BALWANT SINGH (DEAD)
v.
JAGDISH SINGH & ORS.
(Civil Appeal No. 1166 of 2006)

JULY 08, 2010

[DR. B. S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Code of Civil Procedure, 1908 – Order 22, rules 3 and 9; s. 151 read with s.5 of Limitation Act, 1963 – Death of appellant during pendency of appeal before Supreme Court – Application filed after long delay of 778 days for bringing the legal representatives of deceased appellant on record accompanied by application for condonation of delay – Held: Such applications cannot be allowed as a matter of right and even in a routine manner – They should be rejected unless sufficient cause is shown for condonation of delay – On facts, except for a vague averment that the legal representatives were not aware of the pendency of the appeal, no other justifiable reason was stated by the applicants – The applications also did not contain correct and true facts, thus, want of bona fides is imputable to the applicants – No reason nor sufficient cause was shown as to why immediate steps were not taken by the applicants, even after they admittedly came to know of the pendency of the appeal – The conduct of the applicants was abnormal – They acted irresponsibly and even with negligence, and miserably failed in showing any 'sufficient cause' for condonation of the long delay of 778 days – Applications accordingly dismissed – Resultantly, the appeal, having already abated, also dismissed.

Limitation – The law of limitation is a substantive law and has definite consequences on the right and obligation of a party – Once a valuable right is accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be

unreasonable to take away that right on the mere asking of the applicant, particularly, when the delay is directly a result of negligence, default or inaction of that party.

Interpretation of Statutes:

Liberal construction – Purpose of – Held: The purpose of liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation – However, liberal construction cannot be equated with doing injustice to the other party.

Purposive construction – Held: No provision can be treated to have been enacted purposelessly – The Court should not give such an interpretation to a provision which would render it ineffective or otiose.

Words and Phrases – "Sufficient cause" (for not filing an application within the prescribed period of limitation) – Meaning of – Discussed.

The landlord-appellant filed a petition for ejectment of the tenant-respondent on the ground of non-payment of rent. The petition was allowed by the Rent controller under Section 15 of the Haryana Urban Rent (Control of Rent and Eviction) Act, 1973. The order was affirmed by the Appellate Authority. The High Court, however, set aside the concurrent judgments of the Appellate Authority and the Rent Controller.

During the pendency of the appeal before the Supreme Court, the landlord-appellant died on 28th November, 2007. On 15th April, 2010, the legal representatives of the deceased landlord filed an application for bringing them on record (I.A. No. 1 of 2010) alongwith an application for condonation of the long delay in filing such application (I.A. No. 2 of 2010) pleading that I. A. No. 1 of 2010 be treated as an application under

Order 22 Rule 3 read with Section 151, of CPC while I. A. No. 2 of 2010 be treated as an application under Order 22 Rule 9 CPC read with Section 5 of the Limitation Act, 1963. It was submitted by the applicants that they were not aware of the pendency of the appeal before the Court and came to know of the same only in March, 2010 from their counsel.

Dismissing the applications and, consequently, the appeal, the Court

HELD: 1.1. The delay in filing the application I.A. No. 1 of 2010 is considerable and it cannot be disputed that the onus to show that sufficient cause exists for condonation of delay lies upon the applicant. It is obligatory upon the applicant to show sufficient cause due to which he was prevented from continuing to prosecute the proceedings in the suit or before the higher Court. From a bare reading of the application for condonation of delay, it is clear that the applicants were totally callous about pursuing their appeal. They have acted irresponsibly and even with negligence. Besides this, they have not approached the Court with clean hands. The applicant, who seeks aid of the Court for exercising its discretionary power for condoning the delay, is expected to state correct facts and not state lies before the Court. Approaching the Court with unclean hands itself, is a ground for rejection of such application. [Paras 4, 5 and 6] [608-E-H; 609-E-F]

1.2. In para 2 of the I.A. No. 1 of 2010, it has been shown that all the legal representatives of the deceased are residents of Ambala City, (Haryana) and that there are no other legal heirs of the deceased. However, in para 4 of the I.A. No. 2 of 2010, it has been stated that the LRs of the deceased were in service and were not aware of the pendency of the appeal, implying that they were living

at different places and the letter of the lawyer was received at their residential address of Ambala. The stand taken in one application contradicts the stand taken in the other application. [Para 6] [609-G-H; 610-A]

1.3. Furthermore, it is stated that the applicants were not aware of the pendency of the appeal. This, again does not appear to be correct inasmuch as one of the legal representatives of the deceased, was examined in the trial court as AW4, who is the son of the deceased. It is difficult for the court to believe that the person who has been examined as a witness did not even take steps to find out the proceedings pending before the highest Court of the land. [Para 6] [610-B-C]

1.4. Even the letter, alleged to have been written by the counsel, has not been placed on record and the application ex facie lacks bona fide. There is not explanation on record as to why the application was not filed immediately in March 2010, as the applicants had come to know that the appeal was to be listed for hearing in the month of May, and still, till 15th April, 2010, no steps were taken to file the application. [Para 6] [610-C-D]

1.5. The cumulative effect of the conduct of the legal representatives of the sole deceased, appellant clearly shows that they have acted with callousness, irresponsibly and have not even stated true facts in the application for condonation of delay. [Para 6] [610-D-E]

1.6. Moreover, it will be difficult for the Court to exercise its discretionary power in favour of the applicants. There is not even a whisper in the entire application as to why, right from the death of the deceased in November, 2007, the applicants did not take any steps whatsoever till 15th April, 2010 to inform their counsel about the death of the deceased and to bring the legal representatives on record. [Para 6] [610-E-F]

2.1. A right accrued in favour of the respondents in appeal and it will be unfair and unjust to take away their vested right on such flimsy and baseless grounds as pleaded by the legal representatives of the deceased landlord. It is a settled position of law that a suit or an appeal abates automatically if the legal representatives, particularly, of the sole plaintiff or appellant, are not brought on record within the stipulated period. Order 22 Rule 3, CPC prescribes that where the plaintiff dies and the right to sue has survived, then an application could be filed to bring the legal representatives of the deceased plaintiff / appellant on record within the time specified (90 days). Once the proceedings have abated, the suit essentially has to come to an end, except when the abatement is set aside and the legal representatives are ordered to be brought on record by the court of competent jurisdiction in terms of Order 22 Rule 9(3), CPC. Order 22 Rule 9(3) of the CPC contemplates that provisions of Section 5 of the Indian Limitation Act, 1963 shall apply to an application filed under Sub-Rule (2) of Rule 9 of Order 22, CPC. Thus, an application for setting aside the abatement has to be treated at par and the principles enunciated for condonation of delay under Section 5 of the Limitation Act are to apply in para materia. [Para 7] [611-B-G]

2.2. Section 3 of the Limitation Act requires that suits or proceedings instituted after the prescribed period of limitation shall be dismissed. However, in terms of Section 5, the discretion is vested in the Court to admit an appeal or an application, after the expiry of the prescribed period of limitation, if the appellant shows 'sufficient cause' for not preferring the application within the prescribed time. The expression 'sufficient cause' commonly appears in the provisions of Order 22 Rule 9(2), CPC and Section 5 of the Limitation Act, thus categorically demonstrating that they are to be decided

on similar grounds. The decision of such an application has to be guided by similar precepts. [Para 7] [611-G-H; 612-A-C]

2.3. Liberal construction cannot be equated with doing injustice to the other party. Delay should be condoned to do substantial justice without resulting in injustice to the other party. This balance has to be kept in mind by the Court while deciding such applications. Even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness'as it is understood in its general connotation. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. [Para 13] [618-G-H; 619-A-B]

2.4. Once a valuable right is accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly, when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly. The applications filed by the applicants lack in details. Even the averments made are not correct and *ex-facie* lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation

rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. [Para 13] [619-B-E]

2.5. Whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. Also the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. No provision can be treated to have been enacted purposelessly. Furthermore, it is also a well settled cannot of interpretative jurisprudence that the Court should not give such an interpretation to provisions which would render the provision ineffective or otiose. Once the legislature has enacted the provisions of Order 22, with particular reference to Rule 9, and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. [Para 14] [621-E-H; 622-A]

2.6. Liberal construction of the expression 'sufficient cause' is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the Court should condone the delay; equally there would be cases where the Court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect 'sufficient cause' as understood in law. The expression 'sufficient cause' implies the presence of legal and adequate reasons. The words 'sufficient' means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than

that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated. The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention. [Para 14] [622-C-H; 623-A]

Ram Sumiran v. D. D. C. **(1985) 1 SCC 431, held inapplicable**

State of Bihar v. Kameshwar Prasad Singh **(2000) 9 SCC 94, distinguished.**

Union of India v. Ram Charan; **AIR 1964 SC 215;** *P. K. Ramachandran v. State of Kerala;* **(1997) 7 SCC 556;** *Katari Suryanarayana v. Koppisetti Subba Rao* **AIR 2009 SC 2907;** *Perumon Bhagvathy Devaswom v. Bhargavi Amma* **(2008) 8 SCC 321;** *Ramlal and Others v. Rewa Coalfields Ltd.* **AIR 1962 SC 361;** *Union of India v. Tata Yodogawa Ltd.* **1988 (38) Excise Law Times 739 (SC)** *Collector of Central Excise, Madras v. A.MD. Bilal & Co.* **1999 (108) Excise Law Times 331 (SC), relied on.**

Mithailal Dalsangar Singh v. Annabai Devram Kini; **(2003) 10 SCC 691 and** *Ganeshprasad Badrinarayan Lahoti v. Sanjeevprasad Jamnaprasad Chourasiya* **(2004) 7 SCC 482, referred to.**

Advanced Law Lexicon, by P. Ramanatha Aiyar, 2nd Edition, 1997 and 3rd Edition, **2005, referred to.**

3. The explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay in just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. It is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. [Para 16] [624-G-H; 625-A-C]

4. As regards the merits of the application in hand, except for a vague averment that the legal representatives were not aware of the pendency of the appeal before this Court, there is no other justifiable reason stated in the one page application. The application does not contain correct and true facts. Thus, want of bona fides is imputable to the applicant. There is no reason or sufficient cause shown as to what steps were taken during this period and why immediate steps were not taken by the applicant, even after they admittedly came to know of the pendency of the appeal before this Court. It is the abnormal conduct on the part of the applicants, particularly one of them who had appeared as AW4 in the trial court and was fully aware of the proceedings, but still did not inform the counsel of the death of his father. The cumulative effect of all

these circumstances is that the applicants have miserably failed in showing any 'sufficient cause' for condonation of delay of 778 days in filing the application in question. [Para 17] [625-D-H]

Case Law Reference:

(1985) 1 SCC 431	**held inapplicable**	**Para 7**
(2003) 10 SCC 691	**referred to**	**Para 7**
(2004) 7 SCC 482	**referred to**	**Para 7**
AIR 1964 SC 215	**relied on**	**Para 7**
(1997) 7 SCC 556	**relied on**	**Para 8**
AIR 2009 SC 2907	**relied on**	**Para 10**
(2008) 8 SCC 321	**relied on**	**Para 10**
(2000) 9 SCC 94	**distinguished**	**Para 13**
AIR 1962 SC 361	**relied on**	**Para 1**
1988 (38) ELT 739 (SC)	**relied on**	**Para 1**
1999 (108) E LT 331 (SC)	**relied on**	**Para 1**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1166 of 2006.

From the Judgment & Order dated 21.05.2003 of the High Court of Punjab & Haryana at Chandigarh in Civil Revision No. 295 of 2002.

Nagendra Rai, Rishi Malhotra, Prem Malhotra for the Appellant.

Pardeep Gupta, Arvind Bansal, Suresh Bharti, Laxmibai Leithanthem, Eklavya Gupta, K.K. Mohan for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The Learned Single Judge of the High Court of Punjab and Haryana at Chandigarh vide its Judgment dated 21st May, 2003 set aside the concurrent Judgment passed by the Appellate Authority, Ambala, dated 11th December, 2001 and that of the Rent Controller dated 27th September, 2000, passing an order of ejectment against the respondents in exercise of the powers conferred under Section 15 of the Haryana Urban Rent (Control of Rent and Eviction) Act, 1973 (for short 'the Act'). The petition had been instituted by the landlord against the tenant on the ground of non-payment of rent. The tenant had denied the relationship of landlord and tenant and even claimed title to the said property on the basis of an agreement dated 21st November, 1953 entered into between the predecessor in interest of the petitioner. The ground taken for ejectment of the tenant in the eviction petition was non-payment of rent which was only Rs. 200/- per month. As already noticed, the judgment of the Appellate Authority was set aside by the High Court vide its judgment dated 21st May, 2003 and it is this judgment of the High Court which has been assailed by way of a Special Leave Petition before this Court. The leave to appeal was granted by the Court vide order dated 13th February, 2006.

2. During the pendency of the appeal on 28th November, 2007, the sole petitioner died. From the record, it appears that no steps were taken to bring on record the legal representatives of the deceased appellant for a considerable period of time on record. Somewhere on 15th April, 2010, I.A. No. 1 of 2010 has been filed along with I.A. No. 2 of 2010 praying for condonation of delay in filing the application for bringing the legal heirs on record. As is evident from the above narrated facts, the appellant died on 28th November, 2007 while the present applications have been filed on or about 15th April, 2010. Thus, there is delay of 778 days in filing these applications. The application for condonation of delay was seriously contested

on behalf of the non-applicants. It was argued that no sufficient cause or even a reasonable cause has been shown for condoning the delay of more than two years and the appeal has already abated. The application, besides being vague at the face of it, contains untrue averments. As such, it is prayed that the application should be dismissed and consequently, the appeal would not survive for consideration.

3. Firstly, we have to deal with I.A. No. 2 of 2010, which is an application for condonation of delay in filing the application for bringing the legal representatives on record. The Learned Counsel appearing for the applicant stated that though no specific provision had been stated in the headings of any of the applications, I.A. No. 1 of 2010 should be treated as an application under Order 22 Rule 3 read with Section 151, of Code of Civil Procedure (hereinafter referred to as 'CPC') while I.A. No. 2 of 2010 should be treated as an application under Order 22 Rule 9 read with Section 5 of the Limitation Act, 1962.

4. At the very outset, we may notice that the delay in filing the application I.A. No. 1 of 2010 is considerable and it cannot be disputed that the onus to show that sufficient cause exists for condonation of delay lies upon the applicant.

5. It is obligatory upon the applicant to show sufficient cause due to which he was prevented from continuing to prosecute the proceedings in the suit or before the higher Court. Here there is admittedly, a delay of 778 days in filing the application for bringing the legal representative on record. To explain this delay, the applicant has filed a one page application stating that they were not aware of the pendency of the appeal before the Court and came to know, only in March, 2010 from their counsel that the case would be listed for final disposal during the vacations in May, 2010. Then the applications, as already noticed, were filed on 15th April, 2010. In order to examine the reliability and worthiness of the alleged sufficient cause for condonation of delay, it will be appropriate to refer

to paragraph 2 of the application which is the only relevant paragraph out of the four paragraph application:

> "That the LRs. of the applicants are residing on different addresses because the LRs. of the appellant/deceased are in service and they were not aware of the pendency of any appeal before this Hon'ble Court. However, when the letter from the counsel for Sh. Balwant Singh were received at home at Ambala that the appeal is being listed for final hearing during vacation in the month of May, 2010 then these LRs. came to know about the pendency of the appeal. Thereafter these LRs. contacted the counsel in the month of March, 2010 to find out the position of the case. When they contacted the counsel at New Delhi these LRs. the counsel was told about the death of Sh. Balwant Singh which had taken place in November, 2007. It was further pointed out to the counsel that the LRs. were not aware about the pendency of the appeal in this Court or about the requirement of law to bring the LRs. on record after the death of Balwant Singh. It is now they have come to know that the LRs. of Balwant Singh are required to be brought on record otherwise the appeal would abate."

6. It is clear from the bare reading of the above paragraph that the applicants were totally callous about pursuing their appeal. They have acted irresponsibly and even with negligence. Besides this, they have not approached the Court with clean hands. The applicant, who seeks aid of the Court for exercising its discretionary power for condoning the delay, is expected to state correct facts and not state lies before the Court. Approaching the Court with unclean hands itself, is a ground for rejection of such application. In para 2 of the I.A. NO. 1 of 2010, it has been shown that all the legal representatives of the deceased are residents of 9050/5, Naya Bas, Ambala City, (Haryana) and that there are no other legal heirs of the deceased. However, in para 4 of the I.A. No. 2 of 2010, it has been stated that the LRs. of the deceased were in service and

were not aware of the pendency of the appeal, implying that they were living at different places and the letter of the lawyer was received at their residential address of Ambala. The stand taken in one application contradicts the stand taken in the other application. Furthermore, it is stated that they were not aware of the pendency of the appeal. This, again, does not appear to be correct inasmuch as one of the legal representatives of the deceased, namely Har-Inder Singh was examined in the Trial Court as AW4, who is the son of the deceased. It is difficult for the Court to believe that the person who has been examined as a witness did not even take steps to find out the proceedings pending before the highest Court of the land. Even the letter, alleged to have been written by the counsel, has not been placed on record and the application *ex facie* lacks bona fide. There is no explanation on record as to why the application was not filed immediately in March 2010, as they had come to know that the appeal was to be listed for hearing in the month of May, and still, till 15th April, 2010, no steps were taken to file the application. The cumulative effect of the above conduct of the legal representatives of the sole deceased, appellant clearly shows that they have acted with callousness, irresponsibly and have not even stated true facts in the application for condonation of delay. The approach and conduct of the applicants certainly would invite criticism. Moreover, it will be difficult for the Court to exercise its discretionary power in favour of the applicants. There is not even a whisper in the entire application as to why, right from the death of the deceased in November, 2007, the appellant did not take any steps whatsoever till 15th April, 2010 to inform their counsel about the death of the deceased and to bring the legal representatives on record.

7. The counsel appearing for the applicant, while relying upon the judgment of this Court in the case of *Ram Sumiran v. D.D.C.* [(1985) 1 SCC 431], *Mithailal Dalsangar Singh v. Annabai Devram Kini,* [(2003) 10 SCC 691] and *Ganeshprasad Badrinarayan Lahoti v. Sanjeevprasad Jamnaprasad Chourasiya* [(2004) 7 SCC 482] argued that this

Court should take a liberal view and should condone the delay, irrespective of the above facts and in all these judgments the delay has been condoned by the Court. As per contra, the submission of the counsel for the non-applicants is that the appeal has abated and no cause, much less sufficient, has been shown for setting aside the abatement. A right accrues in favour of the respondents in appeal and it will be unfair and unjust to take away their vested right on such flimsy and baseless grounds. It is a settled position of law that a suit or an appeal abates automatically if the legal representatives, particularly of the sole plaintiff or appellant, are not brought on record within the stipulated period. Rule 1 of Order 22, CPC mandates that the death of a defendant or a plaintiff shall not cause the suit to abate if the right to sue survives. In other words, in the event of death of a party, where the right to sue does not survive, the suit shall abate and come to an end. In the event the right to sue survives, the concerned party is expected to take steps in accordance with provisions of this Order. Order 22 Rule 3, CPC therefore, prescribes that where the plaintiff dies and the right to sue has survived, then an application could be filed to bring the legal representatives of the deceased plaintiff/ appellant on record within the time specified (90 days). Once the proceedings have abated, the suit essentially has to come to an end, except when the abatement is set aside and the legal representatives are ordered to be brought on record by the Court of Competent jurisdiction in terms of Order 22 Rule 9 (3), CPC. Order 22 Rule 9 (3) of the CPC contemplates that provisions of Section 5 of the Indian Limitation Act, 1963 shall apply to an application filed under Sub Rule 2 of Rule 9 of Order 22, CPC. In other words, an application for setting aside the abatement has to be treated at par and the principles enunciated for condonation of delay under Section 5 of the Limitation Act are to apply *para materia*. Section 3 of the Limitation Act requires that suits or proceedings instituted after the prescribed period of limitation shall be dismissed. However, in terms of Section 5, the discretion is vested in the Court to

admit an appeal or an application, after the expiry of the prescribed period of limitation, if the appellant shows 'sufficient cause' for not preferring the application within the prescribed time. The expression 'sufficient cause' commonly appears in the provisions of Order 22 Rule 9 (2), CPC and Section 5 of the Limitation Act, thus categorically demonstrating that they are to be decided on similar grounds. The decision of such an application has to be guided by similar precepts. It will be appropriate for us to trace the law enunciated by this Court while referring, both the provisions of Order 22 Rule 9, CPC and Section 5 of the Limitation Act. In the case of *Union of India v. Ram Charan,* [AIR 1964 SC 215], a three Judge Bench of this Court was concerned with an application filed under Order 22 Rule 9, CPC for bringing the legal representatives of the deceased on record beyond the prescribed period of limitation. The Court expressed the view that mere allegations about belated knowledge of death of the opposite party would not be sufficient. The Court applied the principle of 'reasonable time' even to such situations. While stating that the Court was not to invoke its inherent powers under Section 151, C.P.C. it expressed the view that the provisions of Order 22 Rule 9, CPC should be applied. The Court held as under:

> "8. There is no question of construing the expression 'sufficient cause' liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal representatives of the deceased respondent. The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the

merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement.

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10.…The procedure, requires an application for the making of the legal representatives of the deceased plaintiff or defendant a party to the suit. It does not say who is to present the application. Ordinarily it would be the plaintiff as by the abatement of the suit the defendant stands to gain. However, an application is necessary to be made for the purpose. If no such application is made within the time allowed by law, the suit abates so far as the deceased plaintiff is concerned or as against the deceased defendant. The effect of such an abatement on the suit of the surviving plaintiffs or the suit against the surviving defendants depends on other considerations as held by this Court in *State of Punjab v. Nathu Ram,* [AIR 1962 SC 89 and Jhanda Singh v. Gurmukh Singh, C.A. No. 344 of 1956, D/- 10-4-1962 (SC). Any way, that question does not arise in this case as the sole respondent had died.

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12.…The legislature further seems to have taken into account that there may be cases where the plaintiff may not know of the death of the defendant as ordinarily expected and, therefore, not only provided a further period

of two months under Art. 171 for an application to set aside the abatement of the suit, but also made the provisions of Section 5 of the Limitation Act applicable to such applications. Thus the plaintiff is allowed sufficient time to make an application to set aside the abatement which, if exceeding five months, be considered justified by the Court in the proved circumstances of the case. It would be futile to lay down precisely as to what considerations would constitute 'sufficient cause' for setting aside the abatement or for the plaintiff's not applying to bring the legal representatives of the deceased defendant on the record or would be held to be sufficient cause for not making an application to set aside the abatement within the time prescribed. But it can be said that the delay in the making of such applications should not be for reasons which indicate the plaintiff's negligence in not taking certain steps which he could have and should have taken. What would be such necessary steps would again depend on the circumstances of a particular case and each case will have to be decided by the court on the facts and circumstances of the case. Any statement of illustrative circumstances or facts can tend to be a curb on the free exercise of its mind by the Court in determining whether the facts and circumstances of a particular case amount to 'sufficient cause' or not. Courts have to use their discretion in the matter soundly in the interests of justice."

8. In the case of *P.K. Ramachandran v. State of Kerala,* [(1997) 7 SCC 556] where there was delay of 565 days in filing the first appeal by the State, and the High Court had observed, "taking into consideration the averments contained in the affidavit filed in support of the petition to condone the delay, we are inclined to allow the petition". While setting aside this order, this Court found that the explanation rendered for condonation of delay was neither reasonable nor satisfactory and held as under:

"3. It would be noticed from a perusal of the impugned order that the court has not recorded any satisfaction that the explanation for delay was either *reasonable* or *satisfactory*, which is an essential prerequisite to condonation of delay.

