'T.S.L.R.'). Later on, a gazette notification dated 17.07.1976 was issued in this regard which remained unchallenged by anyone by way of proceedings under Section 14 of A.P. Survey & Boundaries Act, 1923. Thus, the said survey having attained finality and the lands having been found in possession of the Respondents, they would be deemed to be land grabbers.

10. Appellant further contended that sometime in the month of December 1998, Respondents without having any right, title or interest on the said land, yet illegally grabbed the schedule property to the extent mentioned above and started construction of multi-storeyed complexes thereon. It was further submitted that by creating fictitious and fabricated documents and obtaining permission from the Municipality, which was earlier rejected but having challenged the same by the Respondents in the High Court by filing Writ Petition No. 25727 of 2000, the same was granted. The Appellant-State, therefore, contended that Respondents are the land grabbers; they should be directed to deliver possession to the Appellant and pay compensation accordingly.

11. On notices being issued to the Respondents on the application filed by the Appellant, they filed counter affidavits denying each and every allegation levelled against them. They contended that first Respondent is a Company duly registered under the Companies Act as on 27.04.1946 and later on, the nomenclature was changed to that of Hyderabad Potteries Pvt. Ltd. Initially, Shri S. Rajeshwar Rao and M.K. Mudaliar had

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A purchased an extent of Acs. 4-32 guntas of land in Survey Nos. 118 to 133 of Nampally Village by registered deed of sale executed in their favour on 09.04.1944 by previous original owner and pattedar Shri Haji Mohd Abdul Azeez. Later on, the said two purchasers sold the said land in favour of Respondent No. 1, Hyderabad Potteries Pvt. Ltd. by registered deed of sale executed on 31.03.1946 showing clear identity of land with boundaries.

12. Out of the said property purchased, certain portions were acquired by erstwhile Hyderabad Government in two spells for the purpose of construction of houses known as "Labour Quarters". In the land acquisition proceedings, the award was passed determining the amount of compensation which was carried to civil court for proper determination and further appeals to the High Court but the property purchased by Respondent No. 1 Company was not acquired. Thereafter, Municipality assigned house numbers for the factory and adjoining premises as 1-1-365 and 1-1-365/A. Later on, the said property was converted for industrial use as per the orders of the Government. On coming into force of A.P. Urban Land Ceiling Act, 1976, Respondent No. 1 had filed a declaration. After due enquiry, an area admeasuring 1427.44 sq. meters of the said land of Respondent No. 1 was declared as surplus land, which was handed over to Government and possession thereof, was also taken by it. Later, under Section 20(1) of the Urban Land Ceiling Act, 1976, the State Government on the application of the Respondents, granted exemption on 11.06.1980. However, since the land was not being used for purposes for which exemption was sought and granted, the Government in its wisdom withdrew the said exemption.

13. Out of the said extent of land, Respondents have constructed a multi-storeyed complex on a part thereof, after obtaining prior approval and sanction from Municipal Corporation Hyderabad and third party rights have been created in favour of people, who are occupying the flats, plots

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and living with their families. The Municipality had also assessed the constructions for the purpose of tax, which is being paid regularly apart from payment of electricity and other charges etc.

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14. For purposes of construction of another multi-storeyed complex, they applied for permission on payment of Rs. 50,00,000/- (Rupees fifty lakhs) towards permission fee and other charges. The said permission was refused on 26.08.2000 stating therein that the land is a Government land. Respondents were, therefore, constrained to challenge the same by filing W.P. No. 25727 of 2000 in the High Court of Andhra Pradesh, which came to be allowed on 25.04.2001 directing the Municipality to grant permission for construction of such multi-storeyed complex. In the light of the aforesaid factual scenario, Respondents contended that the stand of the Appellant-State is unsustainable and Respondents are in possession of the said land for more than 60 years, in their own rights as owners thereof, thus, they cannot be declared land grabbers at all.

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15. On the strength of the pleadings of parties, Special Court was pleased to frame issues, which have been reproduced in the impugned order.

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16. Here, it is pertinent to point out that Section 9 of the Act, gives powers of the Civil Court and Court of Sessions to Special Courts constituted under the Act, in so far as, the same may not be inconsistent with the provisions of this Act. This Section further shows that the Special Court shall be deemed to be a Civil Court and shall have all the powers of a Civil Court.

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17. The parties then went to trial and led evidence. Appellant examined P.W.1, P.W.2 and P.W.3 on its behalf and proved documents A.1 to A.41. Respondents examined R.W.1 on their behalf and proved documents B.1 to B.33.

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18. On consideration of the entire evidence and the material on record produced by both sides, the Special Court

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A by majority view dismissed the application filed by the Appellant-State whereas one of its revenue members gave a differing judgment upholding the claim of the Appellant only on the basis of entries available in T.S.L.R. Due to majority opinion, the suit filed by Appellant came to be dismissed. Appellant-State was thus, constrained to file the aforesaid writ petition being W.P. No.4432 of 2005, under Article 226 of the Constitution of India in the High Court. The Division Bench considered the matter from all angles and came to the conclusion that Appellant had miserably failed to prove that Respondents are land grabbers as contemplated under the provisions of the Act and, therefore, it put its seal of approval on the majority view of the Special Court and dismissed the Appellant's writ petition.

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19. Feeling aggrieved therefrom, this appeal is preferred before us. We have accordingly heard Shri I. Venkatnarayana, learned Senior Counsel for the Appellant and Shri V.A. Bobde with Shri V. Sekhar, learned Senior Counsel for Respondents, at length and perused the record.

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20. The sole basis of the Appellant to claim the land was on the strength of entries made in survey records showing that the schedule property was surveyed as T.S. No. 4 /2, Ward No. 66 of Bakaram village having an area of 19214 sq. meters showing it as a gap area i.e. un-surveyed area as per the old survey records and as such it could only be declared to be Government land as has been recorded in Column No. 20 of the T.S.L.R. Apart from the said revenue record and issuance of gazette notification as mentioned hereinabove, no other material document was filed by the Appellant to show that the said land belonged only to Government. It is trite that entry in the revenue record alone may not be sufficient as conclusive proof of title nor can be relied on for proof of establishing the title as such.

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21. Special Court had considered the admission of P.W.1, one of the witnesses of the Appellant-State, who admitted that

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A the schedule land was given Municipal No. 1-1-365 and NALA tax was being collected from Respondent No. 1 and pleaded total ignorance of the various sale deeds filed by Respondents. This witness also admitted with regard to acquisition of lands for construction of labour colonies and passing of the awards.

B 22. Considering the evidence of other two witnesses; P.W.2 and P.W.3, Special Court recorded a categorical finding that they had admitted that at the time of conducting the survey in the year 1965-1971 and making of entries in T.S.L.R., no notice was ever served on the Respondents and further admitted that it appears that all through the possession of the land continued with Respondents only. P.W.2 also admitted about grant of municipal number to its owner i.e. Respondent No. 1.

C 23. In the light of the same, the majority members of the Special Court came to the conclusion that certain entries in the T.S.L.R. may not be sufficient proof of possession of the Appellant-State as owner thereof. Copy of the T.S.L.R. has been filed showing the details thereof. In Column No. 20 "G" is mentioned meaning thereby Government, but in Column No. 23 which is Remarks Column, the possession of Respondent No. 1, Hyderabad Potteries Pvt. Ltd. is clearly shown which is in consonance with the stand taken by the Respondents. It is also pertinent to mention here that 'G' was encircled raising doubts about it and then in Column No. 23 name of Respondent no.1 is clearly stated.

D 24. Looking to the matter in totality and from all angles it can safely be construed that *prima facie* Appellant-State failed to establish that Respondents are land grabbers of its land or the title of the land vested with the State. Thus, the Special Court committed no error in drawing presumption in favour of the Respondents that they cannot be declared as land grabbers as contemplated under Section 10 of the Act and the *prima facie* burden which lay on the Appellant that its land has been grabbed by them has not at all been discharged. On the other

A hand, on account of various sale deeds, mutation of their names in the T.S.L.R., Payment of Taxes and other documents, it was fully established that Respondents are the exclusive owner thereof. Thus, the burden which lay on the Respondents as contemplated under Section 10 of the Act has fully been discharged.

B 25. The narration of the aforesaid facts would clearly establish that Respondent No.1 had purchased the said land from its previous owners whose names were already mutated in the land records and after purchase, Respondent No.1's name came to be mutated in the records. Corporation number was allotted to it. It had started paying Corporation Taxes as well as NALA Tax and electricity dues. Its possession for last more than 60 years had never been disturbed. It had constructed multi-storeyed building only after obtaining sanction and permission from Municipal Corporation. In the earlier Writ Petition filed by them in the High Court, Municipal Corporation and Appellant-State both were parties, which ultimately resulted in favour of the Respondents, no such ground was raised. Thus, it could not be established even in earlier litigation that the land belonged to the State.

E 26. In fact, second proceedings initiated by the Appellant under Section 8 of the Act, would be barred by constructive *res judicata* as envisaged under Section 11 of the Code of Civil Procedure, even though such a ground was neither taken nor raised before us by the Respondents. Thus, it is no more necessary to further deal with this issue.

F 27. Thus, in our considered opinion, no fault can be found either in the judgment and decree of the Special Court or in the judgment and order passed by Division Bench of the High Court, in Appellant's writ petition.

G 28. Keeping the aforesaid facts in mind, we are of the opinion that there is no merit or substance in this appeal. It is hereby dismissed with no order as to costs.

H R.P. Appeal dismissed.

S. SUMNYAN & ORS.

v.

LIMI NIRI & ORS.

(Civil Appeal No. 3512 of 2010)

APRIL 20, 2010

[DR. MUKUNDAKAM SHARMA AND H.L. DATTU, JJ.]*Service law:*

Arunachal Pradesh Administration [Public Works Department] Group-B Post Recruitment Rules, 1983 – Seniority benefit – Appointment of appellants as Assistant Engineers on temporary and ad-hoc basis by State Government under the Rules – Subsequently constitution of State Public Service Commission – Completion of two years probation period by appellants – Recommendation of the Commission – Regularisation of services of appellants from the date of initial appointment – Meanwhile, respondent no. 1 appointed as Assistant Engineer on regular basis and on probation for period of two years – Publication of several provisional seniority lists showing appellants as senior to respondent no. 1 – No objection raised – Subsequently appellants also promoted to higher posts – Publication of final seniority list – Challenge to, by respondent no. 1 – Direction by Single Judge of High Court to the Government of Arunachal Pradesh to recast the seniority list and that ad-hoc period of service rendered by appellants not to be counted towards seniority – Upheld by Division Bench – On appeal held: There is no justification for denial of the benefit of seniority to appellants from the date of their initial appointment – Respondent no. 1 neither challenged the initial appointment order of appellants as Assistant Engineers nor the subsequent order regularising their services from the date of their initial appointment – Also no objection raised to the seniority lists, thus, the said challenge is belated – Order of

A *regularization became final and binding on all persons concerned – Respondent no. 1 was inducted into Government service by a separate mode of recruitment than that of appellants, therefore, their cases cannot be equated – Thus, order of High Court not called for and is set aside – Delay/laches.*

During the years 1986 and 1988, the Government of Arunachal Pradesh appointed the appellants on temporary and ad-hoc basis as Assistant Engineers [Civil] in the Public Works Department on the condition that they would be regularized according to the Rules on the recommendation of a Selection Board constituted by the Government. As per the Rules, the appellant had to undergo a probation period of two years. Thereafter, Arunachal Pradesh Public Service Commission was constituted. The appellants completed their probation period and the State Public Service Commission considered their cases. They were regularised as Assistant Engineer [Civil] against direct recruitment quota, with effect from the date of their initial appointment. Meanwhile, in the year, 1988, the respondent no. 1 was appointed on ad-hoc basis to the post of the Assistant Engineer. Thereafter, the respondent no. 1 was appointed as Assistant Engineer on regular basis and put on probation for a period of two years on 02.05.1989. In the year 1990, the provisional seniority list of Assistant Engineers was issued and the appellants were shown as seniors to the respondent no. 1. Some of the appellants were promoted to the post of the Executive Engineers and the Superintending Engineer on ad-hoc basis and thereafter, were regularized, by giving them the benefit of service from the actual date of their joining the service. A final seniority list of the Superintending Engineers and the Executive Engineers as on 29.08.2001 was published. In the year

2001, the respondent no. 1 challenged the seniority list by filing a writ petition. The Single Judge of High Court directed the Government of Arunachal Pradesh to recast the seniority list of the Civil Engineers by accepting the date of appointment of the respondent no.1 as on 02.05.1989 and those of the appellants from the respective dates of their regularization and that the *ad-hoc* period of service rendered by them as Assistant Engineers would not be counted towards the seniority in the rank of Assistant Engineer. The Division Bench of High Court upheld the order. Hence the appeal.