4. That apart, we find that in the application filed by the respondent seeking condonation of delay, the thrust in explaining the delay after 12.5.1995 is:

"…..at that time the Advocate General's office *was fed up* with so many arbitration matters (sic) equally important to this case were pending for consideration as per the directions of the Advocate General on 2.9.1995."

5. This can hardly be said to be a reasonable, satisfactory or even a proper explanation for seeking condonation of delay. In the reply filed to the application seeking condonation of delay by the appellant in the High Court, it is asserted that after the judgment and decree was pronounced by the learned Sub-Judge, Kollam on 30-10-1993, the scope for filing of the appeal was examined by the District Government Pleader, Special Law Officer, Law Secretary and the Advocate General and in accordance with their opinion, it was decided that there was no scope for filing the appeal but later on, despite the opinion referred to above, the appeal was filed as late as on 18.1.1996 without disclosing why it was being filed. The High Court does not appear to have examined the reply filed by the appellant as reference to the same is conspicuous by its absence from the order. We are not satisfied that in the facts and circumstances of this case, any explanation, much less a reasonable or satisfactory one had been offered by the respondent-State for condonation of the inordinate delay of 565 days.

6. Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so

prescribed and the courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside. Consequently, the application for condonation of delay filed in the High Court would stand rejected and the miscellaneous first appeal shall stand dismissed as barred by time. No costs."

9. In the case of *Mithailal Dalsangar Singh* (supra), a Bench of this Court had occasion to deal with the provisions of Order 22 Rule 9, CPC and while enunciating the principles controlling the application of and exercising of discretion under these provisions, the Court reiterated the principle that the abatement is automatic and not even a specific order is required to be passed by the Court in that behalf. It would be useful to reproduce paragraph 8 of the said judgment which has a bearing on the matter in controversy before us:

"8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a

specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for."

10. Another Bench of this Court in a recent judgment of *Katari Suryanarayana v. Koppisetti Subba Rao,* [AIR 2009 SC 2907] again had an occasion to construe the ambit, scope and application of the expression 'sufficient cause'. The application for setting aside the abatement and bringing the legal heirs of the deceased on record was filed in that case after a considerable delay. The explanation rendered regarding the delay of 2381 days in filing the application for condonation of delay and 2601 days in bringing the legal representatives on record was not found to be satisfactory. Declining the application for condonation of delay, the Court, while discussing the case of *Perumon Bhagvathy Devaswom v. Bhargavi Amma* [(2008) 8 SCC 321] in its para 9 held as under:

"11. The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in Section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant."

11. The Learned Counsel appearing for the applicant,

while relying upon the cases of Ram Sumiran, *Mithailal Dalsangar Singh and Ganeshprasad Badrinarayan Lahoti* (supra), contended that the Court should adopt a very liberal approach and the delay should be condoned on the mere asking by the applicant. Firstly, none of these cases is of much help to the applicant. Secondly, in the case of *Ram Sumiran* (supra), the Court has not recorded any reasons or enunciated any principle of law for exercising the discretion. The Court, being satisfied with the facts averred in the application and particularly giving benefit to the applicant on account of illiteracy and ignorance, condoned the delay of six years in filing the application. This judgment cannot be treated as a precedent in the eyes of the law. In fact, it was a judgment on its own facts.

12. In the case of *Ganeshprasad Badrinarayan Lahoti* (supra), the High Court had rejected the application, primarily, on the ground that no separate application had been filed for substitution and for setting aside the abatement. The Court held that the principles of res judicata were not applicable and the application could be filed at a subsequent stage. Thus, the delay was condoned. We must notice here that the earlier judgments of the equi benches and even that of larger benches (three Judge Bench) in the case of Ram Charan (supra) were not brought to the notice of the Court. Resultantly, the principles of law stated by this Court in its earlier judgments were not considered by the Bench dealing with the case of *Ganeshprasad Badrinarayan Lahoti* (supra).

13. As held by this Court in the case of *Mithailal Dalsangar Singh* (supra), the abatement results in the denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be construed liberally. We may state that even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party.

The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly. The application filed by the applicants lack in details. Even the averments made are not correct and *ex-facie* lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflect normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party. In the case of *State of Bihar v. Kameshwar Prasad Singh* [(2000) 9 SCC 94], this Court had taken a liberal approach for condoning the delay in cases of the Government, to do substantial justice. Facts of that case were entirely different as that was the case of fixation of seniority of 400 officers and the facts were required to be verified. But what we

are impressing upon is that delay should be condoned to do substantial justice without resulting in injustice to the other party. This balance has to be kept in mind by the Court while deciding such applications. In the case of *Ramlal and Others v. Rewa Coalfields Ltd.,* [AIR 1962 SC 361] this Court took the view:

> "7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree holder by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the *Madras High Court in Krishna v. Chathappan,* ILR 13 Mad 269.
>
> It is however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration

of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;…"

14. In the case of *Union of India v. Tata Yodogawa Ltd.,* [1988 (38) Excise Law Times 739 (SC)], this Court while granting some latitude to the Government in relation to condonation of delay, still held that there must be some way or attempt to explain the cause for such delay and as there was no whisper to explain what legal problems occurred in filing the Special Leave Petition, the application for condonation of delay was dismissed. Similarly, in the case of Collector of *Central Excise, Madras v. A.MD. Bilal & Co.,* [1999 (108) Excise Law Times 331 (SC)], the Supreme Court declined to condone the delay of 502 days in filing the appeal because there was no satisfactory or reasonable explanation rendered for condonation of delay. The provisions of Order 22 Rule 9, CPC has been the subject matter of judicial scrutiny for considerable time now. Sometimes the Courts have taken a view that delay should be condoned with a liberal attitude, while on certain occasions the Courts have taken a stricter view and wherever the explanation was not satisfactory, have dismissed the application for condonation of delay. Thus, it is evident that it is difficult to state any straight-jacket formula which can uniformly be applied to all cases without reference to the peculiar facts and circumstances of a given case. It must be kept in mind that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly. Furthermore, it is also a well settled canon of interpretative jurisprudence that the Court should not give such an interpretation to provisions which would render the provision ineffective or odious. Once the legislature has enacted the provisions of Order 22, with particular reference to Rule 9, and the provisions of the Limitation Act are applied to the

entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. If we accept the contention of the Learned Counsel appearing for the applicant that the Court should take a very liberal approach and interpret these provisions (Order 22 Rule 9 of the CPC and Section 5 of the Limitation Act) in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. Such approach or interpretation would hardly be permissible in law. Liberal construction of the expression 'sufficient cause' is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the Court should condone the delay; equally there would be cases where the Court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect 'sufficient cause' as understood in law. [Advanced Law Lexicon, P. Ramanatha Aiyar, 2nd Edition, 1997] The expression 'sufficient cause' implies the presence of legal and adequate reasons. The word 'sufficient' means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated. We find it unnecessary to discuss the instances which would fall under either of these classes of cases. The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is sufficient to see

whether it could have been avoided by the party by the exercise of due care and attention. [Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edition, 2005]

15. We feel that it would be useful to make a reference to the judgment of this Court in *Perumon Bhagvathy Devaswom* (supra). In this case, the Court, after discussing a number of judgments of this Court as well as that of the High Courts, enunciated the principles which need to be kept in mind while dealing with applications filed under the provisions of Order 22, CPC along with an application under Section 5, Limitation Act for condonation of delay in filing the application for bringing the legal representatives on record. In paragraph 13 of the judgment, the Court held as under:-

> "13 (i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant."
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> (ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decided the matter on merits. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

> (iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.
>
> (iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in re-filing the appeal after rectification of defects.
>
> (v) Want of "diligence" or "inaction" can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

We may also notice here that this judgment had been followed with approval by an equi-bench of this Court in the case of *Katari Suryanarayana* (supra)

16. Above are the principles which should control the exercise of judicial discretion vested in the Court under these provisions. The explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the

conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. The larger benches as well as equi-benches of this Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to condone the delay in the filing of such applications.

17. On an analysis of the above principles, we now revert to the merits of the application in hand. As already noticed, except for a vague averment that the legal representatives were not aware of the pendency of the appeal before this Court, there is no other justifiable reason stated in the one page application. We have already held that the application does not contain correct and true facts. Thus, want of bona fides is imputable to the applicant. There is no reason or sufficient cause shown as to what steps were taken during this period and why immediate steps were not taken by the applicant, even after they admittedly came to know of the pendency of the appeal before this Court. It is the abnormal conduct on the part of the applicants, particularly Har-Inder Singh, who had appeared as AW4 in the trial and was fully aware of the proceedings, but still did not inform the counsel of the death of his father. The cumulative effect of all these circumstances is that the applicants have miserably failed in showing any 'sufficient cause' for condonation of delay of 778 days in filing the application in question.

18. Thus, we have no hesitation in dismissing I.A.No.2 of 2010 and consequently, I.A.No.1 of 2010 does not survive for consideration and is also dismissed. Resultantly, the appeal having already abated also stands dismissed. However, in the facts of the case, there shall be no orders as to costs.

B.B.B. Appeal dismissed.

NARESH KUMAR

v.

DEPARTMENT OF ATOMIC ENERGY AND ORS.

(Civil Appeal No. 3138 of 2008)

JULY 08, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Service Law – Pension – Multiple pension options – Appellant opted for pro-rata pension – Later made representation seeking change in option and claiming pension for combined service – Representation rejected by authorities – Writ petition filed by appellant – Dismissed on ground of unexplained delay and laches, as well as on merits – Propriety of – Held: Proper – The relief claimed by appellant was misconceived and could not be granted on the facts of the case – Moreover, appellant, without giving any explanation, approached the writ court long after his representation was rejected by the authorities – Delay / Laches.

Service Law – Settled practice – Challenge to – Held: Normally the matters which are settled should not be permitted to be unsettled on the mere asking.

The appellant served in the Indian Air Force for 15 years wthereafter he served the Department of Atomic Energy (DAE) and later served the Nuclear Power Corporation (NPC) as well. He had opted to receive pensionary benefits from the Air Force instead of combined benefits of Civil and Military Pension. However, later he moved a representation before the authorities concerned seeking change in option from pro-rata pension to pension for combined service put in by him both under DAE and NPC. The representation was rejected. The appellant made two more representations

for reconsideration of his grievance but they were also rejected.

Subsequently, the appellant filed a writ petition praying for a direction to the respondents to accept his option for combined service pension. The petition was dismissed by the High Court on the ground of unexplained delay and laches, as also on merits.

Dismissing the instant appeal, the Court

HELD: 1.1. The appellant had served in the Air Force at the first phase of his employment whereafter he served DAE and in the third and last phase, he served the NPC. In the representation moved by the appellant, he had submitted that pension for combined service put in both under DAE and NPC be granted to him by change in option and that he was willing to refund the amount of pro-rata pension paid to him. This representation came to be rejected in 1999 but still the appellant chose not to challenge the same and waited for considerable years. The circular of 2001 (relied upon by the appellant) was applicable to re-employed pensioners, who opted for separate military and civil pension, and hardly had any bearing on the case of the appellant, who was claiming combining of the pension of DAE and the Corporation none of them being the part of the military or Air Force service. [Para 7] [633-E-H; 634-A-D]

1.2. The respondents had circulated a booklet wherein it was specifically stated that whosoever opts for a monthly pro-rata pension would not be allowed to commute any part of pro-rata pension either at the time of permanent absorption or at any time thereafter. According to the respondents, this practice has been uniformly followed till date and a large number of employees had exercised their option like the appellant. There is substance in the plea of the respondents that the

appellant having opted and taken benefit for all this period cannot be permitted to alter the option and if his case is now accepted, it will cause tremendous administrative and financial problems for the NPC. It is true that normally the matters which are settled should not be permitted to be unsettled on the mere asking. [Para 6] [632-G-H; 633-A-C]

1.3. The relief claimed by the appellant is misconceived and cannot be granted on the facts of the case. Merely because the case of the appellant was forwarded by the Department for favourable consideration, would not vest any right in the appellant and can hardly be of any material consequence. If an employee keeps making representation after representation which are consistently rejected then the employee cannot claim any relief on that ground. The High Court was not in error while dismissing the writ petition even on the ground of unexplained delay and laches. The representation of the appellant was rejected as back in the year 1999 and for reasons best known to the appellant he did not challenge the same before the Court of competent jurisdiction till the year 2007. [Para 9] [635-A-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3138 of 2008.

From the Judgment & Order dated 04.04.2007 of the High Court of Judicature at Bombay in Writ Petition No. 520 of 2007.

Rajesh Srivastava for the Appellant.

Pravin H. Parekh, Sameer Parekh, Ranjeeta Rohatgi, Shashank Kunwar, Rukhmini Bobde, Vishal Prasad (for Parekh & Co.) for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The appellant was serving in the Indian Air Force as Air Corporal and after putting in fifteen years of service, he received military pension in accordance with the Rules. On 17th April, 1978, the appellant joined Narora Atomic Power Station as a Tradesman E. The power station was under the control of Department of Atomic Energy, Government of India. The appellant claims that he had a choice to avail pensionery benefits from the Air Force or in the alternative not to take pension from the Air Force but to have the benefit of combined qualifying service for his military and civil services from the Union of India. However, the appellant exercised his option to receive benefits from the Air Force and did not opt for combined benefits of Civil and Military Pension.

2. On 3rd September, 1987, the Government incorporated Nuclear Power Corporation of India Limited (NPCIL) under the provisions of Companies Act, 1956. Consequent upon the incorporation, all the employees of Nuclear Power Board (for short 'NPB') a constituent unit of Department of Atomic Energy (for short 'DAE') were transferred *en masse* on deputation to the Corporation vide notification dated 4th September, 1987. The conditions of service were finalized and contained in the Office Memorandum dated 26th May, 1994 which came to be challenged before the Central Administrative Tribunal. The concerned authorities were required to consider the matter and finally a revised offer was issued to the deputationists vide an Office Memorandum dated 24th December, 1997. In the said Memorandum dated 24th December, 1997, it was clearly stated that last date for changing any pension option was 16th February, 1998. On 13th February, 1998, the appellant exercised his option for drawing pro-rata monthly pension and family pension benefits from the date of absorption. The appellant had joined the service of Corporation on 1st January, 1998 and resigned from the service of the Government of India w.e.f. 31st December, 1997. The appellant wanted to change his option in regard to benefits of pension. Vide his request dated 14th January, 1999, the appellant requested the

authorities for change in option from pro-rata pension to pension for combined service put in both under DAE and NPCIL and submitted the requisite option form. However, vide letter dated 18th February, 1999, the appellant was informed that the authorities had not agreed and the Department of Atomic Energy was not willing to permit change in option. The petitioner was drawing independent military pension. On or about 11th April, 2001, the Office Memorandum was issued by the authorities clarifying that rule 18 and 19 of the Central Civil Services (pension) Rules, 1972 (for short 'the Rules') shall apply retrospectively to civil and military re-employed pensioners and shall not be subject to any limitation as per provisions of rule 18(3) of the Rules. The appellant who was in third spell of his service was again informed on 24th September, 2001 that his request cannot be agreed to by the Department of Atomic Energy. After waiting for a considerable time, again on 26th July, 2004, the appellant made a representation to the Additional Secretary of DAE for reconsideration of his grievance. This representation also came to be rejected. Dissatisfied, the appellant moved another representation on 4th July, 2006 which met the same fate. The third and final representation submitted by the appellant on 5th September, 2005 was also disposed of by the authorities by passing the following order:

> *"…Your representation has been re-considered carefully in the Department and it is regretted that your request for allowing you to change the option of pro-rata pension to combind service pension cannot be accepted…"*

3. On 31st January, 2006, the appellant retired from the service of Corporation and finally filed the Writ Petition on 9th January, 2007 before the High Court of Judicature at Mumbai claiming that his services under the Union of India and Military Service should be permitted to be combined for the purposes of pensionery benefits and option be permitted to be re-exercised by him. The Division Bench of the High Court vide

its order dated 4th April, 2007 dismissed the Writ Petition filed by the appellant while noticing that the Writ Petition suffered from the defect of unexplained delay and laches. Besides that, even on merits, the appellant had no case. It noticed that the representation of the appellant was first rejected in the year 1999 and he filed the Writ Petition in the year 2007 after a lapse of nearly 8 years and the Bench found no explanation whatsoever for his inordinate delay.

4. Aggrieved from the judgment of the High Court, the appellant has filed the present appeal. According to learned Counsel appearing for the appellant after issuance of the Memorandum by the authorities relaxing and lifting the limitations as contained in Rule 18(3), the appellant had a fresh cause of action and the respondents were expected to consider the case of the appellant for change of option and consequent payment of combined pensions afresh. It is further contended that as the High Court has failed to appreciate this contention, the judgment of the High Court is liable to be set aside.

5. On the contrary, the arguments on behalf of the respondent is that the appellant had put up a different relief before the authorities concerned while in the Writ Petition before the High Court and even before this Court, the relief prayed for is entirely different. The appellant cannot get combined pension as he had opted for pro-rata pension at a given point of time and now he cannot be permitted to change the option. In any case the option sought for in the writ petition being distinct from the one prayed in the representation, the petitioner cannot be entitled to any relief.

6. The respondents have taken a specific step in the counter affidavit filed before this Court as well as earlier that the details of absorption of the deputationists as well as option to be exercised by the employees was stated in a booklet which was circulated. In that booklet, it had been specifically stated that whosoever opts for a monthly pro-rata pension would not be allowed to commute any part of pro-rata pension either at

the time of permanent absorption or at any time thereafter. The petitioner having opted and taken benefit for all this period cannot be permitted now to alter the option to the prejudice of the Corporation. Another submission which carries some weight on behalf of the Corporation is that this practice has been uniformly followed till date and a large number of employees had exercised their option like the petitioner, none was permitted to change such option, by the Corporation at any subsequent stage. If the case of the petitioner is now accepted, it will cause tremendous administrative and financial problems for the Corporation. It is true that normally the matters which are settled should not be permitted to be unsettled on the mere asking. As per practice, the Corporation has followed this as a Rule and has applied it to all concerned uniformly for all these years and even petitioner whose request was declined in the year 1999 did not bother to approach the Court of law for claiming appropriate relief till the year 2007. Thus, in addition to the other reason that the petitioner is not entitled to the relief on merits, we even find substance in this argument on behalf of the Corporation.

7. From the above noticed facts, it is clear that the appellant had served in the Air Force at the first phase of his employment whereafter he served DAE and in the third and last phase, he served the Corporation. The representation which the appellant moved even on 14th January, 1999, he had submitted that pension for combined service put in both under DAE and NPC be granted to him by change in option and that he was willing to refund the amount of pro-rata pension paid to him. This representation came to be rejected on 18th February, 1999 but still the appellant chose not to challenge the same and waited for considerable years. The circular dated 11th April, 2001 hardly had any bearing on the case of the appellant. That circular was applicable to the re-employee pensioners who opted for separate military and civil pension and whose cases were earlier decided were permitted to be reconsidered and pensionery benefits for civil service may be fixed without

limitation as provided in the paragraphs of that circular. Rule 18(3) provided that a Government servant who opts for Clause (a) of sub rule (1), the pension or gratuity admissible for his subsequent service is subject to the limitation, that service gratuity, or the capital value of the pension and retirement gratuity, if any, shall not be greater than the difference between the value of the pension and retirement gratuity, if any, that would be admissible at the time of the Government servant's final retirement if the two periods of service were combined and the value of retirement benefits already granted to him for the previous service. This obviously meant and was to be examined in contrast to the service rendered in the armed forces and subsequently, in the civil services. As already noticed, the appellant was claiming combining of the pension of DAE and the Corporation none of them being the part of the military or Air Force service.

8. Now, let us examine the option exercised and the proforma filled in by the appellant as back as on 13th February, 1998 much after his retirement even from the DAE. The relevant paragraph of the option reads as under:

"2.3.1 I opt to draw pro-rata monthly pension and family pension benefits from the date of absorption."

9. This representation was filled in by the appellant after having gone through and understood the terms of absorption in the Corporation and it was relatable to the service rendered in the Corporation and absorption therein and pro-rata pension of the service rendered in the forces. His request for change which was rejected by the authorities related to declining of combining the service of DAE and NPC, which itself was not the intent of the circular. In the Writ Petition before the High Court, the appellant had prayed for a direction to the respondents to accept his option for combined service pension. Even the circular issued on 27th January, 2003 (Annexure 'P-7') clearly stated that in case of re-employment of military pensioner in civil service, the pensionery benefits for second

spell of service shall not be subject to any limitation as per provisions of rule 18(3) of the Rules. In other words, it is not relatable to service rendered in DAE vis-à-vis combining the same with the Corporation service. The relief claimed even in the present petition thus, is misconceived and cannot be granted on the facts of the case. Merely because the case of the appellant was forwarded by the Department vide its letter dated 27th January, 2007 for favourable consideration, would not vest any right in the petitioner and can hardly be of any material consequence. If an employee keeps making representation after representation which are consistently rejected then the appellant cannot claim any relief on that ground. We are unable to find any merit in the contention raised before us and we are also of the view that the High Court was not in error while dismissing the Writ Petition even on the ground of unexplained delay and laches. The representation of the appellant was rejected as back in the year 1999 and for reasons best known to the appellant he did not challenge the same before the Court of competent jurisdiction.

10. For the reasons afore-stated, we find no merit in the present appeal and the same is dismissed however, leaving the parties to bear their own costs.

B.B.B. Appeal dismissed.

TRANSMISSION CORPN. OF A.P. LTD. & ANR.
v.
SAI RENEWABLE POWER PVT. LTD. & ORS.
(Civil Appeal No. 2926 of 2006 etc.)

JULY 8, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Electricity – Promotion of generation of grid quality power from non-conventional sources –– Guidelines issued by Central Government indicating the purchase price of such electricity – State Government granting uniform incentives to all the projects based on renewable sources of energy – Order reviewing the tariff and imposing restriction on sale to third party – Non-conventional energy developers/generators accepted and acted upon the order by entering into Power Purchase Agreements – Thereafter State Electricity Regulatory Commission determining the purchase price for procurement of such electricity and also imposing restriction with regard to sale thereof to third party – Propriety of the order of the Regulatory Commission – Held: It is within the power and jurisdiction of the Regulatory Commission to determine the 'purchase price' and to impose restriction on sale to third party – The Commission was not estopped from altering the purchase rates or imposing restriction on the sale – The incentives initially provided by the authorities under the guidelines issued by the Central Government and the Power Purchase Agreements were not for indefinite period, but were subject to review – The contracts entered into by the parties provided for review and the restriction for sale to third party – Parties are bound by contractual obligation and such obligation cannot be frustrated by aid of promissory estoppel – Agreements cannot be said to be result of duress – Duress not proved, so as to render the contract voidable – Conditions of a contract cannot be altered/avoided on presumptions or

assumptions – Determination of tariff is a function assigned legislatively to Regulatory Commission – Supreme Court in exercise of powers under Article 136 of the Constitution would not sit as an appellate authority over the formation of opinion and determination of tariff by the specialized bodies – Matters remanded to the Regulatory Commission to fix/determine the tariff for purchase of electricity – Electricity Regulatory Commission Act, 1998 – s. 17 – Andhra Pradesh Electricity Reform Act, 1998 – s. 11 – Electricity Act, 2003 – ss. 61 and 62 r/w. s. 86(1)(a) and (b) – Contract – Promissory Estoppel – Constitution of India, 1950 – Article 136.

Administrative Law:

Principle of promissory estoppel – Nature and applicability of – Discussed.

Principle of legitimate expectation – Applicability of.

Judicial Review – Scope of, in policy matters.

Maxim – *'Allegans contraria non est audiendus'* – Applicability of.

Words and Phrases – 'Tariff' and 'Purchase price' – Meaning of.

Ministry of Non-Conventional Energy Sources of Central Government wrote letter dated 7.9.1993 to different States informing that under new strategy and action plan of the Ministry, special emphasis would be given to generation of grid quality power from non-conventional sources. Guidelines drawn up by the Ministry were also enclosed with the letter, whereby a minimum buy back price of Rs. 2.25 per unit was proposed. The transmission of electricity was required to be undertaken by State Electricity Board.

In furtherance of the decision of the Central

Government and the Guidelines, State of Andhra Pradesh issued two different Government Orders dated 18.11.1997 and 22.11.1998 granting uniform incentives to all the projects based on renewable sources of energy. The Power Purchase Agreement (PPA) between the appellant-Corporation (APTRANSCO) and non-conventional power project developers were executed. The A.P. Regulatory Commission passed an order on 20.6.2001 determining the tariff as well as defining other rights and obligations between the parties including that the generators of electricity were not permitted to make sale in favour of third party. After passing of this order, developers entered into PPAs and confirmed the acceptance and implementation of the order dated 20.6.2001. The PPAs as well as the order dated 20.6.2001 specifically provided for review/revision of purchase price. The order dated 20.6.2001 was never challenged.

Thereafter, pursuant to *suo motu* proceedings, Andhra Pradesh Electricity Regulatory Commission (which was constituted under Andhra Pradesh Electricity Reform Act, 1998) by its order dated 20.3.2004 fixed the energy purchase rates at base unit price of Rs. 2.25 as on 1.4.1994 and the escalation index of 5% p.a.. Thus, the base price as on 1.4.2004 was 3.37 per kwh. The tariff was frozen for five years. The Regulatory Commission also restricted the sale, procurement and distribution of electricity by the developers to any other party except APTRANSCO. This order was further clarified by order dated 7.7.2004. The developers filed appeals against both the orders. The Appellate Tribunal for Electricity held that there was some element of duress in execution of the PPAs; that the PPA being a statutory document, the Regulatory Commission had no authority to interfere with the same; that the Regulatory Commission had neither the power nor the jurisdiction to compel the developers

to sell the power generated by them to APTRANSCO and/ or DISCOM.

The instant appeals were filed against the orders of the appellate tribunal. The questions, broadly, for consideration before the Supreme Court pertained to the issues as under:

(i) Jurisdiction of the Regulatory Commission for fixation of tariff and sale of generated electricity to third party;

(ii) Correctness of tariff fixation;

(iii) Applicability of principle of estoppel and the extent of its applicability;

(iv) Applicability of plea of duress;

(v) Effect of order dated 20.6.2001 in view of its having attained finality and for the same not being questioned in the instant proceedings.

Disposing of the appeals and remanding the matters to Andhra Pradesh Electricity Regulatory Commission, the Court

HELD: 1.1. The Andhra Pradesh Electricity Regulatory Commission has the jurisdiction to determine tariff which takes within its ambit the 'purchase price' for procurement of the electricity generated by the non-conventional energy developers/ generators, in the facts and circumstances of the instant cases. [Para 52] [717-B]

1.2. The Tribunal was not correct in holding that since no independent notification was issued u/s. 17 of the Regulatory Commission Act, 1998, therefore, the A.P. Electricity Regulatory Commission could not exercise the

powers vested in the Regulatory Commission under that Act. The Regulatory Commission was constituted under the Andhra Pradesh Electricity Reform Act, 1998 and an appropriate notification in that behalf was issued. The Electricity Regulatory Commission Act, 1998 stood repealed by the Electricity Act, 2003. The Electricity Act, 2003 specifically recognized and accepted the Commissions constituted under the enactments specified in the Schedule to the Act as appropriate Commission. In entry 3 of the said Schedule, Reform Act, 1998 has been specifically noticed. Thus, the Regulatory Commission constituted under the Reform Act, 1998 became the appropriate Commission under the Electricity Act, 2003 as well. [Para 3] [665-F-H; 666-A-B]

1.3. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. Fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998, Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies as to whom the job is assigned under the law. The Regulatory Commission constituted by the notification dated 3.4.1999 would be the appropriate Commission under the Reform Act, 1998, Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003 and is required to perform the functions as contemplated u/ss. 11, 17 and 82 of the respective Acts. The functions assigned to the Regulatory Commission are wide enough to specifically impose an obligation on the Regulatory Commission to determine the tariff. [Para 17] [678-F-H; 679-A-F]

1.4. The Regulatory Commission is vested with very vast powers and functions. Section 11 of the Reform Act, 1998 declares fixation of tariff as one of the primary functions of the Regulatory Commission in general more

particularly, to the specified consumers u/s. 26 of the Reform Act, 1998. While under the Electricity Act, 2003, Sections 61 and 62 r/w Section 86(1)(a) and (b) deal with fixation of tariffs in relation to production, distribution and sale of generated power to the end consumer. These provisions clearly demonstrate that the Regulatory Commission is vested with the function for determining the tariff for generation, supply, transmission and billing of electricity etc., as well as regulation of electricity purchase and procurement process of distribution licensees, including price at which electricity shall be procured from the generating companies. With these specific powers in the statute book itself, it cannot be said that procurement of power from the generating companies will not fall within the ambit of powers and functions of the Regulatory Commission. It is a common body performing functions, duties and exercising powers under all these three Acts. [Para 30] [694-F-H; 965-A]

PTC India Ltd. v. Central Electricity Regulatory Commission **(2010) 4 SCC 603, relied on.**

Tata Power Company Ltd. v. Reliance Energy Ltd. **2009 (7) SCALE 513, referred to.**

1.5. All the Power Purchase Agreements (PPAs) entered into by the generating companies with the appropriate body, as well as the orders issued by the State in GO Ms. Nos. 93 and 112, in turn, had provided for review of tariff and the conditions. The Tribunal appears to have fallen in error of law in coming to the conclusion that the Regulatory Commission had no powers either in law or otherwise of reviewing the tariff and so called incentives. From various provisions and the documents on record it is clear that the Regulatory Commission is vested with the power to revise tariff and conditions in relation to procurement of power from generating companies. It is also clear from the record that

in terms of the contract between the parties, the APTRANSCO had reserved the right to revise tariff etc. with the approval of the Regulatory Commission. [Para 33] [698-D-G]

1.6. The Tribunal has taken a narrower view of the jurisdiction vested in the Regulatory Commission which is discharging its statutory functions under all the three Acts in accordance with law. The power available to the Government to issue policy directions has two restrictions. Firstly, the policy direction has to be on the matters related to electricity in the State including overall planning and coordination. Secondly, all such policy directions have to be issued by the State Government in consonance with the object sought to be achieved by this Act and accordingly shall not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of the structure of tariff for supply of electricity to the consumers. Powers vested in the Regulatory Commission to frame regulations under Section 54 also intend that regulations are to be framed with an object to ensure proper performance of its functions under the Act. Both the State and the Regulatory Commission are supposed to exercise their respective powers only for the purposes of furthering the cause of the Reform Act. The Commission discharging its statutory functions within the ambit of Sections 11, 12 and 26 of the Reform Act, 1998 as well as Sections 61, 62 and 86(1)(b) of the Electricity Act, 2003 renders advisory functions to the State. [Para 46] [711-G-H; 712-A-D]

1.7. It is not correct to say that the Regulatory Commission acted in contradiction or conflict with the State policy. The State was certainly not intending to provide incentives and concessions with assurance of buy-back to enable the Non-Conventional Energy developers/generators to sell generated powers to third

parties. It must be kept in mind that the policy of the Government of India as well as the State of Andhra Pradesh was for encouraging the developers/generators of Non-conventional Energy to generate electricity for the benefit of public at large with buy back of power being one of the basic features of this policy. Such parameters are subject to change in larger public interest. All these issues, in fact, loose much significance because of the fact that parties have, by and large, entered into the field of contract simpliciter and their rights are controlled by the contracts executed between them. There is no challenge to these contracts and, therefore, it may be hardly permissible for the Court to go behind these contracts and permit questioning of the statutory jurisdiction vested in the Regulatory Commission. [Para 46] [712-F-H; 713-A-B]

1.8. After creation of the Regulatory Commissions under the provisions of the Electricity Regulatory Commission Act, 1998, the Commission has clear power and jurisdiction to fix tariff. The Court should not adopt an interpretation which should neither be strict nor narrower so as to oust the jurisdiction of the Regulatory Commission, as it would defeat the very object of enacting the said Act. [Para 47] [713-C-D]

1.9. The basic policy of both the Central as well as the State Government was to encourage private sector participation in generation, transmission and distribution of electricity on the one hand and to further the objective of distancing the regulatory responsibilities of the Regulatory Commission from the Government and of harmonizing and rationalizing the provisions of the existing laws relating to electricity in India, on the other hand. The object and reasons of Electricity Act, 2003 as well as the Reform Act, 1998 are definite indicators of such legislative intent. The objects and reasons clearly

postulated the need for introduction of private sector into the field of generation and distribution of energy in the State. Efficiency in performance and economic utilization of resources to ensure satisfactory supply to the public at large is the paramount concern of the State as well as the Regulatory Commission. The policy decisions of these constituents are to be in conformity with the object of the Act. Thus, it is necessary that the Regulatory Commission, in view of this object, take practical decisions which would help in ensuring existence of these units rather than their extinguishment as alleged. [Para 51] [713-A-G]

1.10. The restriction with regard to third party sales was not only creation of a directive issued or approval granted by the Regulatory Commission, but was actually in furtherance of the contract entered into between the parties. Rights and liabilities arising from a binding contract cannot be escaped on the basis of some presumptions or inferences in relation to the facts leading to the execution of the contract between the parties. The jurisdiction of the Regulatory Commission, in the facts of the case, arises not only from the statutory provisions under the different Acts but also in terms of the contract executed between the parties which has binding force. [Para 49] [714-G-H; 715-A-B]

1.11. However, the grievance of the respondents that enforcement of the purchase price at the rate determined by the Regulatory Commission along with complete prohibition on the right of the Non-conventional Energy Generator/Developers to sell generated power to the third parties would compel them to shut down their projects, is a matter of concern, even for the State Government. All these projects, admittedly, were established in furtherance of the scheme and the guidelines provided by the Central Government which, in turn, were adopted

with some modification by the State Government. The State Electricity Board implemented the said scheme and initially had permitted sale of generated electricity to third parties, however, subsequently and after formation of the Regulatory Commission which, in turn, took over the functions of the State Electricity Board, the incentives were modified and certain restrictions were placed. The reasons for these restrictions have been stated in the affidavit filed on behalf of the appellants which is not a matter to be examined by this Court in exercise of its extra-ordinary jurisdiction. These matters, essentially, must be examined by expert bodies particularly, when such bodies are constituted under the provisions of a special statute. [Paras 49 and 50] [715-B-C-E-H]

2.1. It is not correct to say that the developers have legitimate right to expect that the incentives as provided to them in furtherance of the letters and orders of the Central as well as the State Government were to be continued indefinitely and the authorities concerned were estopped from altering the rates and / or imposing the condition of no sale to third parties. For the principle of estoppel to be attracted, there has to be a definite and unambiguous representation to a party which then should act thereupon and then alone the consequences in law can follow. The Tribunal has erred in law in treating the *inter-se* letters and guidelines between the Government of India, State Government and the Commission/the State Electricity Board as unequivocal commitments to the respondent/purchasers/generators/ developers so as to bind the State for all times to come. In the instant cases, the policy guidelines issued by the Central Government were the proposals sent to the State Government, which the State Government accepted to consider, amend or alter as per their needs and conditions and then make efforts to achieve the objects of encouraging non-conventional energy generators and

purchasers to enter into this field. These are the matters, which will squarely fall within the competence of the Regulatory Commission/the State Electricity Board at the relevant points of time. Besides that, there was no definite and clear promise made by the authorities to the developers that would invoke the principle of promissory estoppel. Undoubtedly, to encourage participation in the field of generation of energy through non-conventional methods, some incentives were provided but these incentives under the guidelines as well as under the PPAs signed between the parties from time to time were subject to review. In any case, the matter was completely put at rest by the order of 20th June, 2001 and the PPAs voluntarily signed by the parties at that time, which had also provided such stipulations. If such stipulations were not acceptable to the parties they ought to have raised objections at that time or at least within a reasonable time thereafter. The agreements have not only been signed by the parties but they have been fully acted upon for a substantial period. [Para 36] [702-F-H; 703-A-F]

2.2. The principle of promissory estoppel, even if, it was applicable as such, the Government can still show that equity lies in favour of the Government and can discharge the heavy burden placed on it. In such circumstances, the principle of promissory estoppel would not be enforced against the Government as it is primarily a principle of equity. [Para 37] [703-H; 714-A-B]

2.3. It is a settled canon of law that doctrine of promissory estoppel is not really based on principle of estoppel but is a doctrine evolved by equity in order to prevent injustice. There is no reason why it should be given only a limited application by way of defence. It can also be the basis of a cause of action. Once the ingredients of promissory estoppel are satisfied then it could be enforced against the authorities including the

State with very few extra ordinary exceptions to such enforcement. [Para 37] [704-A-B]

2.4. Even if it is assumed that there was a kind of unequivocal promise or representation to the respondents, the reviews have taken place only after the period specified under the guidelines and/or in the PPAs was over. This is a matter which, primarily, falls in the realm of contract and the parties would be governed by the agreements that they have signed. Once these agreements are signed and are enforceable in law then the contractual obligations cannot be frustrated by the aid of promissory estoppel. [Para 37] [704-D-F]

2.5. If the Promise is made in regard to a present or existing facts, the principle of estoppel can be enforced against the Government. But a promise in relation to a future transaction or act may not fall within the ambit of promissory estoppel. [Para 38] [705-G]

Union of India v. M/s. Indo-Afghan Agencies Ltd. **(1968) 2 SCR 366;** *Century Spinning and Manufacturing Company Ltd. v. The Ulhasnagar Municipal Council* **(1970) 1 SCC 582;** *Motilal Padampat Sugar Mills. Co. Ltd. v. State of Uttar Pradesh* **(1979) 2 SCC 409, relied on.**

2.6. In our country, the law of promissory estoppel has attained certainty . It is only an unambiguous and definite promise, which is otherwise enforceable in law upon which, the parties have acted, comes within the ambit and scope of enforcement of this principle and binding on the parties for their promise and representation. In the instant case, the guidelines cannot take the colour of a definite promise which in the letters of the Central Government itself was proposals to the State Government. Besides that, even if the State letters/ circulars are treated as promise or representations to the private parties like the respondents even then, they lead

to the execution of a definite contract between the parties which will purely fall in the domain of contractual law. These contracts specifically provided for review and when reviewed in the year 2001 parties not only accepted the order but executed contracts (PPAs) in furtherance of it. In these circumstances, it is not correct to say that the State or the Regulatory Commission or erstwhile State Electricity Board were bound to allow same tariff and permit third party sales for an indefinite period. To this extent, authorities, in any case, would not be bound by the principle of estoppel. [Para 41] [707-F-H; 708-A-B]

2.7. Besides, the State of Andhra Pradesh was neither impleaded as a party to the proceedings before the Regulatory Commission nor before the Tribunal. In fact, the Tribunal has referred to various acts and deeds of the State and consequences thereof, but did not consider it appropriate to implead the State Government as a party to the proceedings. The presence of the State Government before the Tribunal could have certainly been appropriate, inasmuch as the State would have placed before the Appellate Authority and the Regulatory authorities, its views in regard to revision of incentives as well as the purchase price. The State of Andhra Pradesh was a necessary, in any case, a proper party in these proceedings. [Para 48] [714-C-F]

BSES Ltd. v. Tata Power Co. Ltd. **(2004) 1 SCC 195;** *Andhra Pradesh Electricity Regulatory Commission v. R.V.K. Energy Private Limited* **(2008) 17 SCC 769, relied on.**

3.1. To frustrate a contract on the ground of duress or coercion, there has to be definite pleadings which have to be substantiated normally by leading cogent and proper evidence. However, in the case where summary procedure is adopted like in the instant case, at least some documentary evidence or affidavit ought to have been filed raising this plea of duress specifically. Nothing

was brought to the notice of the Court to state the plea of duress and to prove the alleged facts which constituted duress, so as to vitiate and/or even partially reduce, the effect of the PPAs. On the one hand, the Tribunal appears to have doubted the binding nature of the contracts stating that it contained unilateral conditions introduced by virtue of Order and approval of the Regulatory Commission, while on the other hand, it proceeded on the presumption that PPAs are final and binding and still drew the conclusion that the Regulatory Commission could not revise the tariff. Even in the order, no facts have been pointed out which, in the opinion of the Tribunal, constituted duress within the meaning of the Contract Act so as to render the contract voidable. In the instant case, it is significant to note that the PPAs were executed prior and subsequent to the issuance of the order dated 20th June, 2001. Different persons executed the contracts at different times in full awareness of the terms and conditions of such PPA. Therefore, the Tribunal was not right in recording the findings that the PPAs executed by the parties, were result of some duress and, thus, it will not vest the authorities with the power to review the tariff and other granted incentives. [Para 42] [708-C-H]

3.2. Besides, none of the generators had challenged the agreements and, in fact, except in arguments before the Tribunal no case was made out for the purposes of vitality of the contract or any part thereof. On the contrary, all the generators under all the branches of non-conventional energies, have accepted the contract and proceeded on the basis that the said contracts are binding and still the Regulatory Commission does not have any power or jurisdiction to revise the tariff or deal with the concessions. Even otherwise, firstly, there are no facts on record, much less, supported by any documentary or any other evidence to sustain the plea

that the contracts (PPAs) are a result of undue influence or duress by the State or its agencies upon the generators. Secondly, the generators have already taken benefit of that contract which was based on the policy of the State as well as the order of the Regulatory Commission. Having attained those benefits, it will hardly be of any help to the generators particularly, in the facts and circumstances of the case, to substantiate, justify or argue the plea of duress. [Para 42] [709-A-G]

Birla Jute Manufacturing Co. v. State of M.P. **(2002) 9 SCC 667, relied on.**

3.3. The finding of the Tribunal that "out of compulsion some of the developers entered into Power Purchase Agreement with APTRANSCO accepting the terms and conditions set out in order dated 20th June, 2001" is not substantiated by any material on record. What was the compulsion and what were the facts which persuaded the Tribunal to take such a view are conspicuous by their very absence. A compulsion leading to execution of a contract is a matter entirely based upon facts. It is difficult for this Court, originally, to infer duress or compulsion in absence of specific pleadings and materials in that behalf. [Para 44] [710-D-F]

4. In the instant case, the order dated 20th June, 2001 was fully accepted by the parties without any reservation. After the lapse of more than reasonable time of their own accord they voluntarily signed the PPA which contained a specific stipulation prohibiting sale of generated power by them to third parties. The agreement also had renewal clause empowering TRANSCO/APTRANSCO/ Board to revise the tariff. Thus, the documents executed by these parties and their conduct of acting upon such agreements over a long period, bind them to the rights and obligations stated in the contract. The parties can

hardly deny the facts as they existed at the relevant time, just because it may not be convenient now to adhere to those terms. Conditions of a contract cannot be altered/ avoided on presumptions or assumptions or the parties having a second thought that a term of contract may not be beneficial to them at a subsequent stage. They would have to abide by the existing facts, correctness of which, they can hardly deny. Such conduct, would be hit by *allegans contraria non est audiendus*. [Para 39] [705-F-H; 706-A-B]

Kusumam Hotels (P) Ltd. v. Kerala Seb **(2008) 13 SCC 213, relied on.**

Pawan Alloys v. UPSEB **(1997) 7 SCC 251, referred to.**

5.1. The expression 'tariff' as explained in the Law Lexicon* is a "determination, ascertainment, a table of rates of export and import duties, in which sense the word has been adopted in English and other European languages and as defined by the law dictionaries the word 'tariff' is a cartel of commerce; a book of rates; a table or catalogue, drawn usually in alphabetical order, containing the names of several kind of merchandise, with the duties or customs to be paid for the same as settled by the authority or agreed between the several princes and States that hold commerce together." It has also been explained as a schedule, system, or scheme of duties imposed by the Government of a country upon goods imported or exported; published volume of rate schedules and general terms and conditions under which a product or service will be supplied; a document approved by the responsible regulatory agency listing the terms and conditions including a schedule of prices, under which utility services will be provided. [Paras 28 and 29] [693-F-H; 694-A-C]

**Law Lexicon with legal Maxims, Latin terms and Words*

and Phrases ***(Second Edition 1997)*** **– referred to.**

5.2. The expression 'purchase price' has to be given its limited meaning, i.e. the price paid for purchasing a good and in the context of the instant case, price at which generated electricity will be sold to the specified agencies. The term 'purchase price' indicated in the PPAs, as such, would be a matter within the realm of contract but this is subject to the changes which are contractually and/or even statutorily permissible. Purchase price ultimately would form part of the tariff, as tariff relatable to a licensee or a consumer would have essentially taken into account, the purchase price. The purchase price may not include tariff but tariff would always or is expected to include purchase price. [Para 29] [694-B-D]

6. The order dated 20th June, 2001 passed by the Andhra Pradesh Electricity Regulatory Commission has attained finality and was not challenged in any proceedings so far. This judgment shall not, therefore, be in detriment to that order which will operate independently and in accordance with law. [Para 52] [717-H; 718-A-B]

7.1 The specialized performance of functions that are assigned to Regulatory Commission can hardly be assumed by any other authority and particularly, the courts in exercise of their judicial discretion. The Tribunal constituted under the provisions of the Electricity Act, 2003, again being a specialized body, is expected to examine such issues, but this Court in exercise of its powers under Article 136 of the Constitution would not sit as an appellate authority over the formation of opinion and determination of tariff by the specialized bodies. This question is itself open to be considered by the appropriate authority at the appropriate stage. Determination of tariff is a function assigned legislatively

to a competent forum/authority. Whether it is by exercise of legislative or subordinate legislative power or a policy decision, if the Act so requires, but it generally falls in the domain of legislative activity and the courts refrain from adverting into this arena. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial conscience of the court making it necessary for the court to intervene. Even in the instant case the scope of jurisdiction is a very limited one. [Para 17, 18] [679-F-H; 680-A-B; D-E]

Association of Industrial Electricity Users v. State of Andhra Pradesh **(2002) 3 SCC 711;** *West Bengal Electricity Regulatory Commission v. CESC Ltd.* **(2002) 8 SCC 715, relied on.**

7.2. The matters are remanded to the Andhra Pradesh Electricity Regulatory Commission with a direction that it shall hear the Non-conventional energy generators afresh and fix/ determine the tariff for purchase of electricity in accordance with law, expeditiously. It shall also re-examine that in addition to the above or in the alternative, whether it would be in the larger interest of the public and the State, to permit sale of generated electricity to third parties, if otherwise feasible. The Andhra Pradesh Electricity Regulatory Commission shall consider and pronounce upon all the objections that may be raised by the parties appearing before it, except objections in relation to its jurisdiction, plea of estoppel and legitimate expectancy against the State and/or APTRANSCO and the plea in regard to PPAs being result of duress as these issues stand concluded by this judgment. It is directed that State of Andhra Pradesh shall be added as a party respondent in the proceedings and the Andhra Pradesh Electricity Regulatory Commission shall grant hearing to the State during pendency of proceeding before it. [Para 52] [717-C-H; 718-A-C]

Case Law Reference:

(2002) 3 SCC 711	**Relied on.**	**Para 18**
(2002) 8 SCC 715	**Relied on.**	**Para 19**
(2010) 4 SCC 603	**Relied on.**	**Para 30**
2009 (7) SCALE 513	**Referred to.**	**Para 31**
(1968) 2 SCR 366	**Relied on.**	**Para 38**
(1970) 1 SCC 582	**Relied on.**	**Para 38**
(1979) 2 SCC 409	**Relied on.**	**Para 38**
(1997) 7 SCC 251	**Referred to.**	**Para 38**
(2008) 13 SCC 213	**Relied on.**	**Para 40**
(2002) 9 SCC 667	**Relied on.**	**Para 43**
(2004) 1 SCC 195	**Relied on.**	**Para 47**
(2008) 17 SCC 769	**Relied on.**	**Para 47**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2926 of 2006.