Allowing the appeal, the Court

HELD: 1.1. The appellants were appointed as Assistant Engineers on purely temporary and *ad-hoc* basis as per the relevant terms and conditions. Few of the letters dated 2nd April, 1986 issued in the case of some of the appellants are placed on record. In clause 3 thereof, it was provided that the appointments would be on purely temporary and *ad-hoc* basis until regular appointments are made according to the Rules on the recommendation of a Selection Board constituted by the Government and the said *ad-hoc* appointments as Assistant Engineer would not entitle any seniority in the cadre of regular Assistant Engineer. Clause 8 of the said appointment letter, on the other hand, stated specifically that his appointment as an Assistant Engineer would be governed by the relevant Rules and Orders of the Government issued from time to time. At the relevant time when the said appointment letters were issued, the service condition of the appellants were governed by the Arunachal Pradesh Administration [Public Works Department] Group-B Post Recruitment Rules, 1983, which is a set of rules issued in exercise of the powers conferred under Article 309 of the Constitution of India. The said Rules also regulate the method of appointment

to the Group-B posts in the Public Works Department and also govern the recruitment process of the Assistant Engineers [Civil] in the Arunachal Pradesh Public Works Department. The said Rules provide both direct recruitment and promotion as methods of recruitment. The said Rules further provide that in case of a failure to recruit by the said methods, transfer on deputation shall be employed and that the period of probation for such appointment would be for two years. The Rules laid down further that the Union Public Service Commission was not required to be consulted in making the recruitment. [Paras 15, 16 and 17] [843-F-H; 844-A-F]

1.2. The appellants after their recruitment on temporary and *ad-hoc* basis worked on probation for a period of two years and on completion of the said period their cases were considered by the State Public Service Commission and by an order dated 20.07.1989, the appointment of the appellants was regularised as Assistant Engineer [Civil] against direct recruitment quota. In the said order, the initial date of joining of the appellant no. 1 to the post of Assistant Engineer [Civil] on temporary and *ad-hoc* basis was shown as 04.02.1986 and his date of regularization of appointment in the concerned Grade was shown to be as 04.02.1986, whereas, the other appellants were also given similar dates, but the fact remains that their appointment to the post of Assistant Engineer is shown to have been regularized with effect from the date of their initial appointment only. [Para 18] [844-F-H; 845-A-B]

1.3. Several seniority lists were published thereafter, showing the names of the appellants as senior to the respondent no.1 and despite such publication, which were of course provisional in nature, no objection was raised by the respondent no. 1. A final seniority list of

Assistant Engineers [Civil] in Arunachal Pradesh Public Works Department as on 01.03.1999 was published on 15.03.1999 through an Office Memorandum and in the said seniority list also the names of the appellants were shown senior to the respondent no. 1. In the said seniority list also not only the date of their initial appointment in the post of Assistant Engineer was shown but also the date of their confirmation in the Grade was also shown which was from the date of their initial appointment. When the said final seniority list was published, the respondent no. 1 finally filed a writ petition in 2001 challenging the seniority position given to the appellants. [Para 19] [844-G-H; 845-A-B]

1.4. On the 2nd of March, 2001, a Gazette notification had also been published which clearly indicates that not only the appellants were confirmed in the post of Assistant Engineer [Civil] but they were also confirmed in the post of the Executive Engineers [Civil] and at least some of them have since been promoted to the post of the Superintending Engineer and one of them is at least occupying the post of the Chief Engineer. The respondents in their writ petition had neither challenged the initial appointment order of the appellants appointing them as Assistant Engineers [Civil] on temporary and *ad-hoc* basis under the 1983 Rules, nor had they challenged the subsequent order passed by the Government of Arunachal Pradesh on the recommendation of the Arunachal Pradesh Public Service Commission regularising the services of the appellants as Assistant Engineers from the date of their initial appointment. Not only these orders were not challenged by the respondent no. 1 in the writ petition filed by him but the subsequent orders of promotion of these appellants to the post of Executive Engineers and their confirmation in the said post, on the basis of their seniority positions counting the *ad-hoc* period of service, were also not challenged.

A These orders are therefore final and binding on all concerned. [Para 20] [845-F-H; 846-A-B]

1.5. The High Court without considering those facts only dealt with one aspect which is that the initial appointment of the appellants to the post of Assistant Engineer was *de hors* the Rules. The said findings recorded by both the Single Judge as also the Division Bench were uncalled for and unjustified for the simple reason that the appointment order itself indicated that their appointment would be governed by the Service Rules then existing, i.e., the 1983 Rules. The fact that their services were regularized from the date of their initial appointment on the recommendation of the Arunachal Pradesh Public Service Commission was also totally ignored by the High Court. Thus, these facts coupled with the fact that none of the said orders were challenged by the respondent no.1, would indicate that the said orders are final and binding on all the persons concerned. The High Court ignored the fact that the respondent no. 1 himself was bound by the said orders. The respondent no.1 was bound by his own appointment orders. The appellants had rendered two years of service as Assistant Engineers and at least some of the appellants including appellant no. 1 had successfully completed their probation period on 01.04.1988 whereas the respondent no. 1 was appointed as Assistant Engineer on regular basis and put on probation for two years on 02.05.1989. Therefore, when the respondent no. 1 was put on probation, the appellant no. 1 and some others had successfully completed their probation. Thus, for all purposes at all times, the appellants were senior to the respondent no. 1. [Para 23] [846-F-H; 847-A-B]

1.6. Considering the fact and the precedents in the Department that all such employees were regularized from the date of their initial appointment, the Government

of Arunachal Pradesh also regularized the services of the appellants in the post of Assistant Engineer from the date of their initial appointment and that was done on the recommendation of the Arunachal Pradesh Public Service Commission. The order of regularization having become final and binding on all concerned could not have been ignored and implicitly set aside by the High Court on a ground that the initial appointment of the appellants was *de hors* the Rules, which is totally a non-existent ground. [Para 24] [847-C-E]

1.7. In all cases since 1980 and prior to the constitution of the State of Arunachal Pradesh as an independent State, the services of the incumbents were regularised giving them retrospective effect from their actual/initial date of joining in the service and since at the stage of initial appointment of the appellants Arunachal Pradesh Public Service Commission was non-existent, the regularization of services of such employees were given through meetings of the Departmental Promotion Committees. By the time appellants completed their two years of probationary service period, the State of Arunachal Pradesh came to be constituted and since Arunachal Pradesh Public Service Commission had come into existence by that time, the cases of regularization of the services of the appellants were considered by the State Public Service Commission and on its recommendation their services were regularized after expiry of the two year period of probation giving retrospective effect to their regularization from the date of their initial appointment. [Paras 26] [848-A-D]

1.8 The State of Arunachal Pradesh clearly stated that if such a retrospective effect to regularization of the services of the appellants by the State Public Service Commission would not have been given and if it had deviated from the past practice, the same would have

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caused prejudice and grievance and a disparity in the application of the Service Rules as compared to the past cases. Thus, it is clearly established that the respondent no. 1 was inducted into Government service by a separate mode of recruitment than that of the appellants and therefore their cases cannot be equated. The statement of the Government of Arunachal Pradesh that the provisional seniority lists were regularly published by the Public Works Department Secretariat from time to time since 1990 to 1999, with ample time being given to the incumbents to reply against any anomaly in the seniority list and that the respondent no.1 never submitted any representation in that regard is not disputed. The respondent no.1, therefore, had challenged the established seniority position after about 10 years and that too without challenging the basic and the fundamental orders of giving the appellants the benefit of regularised service from their initial date of appointment as Assistant Engineers. [Paras 27 and 28] [848-D-H; 849-A-B]

1.9. When the respondents were appointed to the service as Assistant Engineers on the recommendation of the APPSC, the said appointment was on probation for a period of two years. Some of the appellants had successfully completed their probation period on 20.07.1989, after their cases had been taken up for regularization by the APPSC. Therefore, there is no justification for denial of the benefit of seniority to the appellants from the date of their initial appointment. The orders passed by the Single Judge as well as by the Division Bench of the High Court is set aside. The writ petition filed by respondent no. 1 in the High Court is dismissed. [Paras 36 and 37] [852-E-G; 853-A-B]

Shri L. Chandrakishore Singh v. State of Manipur and Ors. (1999) 8 SCC 287; G.P. Doval v. Chief Secy. Govt. of

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U.P. (1984) 4 SCC 329; Direct Recruit Class II Engineering Officers' Assn. v. State of Maharashtra (1990) 2 SCC 715, relied on. A

K. Madalaimuthu and Anr. v. State of T.N. and Ors. (2006) 6 SCC 558, distinguished. B

Case Law Reference:

(2006) 6 SCC 558 Distinguished. Para 30

(1999) 8 SCC 287 Relied on. Para 33 C

(1984) 4 SCC 329 Relied on. Para 34

(1990) 2 SCC 715 Relied on. Para 35

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3512 of 2010. D

From the Judgment & Order dated 19.2.2009 of the High Court of Gauhati in Writ Appeal No. 370 of 2005.

P.K. Goswami, Rajiv Mehta, A. Henry for the Appellants. E

Ginny Jetley Rautray, Kanchan Kaur Dhodi, Anil Shrivastav for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted. F

2. The present appeal is directed against the judgment and order dated 19.02.2009 passed by the Division Bench of the Gauhati High Court, whereby the High Court affirmed the judgment and order of the learned Single Judge allowing the writ petition filed by the private respondent No. 1 herein and holding that necessary correction be made in the seniority list of the Civil Engineers and recast the same by accepting the date of appointment of the respondent No. 1 as on 02.05.1989 and those of the appellants herein from their respective dates H

A of regularization and that the *ad-hoc* period of service rendered by them as Assistant Engineers would not be counted towards their seniority in the rank of Assistant Engineer.

B 3. The appellants herein are aggrieved by the aforesaid directions issued by the learned Single Judge which were subsequently affirmed by the Division Bench of the High Court, since by the aforesaid direction they are losing the benefit of service period of about two years rendered by them as Assistant Engineers on *ad-hoc* basis for the purpose of counting their seniority in the rank of Assistant Engineer. C

D 4. The appellants herein were appointed on temporary and *ad-hoc* basis as Assistant Engineers [Civil] by the Government of Arunachal Pradesh in the Public Works Department on various dates between the years 1986 and 1988 on the condition that they would be regularized according to the Rules on the recommendation of a Selection Board constituted by the Government. The State of Arunachal Pradesh came to be constituted as a separate State of the Republic of India on 20.02.1987. Consequent to such constitution, Arunachal Pradesh Public Service Commission was also constituted under Gazette notification dated 29.03.1988. E

F 5. The respondent No. 1 – Limi Niri herein was also appointed on *ad-hoc* basis in the year 1988 to the post of the Assistant Engineer with a specific condition that he would be regularized according to the relevant Rules on the recommendation of the Arunachal Pradesh Public Service Commission. Sometime in the month of May, 1988, an advertisement was issued inviting applications for filling up the posts of the Assistant Engineers [Civil] and the Assistant Engineers [Electrical] in the Public Works Department of the Government of Arunachal Pradesh. The respondent No. 1 submitted his application pursuant to the aforesaid advertisement. He was found suitable for such appointment as Assistant Engineer [Civil] and consequently he was issued an appointment letter dated 19.04.1989 for his appointment with H

A a condition that he shall be on the post on probation for a period of two years and that his appointment shall not commence before 02.05.1989.

B 6. A provisional seniority list as on 31.08.1990 of Assistant Engineers [Civil] in the Arunachal Pradesh Public Works Department was issued and the appellants herein were shown as seniors to the respondent no. 1. In the year 1993, some of the appellants were promoted as Executive Engineers on *ad-hoc* basis and a provisional seniority list of Executive Engineers in the Arunachal Pradesh Public Works Department was circulated and the names of some of the appellants were shown in the said list of the Executive Engineers. In the year 1997, a further seniority list as on 31.03.1997 of the Assistant Engineers [Civil], which showed the position of various appellants as senior to the respondent no. 1, was circulated for claims and objections. Some of the appellants were thereafter promoted to the posts of the Executive Engineer and the Superintending Engineer and confirmed in the said posts and at least one of them is now occupying the post of the Chief Engineer.

E 7. The authorities after promoting the appellants to the posts of Executive Engineers in between the period from 1991 to 2001 regularized the *ad-hoc* promotions in the post of the Executive Engineer by an order dated 15.02.2001. A final seniority list of the Superintending Engineers and the Executive Engineers as on 29.08.2001 was published. Regularization of some of the appellants by order dated 15.02.2001 and final seniority list [as on 29.08.2001] of Superintending Engineers [Civil] and Executive Engineers circulated on 31.08.2001 were never put in challenge by anyone.

G 8. In the year 2001, the respondent no. 1 herein filed the aforesaid writ petition against the seniority position ascribed and shown in the seniority list dated 15.03.1999 and sought for a direction that he is senior to the appellants herein as he was regularly selected in 1989 by the Arunachal Pradesh Public H

A Service Commission. The appellants and the State Government filed their counter affidavit in the said writ petition contending, inter alia, that the appellants were appointed prior to the constitution of the Arunachal Pradesh Public Service Commission on 29.03.1988. The appointment of Group-B post in the Public Works Department of Arunachal Pradesh was guided by the Arunachal Pradesh Administration [Public Works Department] Group-B Post Recruitment Rules, 1983 and the appointment of the appellants was made as per the said Recruitment Rules in the absence of the Arunachal Pradesh Public Service Commission at the relevant time. Their services also were regularized in terms of the said Rules which provided that a minimum service period of two years, known as period of probation, was necessary for rendering service in the capacity of Assistant Engineer for all appointments made by Government to these posts since 1980. The services of the appellants were regularized as stated hereinabove giving them the benefit of service from the actual date of their joining the service.

E 9. Before the constitution of the Arunachal Pradesh Public Service Commission such regularizations were given by convening meetings of the Departmental Promotion Committee. However, by the time the cases of the appellants could be taken up for consideration for regularization of their services on completion of two years period of probation, the Arunachal Pradesh Public Service Commission came to be constituted and therefore the cases for regularization of the services of the appellants were considered by the Arunachal Pradesh Public Service Commission, which recommended the regularization of the services of the appellants from the date of their initial appointment. It was also pointed out that not giving retrospective effect to regularization of the services of the appellants by Arunachal Pradesh Public Service Commission would have been a deviation from the past practices and that would have caused prejudice and grievance amongst the appellants as also disparity in application of the Service Rules.