From the Judgment and Order dated 02.06.2006 of the Appellate Tribunal for Electricity, New Delhi in Appeals No. 1, 2, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 34, 47, 52, 58, 67 and 80 of 2005.

With

C.A. No. 5940/2006

C.A. No. 5941/2006

C.A. No. 5942/2006

C.A. No. 5943/2006

C.A. No. 5944/2006

C.A. No. 5945/2006
C.A. No. 5946/2006
C.A. No. 5947/2006
C.A. No. 5948/2006
C.A. No. 5949/2006
C.A. No. 5950/2006
C.A. No. 5951/2006
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C.A. No. 5960/2006
C.A. No. 5961/2006
C.A. No. 3091/2006
C.A. No. 5962/2006
C.A. No. 5963/2006
C.A. No. 5964/2006
C.A. No. 3884/2006
C.A. No. 5966/2006

C.A. No. 5967/2006
C.A. No. 5968/2006
C.A. No. 5969/2006
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C.A. No. 5984/2006
C.A. No. 5985/2006
C.A. No. 5986/2006
C.A. No. 5987/2006
C.A. No. 3910/2006
C.A. No. 5988/2006

C.A. No. 5989/2006

C.A. No. 5990/2006

C.A. No. 5991/2006

C.A. No. 4106/2009

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The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Andhra Pradesh Electricity Regulatory Commission (for short 'Regulatory Commission') was created in furtherance to the provisions of the Andhra Pradesh Electricity Reform Act, 1998 (hereinafter referred to as the 'Reform Act, 1998') enacted by the State legislature which received the assent of the President on 21st December, 1998 and became effective w.e.f. 1st February, 1999. The Commission initiated *suo motu* proceedings for determination of tariff applicable to the Non-Conventional Energy generation projects of Andhra Pradesh, which was to take effect from 1st April, 2004 onwards. After hearing the Non-Conventional Power Project Developers, the Non-Conventional Energy Development Corporation of Andhra Pradesh Ltd. and Transmission Corporation of Andhra Pradesh Ltd. (for short referred to as 'NEDCAP' and 'APTRANSCO' respectively), the

Regulatory Commission, vide its detailed order dated 20th March, 2004, arrived at certain conclusions and fixed the energy purchase rates at base unit price of Rs. 2.25 as on 1st April,1994 and the escalation index of 5% p.a., but the escalation would be simple and not to be compounded every year. In other words, the base price as on 1st April, 2004 will be Rs.3.37 per kwh. As these projects have no variable expenses and negligible increase in maintenance cost, the tariff will be frozen for a period of five year, which however, is to be reviewed thereafter. The Regulatory Commission also issued certain instructions to restrict and regulate various operations and other aspects. It restricted the sale, procurement and distribution of electricity by the Developers to any other party except APTRANSCO. After passing of the order dated 20th March, 2004 an application for review was filed by the Developers before the Regulatory Commission. The order was clarified to some extent on this review application vide order dated 7th July, 2004. Aggrieved from both these orders the Developers filed independent appeals under Section 111(1) of the Electricity Act, 2003 collectively against the order dated 20th March, 2004 as modified by order dated 7th July, 2004. These appeals came up for hearing before the Appellate Tribunal for Electricity (for short the 'Tribunal') which decided all these appeals by a common order dated 2nd June, 2006. The Tribunal granted certain relief to the appellants before it, who are the respondents in the present appeals, holding that there was some element of duress in execution of the purchase price agreements. The Power Purchase Agreement (for short 'PPA') was a statutory document and the Regulatory Commission had no authority to interfere with the same. It could not even be altered by the Regulatory Commission. One of the most important finding recorded by the Tribunal was that the Regulatory Commission has neither the power nor jurisdiction to compel the Developers to sell the power generated by them to APTRANSCO and/or DISCOM. Feeling seriously aggrieved from the order of the Tribunal the Transmission Corporation of

Andhra Pradesh Ltd. as well as Eastern Power Distribution Company of Andhra Pradesh Ltd. have come up in appeal before this Court under Section 125 of the Electricity Act, 2003. Though the controversy, in the present case, appears to be a narrow one but on examination it is clear that there are various ancillary questions, which need to be decided by the Court, prior to answering the main controversy relating to the jurisdiction and fixation of tariff by the Regulatory Commission. Arguments at great length were addressed by different learned counsel appearing for the parties. Before we notice the facts in detail or even refer to the contentions raised, it will be appropriate to refer to the issues involved in the case as the entire matter revolves around these questions and answers thereto and the relief granted. For better understanding of the same, let us refer to these questions and answers. The comparative table of the points at issue, that were raised, and the answers thereto are as under:

A. Whether a Regulatory Commission has the power, authority and jurisdiction either under the Electricity Act, 2003 or under the A Electricity Reform Act, 1998 to compel the Developers to sell the power generated by them to the State Transmission Utility or Distribution Company?	On the point 'A', we hold that the Regulatory Commission has neither the power nor the authority nor jurisdiction to compel the Developers to sell the power generated by them TO APTRANSCO or DISCOMS.
B. Whether the A.P. Regulatory Commission having approved and regulated the purchase price of power in terms of arrangement and PPA entered between APTRANSCO and Developers in terms of Sec. 21 (4)(B) and 11 (1)(e) of A.P. Reform Act read with Sec. 86(1)(b) of 2003 Act could re-fix the regulatory purchase price by resorting to tariff fixation under Section 62; 64 read with Sec. 86(1)(a) of 2003 Act?	On the point 'B'. we hold that the Regulatory Commission having approved the regulated the purchase price agreed to between the Developer and the TRANSCO in terms of Section 21 (4)(b) and 11 (1)(e) of the Andhra Pradesh Electricity Reform Act, 1998 read with Section 86 (1)(b) of 2003 Act cannot re-fix the regulatory purchase price by resorting to tariff fixation under Section 62; 64 read with Section 86(1)(a) of 2003 Act, as Section 86(1)(b) being a special provision excludes the applicability of Section 86(1)(a) of the 2003 Act to private Generators.
C. Whether the A.P. Regulatory Commission has the power or authority to alter the policy directions issued by the State Government with respect to NCE Developers? Whether the Commission could claim executive power with respect to NCE Developers and fixation of price for power generated by NCE Developers and sold to APTRANSCO/DISCOM?	On the point 'C' and 'F', we hold that the Andhra Pradesh Regulatory Commission has no power or authority to alter the policy direction issued by the State Government and the said Commission has no executive power nor a plenary power as claimed by it.
D. Whether the plea of estoppel advanced by Developers is sustainable on facts and law?	The points 'D' & 'E' are answered in favour of the appellants and they are substantiated by the appellants.
E. Whether the plea of legitimate expectation advanced by Developers is	The points 'D' & 'E' are answered in favour of the appellants and they are

sustainable?	substantiated by the appellants.
F. Whether the A.P. Electricity Regulatory Commission is possessed of Executive Powers to issue policy and executive directions in respect of NCE Developers in the State?	On the point 'C' and 'F', we hold that the Andhra Pradesh Regulatory Commission has no power or authority to alter the policy direction issued by the State Government and the said Commission has no executive power nor a plenary power as claimed by it.
G. Is not the Commission bound by directions already issued by the State in respect of NCE Developers as well as incentives directed by the given to encourage them?	On the point 'G', we hold that the Andhra Pradesh Electricity Regulatory Commission is bound by policy directions already issued by the State Government so long as they are not modified or altered.
H. Whether Regulatory Commission could alter or change the PPAs entered between the NCE Developers and Electricity Board/APTRANSCO?	On the point 'H', we hold that the Regulatory Commission has no authority to alter or change the PPAs entered between the NCE Developers and Electricity Board/ APTRANSCO
I. Whether the procurement arrangement / PPA entered is a statutory contract and if so, whether it could be interfered by the Commission?	On the point 'I', we hold that the procurement arrangement/ PPA is statutory and the Commission has no authority to interfere with the same.
J. Whether the Commission is just a regulator to approve the PPA entered or whether	On the point 'J', we hold that the Commission is just a regulator or approve the PPA

it could determine tariff with respect to NCE Developers?	entered between the appellant generator and the APTRANSCO by examining as to whether the purchase is economical and it is in terms of State Policy.
K. Having approved PPA by exercise of Regulatory Power, is it open to commission to undertake determination of tariff in respect of private	In the result on the 'K', we hold that the appeals preferred by the NCE Developers-Appellants in appeal Nos. 1,2,5,6,7,8,9,10,12,15,16,17,18,19,20,21,22,34,46,47,52,58, 67 & 80 of 2005 are allowed and the impugned proceedings of the Regulatory Commission are set aside and there will be a direction to the APTRANSCO, the Transmission Corporation of AP, the Central Power Distributing Company of AP Ltd., the Southern Power Distributing Company of AP Ltd., the Northern Power Distributing Company of AP Ltd. and the Eastern Power Distributing Company Limited of AP Ltd. to continue the Power Purchase and at the same rate at which the power generated by NCE Developers supplied to them are being paid before passing of the impugned order of the Commission dated

generation by NCE Developers?	20.03.2004 and 07.07.2004 made in R.P. No.84/2003 and O.P. No.1075/2000 with all differences and arrears thereof, up to date and continue to pay at the same rate, until a new PPA is entered by agreement between them in terms of State Government Policy direction, that may be made hereafter and approved by the Regulatory Commission. This Judgment shall be given effect from the date of communication. For payment of tariff difference and arrears, the respondents shall have six weeks from the date of this Judgment, failing which the respondents shall be liable to pay interest at 9% per annum with effect from the month on which the difference in tariff rate remains to be paid ant till date of payment.
L. To what relief, if any?	Consequently, the Appeal Nos. 46,48,49 and 50 of 2005 preferred by the AP Transmission Corporation and the four Discoms will stand dismissed as there are no merits in them. The parties shall bear the respective cost throughout.

2. The above conclusions arrived at by the Tribunal on the factual matrix that the Government of Andhra Pradesh on 18th January, 1997 by GO Ms. No. 93, with the object of encouraging generation of electricity from renewable sources of energy, allowed uniform charges to all such projects. After issuance of the above GO Ms. 93 certain ambiguities were noticed by the concerned parties. This resulted in issuance of GO Ms. No. 112 dated 22nd December, 1998 and vide this GO clarifications were issued to the earlier Government order and it clearly provided for uniform implementation of the proposed scheme to all non-conventional energy developers/generators of power. The Andhra Pradesh Electricity Regulatory Commission was constituted under the said Reform Act, 1998 vide notification dated 3rd April, 1999 and the same Commission performing the duties and functions under the above Act continued to be a Commission under and within the meaning of Electricity Act, 2003 as well. This was done by virtue of Section 185 of the Electricity Act, 2003. State Government of Andhra Pradesh notified the Transmission Corporation of Andhra Pradesh to be the State Transmission utility. We may also notice here that the Electricity Regulatory Commissions Act, 1998 also contemplated under Section 3, constitution of a Central Electricity Regulatory Commission to exercise the powers conferred and functions assigned to it under the Act. In terms of Section 17 of this Act the State Government was also to notify in the official gazette and establish, for the purposes of this Act a Commission for the State to be known as the State Electricity Regulatory Commission. In terms of Section 22 of this Act the functions of the State Commission were defined, which included determination of tariff for electricity, wholesale, bulk, grid or retail, as the case may be. Under Section 11 of the Reform Act, 1998 it has been spelt out as to what are the functions of the Regulatory Commission, inter alia, it provides to aid and advise to the State Government, in matters concerning electricity generation, transmission, distribution and supply in the State, to issue licences in accordance with the provisions of this Act and determine the conditions to be included in the licences, to

regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected, to require licensees to formulate prospective plans and schemes in cooperation with others for the promotion of generation, transmission, distribution and supply of electricity. Besides these powers, which have been noticed by us, inter alia, the residue clause has been worded very widely to permit the Regulatory Commission to undertake all incidental or ancillary things. Under Section 15, the Regulatory Commission is vested with the power to issue licences and to enter into agreements on specified terms and also to determine the charges and establish tariff in terms of clause (5) of Section 15 of the Reform Act, 1998. It needs to be noticed that the State of Andhra Pradesh was vested with the powers and infact the duty to constitute the Regulatory Commission in terms of Section 11 afore noticed.

3. The Regulatory Commission was constituted as per the provisions of Reform Act, 1998 vide notification dated 3rd April, 1999 and it was to perform all regulatory functions pertaining to the electricity industry in the State of Andhra Pradesh. It was commonly agreed before us during the course of argument that it is the Electricity Regulatory Commission for the State of Andhra Pradesh for all intent and purposes under the Reform Act, 1998 as well as the Electricity Act, 2003. We must notice, at this stage itself, that the Tribunal has entertained the doubt that since no independent notification was issued under Section 17 of Electricity Regulatory Commission Act, 1998, therefore, it could not exercise the powers vested in the Regulatory Commission under that Act. This may not be the correct position in law. The Regulatory Commission was constituted under the Reform Act, 1998 and an appropriate notification in that behalf was issued. The Electricity Regulatory Commission Act, 1998 stood repealed by the Electricity Act, 2003. The

Electricity Act, 2003 specifically recognized and accepted the Commissions constituted under the enactments specified in the schedule to the Act as appropriate Commission. In entry 3 of the said schedule, Reform Act, 1998 has been specifically noticed. In other words, the Regulatory Commission constituted under the Reform Act, 1998 became the appropriate commission under the Electricity Act, 2003 as well.

4. In exercise of its powers, the Regulatory Commission claims to have issued licences to Transmission Corporation as well as DISCOM for bulk and retail supply of electricity w.e.f. 1st April, 2001. Vide order dated 20th June, 2001 made in OP No. 1075 of 2000, the Regulatory Commission directed generators of Non-Conventional Energy to supply power exclusively to APTRANSCO. The Non-Conventional Energy Developers were not permitted to sell the energy generated by them to 3rd parties. By the same order the Regulatory Commission also approved the rate which was prevailing earlier for such supply at Rs. 2.25 per unit with 5% escalation per annum from 1994-95 being the base year. After coming into force of the Electricity Act, 2003, Regulatory Commission issued notice on 23rd October, 2003 inviting objections from various Developers and Generators to the proposals of APTRANSCO and NEDCAP in regard to fixation of price to be paid by APTRANSCO for the quantum of electricity purchased from non-conventional energy projects w.e.f. 1st April, 2004. The objections, if any, were to be filed on or before 5th November, 2003. NEDCAP and DISCOM were to submit proposals for review of incentives. The proposal had been received for review by the Regulatory Commission from APTRANSCO. Within the extended time the Developers, individually as well as acting through their Association, filed various objections in response to the notice dated 23rd October, 2003. All the parties were granted hearing by the Regulatory Commission which, then, passed the order dated 20th March, 2004, reducing the price payable by APTRANSCO to Non-Conventional Energy Developers towards the supply of

electricity. Some of the Developers moved to the Andhra Pradesh High Court by filing a Writ Petition No. 7222 of 2004 in which interim order dated 15th April, 2004 came to be passed directing APTRANSCO to continue to pay to NCE Developers for the power that may be supplied by them as per the earlier rates prevalent on 1st April, 2004. By order dated 27th April, 2004, the High Court disposed of the batch of the Writ Petitions while issuing the direction to the Developers to approach the Regulatory Commission and seek review of its order dated 20th March, 2004. The Regulatory Commission was also directed to take up the review petition and dispose of the same within 8 weeks. Till then, the interim order dated 15th April, 2004 was to remain in force. This resulted in filing of the Review Petitions before the Regulatory Commission. In the meanwhile the Govt. of Andhra Pradesh ordered that APTRANSCO shall cease to engage in trading relating functions and that the PPAs entered with the Developers shall vest in DISCOM(s) w.e.f. 10th June, 2004 in terms of Section 39 read with Section 172(b) of the Electricity Act, 2003. The Review Petitions filed by the Developers before the Regulatory Commission came to be dismissed by different orders passed on 5th July, 2004 and 10th July, 2004 respectively. The Review Petition filed by APTRANSCO also came to be dismissed on 11th July, 2004. This resulted in approaching the High Court again, by nine of the developers, filing Writ Petition No. 16621 of 2004. The High Court, vide its order dated 16th September, 2004, permitted the implementation of the revised tariff by APTRANSCO. It further directed that 50% of the differential amount between the old and the revised tariff shall also be paid for the actual power supplied. By GO 58 dated 7th June, 2005, an approval scheme came to be framed under the Reform Act, 1998 to transfer and distribute the assets and contracts of bulk supply and trading business of APTRANSCO to DISCOM which was in furtherance to the earlier decision of the State of Andhra Pradesh. Ultimately these Writ Petitions came to be disposed of with the direction that the Developers shall approach the Tribunal and the interim order shall continue to

be in force for a period of 8 weeks from 15th June, 2005 or till the Tribunal passes order on the interim application, whichever is earlier. Same interim order was passed by the Tribunal during the pendency of the appeal which, were filed before it.

5. As is obvious from the above narrated facts and again, it is not in dispute that the Regulatory Commission passed an order dated 20th June, 2001 which, in fact, attained finality and its correctness was never been questioned by any of the parties including the present appellants. Thus, the order dated 20th June, 2001 is of some significance and certainly of some definite relevancy. The proceedings were initiated *suo motu* by the Regulatory Commission against all the Developers of Non-Conventional Energy including mini hydro projects. The Regulatory Commission noticed, in its order dated 20th June, 2001 that Govt. of India issued guidelines regarding promotional and fiscal incentives to be given by the State Governments for power generation through Non-Conventional Energy sources. The Govt. of Andhra Pradesh issued order No. 19 dated 16th March, 1996 under which it accorded certain incentives in respect of the Developers with whom NEDCAP had entered into the memorandum of understanding. A review of these incentives was taken after which GO Ms. 93 dated 18th November, 1997 was issued, as already noticed and it was decided to provide uniformity to all the projects based on renewable sources of energy like Waste, Wind, Bio-mass, Co-generation, Municipal Waste and Mini Hydro projects.

6. The Regulatory Commission had passed an order dated 6th March, 2000 giving certain directions including that the Developers could sell the power generated by them to third party upto 17th November, 2000. The rates were indicated, as we have already noticed, and that there would be reviewed with regard to purchase price with reference to each Developer on completion of 10 years from the date of the commission of the project. After noticing various objections that had been raised by the Developers it was stated that the Regulatory

Commission was not attempting to stop any incentive while referring to the statistics and the market conditions. It was specifically noticed that permitting Non-Conventional Energy Developers to make third party sales would not, at all, be in the interest of organized growth of electricity industry and it would create discrimination between the industrial consumer drawing power from Non-Conventional Energy Developers and the industrial consumers drawing power from APTRANSCO and these two would have to pay two different rates. It also noticed that there will be undue enrichment of the Developers as they were permitted to establish their generation plants with definite benefits which were carried out for years together. While holding that the Regulatory Commission had jurisdiction, it also noticed that the rate approved by the Regulatory Commission on the basis of guidelines issued by the Ministry of Non-Conventional Energy Sources are much higher than the rate permitted by the State Government and in comparison to other States they were favourable to the NCE developers. This reasoning persuaded the Regulatory Commission to pass the following directions:

> "29. The existing incentives under G.O. Ms. No. 93, dated 18.11.1997, which are continued under the orders of the Commission from time to time till 24.06.2001 under our letter No. 2473, Dated 24-04-2001 are extended for the time being till 24-07-2001. The temporary extension has been given to enable the developers to finalise agreements'/arrangements relating to supply of power to APTRANSCO prior to 24-07-2001). With effect from the billing month of August 2001, all generators of non-conventional energy shall supply power to APTRANSCO only as per the following terms:
>
> (i) Power generated by non-conventional energy developers is not permitted for sale to third parties.
>
> (ii) Developers of non-conventional energy shall supply power generated to APTRANSCO/ DISCOMS of A.P. only.
>
> (iii) Price applicable for the purchase by the supply licensee should be Rs. 2.25 per unit with 5% escalation per annum with 1994-95 as the base year.
>
> APTRANSCO is simultaneously directed to arrange payment for the supply of power purchased from developers of non-conventional energy by opening a Letter of Credit in favour of the suppliers of power.
>
> 30. A suo motu review of the incentives to take effect from 1st April, 2004, will be undertaken by the Commission after discussions with all the concerned parties. There will also be a review of the purchase price with specific reference to each developer on completion of 10 years from the date of commissioning of the project (by which time the loans from financial institutions would have been repaid) when the purchase price will be reworked on the basis of return on enquity. O&M expenses and the variable cost.
>
> 31. However, if any developer wishes to raise any specific issue with reference to this order, he will be entitled to apply to the Commission in the manner provided in the regulations."

7. After passing of this order by the Regulatory Commission the parties executed PPAs. These agreements were signed on the lines of the directives given in the order of Regulatory Commission. In fact, it was stated that the agreements were required to be and were actually approved by the Regulatory Commission. In terms of Clause 5 of the PPA these agreements were enforceable subject to obtaining consent of the Regulatory Commission as per Section 21 of the Reform Act, 1998. Obviously, the rates and conditions specified in the earlier proceedings of 11th November,1999,

1st April, 2000, 27th January, 2001 and 13th July, 2001 were accepted by the parties. Some of the clauses of the PPA, which have also been heavily relied upon by the learned counsel for the parties, read as under:

"ARTICLE 2

PURCHASE OF DELIVERED ENERGY AND TARIFF

2.1 All the Delivered Energy at the interconnection point for sale to APTRANSCO will be purchased at the tariff provided for in Article 2.2 from and after the date of Commercial Operation of the Project. Title to Delivered Energy purchased shall pass from the Company to the APTRANSCO at the Interconnection Point.

2.2 The Company shall be paid the tariff for the energy delivered at the interconnection point for sale to APTRANSCO at Rs. 2.25 paise per unit with escalation at 5% per annum with 1994-95 as base year and to be revised on 1st April of every year upto the year 2003-2004. Beyond the year 2003-2004, the purchase price by APTRANSCO will be decided by Andhra Pradesh Electricity Regulatory Commission. There will be further review of purchase price on completion of ten years from the date of commissioning of the project, when the purchase price will be reworked on the basis of Return on Equity, O & M expenses and the Variable Cost."

8. Besides the above clauses it also provided other terms and conditions under different articles, which are not necessary for us to be noticed at this stage. It required to be noticed with some significance that no disputes of any kind were raised by

the Developers till and after passing of the order dated 20th March, 2004. The order of 20th June, 2001 read in conjunction with the PPAs executed by the parties controlled the entire field and all the persons including the Regulatory Commission as well as the State therein.