It was also pointed out that the appellants and the respondents were inducted into the Government service through two separately and different modes of recruitment, one taking place before the constitution of the Arunachal Pradesh Public Service Commission and the other after the constitution of the Arunachal Pradesh Public Service Commission.

10. The learned Single Judge of the Gauhati High Court took up the aforesaid writ petition for hearing and by its judgment and order dated 29.04.2005 allowed the writ petition and directed the Government of Arunachal Pradesh to make necessary changes in the seniority list by recasting the same by accepting the date of appointment of the respondent no.1 as on 02.05.1989 and those of the appellants from the respective dates of their regularization and that the *ad-hoc* period of service rendered by them would not be counted towards the seniority in the rank of Assistant Engineer.

11. Being aggrieved by the aforesaid judgment and order, an appeal was filed before the Division Bench of the High Court which was heard accordingly and by a judgment and order dated 19.02.2009 the Division Bench dismissed the writ appeal filed by the appellants and confirmed the judgment and order passed by the learned Single Judge. Being so aggrieved, the present appeal was filed by the appellants herein which was entertained and on completion of the pleadings, we have heard learned counsel appearing for the parties.

12. Counsel appearing for the appellants submitted before us that since the appellants herein were appointed prior to the respondent no.1 in point of time and they were also regularized from an earlier date, they had been rightly shown by the concerned Department to be senior to the respondent no. 1. The counsel for the appellant further submitted before us that therefore in any view of the matter the appointment of the appellants having been made by the State Government prior to the constitution of the Arunachal Pradesh Public Service Commission and their regularisation on the recommendation

A of the State Public Service Commission after successful completion of two years probationary service, having not been challenged by any party, including the respondent no. 1 herein, the High Court was not justified in interfering with the seniority position and the length of service rendered by the appellants in counting the said *ad-hoc* period of service for the benefit of their seniority.

13. It was also submitted that not only their services rendered as temporary and *ad-hoc* service were recognized and counted towards their seniority while regularizing their service as Assistant Engineer with a retrospective date of their initial appointment, but even some of the appellants, in the meantime, depending on their seniority in the post of the Assistant Engineer were considered and promoted during the period from 1991 to 2001 to the post of the Executive Engineer and the Superintending Engineer and one of them was even promoted to the post of the Chief Engineer. However, despite the aforesaid situation, no objection or challenge was made till 2001. It was further submitted that the High Court acted illegally and without jurisdiction in setting aside the benefit given to them as far back as 20.07.1989, although, in the writ petition filed by the respondent no. 1, the said order was not challenged. It was also submitted that the respondent no. 1 himself not having raised any grievance against the initial appointment of the appellants as temporary and *ad-hoc* Assistant Engineers and also having not protested their regularization of service on the recommendation of the Arunachal Pradesh Public Service Commission from the date of their initial appointment and the said order having become final and binding no interference was called for from the High Court on the basis of a writ petition.

14. The counsel appearing for the respondent no. 1, however, submitted that though the initial appointment of the appellants has not been challenged by the respondent no. 1, he is aggrieved by the appellants having been given the benefit of seniority for the period of service which was rendered on

temporary and *ad-hoc* basis. The counsel for the respondents also submitted that since the initial appointment of the appellants was irregular and de hors the relevant Rules, they are entitled to get their seniority only from the date when they were regularized by the competent authority and therefore the judgment and order passed by the High Court is just and proper. It was also submitted by the counsel for the respondents that had the appellants so desired, they could have, as he (respondent no.1) had done, submitted their application for being considered as a regular appointee pursuant to the advertisement issued by the Public Service Commission. The counsel for the respondents further emphasized the fact some of the appellants had availed the said opportunity, which fact would indeed show that they were fully conscious of the fact that their initial appointment was not in accordance with the existing rules and that the same was required to be regularized by following a proper procedure and therefore their seniority could be counted only from the date they were so regularized in the service on the basis of the recommendation of the Arunachal Pradesh Public Service Commission.

15. In the light of the aforesaid submissions and averments made by the counsel appearing for the appellants, the respondents and the State of Arunachal Pradesh and after examining the documents placed on record before us, we find that there is no dispute with regard to the fact that the appellants were appointed as Assistant Engineers on purely temporary and *ad-hoc* basis. Few of the letters dated 2nd April, 1986 issued in the case of some of the appellants are placed on record.

16. A close perusal of the said letters issued shows that a few of the appellants had been appointed on 2nd of April, 1986 as Assistant Engineers purely on temporary and *ad-hoc* basis as per the relevant terms and conditions. In clause 3 thereof, it was provided that the appointments would be on purely temporary and *ad-hoc* basis until regular appointments

are made according to the Rules on the recommendation of a Selection Board constituted by the Government and that aforesaid *ad-hoc* appointments as Assistant Engineer would not entitle any seniority in the cadre of regular Assistant Engineer.

17. Clause 8 of the said appointment letter, on the other hand, stated specifically that his appointment as an Assistant Engineer would be governed by the relevant Rules and Orders of the Government issued from time to time. There is also no dispute with regard to the fact that at the relevant time when the aforesaid appointment letters were issued, the service condition of the appellants were governed by the Arunachal Pradesh Administration [Public Works Department] Group-B Post Recruitment Rules, 1983, which is a set of rules issued in exercise of the powers conferred under Article 309 of the Constitution of India. The said Rules also regulate the method of appointment to the Group-B posts in the Public Works Department and also govern the recruitment process of the Assistant Engineers [Civil] in the Arunachal Pradesh Public Works Department. The said Rules provide both direct recruitment and promotion as methods of recruitment. The said Rules further provide that in case of a failure to recruit by the aforesaid methods, transfer on deputation shall be employed and that the period of probation for such appointment would be for two years. The Rules laid down further that the Union Public Service Commission was not required to be consulted in making the recruitment.

18. The aforesaid appellants after their recruitment on temporary and *ad-hoc* basis worked on probation for a period of two years and on completion of the said period their cases were considered by the State Public Service Commission and by an order dated 20.07.1989, the appointment of the appellants was regularised as Assistant Engineer [Civil] against direct recruitment quota. In the said order, the initial date of joining of the appellant no. 1 to the post of Assistant Engineer

[Civil] on temporary and *ad-hoc* basis was shown as 04.02.1986 and his date of regularization of appointment in the concerned Grade was shown to be as 04.02.1986, whereas, the other appellants were also given similar dates, but the fact remains that their appointment to the post of Assistant Engineer is shown to have been regularized with effect from the date of their initial appointment only.

19. Several seniority lists were published thereafter, showing the names of the appellants as senior to the respondent no.1 and despite such publication, which were of course provisional in nature, no objection was raised by the respondent no. 1. A final seniority list of Assistant Engineers [Civil] in Arunachal Pradesh Public Works Department as on 01.03.1999 was published on 15.03.1999 through an Office Memorandum and in the said seniority list also the names of the appellants were shown senior to the respondent no. 1. In the said seniority list also not only the date of their initial appointment in the post of Assistant Engineer was shown but also the date of their confirmation in the Grade was also shown which was from the date of their initial appointment. When the aforesaid final seniority list was published, the respondent no. 1 finally filed a writ petition in 2001 challenging the seniority position given to the appellants.

20. On the 2nd of March, 2001, a Gazette notification had also been published which clearly indicates that not only the appellants were confirmed in the post of Assistant Engineer [Civil] but they were also confirmed in the post of the Executive Engineers [Civil] and at least some of them have since been promoted to the post of the Superintending Engineer and one of them is at least occupying become the post of the Chief Engineer. The respondents in their writ petition had neither challenged the initial appointment order of the appellants appointing them as Assistant Engineers [Civil] on temporary and *ad-hoc* basis under the 1983 Rules, nor had they challenged the subsequent order passed by the Government of Arunachal

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A Pradesh on the recommendation of the Arunachal Pradesh Public Service Commission regularising the services of the appellants as Assistant Engineers from the date of their initial appointment. Not only these orders were not challenged by the respondent no. 1 in the writ petition filed by him but the subsequent orders of promotion of these appellants to the post of Executive Engineers and their confirmation in the said post, on the basis of their seniority positions counting the *ad-hoc* period of service, were also not challenged. These orders are therefore final and binding on all concerned.

C 21. As noted earlier by us, several seniority lists, although provisional in nature, were published in the meantime, showing that the benefit of *ad-hoc* period had been given to the appellants. But these were never challenged by the respondent no. 1 and it was only in the year 2001 when some of them were promoted to the post of Superintending Engineer and one of them to the post of the Chief Engineer that the respondent no. 1 filed the aforesaid writ petition.

E 22. The High Court without considering those facts have only dealt with one aspect which is that the initial appointment of the appellants to the post of Assistant Engineer was de hors the Rules. The said findings recorded by both the Single Judge as also the Division Bench were uncalled for and unjustified for the simple reason that the appointment order itself indicated that their appointment would be governed by the Service Rules then existing, i.e., the 1983 Rules.

G 23. The fact that their services were regularized from the date of their initial appointment on the recommendation of the Arunachal Pradesh Public Service Commission was also totally ignored by the High Court. Thus, these facts coupled with the fact that none of the aforesaid orders were challenged by the respondent no.1, would indicate that the said orders are final and binding on all the persons concerned. The High Court ignored the fact that the respondent no. 1 himself was bound by the aforesaid orders. The respondent no.1 was bound by

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his own appointment orders. The appellants had rendered two years of service as Assistant Engineers and at least some of the appellants including appellant no. 1 had successfully completed their probation period on 01.04.1988 whereas the respondent no. 1 was appointed as Assistant Engineer on regular basis and put on probation for two years on 02.05.1989. Therefore, when the respondent no. 1 was put on probation, the appellant no. 1 and some others had successfully completed their probation. Thus, for all purposes at all times, the appellants were senior to the respondent no. 1.

24. Considering the said fact and also considering the precedents in the Department that all such employees were regularized from the date of their initial appointment, the Government of Arunachal Pradesh also regularized the services of the appellants in the post of Assistant Engineer from the date of their initial appointment and that was done on the recommendation of the Arunachal Pradesh Public Service Commission. The order of regularization having become final and binding on all concerned could not have been ignored and implicitly set aside by the High Court on a ground that the initial appointment of the appellants was de hors the Rules, which is totally a non-existent ground.

25. There is no denial to the fact that prior to the constitution of the Arunachal Pradesh Public Service Commission on 29th March, 1988 the appointment of Assistant Engineers in the State Public Works Department was always carried out in accordance with the Arunachal Pradesh Administration [Public Works Department] Group-B Post Recruitment Rules, 1983. The appointment of the appellants as indicated by their initial appointment letters issued in 1986 indicate that their appointments were governed as per the said Service Rules.

26. Under the said Rules, a minimum service period of two years, known as period of probation was considered necessary for rendering service in the capacity of Assistant Engineer for

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A all appointments made by Government to these posts since 1980. In all cases since 1980 and prior to the constitution of the State of Arunachal Pradesh as an independent State, the services of the incumbents were regularised giving them retrospective effect from their actual/initial date of joining in the service and since at the stage of initial appointment of the appellants Arunachal Pradesh Public Service Commission was non-existent, the regularization of services of such employees were given through meetings of the Departmental Promotion Committees. By the time appellants completed their two years of probationary service period, the State of Arunachal Pradesh came to be constituted and since Arunachal Pradesh Public Service Commission had come into existence by that time, the cases of regularization of the services of the appellants were considered by the State Public Service Commission and on its recommendation their services were regularized after expiry of the two year period of probation giving retrospective effect to their regularization from the date of their initial appointment.

27. It is clearly stated by the State of Arunachal Pradesh that if such a retrospective effect to regularization of the services of the appellants by the State Public Service Commission would not have been given and if it had deviated from the past practice, the same would have caused prejudice and grievance and a disparity in the application of the Service Rules as compared to the past cases.

F 28. It is, thus, clearly established that the respondent no. 1 was inducted into Government service by a separate mode of recruitment than that of the appellants and therefore their cases cannot be equated. The statement of the Government of Arunachal Pradesh that the provisional seniority lists were regularly published by the Public Works Department Secretariat from time to time since 1990 to 1999, with ample time being given to the incumbents to reply against any anomaly in the seniority list and that the respondent no. 1 never submitted any representation in that regard is not disputed. The respondent

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no. 1, therefore, had challenged the established seniority position after about 10 years and that too without challenging the basic and the fundamental orders of giving the appellants the benefit of regularised service from their initial date of appointment as Assistant Engineers.

29. The challenge appears to us to be belated and in this regard we would endorse the same view as expressed by this Court in the case of *Shri L. Chandrakishore Singh v. State of Manipur & Ors.* reported in (1999) 8 SCC 287 at para 15 which is extracted hereinbelow: -

“15. It is now well settled that even in cases of probation or officiating appointments which are followed by a confirmation unless a contrary rule is shown, the service rendered as officiating appointment or on probation cannot be ignored for reckoning the length of continuous officiating service for determining the place in the seniority list. Where the first appointment is made by not following the prescribed procedure and such appointee is approved later on, the approval would mean his confirmation by the authority shall relate back to the date on which his appointment was made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. In this regard we fortify our view by the judgment of this Court in *G.P. Doval and Anr. v. Chief Secretary, Government of U.P. and Ors.* [(1984) 4 SCC 329].”

30. The respondents have, in support of their case, referred to and relied upon the judgment of this Court in the case of *K. Madalaimuthu and Another v. State of T.N. and Others* reported in (2006) 6 SCC 558. In order to appreciate the contention raised by the counsel appearing for the respondents, we have carefully perused the said decision. However, on a careful scrutiny of the said judgment, we are of the considered opinion that the said decision is distinguishable on facts which are noted hereinbelow.

31. The aforesaid decision was rendered in a fact situation which is altogether different from the present one and this would be apparent on a bare perusal of the said decision. In the said case the recruitment of the respondents therein was admittedly de hors the relevant Recruitment Rules inasmuch as the said recruitment was particularly made under Rule 10 (a) (i) (1) of the Tamil Nadu State and Subordinate Services Rules, 1955. The said provision is extracted hereinbelow for a proper appreciation of the situation: -

“10 (a) (i) (1): Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a service, class or category and there would be undue delay in making such appointment in accordance with these rules and the Special Rules, the appointing authority may temporarily appoint a person, who possess the qualifications prescribed for the post *otherwise than in accordance with the said rules.*”

(emphasis supplied)

32. It is clear from the judgment in the said case that the respondents therein had been appointed under Rule 10 (a) (i) (1) which provides for recruitments in emergent circumstances and allows the appointing authority to make appointments otherwise than in accordance with the said Rules. It was in this context that this Court held that the respondents therein will get benefit of their seniority only from the date they were regularized in the cadre to which they had been appointed. In the case at hand, however, the fact situation is totally different on account of the fact that the appointment letters issued to the appellants appointing them as temporary and *ad-hoc* basis as Assistant Engineers in the Public Works Department specifically mentioned that the appellants will be governed by the Service Rules and also that they would be regularized according to the Rules on the recommendation of a Selection Board constituted by the Government. We would like to extract both the aforesaid

conditions formulating part of the terms and conditions contained in the appointment letters issued to the appellants: -

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“3. This appointment will be on purely temporary and *ad-hoc* basis until regular appointment are made according to rules on the recommendation of a selection Board constituted by the Government. (No increment in time scale will be permissible till their appointment is regularized. This *ad-hoc* appointment as Assistant Engineer will not entitle any seniority in the cadre of regular Assistant Engineer”

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“8. His appointment will be governed by the relevant Rules and Orders of the Government issued from time to time”

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33. In that view of the matter there was not only a case of the appellants having a legitimate expectation that their cases would be considered for regularization by the competent authority but also a case where the Service Rules were also made applicable to the appellants. When the Arunachal Pradesh Public Service Commission (“the APPSC”) considered the cases of the appellants for regularization on completion of their probationary period of two years, all the said factors weighed with the APPSC and consequently it was decided to regularize them from the date of their initial appointment. Therefore, in the facts of the present case, ratio laid down in the case of *Shri L. Chandrakishore Singh* (supra) would be squarely applicable.

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34. We may here also appropriately refer to another decision of this Court in the case of *G.P. Doval v. Chief Secy., Govt. of U.P.* reported in (1984) 4 SCC 329, wherein this Court held that regularization of the services of a person, whose initial appointment although not in accordance with the prescribed procedure but later on approved by an authority having power and jurisdiction to do so would always relate back to the dates of their initial appointment. Para 13 is, which is reproduced hereinbelow:

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“13.If the first appointment is made by not following the prescribed procedure but later on the appointee is approved making his appointment regular, it is obvious commonsense that in the absence of a contrary rule, the approval which means confirmation by the authority which had the authority, power and jurisdiction to make appointment or recommend for appointment, will relate back to the date on which first appointment is made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. That has not been done in this case.....”

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35. We may also usefully refer to the judgment of this Court in *Direct Recruit Class II Engineering Officers’ Assn. v. State of Maharashtra* reported in (1990) 2 SCC 715, which reads as follows:

“47. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.....”

36. The other aspect of the matter which is to be noted is that when the respondents were appointed to the service as Assistant Engineers on the recommendation of the APPSC, the said appointment was on probation for a period of two years. Some of the appellants had successfully completed their probation period on 20.07.1989, after their cases had been taken up for regularization by the APPSC. Therefore, when considered from any angle there is no justification for denial of the benefit of seniority to the appellants from the date of their initial appointment which is also in tune with the legal principles laid down by this Court as referred to hereinbefore and in that view of the matter the aforesaid decision which is relied upon by the counsel appearing for the respondents is held to be not

applicable to the facts and circumstances of the present case. A

37. In view of the aforesaid discussion, we set aside the orders passed by the Single Judge as well as by the Division Bench of the High Court. Consequently, the Writ Petition filed by respondent no. 1 in the High Court would stand dismissed. B

38. Accordingly, the present appeal is allowed. There will be no order as to costs.

N.J. Appeal allowed.

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DAYA KISHAN
v.
STATE OF HARYANA
(Criminal Appeal No. 879 of 2007)

B

APRIL 22, 2010
[J.M. PANCHAL AND DEEPAK VERMA, JJ.]

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Penal Code, 1860:
ss. 302/149, 307/149, 323/149 and s. 148 – Conviction under – Altercation between S-son of informant and K-son of accused – After a short while, K and four others armed with weapons, went to the scene of incident – Brother of K inflicted fatal gun shot injuries to R-nephew of informant and injuries to S – Accused and two others caused injuries to informant – Conviction and sentence of accused u/s 302/149, 307/149, 323/149 and s. 148 by courts below – Three other accused declared proclaimed offenders – On appeal held: No altercation or quarrel took place between R and K nor any enmity between accused and R – Accused did not share common object of one of the members of the unlawful assembly to cause death of R – No knowledge can be attributed to him as regard the likelihood of commission of murder of R – Thus, conviction u/s. 302/149 not sustainable and set aside – Conviction u/s. 307/149 and ss. 323/149 and 148 upheld since finding of courts below based on appreciation of reliable evidence.

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s. 149 – Nature and scope of – Applicability of – Explained.

According to the prosecution case, there was a land dispute between BR-informant and the appellant and the same was settled. The informant's case was that appellant's family were still bearing a grudge against his

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family. On the fateful day, altercation ensued between S-son of informant and K-son of appellant. K came back and after a short while again went to the scene of incident with his father-appellant, brother P and two others. They all were armed with weapons. They raised lalkara that S would not be spared by them. P fired a gun shot resulting in death of R. P also fired a gunshot at S, resulting in injuries to S. The appellant along with other two inflicted blows on the informant. The informant also inflicted injury to the appellant in self-defence. The trial court convicted the appellant u/s. 302/149 IPC and sentenced to R.I. for life for causing death of R; u/s. 307/149 IPC and sentenced to R.I. for seven years for attempting to commit murder of injured S; and u/s. 323/149 IPC with R.I. for one year; and u/s. 148 with RI for two years. Accused RJ was also convicted. The other three accused were declared proclaimed offenders. Hence the appeal.

Partly allowing the appeal, the Court

HELD: 1. Section 149 IPC creates a constructive or vicarious liability on the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. The basis of the constructive guilt u/s. 149 IPC is mere membership of the unlawful assembly, with the requisite common object or knowledge. This Section makes a member of the unlawful assembly responsible as a member for the acts of each and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability u/s. 149. There are two essential ingredients of s. 149, viz., (1) commission of an offence by any member of an unlawful assembly and (2) such offence must have been committed in prosecution of the common object of that

assembly or must be such as the members of that assembly knew to be likely to be committed. Once the court finds that these two ingredients are fulfilled, every person, who at the time of committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to the court to see as to who actually did the offensive act nor it would be open to the Court to require the prosecution to prove which of the members did which of the offensive acts. Whenever a court convicts any person of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but that in pursuance of such common object the offence was committed. There is no manner of doubt that before recording the conviction u/s. 149 IPC, the essential ingredients of s. 149 IPC must be established. [Para 12] [867-H; 868-A-F]

2.1. On the facts and in the circumstances of the case, it is proved beyond pale of doubt that the deceased R died a homicidal death. The trial court as well as the High Court relied upon the testimony of injured informant as well as other witnesses and rightly recorded the conclusion that the deceased died because of shot fired at him by the accused P from his gun. The Sessions Court referred to the injuries sustained by S and correctly come to the conclusion that he had sustained injuries from the shot fired by the accused P. The other findings recorded by the Sessions Court and the High Court relating to commission of offences u/s. 323, 307 and 148 IPC are based on appreciation of reliable evidence. The appellant failed to satisfy that those findings are either perverse or not borne out from the evidence. Under the circumstances those findings are upheld. [Paras 8 and 9] [866-C-F]

2.2. The prosecution did not lead any evidence to prove that the accused party had any grievance or grudge against the deceased R who was nephew of the first informant BR. The only fact, which can be held to be proved by the prosecution, is that the accused K had an altercation with S relating to purchase of some goods, after which K had threatened S and had then left the shop and come back within a short duration with other four accused including the appellant, who were variously armed. The further fact proved by the prosecution is that immediately on coming to the place of incident, P-son of the appellant had fired a shot at R without any provocation or previous enmity or any other reason. The defence tried to prove enmity between the first informant and the appellant but the substantive evidence of first informant- PW 4 and injured S-PW 10, in fact goes to prove that there was no such dispute relating to the land and/or enmity between the first informant and the appellant. The record does not indicate that any altercation had taken place between K-son of the appellant, and R when accused K had gone to the shop of injured S for purchasing certain articles. In fact, the altercation had taken place between K and injured S. Though it was the case of the prosecution that after reaching the place of incident, the members of the unlawful assembly had given lalkara before the attack, the first informant in his substantive evidence before the court did not mention anything about the said lalkara though it was so mentioned by him in his FIR. Thus, the fact that lalkara was made before the attack is disbelieved. If the evidence of the injured witness is appreciated in the said background, it becomes evident that no evidence could be adduced by the prosecution to establish that common object of the unlawful assembly was to do away with R or cause any injury to him. The evidence clinchingly established that

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A immediately after reaching the place of incident a shot was fired by accused P from his gun. It would have been a different matter if R had suffered injuries in some other manner, e.g., R had tried to intervene when S was being attacked and was shot at. In such circumstances B provisions of s. 149 IPC could have been well invoked. [Para 13] [868-H; 869-A-H; 870-A]

2.3. There is no evidence regarding meeting of minds or formation of the common object even at the spur of the moment, when P immediately after reaching the place of incident shot at the deceased R. There is no evidence suggesting that the appellant said something to indicate that he wanted the deceased to be done away with. There is nothing to establish that the appellant knew that P would cause fatal injuries to the deceased, though the appellant must have anticipated that P would cause injuries to S. [Para 13] [870-B-C]

2.4. No overt act is attributed to the appellant so far as the deceased is concerned. Mere fact that the appellant was armed with a lathi by itself would not prove that he shared common object with which the main accused P was inspired. The prosecution did not lead the evidence to establish nexus between the common object and the offence committed. The appellant, being father of the accused K, who had an altercation earlier with injured S, had accompanied K, which can be termed as natural conduct on the part of the appellant. In the course of the incident the appellant himself had sustained serious injuries. The testimony of PW-14 and DW 1-doctors proves the same. The first informant had mentioned in his First Information Report itself that he had caused injuries to the appellant in exercise of his right of self-defence. The record did not indicate that the injuries sustained by the appellant were caused by deceased R. It is not the

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case of the prosecution that the appellant retaliated or asked others to attack the first informant despite having received serious injuries, which would indicate that the appellant had no grudge nor shared the object with which the accused P had fired shot at the deceased R. The only circumstance on the basis of which the prosecution wants to hold that the common object of the unlawful assembly was to murder R is that P had a gun and the appellant was a member of an unlawful assembly. The test for application of s. 149 IPC cannot be accepted. [Para 13] [870-C-H; 871-A-B]

2.5. On the peculiar facts and in the circumstances of the case, it can be safely concluded that the appellant did not share common object of one of the members of the unlawful assembly to cause death of R. The appellant cannot be reasonably attributed with knowledge that there was likelihood of commission of murder of R, because no altercation or quarrel had taken place between R and the accused K nor there was any enmity between the appellant and R. Under the circumstances, the conviction of the appellant u/s. 302/149 IPC for causing death of deceased R, is not well-founded and is set aside. The conviction of the appellant u/s. 307/149 IPC for attempting to commit murder of injured S; and u/s. 323/149 IPC and u/s. 148 IPC is amply borne out from the evidence on the record. The sentences imposed on the appellant for commission of said offences are just and proper and no case is made out to interfere with the same. [Paras 13 and 14] [871-C-E; 872-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 879 of 2007.

From the Judgment & Order dated 21.8.2006 of the High Court of Punjab & Haryana at Chandigarh in CrI. A.No. 277-DB of 2004.

A Gaurav Agrawal for the Appellant.

Rajeev Gaur 'Naseem', Kamal Mohan Gupta for the Respondent.

B The Judgment of the Court was delivered by

C **J.M. PANCHAL, J.** 1. This appeal, by grant of special leave, is directed against judgment dated August 21, 2006, rendered by Division Bench of High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 277-DB of 2004, whereby the High Court has dismissed the appeal filed by the appellant and confirmed judgment dated January 19, 2004, passed by the learned Sessions Judge, Sonipat in Sessions Case No. 21 of 1999/2003 convicting the appellant (1) under Section 302 read with Section 149 of Indian Penal Code (IPC) and sentencing him to R.I. for life and fine of Rs.3, 000/- in default R.I. for two years, (2) under Section 307 read with Section 149 IPC and sentencing him to R.I. for seven years and fine of Rs.2, 000/- in default R.I. for one year, (3) under Section 323 read with Section 149 IPC and sentencing him to R.I. for one year and (4) under Section 148 IPC and sentencing him to R.I. for two years.