9. This period of nearly three years, thus, was free of grievances and objections and the order of 2001 appears to have been implemented willingly by the parties. There was execution of the PPAs completely bringing the matter between the parties into the realm of contract. Thereafter, the Regulatory Commission in terms of its 2001 order appears to have initiated *suo motu* proceedings for determination of tariff for non-conventional energy projects of Andhra Pradesh with effect from 1st April, 2004. The Regulatory Commission, in its order dated 20th March, 2004 has also noticed the background facts of the case and the determination of rates earlier. It had given notice to all the developers and other shareholders to submit their views and objections on the above issues. After hearing the parties, the Regulatory Commission considered the proposal for tariff. The proposal submitted by APTRANSCO and NEDCAP were as under :

"APTRANSCO's Tariff Proposals

Particulars	Unit Tariff (Levelised Tariff over the life of the project)		Year-on-year escalation	
	Existing Plants Rs/kWhr.	New Plants Rs/kWhr.	Existing	New
Mini Hydel	2.42	2.31	—	—
Bagasse	2.23	2.25	2%	2%
Biomass	2.27	2.27	2%	2%
Waste to Energy	Nil	2.66	—	1%
Wind	2.52	2.55	—	—

NEDCAP Tariff proposals:

Bagasse	Rs. 2.62 – Ist year Rs. 2.48 – 10th year
Biomass	Rs. 3.27 – Ist year Rs. 3.77 – 10th year
Mini Hydel	Rs. 2.96 – Ist year Rs. 2.26 – 10th year
Wind Farm	Rs. 4.54 – Ist year Rs. 3.19 – 10th year
Waste to Energy	Rs. 2.99 – Ist year Rs. 3.19 – 10th year

10. Objections to the above proposals were also received. Interestingly and rightly so, the Regulatory Commission before analyzing the proposal and objections, noticed:

> "20….as mentioned herein above, the Commission, in this order is not examining any issues concerning the direction contained in the order dated 20.6.2001 that the NCE Developers shall not sell electricity to third parties and they are required to sell electricity only to APTRANSCO. The Commission, in this order, is dealing with only those NCE Developers who had accepted the order dated 20.6.2001 and voluntarily agreed to sell electricity to APTRANSCO on the terms and conditions contained in the order dated 20.6.2001"

11. While the Regulatory Commission undertook the review of prices in relation to sale of electricity by Non-Conventional Energy developers, it specifically referred to order in O.P. No. 1075 of 2000, which, in turn, provided for review of sale price and incentives given earlier to the said developers with effect from 1st April, 2004. It also noticed that the PPAs signed by the APTRANSCO and NCE Developers include provisions for such review by the Regulatory Commission with effect from 1st April, 2004. It took the view that review of the price at which

APTRANSCO shall purchase power from the NCE developers is within the jurisdiction of the Regulatory Commission under Section 21(4) of the Reform Act, 1998 and also under Section 86(1) of the Electricity Act, 2003. Referring to Section 61 of the Electricity Act, 2003 which cast obligation upon the Regulatory Commission to frame tariff regulations specifying the terms and conditions for determination of tariff, in para 21 of that order, the Regulatory Commission framed the following issues:

> "Issues for consideration on merits:
>
> The Commission has considered inter alia, the following issues:
>
> (i) Whether the tariffs and incentives should be uniform for all the categories of NCE projects as provided earlier in MNES guidelines, GoAP orders and APERC's order OP. No. 1075/2000 dated 20.6.2001 or should they be different for different categories of NCE projects.
>
> (ii) Whether the tariff should be a single part tariff or a two part tariff.
>
> (iii) Whether the tariff should be project specific or uniform for all project falling in a category.
>
> (iv) Whether there should be a cap on tariff when a project exceeds the expected minimum performance.
>
> (v) Social and environmental considerations.
>
> (vi) Control period."

12. The Regulatory Commission decided tariff fixation in relation to Bagasse based co-generation plants, Bio-mass power generation and Mini hydel projects separately. The specific issue raised by the objectors was that the benchmarking of capital cost should be based on market

trends, confirmed through competitive bidding from time to time. Though APTRANSCO accepted this in principle, but stated that they expect a detailed procedure from the Regulatory Commission for an effective competent bidding. The tariff basis was questioned as well as it was submitted that tariff beyond threshold limit should be limited to the variable cost and incentives only and not the full tariff. This was opposed by APTRANSCO which preferred a single time tariff in entire energy purchase. While taking into consideration the applicability of depreciation and its extent the tariff was fixed and the Regulatory Commission drew the following conclusion:

"81. The tariffs arrived at along with escalation under each category will be applicable as detailed in the respective paragraphs under each category. The aforementioned tariffs are, however, also subject to the following:

"i. In regard to tariff for Bagasse based co-generation projects, where the Plant Load Factor during a settlement period exceeds 55% (the level at which the fixed cost is expected to be recovered), only incentive of 21.5 paise/unit and variable cost as indicated in para (47) above shall be paid for every unit delivered in excess of the 55% PLF.

ii. As regards to tariff for Biomass based power projects, where the Plant Load Factor during a settlement period exceeds 80% (the level at which the fixed cost is expected to be recovered), only incentive of 21.5 paise/unit and variable cost as indicated in para (63) above shall be paid for every unit delivered in excess of 80% PLF.

iii. The tariff for mini-hydel power projects is exclusive of Royalty.

iv. In the case of tariff for mini-hydel power projects, where the PLF during settlement period exceeds 35%, only an incentive of 21.5 paise/kwh shall be paid for every unit delivered in excess of 35%.

v. The tariffs authorized above will be applicable w.e.f. 1.4.2004 to all NCE power plants of respective categories for sale to APTRANSCO.

vi. The above tariff structure is valid for control period of five years with effect from 1.4.2004. Thereafter, the Commission will review the prices and incentives after consultation with the Developers and licensees.

vii. A further review of the individual projects will be undertaken on completion of 10 years from the date of commissioning of the project, by which time the loan is expected to have been substantially repaid, and the purchase price will be based on O & M expenditure, return on equity, variable cost and residual depreciation, if any.

viii. For those developers' having captive consumption who supply excess energy to APTRANSCO after meeting their internal consumption, the current practice of meter reading at the interconnection point and grossing up for auxiliary consumption in order to arrive at PLF will be misleading as it will not take into consideration the captive consumption. The incentive payments begin after threshold PLF. In order to ascertain the PLF levels, APTRANSCO should make arrangements for authenticated meter reading at the generator terminals so that the two-tier tariff is properly implemented.

ix. Developers will be entitled to dispatch 100% of

the available capacity without reference to Merit Order Dispatch subject, however, to any system constrains."

13. After arriving at this conclusion the Regulatory Commission also specifically clarified that as and when, however, trading function of APTRANSCO is segregated and vested in new entity pursuant to the Electricity Act, 2003, the terms and conditions contained therein shall be binding on the new entity in the same manner as was applicable to APTRANSCO.

14. As is clear from the order itself that it dealt with, primarily, the question of refund/fixation of tariff in relation to various generation projects. It decided no other matter and even these findings were subsequently questioned by the Developers before the High Court and in furtherance to the order of the High Court dated 15th July, 2004, Review Petitions were filed, which finally resulted in filing of the appeals before the Tribunal.

15. We may notice here that vide notification dated 28th May, 2004, the State Government ordered that APTRANSCO shall cease to engage in trading relating functions and that the PPAs entered with the Developers shall vest in DISCOM w.e.f. 10th June, 2004 in terms of Section 39 read with Section 172(b) of the Electricity Act, 2003. On 9th June, 2004, the Central Government also authorized the State Transmission Utility to engage in bulk purchase and sell it to DISCOM for a period of one year from 10th June, 2004. With this background, the appeals which were filed before the Appellate Tribunal came up for hearing and some appeals were also filed by DISCOM with APTRANSCO as a party. Appeals from both sides came up, heard and decided by the order dated 2nd June, 2006 impugned in the present case.

16. Now with this factual background, we shall proceed to examine the issues of law raised in the present appeals before

this Court. As already noticed, in paragraph 40 of the impugned judgment, the Tribunal had framed as many as 12 points for determination which were answered by it in paragraph 114. The points formulated by the Tribunal, in fact, can be categorized in the following principal heads:

(i) Matters relating to jurisdiction of the Commission for fixation of tariff and sale of generated electricity to third party;

(ii) Correctness of tariff fixation on merits of the case;

(iii) Is the principle of estoppel attracted in the present case, if so, to what extent?

(iv) Does the plea of duress need to be accepted as per settled principles and with reference to the facts of the case?

(v) What is the effect of order dated 20.6.2001 having attained finality and even not being questioned in the present proceedings?

(vi) What orders can be made by this Court to deal with these appeals to do complete justice between the parties?

17. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998, Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is assigned under the law. For example, Section 62 of the Electricity Act, 2003 requires an appropriate Commission to determine the tariff in accordance with the provisions of the Act. The Regulatory Commission has been constituted and notified

under the provisions of Section 3 read with Section 11 of the Reform Act, 1998 which in terms of Section 11(1)(c)&(e) is expected to fix the tariff as well as the terms of licence. There are three different legislations in course and the Regulatory Commission has been constituted under the Reform Act, 1998 which in turn would be the Commission as contemplated under the Electricity Regulatory Commission Act, 1998 and the Electricity Act, 2003. In terms of first proviso to Section 82(1) of the Electricity Act, 2003 the State Electricity Regulatory Commission established by the State Government under Section 17 of the Electricity Regulatory Commission Act, 1998 and the enactment specified in the schedule shall be the State Commission for the purposes of this Act. Even in terms of Section 185(3) of the Electricity Act, 2003 the said authority would be deemed to be an appropriate Commission for all purposes and intent as the Reform Act, 1998 has been specifically mentioned in entry 3 of the Schedule to the Electricity Act, 2003. In other words, as already noticed the Regulatory Commission constituted by the said notification would be the appropriate Commission under all these Acts and is required to perform the functions as contemplated under Sections 11, 17 and 82 of the respective Acts. The functions assigned to the Regulatory Commission are wide enough to specifically impose an obligation on the Regulatory Commission to determine the tariff. The specialized performance of functions that are assigned to Regulatory Commission can hardly be assumed by any other authority and particularly, the Courts in exercise of their judicial discretion. The Tribunal constituted under the provisions of the Electricity Act, 2003, again being a specialized body, is expected to examine such issues, but this Court in exercise of its powers under Article 136 of the Constitution would not sit as an appellate authority over the formation of opinion and determination of tariff by the specialized bodies. We would prefer to leave this question open to be considered by the appropriate authority at the appropriate stage. We do not

consider it appropriate to go into the merit or de-merit of determination of tariff rates in the appeals. Determination of tariff is a function assigned legislatively to a competent forum/ authority. Whether it is by exercise of legislative or subordinate legislative power or a policy decision, if the Act so requires, but it generally falls in the domain of legislative activity and the Courts refrain from adverting into this arena.

18. We have to further examine the legality of this issue in the light of the findings that we have recorded on the issues in relation to jurisdiction of the Regulatory Commission to determine/review the tariff. The jurisdiction of this Court is limited in this aspect. This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the preview of judicial intervention. The only explanation for judicial intervention in tariff fixation/revision is where the person aggrieved can show that the tariff fixation was illegal, arbitrary or ultra virus the Act. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial conscious of the Court making it necessary for the Court to intervene. Even in these cases the scope of jurisdiction is a very limited one. This Court in the case of *Association of Industrial Electricity Users v. State of Andhra Pradesh* [(2002) 3 SCC 711], while dealing with the provisions of tariff fixation in terms of the provisions of the Reform Act, 1998, observed that even where the Act did not envisage classification of consumers according to the purpose for which electricity is used, Sub-Section(9) of Section 26 of that Act does state that the tariff rate relatable to classification of consumers would be permissible, of course, depending upon various factors stipulated in Section 26(7) of the Act. The Court finally held as under:

> "11. We also agree with the High Court that the judicial review in a matter with regard to fixation of tariff has not to be as that of an Appellate Authority in exercise of its

jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law."

19. Similarly, in the case of *West Bengal Electricity Regulatory Commission v. CESC Ltd.* [(2002) 8 SCC 715], this Court was concerned with determination of tariff by the State Commission, the applicability of principles of natural justice and the scope of interference by the High Court in distinction to the power exercisable by the appellate authority. Stating it to be a function in the nature of legislative power, the Court felt that the principles of natural justice were not attracted and the power of judicial review could hardly be invoked. The Court held as under:

"39. Having considered the finding of the High Court, we are of the opinion that though generally it is true that the price fixation is in the nature of a legislative action and no rule of natural justice is applicable (see *Shri Sitaram Sugar Co. Ltd.* v. *Union of India* SCC, para 45), the said principle cannot be applied where the statute itself has provided a right of representation to the party concerned. Therefore, it will be our endeavour to find out whether, as contended by learned counsel for the appellants, the statute has provided such a right to the consumers or not.

xxx xxx xxx xxx

44. Having held on merits that the Regulations are not arbitrary and are in conformity with the provisions of the Act, we will now consider whether the High Court could

have gone into this issue at all in an appeal filed by the respondent Company. First of all, we notice that the High Court has proceeded to declare the Regulations contrary to the Act in a proceeding which was initiated before it in its appellate power under Section 27 of the Act. The appellate power of the High Court in the instant case is derived from the 1998 Act. The Regulations framed by the Commission are under the authority of subordinate legislation conferred on the Commission in Section 58 of the 1998 Act. The Regulations so framed have been placed before the West Bengal Legislature, therefore they have become a part of the statute. That being so, in our opinion the High Court sitting as an appellate court under the 1998 Act could not have gone into the validity of the said Regulations in exercise of its appellate power."

20. In view of the above settled position of law we are of the considered opinion that the present case is one where this Court should examine determination of tariff on merits and particularly, in view of the directions that we propose to pass finally in this case.

21. The issue relating to jurisdiction, again, would have to be divided into two different parts. Firstly, whether the Regulatory Commission could exercise the powers for determination and/or re-fixing the price by resorting to tariff fixation powers under the Act and secondly, with regard to sale of generated electricity by the Generators to parties other than State Transmission Utility or Distribution Company. In regard to first part of this issue the Tribunal in its order, while answering issue B, held that Regulatory Commission has no jurisdiction to re-fix the regulatory purchase price by resorting to tariff fixation methods specified under the provisions of law. Similarly, it also answered issue A in the negative and against the Regulatory Commission. The primary reason recorded by the Tribunal is that the original fixation of purchase price for energy generated by NCE Developers is in terms of the policy

directions issued by the State and it was not within the jurisdiction and scope of the powers conferred upon the Regulatory Commission under the Reform Act, 1998. It was considered by the Tribunal that policy decision of the State could not have been set at naught on the assumption that the Regulatory Commission is vested with executive powers. Also that Regulatory Commission had proceeded on the basis that it has power to review the rate/incentives given to developers or it has power to issue executive directions. The Tribunal also felt that PPAs are final and binding and there is assumption of power on the part of the Regulatory Commission that they have authority to fix tariff with respect to power generators by taking recourse to provisions of Sections 62, 64 read with Section 86(1) of Electricity Act, 2003.

22. Before we proceed to examine the various provisions under different Acts afore referred, let us once again refer, in precise form, the necessary facts. From the record it appears that on 7th September, 1993 the Ministry of Non-Conventional Energy Sources, New Delhi had written a letter to the Chief Secretary of the different States informing them that under the new strategy and action plan of the ministry special emphasis is sought to be given to generation of grid quality power from non-conventional energy sources, noticing that the average cost of power generation from non-conventional energy sources compares quite favourably with new coal thermal/gas based projects and captive diesel generating sets. While in future the costs of the former are expected to drop, costs of conventional electricity generation will only increase. Referring to the fact that Central Government has introduced several fiscal and other promotional incentives to attract private sector participation in the generation and supply of energy from non-conventional energy sources and consequently the States had also introduced measures such as wheeling and banking, buy back, third party sale, capital subsidies, industry status, sales tax exemption etc., it had also been noticed that they were to vary

in operation from State to State. In this background the Ministry had drawn up guidelines which was enclosed to that letter and asked all States to work towards a uniform policy pertaining to the non-conventional energy sources. A minimum buy back price of Rs. 2.25 per unit had been proposed and it required the States to consider that these guidelines were not exhaustive. Other matters, including additional incentives, attractive packages could be formulated by the State and accordingly the States were required to take further steps. The very opening part of the guidelines dealt with the operative period and it was stated that "The Scheme of promotional and fiscal incentives will come into operation with immediate effect and will remain in force for a period of five years." Besides this eligibility, facilities and tax relief etc. were also indicated. The transmission of Electricity was to be undertaken by the State Electricity Board and even the third party must be HT consumer of the Board unless the stipulation was specifically relaxed. SEB was to purchase the electricity from the producer at the minimum specified rate without any restriction on time or quantum of electricity. Importantly, Clause 3(iii) of the policy guidelines suggested that the producer will have the option to sell the electricity generated by him to a third party at mutually agreed rates but within the State as per clause 1(i). On or before 14th February 1994 two projects, namely wind farm and mini hydel projects were transferred from Andhra Pradesh State Electricity Board to NEDCAP by the Government of Andhra Pradesh. Later, vide letter dated 25th November, 1994 the guidelines as indicated in the letter of 7th September, 1993 were further clarified by the Government of India, in relation to fixation of purchase price for power produced from non-conventional energy. As per the guidelines commenting or clarifying the earlier guidelines it was stated that the base price applicable to non-conventional energy based power projects based on solar, wind small hydro, biomass etc. shall be equal to the base price of the year in which the PPAs are signed, clause 2 of the guidelines reads as under:

"A promoter / developer shall be entitled to receive the base price set out in PPA for all electrical energy delivered from his project to the State grid for the duration of the Power Purchase Agreement. The rate shall be equal to base price in the year of signing of PPA, escalated at a rate of 5% per year for a period of 10 years, from the date of signing of the Power Purchase Agreement. From the end of the 10 years, and for the remaining duration of the Power Purchase Agreement, the new purchase price shall be equal to the purchase price at the end of the 10th year, or the High Tension (HT) tariff prevalent in the State at that time which is higher."

23. In furtherance of the decision of the Govt. of India and the guidelines published, the Govt. of Andhra Pradesh issued two different GOs on which, the Tribunal as well as all the parties before us have placed heavy reliance. They read as under:

ENERGY (RES) DEPARTMENT

G.O.MS. NO: 93 DATED: 18-11-1997

ORDER:-

"In the reference 1st read above, the Ministry of Non-Conventional Energy Sources, Government of India have issued guidelines for promotional and Fiscal incentives to be given by State Government for power generation from Non-Conventional Energy Sources. The incentives are envisaged to encourage power generation in the Non-Conventional Sector which are renewable and encouragement from the Government for this Sector is necessary in view of the fact depletion of fossilfuels. Further, the Renewable/ Non-Conventional Energy Sources are least pollution-effecting.

In the G.O. third read above, the Government have accorded certain revised incentives in respect of the

Developers with whom Non-Conventional Energy Development Corporation of Andhra Pradesh had already entered into Memoranda of Understanding based on the guidelines existing prior to 15th November, 1995.

While reviewing the incentives made available to the sectors, certain representations were received from some of the Non-Conventional Energy Developers, and they have requested for extending the benefits available to other sectors.

A review of the incentives made available to various sectors of non-conventional energy was made in the presence of official from Non-Conventional Energy Development Corporation of Andhra Pradesh and Andhra Pradesh State Electricity Board, duly keeping in view the guidelines of Ministry of Non-Conventional Energy Sources, Government of India, dated: 13-9-1993, a view was taken to make available the incentives to all the Non-Conventional Energy Sources uniformly.

The Government after careful examination of the recommendations and with a view to encourage generation of electricity from renewable sources of energy hereby allow the following uniform incentives to all the projects based on renewable sources of energy viz. Wind, Biomass, Co-generation, Municipal Waste and Mini Hydel:

S.No.	Description	
1.	Power Purchase price	Rs. 2.25
2.	Escalation	5% per annum with 1997-98 as base year and to be revised on 1st April of every year upto the

		year 2000 A.D.
3.	Wheeling Charges	2%
4.	Third party sales	Allowed at a tariff not lower than H.T. tariff of A.P.S.E. Board.
5.	Banking	Allowed upto 12 months
(a)	Captive consumption	Allowed throughout the year on 2% banking charges.
(b)	Third party sale	Allowed on 2% banking charges from August to March.

This order issues with the concurrence of Finance & Planning (Fin.) Department vide their U.O. No. 46291/351/EBS-EFES&T/97, dated: 18.11.1997.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH)

V.S. SAMPATH

SECRETARY TO GOVERNMENT

ENERGY (RES) DEPARTMENT

G.O. Ms. No. 112 Dated: 22.12.1998

ORDER:

"In the Government Order cited, certain uniform incentives were extended to the Developers of Power Projects using wind, biomass co-generation, Municipal wastes and mini hydel for promotion of and to encourage generation of electricity from renewable sources of energy. In order to remove certain ambiguities in the implementation of uniform incentives scheme and also to ensure that the incentives contemplated are channelled for promotion and development of non-conventional energy sources, in keeping with the spirit of Government Order cited, the following amendments are issued:

In the Government Order cited, certain uniform incentives were extended to the Developers of Power Projects using wind, biomass co-generation, Municipal wastes and mini hydel for promotion of and to encourage generation of electricity from renewable sources of energy. In order to remove certain ambiguities in the implementation of uniform incentives scheme and also to ensure that the incentives contemplated are channelled for promotion and development of non-conventional energy sources, in keeping with the spirit of Government Order cited, the following amendments are issued:

1. The uniform incentives specified in G.O. Ms. No.93, dated 18.11.1997 shall be available only to the power projects where fuel used is from non-conventional energy sources which are on the nature of renewable sources of energy.

2. The operation of the incentives scheme shall be watched for a period of 3 years and at the end of 3 years period from the date of G.O. Ms. No.93 the Andhra Pradesh State Electricity Board shall come up with suitable proposals for review for further continuance of the incentives in the present form or in a suitable modified manner to achieve the objectives of promotion of power generation

through non-conventional sources.

3. Though there is a provision for banking and third party sale, in the absence of conferring the status of licences under Section 3 of the Indian Electricity Act, the Entrepreneurs/ Developers of non-conventional energy power may be handicapped in effecting third party sales to the needy and contracted consumers. Therefore, it is hereby ordered that the Entrepreneurs/Developers covered by G.O.Ms. No.93, dated 18.11.1997 who made the third party sale of energy shall be deemed to be licencees for the purpose under Section 3 of the Electricity Duty Act, 1930 read with Section 28 of Indian Electricity Act."

(BY ORDER AND IN THE NAME OF GOVERNOR OF ANDHRA PRADESH)

S. SAMPATH

SECRETARY TO GOVERNMENT

24. These were the declarations or representations stated to have been made by the State to the Developers. The PPAs between Transmission Corporation of Andhra Pradesh Ltd. and the Developers were executed somewhere in May 1999 and some of the agreements even prior thereto. However, despite all the above guidelines and GOs, the Regulatory Commission passed an order on 20th June, 2001 determining the tariff as well as defining other rights and obligations between the parties including that the generators were not permitted to make sale in favour of third party. After the passing of this order the Developers entered into PPAs between the period August 2001 to 2002 and confirmed the acceptance and implementation of the order of 20th June, 2001. While providing

different clauses relating to various facets of sale and distribution of generated power, PPAs under Articles 2.1 and 2.2, which we have already reproduced, contemplate specifically that the purchase of energy by APTRANSCO will be at the tariff provided under Article 2.2. Article 2.2 determines the rate at Rs. 2.25 per unit with escalation at 5% per annum with 1994-1995 as base year which is to be revised on 1st April of every year upto the year 2003-2004, beyond which the purchase price by APTRANSCO will be decided by the Regulatory Commission. Still a further review of purchase price is contemplated on completion of 10 years from the date of commissioning of the project when it will be reworked. In other words, there are specific stipulations provided under the PPAs, as well as in the order dated 20th June, 2001, for revision/ review of purchase price. Clause 2.3 further clearly says that tariff is inclusive of all taxes, duties and levies. In other words, all the documents afore stated provide for a review including the guidelines issued by the Govt. of India.