2. The facts emerging from the record of the case are as under: -

F Bhale Ram is a resident of Village Jagsi. He has constructed shops on Bus Adda of Village Jagsi. There is a liquor vend in one of the shops constructed by him, while one shop, i.e., tea stall was being run by his son Sanjay and nephew Rajesh, son of Balbir. Two other shops are lying vacant and there is land behind these shops for tethering the cattle. According to the prosecution case a civil suit between Bhale Ram and the appellant regarding the land was pending since long time. The dispute relating to land was referred to Panchayat of the village. It was the claim of Bhale Ram that the said dispute was settled by the Panchayat but thereafter also

A the members of the family of the appellant were bearing a
grudge against him and his family. The incident in question took
place on November 30, 1998. At about 7.00 P.M. on the said
date Sanjay and nephew of Bhale Ram were sitting in the shop
when accused No. 1 Krishan, son of the appellant, came to the
shop and asked for some goods. The goods were given by
Sanjay to him. When Sanjay demanded money, an altercation
ensued. Krishan threatened Sanjay that he would burn him.
Krishan went back to his house, which was just behind the shop
and after a short time (1) Krishan, (2) Pohla @ Sat Narayan,
both sons of the appellant Daya Kishan, (3) the appellant Daya
Kishan himself, (4) Ajmer and (5) Raja, both sons of Lalchand
Bairagi, came there. They raised lalkara saying that Sanjay
would not be spared by them. Pohla was armed with a gun
whereas Ajmer was armed with Jelli and other accused
including the appellant were armed with lathi. On coming to the
place of incident, Pohla at once fired a shot at Rajesh from his
gun, which hit on the chest of Rajesh. When Sanjay went to the
rescue of Rajesh, Pohla fired at Sanjay as a result of which
Sanjay sustained injuries. The appellant gave a lathi blow on
the right eye of the informant Bhale Ram whereas other
accused, namely, Ajmer caused injury to the first informant with
a jelli and Krishan gave a lathi blow on the wrist of the informant.
The other assailants caused injuries to the informant's
daughters, namely, Kamlesh and Meena and wife Kishni and
left. The injured were taken to Health Centre, Gohana from
where they were referred to PGIMS, Rohtak. When they
reached PGIMS Hospital, Rohtak, Rajesh was declared brought
dead whereas others were admitted to the hospital. The first
informant Bhale Ram had also caused injury to the appellant in
self-defence. The Head Constable on duty at PGIMS Hospital,
Rohtak, had informed the police station about the injured having
been admitted in the hospital for treatment. Therefore, ASI Ram
Prakash went to PGIMS Hospital and recorded the statement
of Bhale Ram. The ASI sent the statement to P.S. Baroda for
registration of FIR. At the police station, FIR was registered

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A against the accused for commission of offences punishable
under Sections 148, 149, 323, 307 and 302 IPC as well as
under Sections 27, 54 and 59 of the Arms Act.

B 3. The Investigating Officer recorded statements of the
witnesses, who were found to be conversant with the facts of
the case. Inquest was held on the dead body of the deceased
and arrangements were made by the ASI for conducting post
mortem examination on the dead body of the deceased. On
completion of the investigation the appellant and three other
accused were charge-sheeted in the court of learned Judicial
Magistrate, First Class, Gohana for commission of offences
punishable under Sections 148, 149, 323, 307 and 302 IPC
as well as Sections 27, 54 and 59 of Arms Act. As the offences
punishable under Sections 307 and 302 IPC are exclusively
triable by Court of Sessions, the case was committed to
Sessions Court, Sonapat for trial. In the Charge-sheet it was
mentioned that accused Sat Narayan was absconding and
declared proclaimed offender. Subsequently, he was arrested
and a supplementary challan was submitted resulting into
registration of Sessions Case No. 122 of 1999.

E 4. The learned Sessions Judge framed charge against the
appellant and other accused for commission of offences
punishable under Sections 148, 149, 323, 307 and 302 IPC.
The same was read over and explained to them. They pleaded
not guilty to the same and claimed to be tried. The prosecution,
therefore, examined several witnesses and produced
documents in support of its case against the appellant and
others. In his statement under Section 313 accused Krishan
denied all the allegations levelled against him by the
prosecution. He stated that when he was present in his house
with his father Daya Kishan, i.e., the appellant and ladies,
Sanjay, who was armed with Gandasa along with 20 to 25
persons armed with weapons came to his house and raised
lalkara to teach a lesson to them. According to him Sanjay gave
Gandasa blow to him and other persons who were in the house

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A and therefore in the defence of himself (Krishan) and other members of the family, his father Daya Kishan ('the appellant' therein) fired a shot from a gun. Krishan further mentioned in his statement that other accused namely Ajmer, Sat Narayan and Raja were not present in the house.

B Ajmer in his further statement stated that he was not present at the time of occurrence and was falsely implicated.

C The appellant in his statement under Section 313 of Cr.P.C. denied the allegations of the prosecution and mentioned that when he was present in his house along with his son Krishan and ladies, Sanjay, who was armed with Gandasa and came with 20 to 25 other persons armed with weapons came to his house. According to him, after raising lalkara to teach him and others a lesson, Sanjay gave Gandasa blow to him and other persons and, therefore, to rescue him and his son, Krishan, he fired a shot from a gun and other persons, namely, Ajmer, Raja and Sat Narayan were not present at all.

E Accused Raja denied all the allegations of the prosecution and stated that he was not present at the place of incident. In defence the accused examined (1) Dr. Gaurav Bhardwaj as DW-1, (2) Bhan Singh as DW-2, (3) Khajan Singh as DW-3 and (4) Dr. S.S. Gupta as DW-4.

F It may be mentioned that after recording of defence evidence was over, three other accused, i.e., Krishan, Ajmer and Raj Singh alias Raja jumped the bail. Their presence could not be procured despite the proclamation issued by the learned Additional Sessions Judge, Sonipat. Ultimately, they were declared proclaimed offenders and in such circumstances, Sessions Case No.121 of 1999 was tried and decided only against the present appellant. However, subsequently Raj Singh alias Raja was also arrested and his trial was concluded. Raj Singh was convicted under Section 148/302/307/323 read

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A with Section 149 IPC and was visited with sentences mentioned in the judgment.

B 5. On appreciation of the evidence adduced by the parties, the learned Judge came to the conclusion that it was proved by the prosecution beyond reasonable doubt that deceased Rajesh had died a homicidal death. Placing reliance on the depositions of the injured informant and other witnesses, the trial court concluded that it was proved by the prosecution that there was no delay in lodging the FIR nor any evidence could be produced to suggest that the First Information Report was filed after due deliberation or that the accused were falsely implicated. After referring to the prosecution story as narrated by the witnesses and defence version as narrated by the defence witnesses, the learned Judge came to the conclusion that the incident had taken place at the site mentioned by the prosecution and not at the house of the accused. The learned Judge held that the deceased Rajesh had died because of the shot fired on him from a gun by Pohla @ Sat Narayan and he had also injured witness Sanjay, who had gone to the rescue of the deceased Rajesh. According to the learned Judge it was not probalised by the defence that the appellant had fired shot at deceased Rajesh and Sanjay in exercise of right of self-defence whereas the injuries sustained by the appellant were explained by the first informant Bhale Ram. The learned Judge held that it was proved by the prosecution that the accused had formed an unlawful assembly, common object of which was to cause death of Rajesh and injure other witnesses and, therefore, the appellant was liable to be convicted under Section 302 read with Section 149 IPC, Section 307 read with Section 149 IPC, Section 323 read with Section 149 IPC and Section 148 IPC.

C The learned Judge accordingly convicted the appellant and imposed sentences referred to above. It may be noticed that in Sessions Case No.122 of 1999/2003 accused Sat Narayan alias Pohla was released on interim bail vide order dated 5.4.2000. His bail was continued till the next date of hearing.

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On 27.4.2000, when Sat Narayan failed to surrender before the court, warrants for his arrest were issued. Despite best efforts, his presence could not be procured and hence he was declared proclaimed offender vide order dated 16.1.2001 by the learned Additional Sessions Judge, Sonipat. Thus, Sessions Case No.122 of 1999/2003 has remained unconcluded. It was clarified by the learned Sessions Judge that finding of conviction recorded against the present appellant would not amount to expression of opinion for or against other remaining four accused unless they and the prosecution are heard. A direction was given by the learned Judge that file of this case and that of Sessions Case No.122 of 1999/2003 should be consigned to the record room but should be restored as and when the accused who are declared proclaimed offenders are produced by the police for hearing.

6. Feeling aggrieved, the appellant preferred Criminal Appeal No. 277-DB of 2004 before the High Court of Punjab and Haryana at Chandigarh. The Division Bench of the High Court dismissed the same by judgment dated August 21, 2006, giving rise to the instant appeal.

7. This Court has heard the learned counsel for the parties at length and considered the record of the case summoned from the trial court.

8. The fact that the deceased Rajesh died a homicidal death is not challenged before this Court. PW-3, Dr. Vimal Kumar Sharma stated in his testimony that he had conducted post mortem examination on the dead body of the deceased Rajesh on December 1, 1998 at about 2.30 P.M. and found that there were bluish circular 0.5 cm to 1.00 cm in diameter multiple holes on the anterior surface of chest and upper part of abdomen in the area of 25 cm x 22 cm starting from 5 cm. above the nipple and 6 cm. above the umbilicus. Margins were abraded and inverted. According to him on dissection the internal organs were found perforated and pellets had pierced

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A the internal organs. What is mentioned by him is that 26 pellets were found on internal examination of the body, which were handed over to the police. According to the doctor, the cause of death of the deceased was shock and haemorrhage caused by fire arm injuries, which were ante mortem in nature and sufficient to cause death in ordinary course of nature. The testimony of the doctor, who performed autopsy on the dead body of the deceased, gets complete corroboration from the contents of post mortem notes produced by the prosecution. On the facts and in the circumstances of the case this Court is of the opinion that it is proved beyond pale of doubt that the deceased Rajesh had died a homicidal death.

9. The trial court as well as the High Court had relied upon the testimony of injured informant as well as other witnesses and had rightly recorded the conclusion that the deceased had died because of shot fired at him by the accused Pohla from his gun. The Sessions Court referred to the injuries sustained by Sanjay and has correctly come to the conclusion that he had sustained injuries from the shot fired by the accused Pohla. The other findings recorded by the Sessions Court and the High Court relating to commission of offences under Sections 323, 307 and 148 IPC are based on appreciation of reliable evidence. The learned counsel for the appellant has failed to satisfy this Court that those findings are either perverse or not borne out from the evidence. Under the circumstances those findings deserve to be confirmed and are hereby confirmed.

10. The only point argued was that the appellant could not have been fastened with the liability under Section 302 read with Section 149 IPC for the death of Rajesh, which was caused by the accused Pohla @ Sat Narayan. According to the learned counsel for the appellant, the prosecution has not proved that common object of the unlawful assembly was to cause death of the deceased Rajesh, but at best it can be said that it was proved by the prosecution that common object of the assembly was to teach Sanjay a lesson and in that process

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to injure him and, therefore, the instant appeal should be accepted. It was maintained that the act of Sat Narayan of firing a shot at Rajesh was his individual act and, therefore, the appellant should not have been convicted for murder of Rajesh with the aid of Section 149 IPC. The learned counsel emphasised that the prosecution has failed to prove that the appellant knew that death of Rajesh was likely to be caused by any member of the unlawful assembly in prosecution of the common object because common object of the unlawful assembly was to teach a lesson to PW-10, Sanjay and, therefore, the conviction of the appellant under Section 302 with the aid of Section 149 IPC should be set aside.

11. The learned counsel for the State contented that the appellant himself armed with a lathi was a member of unlawful assembly, common object of which was to cause death of Sanjay as well as those who were accompanying him and, therefore, it is not correct to say that the provisions of Section 149 IPC would not apply to the facts of the case. According to the learned counsel for the State, the appellant, who was a member of the unlawful assembly, had come with other four accused and was armed with lathi and after fatal injury was caused to Rajesh and Sanjay was seriously injured with others, the appellant had left the place of incident with other accused and, therefore, the Sessions Court and the High Court committed no error in convicting the appellant under Section 302 with the aid of Section 149 IPC for causing death of deceased Rajesh. What was maintained was that sufficient evidence was brought on record by the prosecution to prove that the appellant had known that death of the deceased Rajesh was likely to be caused by any member of unlawful assembly in prosecution of the common object and, therefore, well recorded conviction of the appellant under Section 302 read with Section 149 IPC should be upheld by this Court.

12. Section 149 IPC creates a constructive or vicarious liability on the members of the unlawful assembly for the unlawful

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A acts committed pursuant to the common object by any other member of that assembly. The basis of the constructive guilt under Section 149 IPC is mere membership of the unlawful assembly, with the requisite common object or knowledge. This Section makes a member of the unlawful assembly responsible as a member for the acts of each and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149. There are two essential ingredients of Section 149, viz., (1) commission of an offence by any member of an unlawful assembly and (2) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Once the court finds that these two ingredients are fulfilled, every person, who at the time of committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to the court to see as to who actually did the offensive act nor it would be open to the Court to require the prosecution to prove which of the members did which of the offensive acts. Whenever a court convicts any person of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but that in pursuance of such common object the offence was committed. There is no manner of doubt that before recording the conviction under Section 149 IPC, the essential ingredients of Section 149 IPC must be established.