25. At this stage, we may notice that these guidelines are general guidelines and every State was required to act as per its own needs, convenience and by taking a general view, as to, which are the most practical and affordable projects and how they should be carried on by the State. To give meaning to the guidelines that they were 'absolutely mandatory', will not be in conformity with the law relating to interpretation of documents as well as according to the canons of exercise of executive and administrative powers. These guidelines were certainly required to be moulded by the State to meet their requirements depending on various factors prevailing in the State.

26. Now we will proceed to refer to the various legal provisions relating to purchase price and/or tariff regulations. The principal central legislation in this regard is the Indian Electricity Act, 2003. Under Section 3, a national electricity policy and plan has to be prepared by the Central Government

which has to be notified. This plan itself can be reviewed or revised by the appropriate authority under the Act. Section 8 of the Electricity Act, 2003 requires every State to notify and constitute, for the purposes of this Act, a Commission for the State to be known as Electricity Regulatory Commission of that State. Section 86 of this Act spells out the functions of the State Commission. Under Section 86(1)(a) it is to determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk and retail, as the case may be. It is also to regulate electricity purchase and procurement process of distribution licencees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State as per Section 86(1)(b). Section 86(1)(d) empowers this Commission to issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State. Besides its advisory functions it has also been given the general /residue powers to do all other functions in terms of Section 86(1)(k). Sections 61 to 64 of the Electricity Act, 2003 place an obligation upon the appropriate Commission to determine the tariff in accordance with the provisions of this Act. An application for determination of tariff shall be made by the generating company under Section 64 and the tariff has to be determined by the appropriate Commission and it is also required to specify the terms and conditions for determination of the tariff as per the factors and the guidelines specified under Section 61 of the Act.

27. The Reform Act, 1998 was enacted, primarily, with the object of constituting two separate corporations; one for generation and other for transmission and distribution of electrical energy. The essence was restructuring, so as to achieve the balance required to be maintained in regard to competitiveness and efficiency on the one part and the social objective of ensuring a fair deal to the consumer on the other. This Act is also intended for creation of a statutory regulatory

authority. Section 3 of the Act requires the State Govt. to establish by notification a Commission to be known as Andhra Pradesh Electricity Regulatory Commission. This was done by notification dated 3rd April, 1999. As already noticed, section 11 detailed the functions of the Regulatory Commission and primarily it had advisory as well as regulatory functions. In terms of Section 11(1)(c) it was required to issue licenses in accordance with the provisions of the Act and determine the conditions to be included in the license. However, 11(1)(e) gave it much wider power and duty to regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected. In terms of Section 11(1)(l) it was to undertake all incidental or ancillary things to the functions assigned to it under the provisions of the Act. Section 12 of the Act vests the State Govt. with the power to issue policy directions on matters concerning electricity in the State including the overall planning and co-ordination. All policy directions shall be issued by the State Govt. consistent with the objects sought to be achieved by this Act and, accordingly, shall not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of the structure of tariffs for supply of electricity to various classes of consumers. The State Govt. is further expected to consult the Regulatory Commission in regard to the proposed legislation or rules concerning any policy direction and shall duly take into account the recommendation by the Regulatory Commission on all such matters. Thus the scheme of these provisions is to grant supremacy to the Regulatory Commission and the State is not expected to take any policy decision or planning which would adversely affect the functioning of the Regulatory Commission or interfere with its functions. This provision also clearly implies that fixation of tariff is the function of the Regulatory Commission and the State Govt. has a minimum

role in that regard. Chapter VII of this Act deals with tariff. In terms of Section 26(2), the Regulatory Commission, in addition to its power of issuing licence, is entitled to fix terms and conditions for determination of the licensee's revenue and tariffs by regulations which are to be duly published. The expression 'tariff' has not been defined in any of the Acts, with which we are concerned in the present appeals, despite the fact that the expression 'tariff' has been used repeatedly in both the Acts. Under the Electricity Act, 2003 'tariff' has neither been defined nor explained in any of the provisions of the Act. Explanation (b) to Section 26 of the Reform Act, 1998 states what is meant by 'tariff'. This provision states that 'tariff' means a schedule of standard price or charges or specified services which are applicable to all such specified services provided to the type or types of customers specified in the 'tariff' notification. This is an explanation to Section 26 which deals with licenses, revenues and tariffs. In other words, this explanation may not be of greater help to the Court in dealing with the case of generating companies. Similarly, the expression 'purchase price' has neither been defined nor explained in any of the afore-stated Acts.

28. Therefore, in the absence of any specific definition in any of these Acts we will have to depend upon the meaning attached to these expressions under the general law or in common parlance. The expression 'tariff' has been explained in the Law Lexicon with legal Maxims, Latin terms and Words & Phrases (Second Edition 1997) as "determination, ascertainment, a table of rates of export and import duties, in which sense the word has been adopted in English and other European languages and as defined by the law dictionaries the word 'tariff' is a cartel of commerce; a book of rates; a table or catalogue, drawn usually in alphabetical order, containing the names of several kind of merchandise, with the duties or customs to be paid for the same as settled by the authority or agreed between the several princes and States that hold commerce together."

29. It has also been explained as a schedule, system, or scheme of duties imposed by the Government of a country upon goods imported or exported; published volume of rate schedules and general terms and conditions under which a product or service will be supplied; a document approved by the responsible regulatory agency listing the terms and conditions including a schedule of prices, under which utility services will be provided. The expression 'purchase price' has to be given its limited meaning, i.e. the price paid for purchasing a good and in the context of the present case, price at which generated electricity will be sold to the specified agencies. The term 'purchase price' indicated in the PPAs, as such, would be a matter within the realm of contract but this is subject to the changes which are contractually and/or even statutorily permissible. Purchase price ultimately would form part of the tariff, as tariff relatable to a licensee or a consumer would have essentially taken into account, the purchase price. The purchase price may not include tariff but tariff would always or is expected to include purchase price.

30. The Regulatory Commission is vested with very vast powers and functions. Section 11 of the Reform Act, 1998 declares fixation of tariff as one of the primary functions of the Regulatory Commission in general more particularly, to the specified consumers under Section 26 of the Reform Act, 1998. While under the Electricity Act, 2003, Sections 61 and 62 read with Section 86 (1)(a)(b) deal with fixation of tariffs in relation to production, distribution and sale of generated power to the end consumer. These provisions clearly demonstrate that the Regulatory Commission is vested with the function for determining the tariff for generation, supply, transmission and billing of electricity etc., as well as regulation of electricity purchase and procurement process of distribution licensees, including price at which electricity shall be procured from the generating companies. With these specific powers in the statute book itself, it cannot be said that procurement of power from the generating companies will not fall within the ambit of

powers and functions of the Regulatory Commission. It, as already noted, is a common body performing functions, duties and exercising powers under all these three Acts. This Court had the occasion to deal with somewhat similar issues in the case of *PTC India Ltd. v. Central Electricity Regulatory Commission* [(2010) 4 SCC 603]. The Court was, amongst others, dealing with the provisions of Sections 61 to 63 of the Electricity Act, 2003 and regulation making power of the Regulatory Commission. The Court was concerned with other issues as well including the powers of the Tribunal in relation to judicial review etc. but it will be of assistance to us to notice that the Court referred to different kinds of delegated legislations under the provisions of Electricity Act, 2003 and with regard to the power of the Regulatory Commission and the scope of the term 'tariff' the Court held as under:

> "23. Section 52 of the 2003 Act deals with trading of electricity activity. Under Section 52(1), the appropriate Commission may specify the technical requirement, capital adequacy requirement and creditworthiness for being an electricity trader. Under Section 52(2), every trader is required to discharge its duties, in relation to supply and trading in electricity, as may be specified by the appropriate Commission.
>
> 24. The standards of performance of licensee(s) may be specified by the appropriate Commission under Section 57 of the Act.
>
> 25. The 2003 Act contains separate provisions for the performance of dual functions by the Commission. Section 61 is the enabling provision for framing of regulations by the Central Commission; the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case.

> Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity.
>
> 26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Section 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination.
>
> 27. Section 66 confers substantial powers on the appropriate Commission to develop the relevant market in accordance with the principles of competition, fair participation as well as protection of consumers' interests. Under Sections 111(1) and 111(6) respectively, the Tribunal has appellate and revisional powers. In addition, there are powers given to the Tribunal under Section 121 of the 2003 Act to issue orders, instructions or directions, as it may deem fit, to the appropriate Commission for the performance of statutory functions under the 2003 Act."
>
> 31. Similarly, another Bench of this Court in the case of

Tata Power Company Ltd. v. Reliance Energy Ltd., [2009 (7) SCALE 513], was primarily, concerned with the role of the generating companies and their right to make choice to sell power to any person or licensee and while referring to the concept of open access, the Court in para 59 of the judgment referred to the issues arising in the case which read as under:

> "Although before us a large number of contentions had been raised, the core questions, which arise for our consideration, are:-
>
> (A) Whether recourse to Section 23 of the Act can be taken for issuance of any direction to the generating company?
>
> (B) Whether the Commission while applying the provisions of Section 86(1)(b) of the Act could also take recourse to Sections 23 and 60 thereof?
>
> (C) Whether equitable allocation of power generated by a generating company is permissible?"

32. In the present case we are, primarily, concerned with the answers given by the Court to questions (A) and (B) framed therein, the discussion on the subject and finally the relevant conclusions drawn by the Court in para 140 to 142. The Court elaborately discussed the matter including the fact that some generating companies had entered into PPAs while other had not. The Court, amongst others, declare the following conclusions (of which we refer only the relevant portions):

> "7) if regulatory clause is sought to be applied in relation to allocation of power, the same would defeat the de-licensing provisions. Generating companies have the freedom to enter into contract and in particular long term contracts with a distribution company subject to the regulatory provisions contained in the 2003 Act.
>
> 8) PPA for a long term is essential for increasing and

> decreasing the capacity of generation of electricity by the generating company, which purpose by the 2003 Act must be allowed to achieve.
>
> 13) Section 86(1)(b) of the 2003 Act clearly shows that the generating company indirectly comes within the purview of regulatory jurisdiction as and when directions are issued to the distributing companies by the appropriate Commission but the same would not mean that while exercising the said jurisdiction, the Commission will bring within its umbrage the generating company also for the purpose of issuance separate direction."

33. In addition to the statutory provisions and the judgments afore referred, we must notice that all the PPAs entered into by the generating companies with the appropriate body, as well as the orders issued by the State in GO Ms. Nos. 93 and 112, in turn, had provided for review of tariff and the conditions. The Tribunal appears to have fallen in error of law in coming to the conclusion that the Regulatory Commission had no powers either in law or otherwise of reviewing the tariff and so called incentives. Every document on record refers to the power of the authority/Commission to take a review on all aspects including that of the tariff. One of the relevant consideration for determining the question in controversy is to examine whether the matter falls within the statutory or contractual domain. From various provisions and the documents on record it is clear that Regulatory Commission is vested with the power to revise tariff and conditions in relation to procurement of power from generating companies. It is also clear from the record that in terms of the contract between the parties, the APTRANSCO had reserved the right to revise tariff etc. with the approval of the Regulatory Commission.

34. With some emphasis, the parties had argued the question relating to 'estoppel' and 'legitimate expectation' with reference to the facts of the present case. The contention is

raised that by the GOs issued by the State Government as well as the letters of the ministry a representation was made by the Government to the generating companies and they, having altered their positions, have a right to compel the State Government and the Regulatory Commission to abide by those terms for ever and it is their legitimate expectation that State is required to comply with those conditions and no other.

35. For proper analysis of the submissions made by the parties, it is necessary for us to examine on what premises the appellants had claimed and the Tribunal has accepted the plea of estoppel. Admittedly, this all begins with the letter dated 7th September, 1993 issued by the Government of India, Ministry of Non-Conventional Energy Sources, New Delhi to the Chief Secretary of the respective States. In this letter, the new strategy action plan of the Ministry in relation to generation of grid quality power from non-conventional energy sources was mentioned in some elaboration and the Ministry had referred to the fact that it had drawn certain guidelines and also indicated the minimum buy-back price of Rs. 2.25 per unit which was proposed by the Ministry and it was based upon the average cost of generation, as noticed by the authorities, at the relevant point of time. These guidelines were to constitute an attractive package to encourage private sector and the respective States were required to examine and alter or amend the same as conducive to a particular State. Hereafter, a letter dated 25th November, 1994 was again issued by the Ministry to the Managing Director of the Non-Conventional Energy Development Corporation, Andhra Pradesh annexing the guidelines which were subject to be amended. These guidelines itself showed that Electricity Board, which was the competent authority at that relevant point of time, to announce a 'base purchase price' every year for electrical energy purchased by the Board from the non-conventional energy based projects. These guidelines contemplated that the base price shall be escalated at a minimum rate of 5% every year. Clause 2 of the Guidelines stipulated that the promoter or a

developer shall be entitled to receive the base price set out in the PPA for all electrical energy delivered for the duration of the PPA. The rate shall be equal to the base price in the year of signing of PPA, escalated at the rate of 5% per year for a period of ten years from the date of signing. Thereafter new purchase price will be fixed as per the tariff prevalent in the State at the relevant time. Thereafter, the Andhra Pradesh Government has issued GO Ms. No. 93 dated 18th November, 1997 referring to certain incentives required to be given to the projects. These incentives only referred to the power purchase price, escalation of 5% with base year 1997-98, wheeling charges, third party sales allowed to a limited extent. These, again, were the guidelines which, in fact, we have referred to in great detail above and were primarily intended to guide the States in taking the respective decisions in that behalf. Again vide GO. Ms. No. 112 dated 22nd December, 1998 referring to the extension of all these uniform incentives, certain amendments were carried out to GO Ms. No. 93 dated 18th November, 1997. Clause 2 of this order referred that the operation of the incentive scheme shall be watched for a period of three years and at the end of three years the Electricity Board shall come up with suitable proposals for review for further continuance of the incentives in that form, or to be modified suitably. Keeping these guidelines in mind, the State of Andhra Pradesh vide GO Ms. No. 93 dated 18th November, 1997, while referring to the guidelines issued by the Government of India for promotional and fiscal incentives, noticed the various representations which were received from Non-conventional Energy Developers for extension of benefits as afore-referred in relation to all non-conventional energy resources uniformly. Thereafter, the parties took up the matter for annual consideration, which exercise was undertaken by them in terms of the guidelines issued by the State and the Central Government. State of Andhra Pradesh reiterated the incentives and directed that the same would continue for a period of three years in terms of GO Ms. No. 93, whereafter it will be reviewed. The incentives relied upon, on the basis of the guidelines and

the issued Government orders are primarily, related to fixation of purchase price of the generated power from Non-Conventional developer/generators and sale of such energy to third parties. In the meanwhile, Regulatory Commission had been established under the provisions of the Reform Act, 1998. This Regulatory Commission was to take over all the functions of the said Electricity Board as well as other authorities for generation, distribution and other matters relating to electricity in the State. This resulted in initiation of *suo motu* proceedings by the Regulatory Commission for determination and fixation of tariff, which after hearing the parties finally passed the order dated 20th June, 2001. This order as we have already noticed was accepted by all the parties and has not been questioned till date. This order provided for certain variations in the incentives, which as already noticed, are related to the fixation of tariff or purchase price and as stipulated, the Commission considered all objections at some length and ordered that power generated by Non-conventional Energy Developers is not permitted to be sold to third parties and price was kept at Rs. 2.25 per unit price with 5% escalation per annum with 1994-95 as the base year. The parties had entered into agreements i.e. PPAs at different times after passing of this order between June, 2001 to August, 2001 and even thereafter. Thus, at that time, the entire matter between the parties was controlled by the PPAs which fully contemplated that all the delivered energy at the interconnection point for sale to TRANSCO will be purchased at the tariff provided under Article 2.2 which in turn confirmed the order of 20th June, 2001 in that regard and it was stated that the matter will be reviewed in April, 2004 and it could also be reviewed after 10 years from the date of commissioning of the project. This PPA as well as the order passed by the Regulatory Commission in the year 2001 remained in force without being questioned in any manner whatsoever before any competent forum and in any case, not to any benefit of respondents. Then came the order dated 20th March, 2004 passed by the Regulatory Commission again, by

initiating *suo motu* proceedings. In this order, the Commission had retained the basic unit price of 2.25 as on 1st April, 1994 and the escalation index of 5% per annum which was to be simple and not compounded every year. In other words, on 1st April, 2001 the price was 3.37/kwh in relation to Wind Power Purchasers. Except varying this price, the order of 2004, in turn, had reiterated the contents of the order of 2001 which, as already noticed, has attained finality. Another factor which we may notice is that in its order dated 7th July, 2004, while clarifying its order dated 20th March 2004, the Commission has clearly observed:

> *"12. It is relevant to clarify that by the order dated 20-03-2004, the Commission is not mandating in any manner those NCE developers who have not accepted the earlier order dated 20-06-2001 passed by the Commission, while their challenge to the order is pending the decision by the High Court. However, such of the NCE developers who had accepted the earlier order dated 20-06-2001 and have been selling electricity generated by them to APTRANSCO cannot challenge the jurisdiction of the Commission to review the terms as per the stipulation contained in the order dated 20-6-2001."*

36. On the basis of this factual matrix, the respondents claimed that the State Government and the Regulatory Commission both were bound to continue the incentives as were provided to them in furtherance to the letters and orders of Central as well as the State Governments discussed above. They have a legitimate right to expect that these incentives were to be continued indefinitely in the same manner and the authorities concerned are estopped from altering the rates and/or imposing the condition of no sale to third parties. We are unable to find any merit in this contention. In our view, the Tribunal has erred in law in treating these *inter-se* letters and guidelines between the Government of India, State Government and the Commission/the State Electricity Board as unequivocal

commitments to the respondent/purchasers/generators/ developers so as to bind the State for all times to come. For the principle of estoppel to be attracted, there has to be a definite and unambiguous representation to a party which then should act thereupon and then alone the consequences in law can follow. In the present case, the policy guidelines issued by the Central Government were the proposals sent to the State Government, which the State Government accepted to consider, amend or alter as per their needs and conditions and then make efforts to achieve the objects of encouraging Non-conventional Energy Generator and Purchasers to enter into this field. These are the matters, which will squarely fall within the competence of the Regulatory Commission/the State Electricity Board at the relevant points of time. Besides that, there was no definite and clear promise made by the authorities to the developers that would invoke the principle of promissory estoppel. Undoubtedly, to encourage participation in the field of generation of energy through non-conventional methods, some incentives were provided but these incentives under the guidelines as well as under the PPAs signed between the parties from time to time were subject to review. In any case, the matter was completely put at rest by the order of 20th June, 2001 and the PPAs voluntarily signed by the parties at that time, which had also provided such stipulations. If such stipulations were not acceptable to the parties they ought to have raised objections at that time or at least within a reasonable time thereafter. The agreements have not only been signed by the parties but they have been fully acted upon for a substantial period. We have already referred to various statutory provisions where the Regulatory Commission is entitled to determine the tariff. In this situation we are unable to agree with the view taken by the Tribunal that Regulatory Commission had no jurisdiction and that fixation of tariff does not include purchase price for buy back of the generated power.

37. The principle of promissory estoppel, even if, it was applicable as such, the Government can still show that equity

lies in favour of the Government and can discharge the heavy burden placed on it. In such circumstances, the principle of promissory estoppel would not be enforced against the Government as it is primarily a principle of equity. Once the ingredients of promissory estoppel are satisfied then it could be enforced against the authorities including the State with very few extra ordinary exceptions to such enforcement. In the United States the doctrine of Promissory Estoppel displayed remarkable vigor and vitality but it is still developing and expanding. In India, the law is more or less settled that where the Government makes a promise knowing or intending that it would be acted upon by the promissory and in fact the promissory has acted in reliance of it, the Government may be held to be bound by such promise. It is a settled canon of law that doctrine of promissory estoppel is not really based on principle of estoppel but is a doctrine evolved by equity in order to prevent injustice. There is no reason why it should be given only a limited application by way of defence. It can also be the basis of a cause of action. Even if we assume that there was a kind of unequivocal promise or representation to the respondents, the reviews have taken place only after the period specified under the guidelines and/or in the PPAs was over. This is a matter which, primarily, falls in the realm of contract and the parties would be governed by the agreements that they have signed. Once these agreements are singed and are enforceable in law then the contractual obligations cannot be frustrated by the aid of promissory estoppel.

38. Following the judgment of this Court in the case of *Union of India v. M/s. Indo-Afghan Agencies Ltd.* [(1968) 2 SCR 366], this Court in the case of *Century Spinning and Manufacturing Company Ltd. v. The Ulhasnagar Municipal Council* [(1970) 1 SCC 582] held that if the promise is made in regard to a present or existing fact, the principle of estoppel can be enforced against the Government. But a promise in relation to a future transaction or act may not fall within the ambit of promissory estoppel. This law was further discussed with

some elaboration by the Court in the case of *Motilal Padampat Sugar Mills. Co. Ltd. v. State of Uttar Pradesh* [(1979) 2 SCC 409], where the Court after considering the position of law in England and United States and comparing the same to the Indian Law, laid down the basic concept of promissory estoppel that would determine its enforceability. In the case of *Pawan Alloys v. UPSEB* [(1997) 7 SCC 251], the Court, though had enforced the principle of promissory estoppel against the Board, but certain basic facts of that case needs to be noticed by us. The appellants in that case had neither expressly nor impliedly stated that it has the power to withdraw the incentives and rebate at a time prior to the expiry of three years for which it was granted. Secondly, none of the private parties had voluntarily or even by remotest choice agreed to give up the benefits given to them by clear representation held out by the Board. As is obvious, the power of the Board to increase the general tariff was accepted, but the incentive of rebate was *de horse* the tariff and thus, promissory estoppel was enforceable against the Board.

39. Another very important dictum of the Court in this judgment was that the power of the Board to fix general tariff as well as discharge of other related functions was held to be quasi-judicial in character. This power of the Board is exercised under the statute as a power-cum-duty and is independent of granting or declining any rebate. In the present case the order dated 20th June, 2001 was fully accepted by the parties without any reservation. After the lapse of more than reasonable time of their own accord they voluntarily signed the PPA which contained a specific stipulation prohibiting sale of generated power by them to third parties. The agreement also had renewal clause empowering TRANSCO/APTRANSCO/Board to revise the tariff. Thus, the documents executed by these parties and their conduct of acting upon such agreements over a long period, in our view, bind them to the rights and obligations stated in the contract. The parties can hardly deny the facts as they existed at the relevant time, just because it may not be

convenient now to adhere to those terms. Conditions of a contract cannot be altered/avoided on presumptions or assumptions or the parties having a second thought that a term of contract may not be beneficial to them at a subsequent stage. They would have to abide by the existing facts, correctness of which, they can hardly deny. Such conduct, would be hit by *allegans contraria non est audiendus*.

40. Lastly, we may refer to a more recent judgment of this Court. In the case of *Kusumam Hotels (P) Ltd. v. Kerala Seb* [(2008) 13 SCC 213], where the Court discussed in some elaboration the different judgments of this Court on the subject and then declined to enforce the principle of promissory estoppel as there was no foundational facts and also indicated that the Government can alter, amend or rescind its policy decision in public interest, the Court held as under:

> **"27.** Yet again in *U.P. Power Corpn. Ltd. v. Sant Steels & Alloys (P) Ltd.,* it was held: (SCC p.800, para 27)
>
> "*27*. In this background, in view of various decisions noticed above, it will appear that the Court's approach in the matter of invoking the principle of promissory estoppel depends on the facts of each case. But the general principle that emerges is that once a representation has been made by one party and the other party acts on that representation and makes investment and thereafter the other party resiles, such act cannot be stated to be fair and reasonable. When the State Government makes a representation and invites the entrepreneurs by showing various benefits for encouraging to make investment by way of industrial development of the backward areas or the hill areas, and thereafter the entrepreneurs on the representations so made bona fide make investment and thereafter if the State Government resiles from such benefits, then it certainly is an act of unfairness and

arbitrariness. Consideration of public interest and the fact that there cannot be any estoppel against a statute are exceptions."

xxx xxx xxx

36. The law which emerges from the above discussion is that the doctrine of promissory estoppel would not be applicable as no foundational fact therefor has been laid down in a case of this nature. The State, however, would be entitled to alter, amend or rescind its policy decision. Such a policy decision, if taken in public interest, should be given effect to. In certain situations, it may have an impact from a retrospective effect but the same by itself would not be sufficient to be struck down on the ground of unreasonableness if the source of power is referable to a statute or statutory provisions. In our constitutional scheme, however, the statute and/or any direction issued thereunder must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication. It is a principle of the rule of law. A presumption can be raised that a statute or statutory rule has prospective operation only."

41. In our country, the law of promissory estoppel has attained certainty. It is only an unambiguous and definite promise, which is otherwise enforceable in law upon which, the parties have acted, comes within the ambit and scope of enforcement of this principle and binding on the parties for their promise and representation. It will be difficult for the Court to hold that the guidelines can take the colour of a definite promise which in the letters of the Central Government itself were proposals to the State Government. Besides that, if for the sake of argument, we treat the State letters/circulars as promise or representations to the private parties like the respondents, even then, they led to the execution of a definite contract between the parties which will purely fall in the domain of contractual law.

These contracts specifically provided for review and when reviewed in the year 2001 parties not only accepted the order but executed contracts (PPAs) in furtherance of it. In these circumstances, we are unable to accept the argument that the State or the Regulatory Commission or erstwhile State Electricity Board were bound to allow same tariff and permit third party sales for an indefinite period. To this extent, authorities, in any case, would not be bound by the principle of estoppel.

42. Now, we will proceed to examine the merits or otherwise of the findings recorded by the Tribunal that the PPAs executed by the parties, were result of some duress and thus, it will not vest the authorities with the power to review the tariff and other granted incentives. PPAs were executed prior and subsequent to the issuance of the order dated 20th June, 2001. Different persons executed the contracts at different times in full awareness of the terms and conditions of such PPA. To frustrate a contract on the ground of duress or coercion, there has to be definite pleadings which have to be substantiated normally by leading cogent and proper evidence. However, in the case where summary procedure is adopted like the present one, at least some documentary evidence or affidavit ought to have been filed raising this plea of duress specifically. From the record before us, nothing was brought to our notice to state the plea of duress and to prove the alleged facts which constituted duress, so as to vitiate and/or even partially reduce, the effect of the PPAs. On the one hand, the Tribunal appears to have doubted the binding nature of the contracts stating that it contained unilateral conditions introduced by virtue of Order and approval of the Regulatory Commission, while on the other hand, in para 53 of the Order, it proceeded on the presumption that PPAs are final and binding and still drew the conclusion that the Regulatory Commission could not revise the tariff. Even in the order, no facts have been pointed out which, in the opinion of the Tribunal, constituted duress within the meaning of the Contract Act so as to render the contract voidable.

Another aspect of the entire controversy is that none of the generators had challenged the agreements and in fact, except in arguments before the Tribunal no case was made out for the purposes of vitality of the contract or any part thereof. On the contrary, all the generators under all the branches of Non-Conventional Energies, have accepted the contract and proceeded on the basis that the said contracts are binding and still the Regulatory Commission does not have any power or jurisdiction to revise the tariff or deal with the concessions. If the contracts are a result of duress and cannot be given effect, the results could be disastrous for both the sides. If a contract suffers from the defect of undue influence or duress, as the case may be then the consequences in law should follow. It is a settled canon of law that when the consent to agreement is caused by undue influence the agreement is a contract voidable at the option of the parties whose consent was so caused. Even if such party had received any benefit under the terms of the contract the Court could still pass orders as to the voidability or otherwise of the contract but upon such terms and conditions as the Court may deem just. Undue influence or duress is said to be subtle of the fraud whereby mysteries burden over the mind of a victim by insidious approaches. Firstly, there are no facts on record, much less, supported by any documentary or any other evidence to sustain the plea that the contracts (PPAs) are a result of undue influence or duress by the State or its agencies upon the generators. Secondly, the generators have already taken benefit of that contract which was based on the policy of the State as well as the order of the Regulatory Commission. Having attained those benefits, it will hardly be of any help to the appellants, particularly, in the facts and circumstances of the case, to substantiate, justify or argue the plea of duress.

43. In the case of *Birla Jute Manufacturing Co. v. State of M.P.* [(2002) 9 SCC 667], the Supreme Court was concerned with a case where validity of undertaking given under duress was the plea taken by the appellant. This pleading

on the same merits and noticing the material, like the present case, the Court held as under:

> "2. Learned counsel, appearing for the appellant urged that the undertaking given by the appellant Company was under duress and, therefore, it is not an undertaking in the eyes of law and the appellant is not liable to pay the water charges under such circumstances. There is no material before us to come to this conclusion that the undertaking given by the appellant was under duress. On the contrary we find that the appellant had given the solemn undertaking voluntarily. We, therefore, find no merit in the appeal."

44. The Tribunal in paras 45-47 of its order has used the expression "out of compulsion some of the developers entered into Power Purchase Agreement with APTRANSCO accepting the terms and conditions set out in order dated 20th June, 2001". We are afraid that there is hardly any material on record to substantiate such a finding. What was the compulsion and what were the facts which persuaded the Tribunal to take such a view are conspicuous by their very absence. A compulsion leading to execution of a contract is a matter entirely based upon facts. It is difficult for this Court, originally, to infer duress or compulsion in absence of specific pleadings and materials in that behalf. It may also be noticed at the cost of repetition that the order dated 20th June, 2001 was never questioned by any of the parties to any favourable results. Even in these proceedings there is no challenge to the said order which, admittedly, has been acted upon and has attained finality. The power generators/Non-Conventional Energy developers have executed the PPAs without any protest and, in fact, did nothing to challenge such agreements or any part thereof, till passing of the impugned order of 2004. There were some proceedings, without questioning the validity and effectiveness of the order dated 20th June, 2001, carried out by some of the generators before the Andhra Pradesh High Court. Certain interim

directions were passed in those proceedings, as already noticed, but finally all proceedings culminated into dismissal of the Writ Petitions and/or reference back to the Regulatory Commission for grant of a hearing as per the directions contained in the order of the High Court.

45. Another important aspect of the case is that the learned counsel appearing for the respondents, particularly, in Appeal No. 2926 of 2006 had stated that they are not arguing in support of the plea of estoppel and duress as decided by the Tribunal in their favour. They had mainly concentrated their submissions on jurisdiction of the Regulatory Commission with respect to withdrawal of incentives and fixation of tariff. These are the contracts which have been executed prior and after the issuance of the order dated 20th June, 2001 and have been acted upon by the parties without any reservation. In view of the fact that no challenge was made to the order dated 20th June, 2001, execution of PPAs and the conduct of the respondents over the long period and particularly, while keeping in mind the statutory provisions we are unable to sustain the plea of duress in favour of the respondents.

46. The main emphasis of the judgment of the Tribunal is that the Government had framed the policy under which, incentives were given and as such, the Regulatory Commission had no power and authority to fix tariffs or amend or alter the policy decision of the State. We have already held that in law and in face of the contract between the parties the Regulatory Commission is the Authority to fix the tariff which includes within its ambit the purchase price of the Non-conventional Energy under the policy of the State. It appears that the Tribunal has taken a narrower view of the jurisdiction vested in the Regulatory Commission which is discharging its statutory functions under all the three Acts in accordance with law. In terms of Section 12 of the Reform Act, 1998, which has been referred to by the Tribunal, the power of the Government had been stated. The power available to the Government to issue policy directions

has two restrictions. Firstly, the policy direction has to be on the matters related to electricity in State including overall planning and coordination. Secondly, all such policy directions have to be issued by the State Government in consonance with the object sought to be achieved by this Act and accordingly shall not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of the structure of tariff for supply of electricity to the consumers. Powers vested in the Regulatory Commission to frame regulations under Section 54 also intend that regulations are to be framed with an object to ensure proper performance of its functions under the Act. In other words, both the State and the Regulatory Commission, are supposed to exercise their respective powers only for the purposes of furthering the cause of the Act. The Commission discharging its statutory functions within the ambit of Sections 11, 12 and 26 of the Reform Act, 1998 as well as Sections 61, 62 and 86(1)(b) of the Electricity Act, 2003 renders advisory functions to the State. All these provisions, examined and analyzed cumulatively, do not support the approach adopted by the Tribunal that the functions of the Regulatory Commission in fixing tariff/purchase price was contrary to or distinctive of the said policy. This cannot be supported either on the basis of the statutory provisions of the various Acts as well as with reference to the various documents on record including the order dated 20th June, 2001 and the PPAs signed by the parties at different stages. We are also unable to contribute to the view of the Tribunal that the Regulatory Commission has acted in contradiction or conflict with the State policy. The State was certainly not intending to provide incentives and concessions with assurance of buy-back to enable the Non-Conventional Energy developers/generators to sell generated powers to third parties. It must be kept in mind that the policy of the Government of India as well as the State of Andhra Pradesh was for encouraging the developers/generators of Non-conventional Energy to generate electricity for the benefit of public at large

with buy back of power being one of the basic features of this policy. Such parameters are obviously subject to change in larger public interest. All these issues, in fact, loose much significance because of the fact that parties have, by and large, entered into the field of contract simpliciter and their rights are controlled by the contracts executed between them. There is no challenge to these contracts and, therefore, it may be hardly permissible for the Court to go behind these contracts and permit questioning of the statutory jurisdiction vested in the Regulatory Commission.

47. In the case of *BSES Ltd. v. Tata Power Co. Ltd.* [(2004) 1 SCC 195], the Court clearly held that after creation of the Regulatory Commissions under the provisions of the Electricity Regulatory Commission Act, 1998, the Commission has clear power and jurisdiction to fix tariff. The Court should not adopt an interpretation which should neither be strict nor narrower so as to oust the jurisdiction of the Regulatory Commission, as it would defeat the very object of enacting the said Act. The reliance placed by the respondents upon the judgment of this Court in the case of *Andhra Pradesh Electricity Regulatory Commission v. R.V.K. Energy Private Limited* [(2008) 17 SCC 769] is, again, of not much help to them. In that case also, the Court had upheld the exercise of statutory power by the Regulatory Commission. Of course, the Court held that the regulatory power u/s 11(1)(e) of the Reform Act, 1998 does not ordinarily extend to prohibition or positive direction for entire supply to APTRANSCO alone. Such prohibition may be resorted to in exceptional situations. It reiterated the principle that the Government policy as well as the Regulatory Commission should act in consonance with the object of the Act.

48. The appellants have referred and relied upon the policy directions and guidelines framed by the Central Government while the respondents have relied upon these documents as well as the circulars issued by the State of Andhra Pradesh.

The respondents have raised the plea of estoppel against the Regulatory Commission on the basis of the averment that the State had framed policies, which the Regulatory Commission instead of implementing, has acted contrary thereto. There is no doubt that before the formation of the Regulatory Commission it was the State Electricity Board which was performing all the functions in relation to generation as well as distribution of electricity. The Board was directly under the control of the State and the State, in exercise of its general executive powers, had framed policies to encourage Non-conventional Energy developers and producers to come into the field of generation of electricity and had issued the Government orders which we have discussed in some detail above. Strange enough, the State of Andhra Pradesh was neither impleaded as a party to the proceedings before the Regulatory Commission nor before the Tribunal. In fact, the Tribunal has referred to various acts and deeds of the State and consequences thereof, but did not consider it appropriate to implead the State Government as a party to the proceedings. We are of the considered view that presence of the State Government before the Tribunal could have certainly been appropriate, inasmuch as the State would have placed before the Appellate Authority and the Regulatory authorities, its views in regard to revision of incentives as well as the purchase price. We are also constrained to observe that the State of Andhra Pradesh was a necessary, in any case, a proper party in these proceedings. This itself would be a ground for this Court to remit the matter to the Competent Authority, in addition to the other reasons recorded in this judgment.

49. In the present case, the restriction with regard to third party sales was not only creation of a directive issued or approval granted by the Regulatory Commission, but was actually in furtherance to the contract entered into between the parties. Rights and liabilities arising from a binding contract cannot be escaped on the basis of some presumptions or inferences in relation to the facts leading to the execution of the

contract between the parties. The jurisdiction of the Regulatory Commission, in the facts of the case, arises not only from the statutory provisions under the different Acts but also in terms of the contract executed between the parties which has binding force. Lastly, but with great emphasis, it was argued on behalf of the respondents that enforcement of the purchase price at the rate determined by the Regulatory Commission along with complete prohibition on the right of the Non-conventional Energy Generator/Developers to sell generated power to the third parties would compel them to shut down their projects. The rates are so unfair that it would result in extinguishment of the power generating units from the State of Andhra Pradesh on the one hand, while on the other, it is bound to prejudicially affect the larger public interest. According to the respondents they have invested large sums of money in developing these generating units and it will be unfair to compel their closure, particularly, when for all these years they have supplied electricity generated by them solely to APTRANSCO or its predecessors.

50. We find some substance in this submission and are of the view that it is a matter of some concern, even for the State Government. All these projects, admittedly, were established in furtherance to the scheme and the guidelines provided by the Central Government which, in turn, were adopted with some modification by the State Government. The State Electricity Board implemented the said scheme and initially had permitted sale of generated electricity to third parties, however, subsequently and after formation of the Regulatory Commission which, in turn, took over the functions of the State Electricity Board, the incentives were modified and certain restrictions were placed. The reasons for these restrictions have been stated in the affidavit filed on behalf of the appellants which, as already noticed by us, is not a matter to be examined by this Court in exercise of its extra-ordinary jurisdiction. These matters, essentially, must be examined by expert bodies particularly, when such bodies are constituted under the provisions of a special statute.

51. The basic policy of both the Central as well as the State Government was to encourage private sector participation in generation, transmission and distribution of electricity on the one hand and to further the objective of distancing the regulatory responsibilities of the Regulatory Commission from the Government and of harmonizing and rationalizing the provisions of the existing laws relating to electricity in India, on the other hand. The object and reasons of Electricity Act, 2003 as well as the Reform Act, 1998 are definite indicators of such legislative intent. The basic objects of these enactments were that the said Regulatory Commission may permit open access in distribution of energy as well as to decentralize management of power distribution through different bodies. The Reform Act, 1998 stated in its objects and reasons that the set-up of power sector in force, at that time, was virtually integrated and functional priorities were getting distorted due to resource-crunch. This has resulted in inadequate investment in transmission and distribution which has adversely affected the quality and reliability of supply. The two corporations proposed thereunder were to be constituted to perform various functions and to ensure efficiency and social object of ensuring a fair deal to the customer. These objects and reasons clearly postulated the need for introduction of private sector into the field of generation and distribution of energy in the State. Efficiency in performance and economic utilization of resources to ensure satisfactory supply to the public at large is the paramount concern of the State as well as the Regulatory Commission. The policy decisions of these constituents are to be in conformity with the object of the Act. Thus, it is necessary that the Regulatory Commission, in view of this object, take practical decisions which would help in ensuring existence of these units rather than their extinguishment as alleged.

52. In view of our above detailed discussion, we dispose of these appeals with the following order:

(a) The order of the Tribunal dated 2nd June,

2006 is hereby set aside.

(b) We hold that the Andhra Pradesh Electricity Regulatory Commission has the jurisdiction to determine tariff which takes within its ambit the 'purchase price' for procurement of the electricity generated by the Non-conventional energy developers/ generators, in the facts and circumstances of these cases.

(c) We hereby remand the matters to the Andhra Pradesh Electricity Regulatory Commission with a direction that it shall hear the Non-conventional energy generators afresh and fix/ determine the tariff for purchase of electricity in accordance with law, expeditiously.

(d) It shall also re-examine that in addition to the above or in the alternative, whether it would be in the larger interest of the public and the State, to permit sale of generated electricity to third parties, if otherwise feasible.

(e) The Andhra Pradesh Electricity Regulatory Commission shall consider and pronounce upon all the objections that may be raised by the parties appearing before it, except objections in relation to its jurisdiction, plea of estoppel and legitimate expectancy against the State and/or APTRANSCO and the plea in regard to PPAs being result of duress as these issues stand concluded by this judgment.

(f) We make it clear that the order dated 20th June, 2001 passed by the Andhra Pradesh

Electricity Regulatory Commission has attained finality and was not challenged in any proceedings so far. This judgment shall not, therefore, be in detriment to that order which will operate independently and in accordance with law.

(g) We also hereby direct that State of Andhra Pradesh shall be added as a party respondent in the proceedings and the Andhra Pradesh Electricity Regulatory Commission shall grant hearing to the State during pendency of proceeding before it.

53. In the facts and circumstances of the case parties are left to bear their own costs.

K.K.T. Appeals disposed of.

CONTROLLER, VINAYAK MISSION DEN. COL.& ANR.

v.

GEETIKA KHARE

(Civil Appeal No. 5213-5214 of 2010)

JULY 9, 2010

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

CONSUMER PROTECTION ACT, 1986:

Complaint by a BDS student against a BDS College—Alleging that student had to withdraw from the college for lack of recognition and other deficiencies, which caused inconvenience , mental harassment and loss of an academic year—State Commission, directing refund of fee amounting to Rs. 5,15,000/- with 12% interest and also awarding Rs. 6,15,000/- as compensation—National Commission upholding the order of refund of fee with interest, but reducing the compensation amount to Rs. 2,50,000/-— HELD: Refund of the amount of fee deposited by the student with interest @ 12% p.a. w.e.f. 31st July, 2000 till the date of payment meets the ends of justice—Since the said amount has already been paid, there is no reason to award any further amount to the respondent—The directions issued by the State Commission and modified by the National Commission for payment of further amount of compensation set aside – Medical Education.

CIVIL APPELLATE JURISDICTION : Civil Appeal No(s). 5213-5214 of 2010.

From the Judgment & Order dated 14.07.2009 of the National Consumer Disputes Redressal Commission, New Delhi in First Appeal No. 340 of 2004 and Dated 20.08.2009 in Review Application No. 238 of 2009 in First Appeal No. 340 of 2004.

G. Umapathy, M.M. Manivel, Rakesh K. Sharma for the Appellants.

Vikram Singh Gulia, Umed Singh Gulia, Nikhil Jain for the Respondent.

The following order of the Court were delivered

O R D E R

1. Leave granted.

2. National Consumer Disputes Redressal Commission, New Delhi, has by the order impugned in these appeals upheld an ex parte order passed by the State Commission directing refund of a sum of Rs.5,15,000/- to the respondent with interest @ 12% p.a. but reduced the amount of compensation awarded to the respondent to Rs.2,50,000/- only as against Rs.6,15,000/- awarded by the State Commission.

3. The facts giving rise to the appeals have been set out in the orders passed by the State Commission and that passed by the National Consumer Disputes Redressal Commission, New Delhi. We need not, therefore, repeat the same here again. Suffice it to say that the respondent had filed a complaint against the appellant herein alleging deficiency in service and seeking not only refund of Rs.5,15,000/- paid by her towards fee but also compensation for the loss of an academic year and mental harassment etc. The respondent's case as set out in the complaint was that she had secured admission to a BDS college established and run by the appellant but had to withdraw from the same on account of lack of recognition of the said college and also other deficiencies, which not only caused inconvenience and mental harassment but also resulted in the loss of an academic year. The State Commission passed an ex parte order on 25th March, 2004 granting the following reliefs to the respondent:

"In the result the complaint succeeds and is allowed. The

compensations claimed are hereby decreed. The opposite parties 01 and 02 are hereby directed to pay Rs.5,15,000/- with 24% interest with effect from 11-08-1998 till the date of payment. The opposite parties 01 and 02 are further directed to pay Rs.5,00,000/- as damages for spoiling the good academic years of the complainant with another sum of Rs.1,00,000/- as compensation for the mental agony, harassment and torture. The complainant is entitled to cost of Rs.5,000/- only."

4. Aggrieved by the above order, the appellant appealed to the National Commission which appeal has been partly allowed by the latter reducing the amount of compensation payable to the respondent to Rs.2,50,000/- only.

5. Heard learned counsel for the parties. A reading of the order passed by the National Commission shows that during the pendency of the appeal before it the appellant had been directed to deposit an amount of Rs.5,15,000/- received by it towards fee from the respondent with interest @ 9% w.e.f. 31st July, 2000, and the respondent given liberty to withdraw the same. It is not in dispute that the said amount was deposited by the appellant and has been disbursed to the respondent. The only question that remains is whether any further amount is payable to the respondent, in the facts and circumstances of the case.

6. It is argued on behalf of the appellant that order passed by the State Commission was an ex parte order and that there was no evidence whatsoever on record to suggest that the respondent had suffered any prejudice or inconvenience on account of her having taken admission in the dental college of the appellant. It is also pointed out that the father of the respondent had in terms of his letter dated 30th July, 2000 withdrawn the respondent from the college because of his own problems. This is evident from a reading of the letter, relevant portion whereof is hereunder:

"Sir,

I am herewith informing that I am withdrawing my daughter Ku. Geetika Khare from 1st Professional B.D.S. Course because of my own problems and for her admission in other college."

7. It was contended that although the rules and regulations governing the admission of students to B.D.S. course did not permit the candidate to seek refund in the above circumstances the amount of fee paid to the college together with interest @ 12% and been deposited by the appellant and withdrawn by the respondent.]

8. On behalf of the respondent, it was on the other hand, contended that the commission was justified in holding that there was a deficiency in the service provided by the appellant which finding did not call for any interference from this Court.

9. Having carefully considered the rival submissions made at the bar and the material placed on record we are of the opinion that refund of the amount of fee deposited by the respondent with interest @ 12% p.a. w.e.f 31st July, 2000 till the date of payment meets the ends of justice. Since the said amount has already been paid to the respondent, we see no reason to award any further amount to the respondent. We accordingly allow these appeals and direct that the claim made by the respondent in her complaint filed before the State Commission shall stand settled with the payment of Rs.5,15,000/- with interest @ 12% already received by the respondent. The directions issued by the State Commission and modified by the National Commission for payment of further amount of compensation fixed at Rs.2,50,000/- by the National Commission shall accordingly stand set aside. No costs.

R.P. Appeals allowed.

AMICUS CURIAE

v.

PRASHANT BHUSHAN & ANR.

(Contempt Petition (Crl.) No. 10 of 2009)

JULY 14, 2010

[ALTAMAS KABIR, CYRIAC JOSEPH AND H.L. DATTU, JJ.]