G 13. Applying the abovementioned well settled principles to the facts of the present case, this Court finds that the prosecution has not led any evidence to prove that the accused party had any grievance or grudge against the deceased Rajesh, who was nephew of the first informant Bhale Ram. The only fact, which can be held to be proved by the prosecution,

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A is that the accused Krishan had an altercation with Sanjay
relating to purchase of some goods, after which Krishan had
threatened Sanjay and had then left the shop and come back
within a short duration with other four accused including the
appellant, who were variously armed. The further fact proved
by the prosecution is that immediately on coming to the place
of incident, the son of the appellant named Sat Narayan @
Pohla had fired a shot at Rajesh without any provocation or
previous enmity or any other reason. It may be mentioned that
the defence had tried to prove enmity between the first
informant and the appellant but the substantive evidence of first
informant Bhale Ram, examined as PW-4, and injured Sanjay,
examined as PW-10, in fact goes to prove that there was no
such dispute relating to the land and/or enmity between the first
informant Bhale Ram and the appellant. The record does not
indicate that any altercation had taken place between Krishan,
who is son of the appellant, and deceased Rajesh when
accused Krishan had gone to the shop of injured Sanjay for
purchasing certain articles. In fact, the altercation had taken
place between Krishan and injured Sanjay. Though it was the
case of the prosecution that after reaching the place of incident,
the members of the unlawful assembly had given lalkara before
the attack, the first informant in his substantive evidence before
the court has not mentioned anything about the said lalkara
though it was so mentioned by him in his FIR. Thus, the fact
that lalkara was made before the attack will have to be
disbelieved. If the evidence of the injured witness is appreciated
in the above background, it becomes evident that no evidence
could be adduced by the prosecution to establish that common
object of the unlawful assembly was to do away with Rajesh or
cause any injury to him. As mentioned earlier the evidence
clinchingly establishes that immediately after reaching the place
of incident a shot was fired by accused Pohla from his gun. It
would have been a different matter if Rajesh had suffered
injuries in some other manner, e.g., Rajesh had tried to
intervene when Sanjay was being attacked and was shot at. In

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A such circumstances provisions of Section 149 IPC could have
been well invoked. There is no evidence regarding meeting of
minds or formation of the common object even at the spur of
the moment, when Pohla immediately after reaching the place
of incident shot at the deceased Rajesh. There is no evidence
B suggesting that the appellant said something to indicate that
he wanted the deceased to be done away with. There is nothing
to establish that the appellant knew that Pohla would cause fatal
injuries to the deceased, though the appellant must have
anticipated that Pohla would cause injuries to Sanjay. In the
C present case, no overt act is attributed to the appellant so far
as the deceased is concerned. Mere fact that the appellant was
armed with a lathi by itself would not prove that he shared
common object with which the main accused Pohla was
inspired. The prosecution has not led the evidence to establish
D nexus between the common object and the offence committed.
The appellant, being father of the accused Krishan, who had
an altercation earlier with injured Sanjay, had accompanied
Krishan, which can be termed as natural conduct on the part
of the appellant. It is relevant to notice that in the course of the
E incident the appellant himself had sustained serious injuries.
The testimony of PW-14, Dr. Rajesh Saini indicates that he had
examined the appellant Daya Kishan on December 1, 1998 at
2.30 P.M. and noticed abrasion of 1.5 cm x 0.2 cm on anterior
surface of left leg and swelling around the abrasion. According
F to him the movements of leg were restricted and he had also
found lacerated wound of 6 cm x 0.3 cm on left parietal region.
The testimony of Dr. Gaurav Bhardwaj, examined as DW-1,
makes it clear that the appellant had sustained fracture of both
bones of the left leg for which POP cast was given. As noticed
G earlier the first informant Bhale Ram has mentioned in his First
Information Report itself that he had caused injuries to the
appellant in exercise of his right of self-defence. The record
does not indicate that the injuries sustained by the appellant
were caused by deceased Rajesh. It is not the case of the
H prosecution that the appellant retaliated or asked others to

attack the first informant despite having received serious injuries, which would indicate that the appellant had no grudge nor shared the object with which the accused Pohla had fired shot at the deceased Rajesh. The only circumstance on the basis of which the prosecution wants to hold that the common object of the unlawful assembly was to murder Rajesh is that Pohla had a gun and the appellant was a member of an unlawful assembly. The test for application of Section 149 IPC as suggested by the prosecution cannot be accepted. On the peculiar facts and in the circumstances of the case it can be safely concluded that the appellant did not share common object of one of the members of the unlawful assembly to cause death of Rajesh. The appellant cannot be reasonably attributed with knowledge that there was likelihood of commission of murder of Rajesh, because no altercation or quarrel had taken place between Rajesh and the accused Krishan nor there was any enmity between the appellant and Rajesh. Under the circumstances, this Court is of the opinion that the conviction of the appellant recorded under Section 302 read with Section 149 IPC for causing death of deceased Rajesh is not well-founded and is liable to be set aside. As far as conviction of the appellant under Section 307 read with Section 149 IPC is concerned, this Court finds that the said conviction recorded by the Sessions Court and affirmed by the High Court is amply borne out from the evidence on the record. So also the learned counsel for the appellant could not demonstrate that the conviction of the appellant under Section 323 read with Section 149 IPC and under Section 148 IPC are contrary to the evidence on record. Therefore, those convictions will have to be upheld.

14. The net result of the above discussion is that the appeal filed by the appellant partly succeeds. His conviction under Section 302 read with Section 149 IPC for causing death of the deceased Rajesh recorded by the Sessions Court and affirmed by the High Court is hereby set aside. His conviction under Section 307 read with Section 149 IPC for attempting

A to commit murder of injured Sanjay, under Section 323 read with Section 149 IPC and under Section 148 IPC is confirmed. This Court also finds that the sentences imposed on the appellant for commission of abovementioned offences are just and proper and no case is made out to interfere with the same.

B 15. Subject to above observations, the appeal stands disposed of.

N.J. Appeal partly allowed.

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SHAUKAT
v.
STATE OF UTTARANCHAL
(Criminal Appeal No. 757 of 2005)

APRIL 22, 2010

[J.M. PANCHAL AND DEEPAK VERMA, JJ.]

Penal Code, 1860:

s. 300 'Thirdly', Exception 4, and ss. 302, 307, 304(part 1) and 308 – Dispute regarding digging of earth from village pond by the victim – Scuffle between father of accused and the victim – On exhortation by the father, accused giving two knife blows to the victim resulting in his death – The witness who tried to save the victim sustained grievous injuries at the hands of accused – Conviction by trial court u/ss 302 and 307 IPC – High Court holding Exception 4 to s.300 applicable and substituting conviction of accused to one u/ss 304(part-I) and 308 – HELD: The record established motive for the crime – There is no evidence to suggest a sudden fight between accused and deceased or that the act was done by accused in heat of passion – Premeditation to cause the death stands proved – Accused took undue advantage while delivering fatal blow to the deceased – Thus, ingredients of Exception 4 to s.300 not satisfied – On the other hand, case falls within four corners of clause 'Thirdly' of s.300 – Conclusion of High Court that accused was guilty u/s 304(part I) is erroneous – Further, in view of grievous injuries sustained by the witness in the manner established by prosecution evidence, offence committed by accused falls u/s 307 and not u/s 308 IPC – Conviction and sentence u/s 304 (part I) and s.308 as recorded by High Court, set aside and that recorded by trial court u/ss 302 and 307 restored.

The appellant in Criminal Appeal No. 757 of 2005 and

A his father 'S' were prosecuted for committing murder of one 'W' and attempting to commit murder of his brother, 'R'. The prosecution case was that the deceased used to dig earth from the village pond for maintenance of his house. This was objected to by the accused persons as it would damage their land which was nearby. On the day of the incident, inspite of the protest by the accused persons, 'W' started digging earth from the pond. A scuffle ensued between 'W' and 'S'. On the exhortation given by 'S', the appellant took out a knife and gave two blows on the back and chest of 'W', who fell down and died on the spot. The appellant also injured 'R', who tried to save 'W'. The appellant managed to escape while his father was caught by the villagers who had meanwhile reached the scene. Injured 'R' was referred to hospital. His medical examination revealed that he sustained grievous injuries. The trial court convicted the appellant u/ss 302 and 307 IPC. Accused 'S' was convicted u/ss 302/34 and 307/34 IPC. During the pendency of appeal before the High Court, accused 'S' died. The High Court convicted the appellant u/s 304 (part I) and 308 IPC. The convict filed Criminal Appeal No. 757 of 2005; whereas the State filed Criminal Appeal No. 758 of 2005.

Allowing the appeal filed by the State and dismissing that of the accused, the Court

HELD: 1.1. The fact that the deceased died a homicidal death is not disputed and has been firmly established. The said fact stands amply proved by the testimony of PW-9, the doctor who conducted the autopsy. The evidence of three eye-witnesses, including the first informant and the injured, would indicate that when the deceased was digging earth, he was prevented from doing so by accused 'S' whereupon a scuffle ensued between the deceased and accused 'S'. All the witnesses have specifically stated that accused 'S' told his son, the

appellant, to kill 'W'. Thereupon the appellant took out a knife from his pocket and inflicted a blow on the back and another on the chest of 'W' whereupon the victim fell down and died on the spot. The eye-witness account further establishes that 'R' tried to save his brother but the appellant also injured him with the knife. As per the medical evidence on record as proved by PW4, the surgeon of the Primary Health Centre, injured 'R' had received as many as six injuries. [para 10-11] [884-D-E-G; 885-C-D]

1.2. On reappraisal of the testimony of the three eye witnesses, this Court finds that the version presented by them before the Court inspires confidence. Though each of them was subjected to searching cross-examination, nothing could be brought on record to impeach credibility of any of them. The evidence of the eye-witnesses further makes it clear that there are no major contradictions or omissions. In the circumstances, this Court is of the opinion that neither the trial court nor the High Court committed any error in placing reliance on the testimony of the three eye-witnesses for the purpose of coming to the conclusion that the appellant was the author of the injuries sustained by the deceased and injured 'R'. [para 11] [885-D-G]

2. As regards the plea of self-defence, the evidence on record does not indicate that any assault was mounted either on the appellant or his father by the deceased or injured 'R'. On the contrary, the evidence shows that the appellant and his father 'S' went to the place where deceased was digging earth, and 'S' picked up a quarrel with him. On the facts and in the circumstances of the case, this Court finds that plea of self-defence is not made out by the appellant. [para 15] [888-D-F]

3.1. Exception 4 to s.300 IPC would be attracted only

A if four requirements are satisfied, namely, (1) it was a sudden fight; (2) there was no premeditation; (3) the act was done in a heat of passion; and (4) without the assailant having taken any undue advantage or acted in a cruel manner. This Court notices that several important aspects of the matter have been totally lost sight of and ignored by the High Court while recording conviction of the appellant u/ss 304 (part I) and 308 IPC. The facts of the instant case establish beyond doubt that there was premeditation between the appellant and his father to cause the death of the deceased and to execute the threat given by accused 'S' to the deceased near the mosque at about 5.30 in the morning. Both of them followed the deceased who had gone to the pond for the purpose of digging the earth. Further, the appellant carried with him lethal weapon like knife while following the deceased. The record amply establishes that motive for the crime was digging of earth by the deceased near the field of the appellant. There is nothing on the record even to remotely suggest that a sudden fight took place between the appellant and the deceased. Premeditation to cause death of the deceased stands proved by reliable evidence adduced by the prosecution. Nothing is brought on record to show that the act of mounting fatal attack on the deceased was done by the appellant in a heat of passion. The evidence adduced positively proves that the appellant took undue advantage while delivering fatal blow to the deceased. The four requirements for applicability of Exception 4 to s.300 IPC are not satisfied at all. On the other hand, the facts proved bring the case of the appellant within four corners of clause 'Thirdly' of s.300 IPC and it will have to be held that the appellant committed murder of the deceased punishable u/s 302 IPC. Therefore, the conclusion of the High Court that the appellant would be guilty u/s 304 (Part-I) IPC, being erroneous in law, is liable to be set aside. [para 16-17] [889-A-C; 890-A-G]

3.2. As far as conviction of the appellant for causing injuries to 'R' is concerned, the medical report indicated six injuries on the person of 'R'. The medical officer has stated that the first two injuries sustained by the injured were grievous in nature. This assertion has gone unchallenged and was never disputed by the defence. Causing an incised wound 10 cm x 7 cm x bone deep with fracture of left side rib with tear of pleura on the left side chest, and another incised wound 6 cm x 4 cm bone deep with fracture of under lying bone on left side of back just at the iliac crest, cannot be regarded as bringing the case of the appellant within the purview of s. 308 IPC. There is no manner of doubt that the injuries were caused to 'R' with a view to committing his murder. The finding recorded by the High Court that the appellant had caused injuries to 'R' in an attempt to escape, is not borne out from the record of the case at all. Therefore, this Court is of the firm opinion that the appellant could not have been convicted u/s 308 for causing injuries to injured 'R', but is liable to be convicted u/s 307 IPC. [para 18] [893-F-H; 894-A-C-D]

4. The appellant is held guilty u/s 302 IPC for commission of murder of the deceased and u/s 307 for attempting to commit murder of injured 'R'. The sentences, as imposed on the appellant by the trial court are restored. [para 19] [894-E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 757 of 2005.

From the Judgment & Order dated 24.12.2004 of the High Court of Uttaranchal at Nainital in Criminal Appeal No. 1034 of 2001.

WITH

Criminal Appeal No. 758 of 2005.

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A Ujjal Singh, J.P. Singh, R.C. Kaushik for the Appellant.
Abhay Prakash Sahay, J.K. Bhatia for the Respondent.
The Judgment of the Court was delivered by

B **J.M. PANCHAL, J.** 1. The appellant in Criminal Appeal No.757 of 2005 with his father Sabbir, son of Ilahi Bux was charged for commission of offences punishable under Section 302 read with Section 34 Indian Penal Code (IPC) and Section 307 read with Section 34 IPC for causing death of Wilayat and attempting to commit murder of Rahmat. The learned Sessions Judge, Nainital by judgment dated September 18, 1982 passed in Sessions Trial No.17 of 1981 convicted the appellant under Sections 302 and 307 for causing murder of deceased Wilayat and for making attempt to murder Rahmat and sentenced him to life imprisonment for commission of offence punishable under Section 302 as well as R.I. for ten years for commission of offence punishable under Section 307 IPC. His father Sabbir was convicted under Section 302 read with Section 34 IPC and Section 307 read with Section 34 IPC. Mr. Sabbir was sentenced to life imprisonment for commission of offence under Section 302 read with Section 34 IPC and R.I. for seven years for commission of offence under Section 307 read with Section 34 IPC.

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F 2. Feeling aggrieved, the appellant and his father preferred Criminal Appeal No.1034 of 2001 in the High Court of Uttaranchal at Nainital. During the pendency of the said appeal, Sabbir, who was father of the appellant, expired. Therefore, the appeal filed by the appellant was considered by the High Court. The Division Bench of the High Court, by judgment dated December 24, 2004, held the appellant guilty for commission of offence of culpable homicide not amounting to murder punishable under Section 304 Part-I IPC and sentenced him to undergo R.I. for 10 years and a fine of Rs.5,000/- in default R.I. for one year. The High Court also found the appellant guilty for commission of offence under Section 308 IPC and

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sentenced him to R.I. for two years and fine of Rs.1,000/- in default R.I. for three months. Feeling aggrieved, the appellant has filed Criminal Appeal No.757 of 2005 by Special Leave.

3. As noticed earlier, the appellant was acquitted of the offences punishable under Sections 302 IPC and Section 307 IPC. Therefore, feeling aggrieved by the said acquittal, the State of Uttaranchal has filed Criminal Appeal No.758 of 2005 by Special Leave.

4. Both the appeals arise out of the common judgment dated December 24, 2004 rendered by the Division Bench of the High Court of Uttaranchal at Nainital. Therefore, this Court proposes to dispose of by this common judgment.

5. The facts emerging from the record of the case lie in narrow compass. The appellant is resident of Village Darauki Madhaia, P.S. Kichha, District Nainital. In the village, there is a Panchayat pond. The length of the pond from east to west is about 40 to 50 paces whereas its width from north to south is about 25 to 30 paces. The said pond is meant for common use of all the villagers. The people of the village used to take earth from the said pond for maintenance of their houses and other household purposes. The field of the appellant is located on the southern side of the pond. Between the pond and the field of the appellant, there is a palm tree. The boundary of the field belonging to the appellant is extended upto the said palm tree after which the boundary of the pond begins. On the western side of the pond, there is a house of one Sagir and on the west side of the said house, there is a passage whereas on the west side of the passage there is abadi of the village. Injured Rahmat and deceased Wilayat were also residents of this very village. From the place which is near to the field of the appellant, deceased Wilayat used to dig and take earth from the pond. This was not approved by Sabbir who was father of the appellant and he used to object to the digging of soil from the pond on the ground that the field belonging to him would get damaged. The incident in question took place on October 13,

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A 1980. On that day, in the morning at about 5.00 a.m., Rahmat, with his deceased brother Wilayat and Chhote went for offering prayers in a mosque. After offering *Namaz*, they came out from the mosque at about 5.30 a.m. Rahmat and his brother Chhote were residing in the same house and the house of deceased
B Wilayat was situated leaving one house from their house. The appellant with his father was residing near the mosque. The appellant and his father stopped Wilayat and Rahmat and told that they had taken earth from the place near their field and if earth was again taken from the same place, they would be
C appropriately dealt with. Thereupon deceased Wilayat replied the appellant and his father that their field was upto the palm tree whereas pond was common for the villagers and he would bring soil from the pond even on that day. On hearing such
D reply, the appellant told Wilayat that he would see Wilayat on the spot. Thereafter, the three brothers came to their respective houses. Deceased Wilayat, after taking a spade, went towards the pond for bringing soil at about 5.45 a.m. After some time, Chhote came out from his house and witnessed that deceased
E Sabbir and the appellant were going speedily towards the pond. As Chhote saw the appellant and his father going speedily towards the pond, he decided to go to the place where his deceased brother Wilayat was digging the earth to see that
F nothing untoward happened to him. Chhote was also accompanied by his brother Rahmat. When they reached the pond, they saw that their brother Wilayat was digging earth in the pond from 10 to 12 paces away from the field of the
G appellant. Accused Sabbir forbade Wilayat from digging the soil but Wilayat continued digging the soil. Thereupon a scuffle ensued between accused Sabbir and deceased Wilayat. When scuffle was so going on, the accused Sabbir asked the
H appellant to kill Wilayat by saying as to what he was looking at. On this, the appellant who was already armed with a knife, took out the same from his pant's pocket and gave one blow on the back of Wilayat. On receipt of the knife blow, Wilayat immediately turned. Thereupon, the appellant inflicted another injury by knife on left side of chest of Wilayat from the front side.

On sustaining injuries, Wilayat fell down in the mud. Rahmat tried to catch hold of the appellant but the appellant inflicted injuries by knife on Rahmat also. Chhote also tried to catch hold of the appellant but accused Sabbir caught hold of collar of the shirt of Chhote and in the meantime the appellant made his escape good from the place of incident. Because of the hubbub created by the incident, Ms. Banu Begum, Pattu Wilayat, Mohd. Yasin, Bafati Shah etc. reached the place of incident. They found that Wilayat had died on the spot. They also noticed that Rahmat who had attempted to rescue his brother Wilayat was also assaulted by the appellant with knife as a result of which Rahmat had fallen down. Accused Sabbir had also made attempt to flee from the place of incident but Md. Yasin with others had caught hold of the legs of Sabbir and, therefore, Sabbir had also fallen down and dashed with another palm tree and sustained superficial injuries. Thereafter, those people who had gathered near the place of incident had tied Sabbir with the tree. A cart was summoned at the place of incident and Chhote along with injured Rahmat had gone to Kichha where he had met Sayed Mohammed Saleem who had reduced the information into writing. After the complaint was scribed, Chhote had put his thumb mark thereon and went to the Police Station. At the Police Station, the complaint was presented. In view of the contents of the First Information Report, offences punishable under Section 302 read with Section 34 IPC and Section 307 read with Section 34 IPC were registered and investigation commenced. The Investigating Officer went to the place of incident and held inquest on the dead body of Wilayat in the presence of *Panchas*. He also made arrangement for sending the dead body of the deceased to hospital for post mortem examination. He recorded the statements of those persons who were found to be conversant with the facts of the case. Incriminating articles were seized from the place of incident. Injured Rahmat was referred to hospital for treatment. His condition was precarious and, therefore, his statement could not be recorded. The accused Sabbir was arrested from the spot. The appellant was also arrested on the same day. After

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A investigation was over and chargesheet was submitted, the case was committed to the Court of learned Sessions Judge, Nainital for trial.

B 6. The learned Sessions Judge framed charge against the appellant for commission of offences punishable under Sections 302 and 307 IPC and against accused Sabbir for commission of offences punishable under Section 302 read with Section 34 IPC and Section 307 read with Section 34 IPC. The charge was read over and explained to the appellant and his father. Both of them pleaded not guilty to the same. C Therefore, the prosecution examined witnesses and produced documents to prove its case against the appellant and his father. After recording of evidence of the prosecution witnesses was over, the learned Judge explained to the appellant and his father the circumstances appearing against them in the evidence of prosecution and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In their further statements, the appellant and his father pleaded that they were innocent. However, no witness was examined by any of them in support of their defence that they were innocent. E

F 7. On appreciation of the evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the deceased Wilayat had died a homicidal death. The learned Judge considered the eye-witness account tendered by the first informant Chhote, injured Rahmat as well as witness Md. Yasin and found that their evidence was reliable. Placing reliance on the testimony of the abovementioned witnesses, the learned Judge held that the appellant had committed murder of deceased Wilayat and had made attempt to murder injured Rahmat and was, therefore, liable to be convicted under Section 302 and 307 IPC. The learned Judge further held that accused Sabbir had shared common intention with the appellant to cause death of the deceased Wilayat and had H

attempted to murder injured Rahmat and, therefore, he was liable to be convicted for commission of offences punishable under Section 302 read with Section 34 IPC and Section 307 read with Section 34 IPC. Accordingly, the appellant and his father were convicted. Thereafter, the appellant and his father were heard on the question of sentence. After hearing the appellant and his father as well as learned Additional Public Prosecutor and the defence counsel, the appellant was sentenced to life imprisonment for commission of offence punishable under Section 302 as well as R.I. for ten years for commission of offence punishable under Section 307 IPC whereas his father Sabbir was sentenced to life imprisonment for commission of offence punishable under Section 302 read with Section 34 IPC and R.I. for seven years for commission of offence punishable under Section 307 read with Section 34 IPC.

8. Feeling aggrieved, the appellant and his father preferred Criminal Appeal No.1034 of 2001. During the pendency of the appeal, the father of the appellant, i.e., Sabbir expired and, therefore, the case of the appellant alone was considered by the Division Bench of the High Court of Uttaranchal at Nainital. The High Court found that there was no enmity between the parties nor there was premeditation between the appellant and his father for committing the crime. According to the High Court, the quarrel took place suddenly under the heat of passion because the time between the quarrel and the fight was stated to be few minutes. The High Court was of the view that the quarrel had taken place on account of sudden provocation in which the appellant had caused injuries to the deceased with knife and, therefore, the appellant had committed the offence of culpable homicide not amounting to murder punishable under Section 304, Part I of the IPC. The appellant was accordingly convicted and was sentenced to undergo R.I. for ten years and a fine of Rs.5,000/- in default R.I. for one year. The High Court was further of the view that the injuries on the person of Rahmat indicated that Rahmat had tried to apprehend the appellant

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A when the appellant was trying to make his escape good from the place of occurrence and, therefore, it was natural for the appellant to inflict injuries on the person of Rahmat in order to make his escape good. The High Court, therefore, concluded that the appellant had, in fact, no intention to make an attempt to commit murder of Rahmat and had committed offence punishable under Section 308 IPC. Accordingly, the High Court convicted the appellant under Section 308 IPC and sentenced him to R.I. for two years and a fine of Rs.1,000/- in default R.I. for three months by judgment dated December 24, 2004. The above judgment has given rise to the two appeals.

9. This Court has heard learned counsel for the parties at length and considered the documents forming part of the appeal as well as original record summoned from the Trial Court.

10. The fact that deceased Wilayat died a homicidal death is not disputed before this Court. The said fact stands amply proved by the testimony of PW9, Dr. S.C. Mishra. According to the Medical Officer, Haldwani, he had conducted autopsy on the dead body of deceased Wilayat on October 14, 1980 and found a stab wound measuring about 8 cm x 4 cm x cavity deep over left side of chest about 2 cm below left nipple and one incised wound measuring about 6 cm x 2 cm x muscle deep in left luminal region about 8 cm above head of femur. The injuries mentioned by Dr. Mishra are also noted in the post mortem report prepared by him and produced on the record of the case at Exhibit KA-19. It is nobody's case that the deceased received the abovementioned injuries accidentally. Nor it is the case of anyone that the deceased had received those injuries in an attempt to commit suicide. On the facts and in the circumstances of the case, this Court is of the definite opinion that the fact that the deceased had died a homicidal death is firmly established.

11. The evidence of the three eye-witnesses, namely, Chhote, who was the first informant as well as that of injured Rahmat and witness Md. Yasin would indicate that when the

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deceased was digging earth, he was prevented from doing so by accused Sabbir whereupon a scuffle had ensued between the deceased and accused Sabbir. All the witnesses have specifically stated that accused Sabbir had told his son, i.e., the appellant not to be a passive spectator and kill the deceased. According to the witnesses, the appellant had thereupon taken out knife from his pant's pocket and inflicted first blow on the back of the deceased. Their evidence further shows that on receipt of the blow on his back, the deceased had immediately turned and, therefore, another blow was inflicted by the appellant on the chest of the deceased whereupon the deceased had fallen down on the ground and died on the spot. The eye-witness account further establishes that injured Rahmat had tried to save his brother Wilayat but the appellant had also injured him with the knife. As per the medical evidence on record, injured Rahmat had received as many as six injuries. This is amply proved by PW4, Dr. Yogesh Mishra, who was the then surgeon, Primary Health Centre, Kichha. On reappraisal of the testimony of the three witnesses, this Court finds that the version presented by them before the Court inspires confidence. Though each of them was subjected to searching cross-examination, nothing could be brought on record to impeach credibility of any of them. It is relevant to notice that one of the eye-witnesses was injured Rahmat himself. Therefore, his presence at the place of incident can hardly be doubted. He being real brother of the deceased and he himself having received injuries, would not allow the real culprit to go scot free and involve innocent persons falsely. The evidence of the eye-witnesses further makes it clear that there are no major contradictions or omissions. Under the circumstances, this Court is of the opinion that neither the Trial Court nor the High Court committed any error in placing reliance on the testimony of the three eye-witnesses for the purpose of coming to the conclusion that the appellant was the author of the injuries sustained by the deceased and injured Rahmat.

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12. The learned counsel for the appellant in Criminal

A Appeal No.757 of 2005 argued that the accused Sabbir had received two injuries whereas the appellant had sustained one injury and, therefore, injuries having been caused to the deceased in exercise of right of self-defence, the conviction of the appellant under Section 304, Part-I for the death of the deceased and under Section 308 IPC for causing injuries to Rahmat should be set aside. On the other hand, the learned Additional Public Prosecutor vehemently argued that the Trial Court had given cogent and convincing reasons for the purpose of coming to the conclusion that the appellant is guilty under Section 302 IPC for causing murder of the deceased Wilayat and under Section 307 for attempting to commit murder of injured Rahmat and the High Court was not justified in coming to the conclusion that the appellant had committed offence punishable under Section 304, Part I IPC as far as murder of the deceased was concerned and offence punishable under Section 308 IPC for causing injuries to injured Rahmat.

13. In order to determine whether the appellant is guilty under Section 302 for causing murder of the deceased and under Section 307 for attempting to commit murder of injured Rahmat, it would be necessary to consider the relevant facts which have emerged from the record of the case.

14. The learned counsel for the appellant would argue that the injuries sustained by the appellant and his father would indicate that the appellant had murdered deceased Wilayat and injured witness Rahmat, in exercise of right of self-defence as a result of which conviction under Section 304, Part-I for murder of the deceased and under Section 308 IPC for causing injuries to the injured Rahmat should not be interfered with by this Court in State appeal. While considering these submissions, this Court finds that PW4, Dr. Yogesh Mishra had examined accused Sabbir on October 13, 1980 and had found the following injuries :

(i) Contusion 2 cm x 1 cm present on the nose, ½ cm below the bridge of nose.

(ii) Contusion 2 cm x 3 cm present on the right of face 1 cm below the right eye.” A

The testimony of Dr. Yogesh Mishra further makes it very clear that on the same day he had also examined the appellant and found following injury :

(i) Incised wound 3 cm x 0.5 cm x skin deep present on the right palm on middle side 6 cm above ulnar styloid process.” B

The doctor has stated in his testimony that the two injuries sustained by accused Sabbir were simple and could have been caused by dash with the palm tree. As far as injury sustained by the appellant is concerned, it was mentioned by the same medical officer that the injury could have been caused by sharp weapon like knife or could have been self-inflicted. This medical officer was cross-examined on behalf of the appellant and a suggestion was made to him that the injury sustained by the appellant could have been caused by a sharp side of the spade. It may be mentioned that this suggestion was made because according to the prosecution witnesses, the deceased was digging earth with a spade. However, the medical officer has in terms stated that the injuries sustained by the appellant could not have been caused by the sharp side of a spade as it could have been caused by a sharper weapon than spade and that the spade was not sharp enough to cause the injury sustained by the appellant. From the record, it is clear that the learned Sessions Judge had put a question to the witness to elicit answer from him as to whether the sharp edged spade used by the deceased for digging the earth, produced as Exhibit-I could have caused the injury sustained by the appellant. The medical Officer, after looking to the spade, answered that its sharpness was not such so as to cause injury sustained by the appellant. The medical officer was further questioned by the learned counsel for the appellant and it was replied by him that if the spade had been used to cause injury to the appellant, it would have caused an abrasion and not the incised wound. C
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A After explaining the difference between incised wound and an abrasion, namely, that incised wound contains edge and also intermediary tissue and all those are clean cut whereas in case of an abrasion, skin tissues slough superficially, it was mentioned by the medical officer that Exhibit-I was not that sharp so as to cause incised wound sustained by the appellant. B
C It was suggested to the medical officer that Exhibit-I, spade, before it was opened in the court was kept at different places for a period of about 1½ years and, therefore, its edge might have become blunt, but this suggestion was emphatically denied by him. As far as injuries sustained by accused Sabbir are concerned, it was mentioned by this witness in cross-examination that both the injuries sustained by Sabbir could have been caused by only one dash with any blunt object.

D 15. A fair reading of the testimony of the medical officer makes it abundantly clear that the accused Sabbir had sustained two superficial injuries when he had hit the palm tree whereas the injury sustained by the appellant was self-inflicted one. The evidence on record does not indicate that any assault was mounted either on the appellant or his father by the deceased or injured Rahmat. On the contrary, the evidence shows that the appellant and his father had gone to the place where deceased was digging earth and accused Sabbir had picked up quarrel with him. On the facts and in the circumstances of the case, this Court finds that plea of self-defence is not made out by the appellant and, therefore, contention that the finding recorded by the High Court that he is guilty under Section 304, Part-I IPC for causing death of the deceased and under Section 308 IPC for causing injuries to Rahmat should be sustained cannot be accepted. E
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G 16. As far as the High Court is concerned, this Court finds that the High Court has recorded a finding that there was no enmity between the appellant and his father on one hand and the deceased and the injured on the other nor was there premeditation on the part of the appellant and his father to H

murder the deceased and as the quarrel had taken place all of a sudden under the heat of passion, the appellant would be guilty under Section 304, Part I IPC for causing death of the deceased and under Section 308 for causing injuries to injured Rahmat. However, this Court notices that several important aspects of the matter have been totally lost sight of and ignored by the High Court while recording abovementioned findings. To begin with, the reliable testimony of three witnesses has established that in the morning at about 5.30 a.m. on the date of the incident, the accused Sabbir and the appellant had asked the deceased not to dig earth from the place which was near their field whereupon the deceased had told him that pond was meant for general public and, therefore, he would dig the earth from the same place. Two brothers of the deceased, namely, Chhote and Rehmat have in terms stated that the accused Sabbir had threatened that he would not spare the deceased. The evidence of the witnesses would further show that the deceased had gone in the early morning to dig the earth and thereupon the appellant and his father had followed him. What is relevant to mention is that the appellant was carrying a knife in his pant's pocket and this fact was known to his father Sabbir, who had asked him to kill the deceased. As soon as the appellant was asked by his father to kill the deceased, he had taken out the knife from his pant's pocket and inflicted a blow on the back of the deceased. The evidence further establishes that on receipt of the blow, the deceased had turned and the appellant who was bent upon obeying directions of his father to kill the deceased had inflicted another blow on the chest of the deceased. The testimony of Dr. S.C. Mishra, who performed autopsy on the dead body of the deceased would indicate that during the internal examination, heart was found to be pale, empty and punctured whereas the fifth rib of the left side was found fractured. This establishes that the blow with knife on chest of the deceased was inflicted with a great force. According to the doctor, the puncture of heart and fracture of the fifth rib was corresponding to injury No.1. The doctor further mentioned that injury No.1 could have been caused by knife

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A which was produced as Exhibit-3 and that the said injury was sufficient in the ordinary course of nature to cause death of the deceased immediately. This assertion made by the medical officer was not challenged during his cross-examination at all. The evidence on record, thus, shows that before reaching the place of incident, the appellant had armed himself with a dangerous weapon and had caused injury by using that weapon with such a great force on vital part of the body of the deceased that it had resulted into instant death of the deceased on the spot. It is not the case of the appellant that he had intended to inflict injury No.1 on other part of the body of the deceased and due to movement of the deceased, the blow had landed on the chest of the deceased which had punctured his heart and fractured his rib. The eye-witness account of assault on the deceased by the appellant read with medical evidence makes it more than clear that the act of the appellant, by which the death of the deceased was caused, was done with the intention of causing such bodily injury to the deceased as found by medical evidence in this case and that the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death of the deceased. Thus the facts proved, bring the case of the appellant within four corners of clause Thirdly of Section 300 IPC and it will have to be held that the appellant had committed murder of the deceased punishable under Section 302 IPC.

F 17. As observed earlier, the High Court has held that there was no enmity between the parties nor there was premeditation on the part of the appellant and his father to murder the deceased and as the quarrel had taken place all of a sudden under the heat of passion, the appellant would be guilty under Section 304 Part I IPC. In view of this finding, it has become necessary for this Court to examine the question whether Exception 4 to Section 300 IPC would be applicable to the facts of this case.

H Exception 4 to Section 300 IPC would be attracted only if

four requirements are satisfied, namely, (1) it was a sudden fight; (2) there was no premeditation; (3) the act was done in a heat of passion; and (4) the assailant had not taken any undue advantage or acted in a cruel manner. The facts of the instant case establish beyond pale of doubt that there was premeditation between the appellant and his father to cause the death of the deceased and to execute the threat given by accused Sabbir to the deceased near the mosque at about 5.30 in the morning. Thus, both of them had followed the deceased who had gone to the pond for the purpose of digging the earth and ultimately the appellant had murdered him. Further, the appellant had carried with him lethal weapon like knife while following the deceased. The record would show that the father of the appellant had asked the deceased to stop digging the earth but the deceased had continued to dig the earth because the pond was meant for the benefit of all the villagers including the deceased and thereupon a scuffle had ensued between the father of the appellant and the deceased. The evidence does not indicate at all that any scuffle had taken place between the appellant and the deceased. It is also established that the father of the appellant had asked the appellant not to look at the scuffle as a passive spectator and kill the deceased and thereupon the appellant had first of all given blow with knife on the back of the deceased and thereafter on the chest of the deceased. If the intention of the appellant had not been to murder the deceased, the appellant would not have inflicted second blow with knife with such a great force on vital part of the body of the deceased which resulted into puncture of heart and fracture of rib and ultimately into death of the deceased within no time. Further, the evidence of the injured, i.e., Rahmat would show that he had tried to save his brother but as many as six injuries were caused to him by the appellant. The record amply establishes that motive for the crime was digging of earth by the deceased near the field of the appellant. There is nothing on the record of the case to suggest even remotely that a sudden quarrel had taken place either between the appellant and the deceased or between the father of the appellant and

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A the deceased. On the contrary, the evidence establishes that the appellant and his father had followed the deceased who had gone to the pond for the purpose of digging earth and after picking up quarrel with him, the appellant had murdered him. This cannot be said to be a sudden quarrel within the meaning of Exception IV to Section 300 IPC at all. Further, the appellant had taken disadvantage of the situation in the sense that after inflicting one blow on the back of the deceased, he was not contented and had caused another fatal injury on the chest as well and also caused as many as six injuries to injured Rahmat who had made attempt to save his brother. There is nothing on the record of the case even to remotely suggest that a sudden fight had taken place between the appellant and the deceased. Premeditation to cause death of the deceased stands proved by reliable evidence adduced by the prosecution. Nothing is brought on record of the case to show that the act of mounting fatal attack on the deceased was done by the appellant in a heat of passion. The evidence adduced positively proves that the appellant had taken undue advantage while delivering fatal blow to the deceased. The four requirements for applicability of Exception 4 to Section 300 IPC are not satisfied at all and, therefore, the conclusion of the High Court that the appellant would be guilty under Section 304 Part I IPC, being erroneous in law, is liable to be set aside. Therefore, the appellant will have to be found guilty under Section 302 IPC for causing murder of the deceased.

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18. As far as conviction of the appellant recorded under Section 308 IPC for attempting to commit culpable homicide by causing injuries on the person of Rahmat is concerned, this Court finds that the medical officer had found following six injuries on the person of the injured Rahmat when he was examined at 7.50 a.m. on October 13, 1980 :

“(i) An incised wound 10 cm x 7 cm x bone deep with fracture of left side ribs with surgical empty semi

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- with tear of pleura on the left side of chest, posturally 8 cm lateral to left nipple. A
- (ii) An incised wound 6 cm x 4 cm x bone deep with fracture of under lying bone present on left side of back just at the iliac crest. B
- (iii) Incised wound 4 cm x 1 cm x bone deep present on the left hand 2 cm below the left index finger base. C
- (iv) An incised wound 2 cm x 0.5 cm x muscle deep present on the left thumb in the aspect 2 cm above the base of right thumb D
- (v) Incised wound 1 cm x 0.2 cm x skin deep present on the inner aspect of right thumb just at the nail root. E
- (vi) An incised wound 4 cm x 2 cm present on the ventral aspect of left tercunum 6 cm above the left writ joint.” F

The medical officer has in terms stated that the first two injuries sustained by the injured were grievous whereas injuries 3, 4, 5 and 6 were simple. According to the doctor, all the injuries could have been caused by a sharp object. What is relevant to notice is that the doctor had conducted operation of injured Rahmat with regard to injury No.1 and, for that purpose, the injured was admitted in the hospital. The assertion made by the doctor that injury Nos. 1 and 2 sustained by the injured were grievous in nature has gone unchallenged and was never disputed by the defence. Causing an incised wound 10 cm x 7 cm x bone deep with fracture of left side rib with surgical empty semi with tear of pleura on the left side chest, and another incised wound 6 cm x 4 cm bone deep with fracture of under lying bone on left side of back just at the iliac crest, cannot be regarded as bringing the case of the appellant within the purview of Section 308 IPC. There is no manner of doubt H

A that the injuries were caused to injured Rahman with a view to committing his murder. The finding recorded by the High Court that the appellatant had caused injuries to Rahmat in an attempt to escape, is not borne out from the record of the case at all. Even no suggestion was made to any of the eye-witnesses that the appellatant had caused injuries to injured Rahmat while making attempt to make his escape good. On the contrary, reliable evidence of Rahmat satisfactorily proves that the appellatant had caused injuries to this witness when the witness had made attempt to save his brother. The findings recorded by the High Court are not only not borne out from the record of the case but are contrary to the positive evidence on record. Therefore, this Court is of the firm opinion that the appellatant could not have been convicted under Section 308 for causing injuries to injured Rahmat and is liable to be convicted under Section 307 IPC.

19. For the foregoing reasons, Criminal Appeal No.757 of 2005 filed by the appellatant Shaukat is dismissed whereas Criminal Appeal No.758 of 2005 filed by the State of Uttaranchal is accepted. The appellatant is held guilty under Section 302 IPC for commission of murder of deceased Wilayat and under Section 307 for attempting to commit murder of injured Rahmat. The sentences, as imposed on the appellatant by the Trial Court for commission of offences under Sections 302 and 307 IPC, are restored. Both the appeals accordingly stand disposed of.

R.P. Appeals disposed of.