RULES TO REGULATE PROCEEDINGS FOR CONTEMPT OF THE SUPREME COURT, 1975:

rr. 3(a) and (c) – Contempt proceedings – Maintainability of – Application by amicus curaie before the Bench presided over by the Chief Justice of India, drawing the attention of the Court to certain statements reported in a magazine alleging corruption in judiciary, and, in particular, higher judiciary, and also making serious imputation against a sitting Judge of the Court – Directions given to issue notice and to post the matter before a three-Judge Bench – Plea that the order issuing notice being neither on suo motu cognizance taken by the Court nor on a petition made by either of the persons mentioned in r.3(b) but, the petition having been made by amicus curaie under r.3(c) was not maintainable – Held: Merely because the information regarding the alleged contemptuous statements was furnished to the Court by the Amicus Curiae, the proceedings cannot lose its nature or character as suo motu proceedings – Primarily, certain information was brought to the notice of the Chief Justice of India on which action was taken – Thus, notwithstanding the prayer in the application made by the Amicus Curiae, the Chief Justice of India took cognizance and directed notice to issue thereupon – The issues involved in these proceedings have far greater ramifications and impact on the administration of justice and the justice delivery system and

the credibility of the Supreme Court in the eyes of the general public than what was under consideration in either Duda's case or Bal Thackrey's case** – Even though suo motu cognizance was taken in this case, this is one of those rare cases where, even if the cognizance is deemed to have been taken in terms of r. 3 (c) of the Rules, without the consent of the Attorney General or the Solicitor General, the proceedings must be held to be maintainable – Thus, on prima facie satisfaction that there were sufficient grounds for taking action on its own motion, the Court initiated suo motu action by directing issue of notice to the respondents – Therefore, the instant contempt proceeding was initiated by the Court on its own motion and it is neither covered by clauses (a), (b) and (c) of sub-s. (1) of s.15 of the Contempt of Courts Act, 1971 nor by clauses (b) and (c) of r. 3 of the Rules, but is covered by clause (a) of r. 3 of the Rules – The proceedings are maintainable – Contempt of Courts Act, 1971 – ss. 15 and 23 – Constitution of India, 1950 – Articles 129 and 145.*

P.N. Duda vs. P. Shiv Shanker & Ors.* **(1988) 3 SCC 167; ***Bal Thackrey vs. Harish Pimpalkhute & Ors.* **(2005) 1 SCC 254, referred to.**

Case Law Reference:

(1988) 3 SCC 167	**referred to**	**para 8**
(2005) 1 SCC 254	**referred to**	**para 9**

CRIMINAL ORIGINAL JURISDICTION CONTEMPT PETITION (CRL.) No. 10 of 2009.

IN

I.A. No. 1324, 1474 & 2134

IN

WRIT PETITION (C) No. 202 of 1995.

Harish N. Salve, (A.C.), Ram Jethamalani, Shanti Bhushan, A.D.N. Rao, Meenakshi Grover, Kamini Jaiswal, Divyesh Pratap Singh, P.R. Mala, Saurabh Ajay Gupta, Pranav Diesh, Mazag Andrabi, Mayank Mishra, Abhishek Sood, Vivek Bishnoi, Rohit Kumar Singh for the appearing parties.

The order of the Court was delivered by

O R D E R

ALTAMAS KABIR, J. 1. During the course of hearing of certain Interlocutory Applications in Writ Petition (C) No.202 of 1995, an application was filed by the Amicus Curiae, Mr. Harish N. Salve, learned Senior Advocate, drawing the attention of this Court to certain statements made by Respondent No.1, Shri Prashant Bhushan, Senior Advocate, which was reported in Tehelka magazine, of which Shri Tarun J. Tejpal, the Respondent No.2, was the Editor-in-Chief. The learned Amicus Curiae drew the attention of the Court to certain statements which had been made by the Respondent No.1 in an interview given to Ms. Shoma Chaudhury, wherein various statements were made alleging corruption in the judiciary and, in particular, the higher judiciary, without any material in support thereof. In the interview he went on to say that although he did not have any proof for his allegations, half of the last 16 Chief Justices were corrupt. He also made a serious imputation against the Hon'ble the Chief Justice of India, Justice S.H. Kapadia, as His Lordship then was, alleging misdemeanor with regard to the hearing of a matter involving a Company known as Sterlite, in which Justice Kapadia had certain shares, deliberately omitting to mention that the said fact had been made known to the Counsel appearing in the matter, who had categorically stated that they had no objection whatsoever to the matter being heard by His Lordship.

2. On 6th November, 2009, when the said facts were placed before the Bench presided over by Hon'ble the Chief

Justice, K.G. Balakrishnan, as His Lordship then was, in which Justice Kapadia was also a member, directions were given to issue notice and to post the matter before a three Judge Bench of which Justice Kapadia was not a member. It should, however, be indicated that Justice Kapadia was not a party to the aforesaid order that was passed. The matter was thereafter placed before us on 19.01.2010 for consideration. On the said date, we requested Mr. Harish N. Salve, learned Senior Advocate, to continue to assist the Court as Amicus Curiae in the matter which was directed to be listed for further consideration as to whether on the basis of the prayers made in the application, this Court should take *suo motu* cognizance of the alleged contempt said to have been committed by the respondents in the application which was numbered as Contempt Petition (Crl.) No.10 of 2009.

3. The matter was, thereafter, heard at length by us on the question of maintainability of the contempt proceedings and also on the question as to whether this Court should take *suo motu* cognizance and proceed accordingly.

4. Mr. Ram Jethmalani, learned Senior Advocate appearing for the Respondent No.1, Mr. Prashant Bhushan, Advocate, submitted that the contempt proceeding was not maintainable not only on account of the provisions of Section 15 of the Contempt of Courts Act, 1971, but also in view of the 1975 Supreme Court Rules regarding proceedings for Contempt. He submitted that the report published in Issue No.35 of Volume 6 of Tehelka magazine dated 5th September, 2009, which comprised the contents of the interview given by the Respondent No.1 to the Tehelka magazine, had been placed before the Court on 6th November, 2009 and upon hearing the counsel present, the Court directed the matter to be taken on board and directed notice to issue.

5. Mr. Jethmalani submitted that in relation to matters involving contempt of the Supreme Court, Rules have been framed by the Supreme Court itself under powers vested in it

under Section 23 of the Contempt of Courts Act, 1971, read with Article 145 of the Constitution of India. The said Rules described as the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975, laid down the procedure to be followed in matters relating to taking of cognizance of criminal contempt of the Supreme Court under Section 15 of the Contempt of Courts Act, 1971. Mr. Jethmalani submitted that Rule 3 of the aforesaid Rules enables the Court to take action in a case of contempt other than the contempt committed in the face of the Court and provides as follows :

> "3. In case of contempt other than the contempt referred to in rule 2, the Court may take action: -
>
> (a) suo motu, or
>
> (b) on a petition made by Attorney General, or Solicitor General, or
>
> (c) on a petition made by any person, and in the case of a criminal contempt with the consent in writing of the Attorney General or the Solicitor General."

6. Mr. Jethmalani submitted that the order passed on 6th November, 2009 was not on *suo motu* cognizance taken by this Court, nor on a petition made by the Attorney General for India or Solicitor General of India and must, therefore, have been made under Rule 3(c) on a petition made by the Amicus Curiae, Mr. Harish N. Salve, Senior Advocate, in which case, the same ought not to have been entertained without the consent in writing of the Attorney General or Solicitor General. Mr. Jethmalani submitted that in that view of the matter, the contempt proceedings were without jurisdiction and could not be proceeded with.

7. Mr. Jethmalani also urged that even Rule 6 of the

aforesaid Rules had not been followed, as notices have not been issued to the respondents in Form 1, as prescribed and the proceedings were, therefore, liable to be discontinued on such ground as well.

8. In support of his aforesaid submissions, Mr. Jethmalani referred to and relied upon the decision of this Court in *P.N. Duda vs. P. Shiv Shanker & Ors.* [(1988) 3 SCC 167], in which the provisions of Section 15(1)(a) and (b) of the Contempt of Courts Act, 1971, read with Explanation (a) and Rule 3(a), (b) and (c) of the Contempt of Supreme Court Rules, 1975, had been considered in paragraphs 53 and 54 of the judgment. It was pointed out that a direction had been given by this Court that if any information was lodged even in the form of a petition inviting this Court to take action under the Contempt of Courts Act or Article 215 of the Constitution, where the informant is not one of the persons named in Section 15 of the said Act, it should not be styled as a petition and should not be placed for admission on the judicial side. On the other hand, such a petition was required to be placed before the Chief Justice for orders in Chambers and the Chief Justice could decide, either by himself or in consultation with the other judges of the Court, whether to take any cognizance of the information. Mr. Jethmalani submitted that since, despite the aforesaid direction, the application filed by the Amicus Curiae had been placed before the Court in its judicial side, the same was not maintainable on such score as well and the proceedings were liable to be discontinued on such ground also.

9. Mr. Jethmalani also referred to the decision of this Court in *Bal Thackrey vs. Harish Pimpalkhute & Ors.* [(2005) 1 SCC 254], wherein in the absence of the consent of the Advocate General in respect of a contempt petition filed by a private party under Section 15 of the Contempt of Courts Act, without a prayer for taking *suo motu* action of contempt, was held to be not maintainable.

10. Mr. Jethmalani urged that the power vested in the High Courts and the Supreme Court under the Contempt of Courts Act, 1971, was a regulatory measure imposing a fetter on a citizen's fundamental right to freedom of speech and would have to be invoked and exercised with utmost caution so as not to infringe upon such fundamental right. Any deviation from the prescribed Rules should not be accepted or condoned lightly and must be deemed to be fatal to the proceedings taken to initiate action for contempt.

11. Mr. Shanti Bhushan, learned Senior Advocate, who appeared for Respondent No.2, while reiterating the submissions made by Mr. Ram Jethmalani, laid special stress on the decision in *Duda's* case (supra) and reiterated the directions given in such case to the effect that the application made by the Amicus Curiae could have been placed only before the Chief Justice in Chambers on the administrative side and not on the judicial side. Mr. Shanti Bhushan submitted that in matters such as this, the reputation of the Court had to be considered and in view of the deviation from the normal procedure, which was meant to be strictly adhered to, the contempt proceedings and notice issued on the aforesaid application, were liable to be dropped.

12. We have given our careful consideration to the submissions made by Mr. Jethmalani and Mr. Shanti Bhushan, learned Senior Advocates, regarding the maintainability of the contempt proceeding, but we are not inclined to accept the same.

13. The learned Amicus Curiae, Mr. Harish Salve, filed an application in an ongoing proceeding to bring to the knowledge of the Hon'ble Chief Justice of India certain statements made by the Respondent No.1 in an interview given to the Tehelka magazine deliberately aimed at tarnishing the image of the judiciary as a whole, and, in particular, a sitting Judge of the Supreme Court, in the eyes of the general public without any

foundation or basis therefore. By publishing the said interview, the Respondent No.2 was also responsible for lowering the dignity of this Court in the eyes of all stake holders in the justice delivery system. Prima facie, a case for issuance of notice having been made out, the Hon'ble Chief Justice of India directed issuance of notice to the Respondents to show cause in regard to the allegations contained in the application filed by the learned Amicus Curiae. The error committed by the Registry of the Supreme Court in placing the matter on the judicial side instead of placing the same before the Hon'ble Chief Justice of India on the administrative side, is an administrative lapse which does not reduce the gravity of the allegations. Even in *Duda's* case (supra) and more explicitly in *Bal Thackrey's* case, it has been indicated by this Court that it could have taken *suo motu* cognizance, had the petitioners prayed for it, even without the consent of the Attorney General, but that such a recourse should be confined to rare occasions only.

14. The matter may require further consideration, but we are not inclined to hold that the contempt proceedings are not maintainable for the above-mentioned reasons. Primarily, certain information was brought to the notice of the Chief Justice of India on which action was taken. In other words, notwithstanding the prayer in the application made by the learned Amicus Curiae, the Chief Justice of India took cognizance and directed notice to issue thereupon. The issues involved in these proceedings have far greater ramifications and impact on the administration of justice and the justice delivery system and the credibility of the Supreme Court in the eyes of the general public than what was under consideration in either *Duda's* case or *Bal Thackrey's* case (supra). In our view, even though *suo motu* cognizance was taken in this case, this is one of those rare cases where, even if the cognizance is deemed to have been taken in terms of Rule 3 (c) of the Rules to Regulate Proceedings for Contempt of the Supreme

Court, 1975, without the consent of the Attorney General or the Solicitor General, the proceedings must be held to be maintainable.

15. Thus, on *prima facie* satisfaction that there were sufficient grounds for taking action on its own motion, the Court initiated *suo motu* action by directing issue of notice to the Respondents. Hence, the present contempt proceeding was initiated by the Court on its own motion and it is not covered by clauses (a), (b) and (c) of sub-section (1) of Section 15 of the Contempt of courts Act, 1971 or clauses (b) and (c) of Rule 3 of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975. On the other hand, the present proceeding is covered by clause (a) of rule 3 of the said Rules. Merely because the information regarding the allegedly contemptuous statements made by Respondent No.1 and published by Respondent No.2 was furnished to the Court by the learned Amicus Curiae, the proceeding cannot lose its nature or character as a *suo motu* proceeding. The learned Amicus Curiae was entitled to place the information in his possession before the court and request the court to take action. The petition filed by him constituted nothing more than a mode of laying the relevant information before the court for such action as the court may deem fit. No proceedings can commence until and unless the court considers the information before it and decides to initiate proceedings. If the court considers the information placed before it and initiates proceedings by directing notice to issue to the alleged contemnors the action taken comes within the ambit of Rule 3(a) of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975.

16. Hence, the objections raised by the Respondents against the maintainability of the present proceedings are without any basis.

17. We, therefore, hold these proceedings to be

maintainable and direct that the matter be placed for hearing on merits. The respondents will be entitled to file further affidavits in the matter within eight weeks from date. Thereafter, notwithstanding the provisions of Rule 9 of the 1975 Rules, let the matter be placed for hearing on merits on the available papers and affidavits on 10th November, 2010.

R.P. Contempt Petition Adjourned.

UNION OF INDIA AND OTHERS
V.
MISS PRITILATA NANDA
(Civil Appeal No. 5646 of 2010)

JULY 16, 2010

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

SERVICE LAW

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959:

s.4 – Appointment – Vacancies to be notified to Employment Exchanges – A handicapped candidate registered in Employment Exchange, though selected, yet denied appointment stating that she did not get her name sponsored by the Employment Exchange – HELD: The condition embodied in the advertisement that the candidate should get his/her name sponsored by the employment exchange cannot be equated with a mandatory provision incorporated in a statute, the violation of which may visit the person concerned with penal consequence – Section 4 makes it clear that even though the employer is required to notify the vacancies to the employment exchanges, it is not obliged to recruit only those who are sponsored by the employment exchanges – The authorities concerned committed grave illegality by denying appointment to the claimant only on the ground that she did not get her name sponsored by an employment exchange – It was neither the pleaded case of the authorities nor any evidence has been produced by them to prove that the notification/advertisement was sent to all the employment exchanges including the special employment exchanges in the State of Orissa – By denying appointment to the claimant, despite her selection and placement in the merit list, the employer violated her right

to equality in the matter of employment guaranteed under Article 16 of the Constitution – Constitution of India, 1950 – Article 16.

SERVICE LAW

Backwages and seniority – Appointment illegally denied to a handicapped candidate – High Court directing appointment of claimant from the date the candidate below her in merit list was appointed, with full back wages and seniority – Held: While the High Court was fully justified in directing the employers to appoint the claimant from the date the persons lower in merit were appointed, but, the direction given for payment of full salary with retrospective effect cannot be approved – High Court should have directed the employers to notionally fix the pay of the claimant with effect from the date the person placed below her in the merit list was appointed and give her all monetary benefits with effect from that date – The seniority of the claimant shall be fixed in accordance with her position in the merit list – If during the intervening period, any person junior to the claimant has been promoted on the next higher post, then her candidature shall also be considered for promotion and on being found suitable, she shall be promoted with effect from the date any of her junior was promoted, with all consequential benefits – Since the claimant has been deprived of her rights for almost 21 years, the employers are directed to pay her cost of Rs.3,00,000/- – Costs.

Union of India v. N. Hargopal **1987 (2) SCR 911=(1987) 3 SCC 308;** *Excise Superintendent, Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao and others* **1996 (5) Suppl. SCR 73=(1996) 6 SCC 216;** *Susanta Kumar Kar v. Registrar (Judicial), Orissa High Court, Cuttack* **83(1997) CLT 335, relied on.**

Jacob M. Puthuparambil and others v. Kerala Water

Authority and others **1990 (1) Suppl. SCR 562=(1991) 1 SCC 28, referred to.**

Case Law Reference:

1990 (1) Suppl. SCR 562	**referred to**	**para 5**
1996 (5) Suppl. SCR 73	**relied on**	**para 10**
83(1997) CLT 335	**relied on**	**para 10**
1987 (2) SCR 911	**relied on**	**para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5646 of 2010.

From the Judgment & Order dated 05.08.2008 of the High Court of Orissa at Cuttack in Original Jurisdiction Case No. 9958 of 2001.

Mohan Jain, D.K. Thakur, Rohini Mukherjee, Subhash Kaushik, A.K. Sharma, Sushma Suri for the Appellants

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. The only question which arises for consideration in this appeal filed by the Union of India and four functionaries of South Eastern Railway against the order of the Division Bench of Orissa High Court is whether respondent – Miss Pritilata Nanda, who is physically handicapped, could be denied appointment on Class III post despite her selection by the competent authority only on the ground that she did not get her name sponsored by an employment exchange.

3. Since the inception of mankind, many lacs have suffered from different types of physical handicaps (today about 600 million people suffer from such handicaps), but many of them

overcame all kinds of handicaps and achieved distinctions in various fields. Sarah Bernhardt – French actress was disabled by a knee injury. Her leg was amputated in 1914 but she continued to work on stage until just before her death. Beethoven was deaf when he composed his 9th symphony. Winston Churchill, Walt Disney, Thomas Edison, Albert Einstein, Alexander Graham Bell, Nelson Rockefeller, George Washington and many others had learning disability. Stevie Wonder who was blinded during his childhood became world famous pianist and singer. Brail, who was a blind, had the distinction of inventing script for the blind. With the aid of brail script, a large number of physically handicapped (blind) made tremendous achievement in life. Dr. Hellen Keller who was blind became an international figure because despite her handicap, she discovered the world through her finger tips. Her achievements of difficult goals and her loving kindness made her life an inspiration for countless people all over the world. Expressing his admiration for Dr. Hellen Keller, Eleanor Roosevelt wrote “in her life and happiness in life, Miss Keller has taught an unforgettable lesson to the rest of us who would not have had such difficulties to overcome. Ralph Barton Perry in his introduction to Dr. Keller’s book ‘The Story of My Life’ wrote “it is true that Hellen Keller is handicapped as indeed, who is not but that which distinguishes her is not her handicap but the extent to which she has overcome it and even profited by it. She calls for sympathy and understanding and not pity. No one can know her or read her without feeling admiration and gratitude. Soordas and Milton, both of whom were blind made poetry great by their brilliance and richness of thoughts and language. Edison, a great scientist and inventor was deaf. Byron, a great poet of England and Taimoor Leng, Mangolian warrior were lame. Maharaja Ranjit Singh, a great warrior and administrator was handicapped in eye sight. Mr. Mukat Behari Lal, a renowned and eminent advocate of the country, who became blind at a young age acquired phenomenal memory and argued cases after cases with extraordinary brilliance. He also remained member of Parliament for two decades and did

not face any difficulty in discharging his role in that capacity.

4. The framers of the Constitution recognized the necessity of providing assistance to the physically challenged by making it obligatory for the State, within the limits of its economic capacity and development, to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. (Article 41).

5. In *Jacob M. Puthuparambil and others v. Kerala Water Authority and others* (1991) 1 SCC 28, this Court highlighted the importance of both, Part III and Part IV of the Constitution in the following words:

> "The Preamble of our Constitution obligates the State to secure to all its citizens social and economic justice, besides political justice. By the Forty-second Amendment, the Preamble of the Constitution was amended to say that ours will be a socialistic democracy. In furtherance of these promises certain fundamental rights were engrafted in Part III of the Constitution. The Constitution guarantees 'equality', abhors discrimination, prohibits and penalises forced labour in any form whatsoever and extends protection against exploitation of labour including child labour. After extending these guarantees, amongst others, the Constitution makers proceeded to chart out the course for the governance of the country in Part IV of the Constitution entitled 'Directive Principles of State Policy'. These principles reflect the hopes and aspirations of the people. Although the provisions of this part are not enforceable by any court, the principles laid down therein are nevertheless fundamental in the governance of the country and the State is under an obligation to apply them in making laws. The principles laid down therein, therefore, define the objectives and goals which the State must endeavour to achieve over a period of time. Therefore, whenever the State is required to make laws it must do so consistently

> with these principles with a view to securing social and economic freedom so essential for the establishment of an egalitarian society. This part, therefore, mandates that the State shall strive to promote the welfare of the people by minimising the inequalities in income and eliminating inequalities in status, facilities and opportunities; by directing its policy towards securing, amongst others, the distribution of the material resources of the community to subserve the common good; by so operating the economic system as not to result in concentration of wealth; and by making effective provision for securing the right to work as also to public assistance in cases of unemployment, albeit within the limits of its economic capacities. There are certain other provisions which enjoin on the State certain duties, e.g. securing to all workers work, a living wage, just and humane conditions of work, a decent standard of life, participation in management, etc. which are aimed at improving the lot of the working classes. Thus the Preamble promises socio-economic justice, the fundamental rights confer certain justiciable socio-economic rights and the Directive Principles fix the socio-economic goals which the State must strive to attain. These three together constitute the core and conscience of the Constitution."

6. In last about six decades, the Parliament and State Legislatures have enacted several laws for giving effect to the provisions contained in Part IV of the Constitution but implementation of these legislations has been extremely tardy and intended beneficiaries of such legislations have to struggle hard and, at times, seek intervention of the Court for getting their dues.

7. In one of her lectures, Dr. Hellen Keller said: Science may have found a cure for most evils; but it has found no remedy for the worst of them all – the apathy of human beings. This appeal is one of many cases illustrative of lack of sensitivity

on the part of those entrusted with the task of doing justice on the administrative side which is sine qua non for good governance. The respondent, who suffers from paralysis of lower limbs, has become a victim of constitutionally flawed approach adopted by the officers of South Eastern Railway and has been deprived of her legitimate right to be appointed on a Class III post. The respondent appears to have become so frustrated that even though she succeeded in convincing the High Court to issue a direction to the competent authority to appoint her on a Class III post with retrospective effect, she has not thought it proper to appear and contest this appeal filed against order dated 5.8.2008 passed by the Division Bench of Orissa High Court in O.J.C. No.9958/2001.

8. In response to notification / advertisement dated 31.1.1987 issued by the office of Railway Divisional Manager, South Eastern Railway, Khurda Road, the respondent applied for appointment as Class III employee. At the relevant time, she possessed the qualification of B.A. (Economics with Hons.) and was registered with Employment Exchange, Pun with registration No.CW/750/87 (Code No.XOI/30).

9. The competent authority entertained the respondent's application and allowed her to appear in the written test held on 2.7.1989. On being declared successful in the written test, the respondent was called for viva voce test. She was finally selected and her name was placed at serial No. 11 in the merit list. Notwithstanding this, she was not appointed against one of the advertised posts and those placed at Sl. Nos.12 and 13 were offered appointment. The respondent represented her grievance before the higher authorities of South Eastern Railway, but without success. She then filed O.A. No. 112 of 1996 in Cuttack Bench of the Central Administrative Tribunal (for short, 'the Tribunal'). The Tribunal passed an interim order and made it clear that any future appointment of physically handicapped candidate will be subject to the result of the O.A. During the pendency of the case, the respondent's father was

informed by General Manager, South Eastern Railway, Caluctta that his daughter's case would be considered only if the O.A. is withdrawn. Thereupon, the respondent withdrew O.A. No. 112 of 1996. However, her candidature was not considered necessitating filing of O.A. No. 198 of 1997 in which she prayed for issue of a direction to the concerned authorities of South Eastern Railway to appoint her on a class III post. In the counter filed by the appellants herein, it was pleaded that even though the respondent had been selected, she was not offered appointment because her candidature had not been sponsored by any special employment exchange or any ordinary employment exchange.

10. By an order dated 3.5.2001, the Tribunal dismissed O.A. No.198/1997 by observing that respondent's candidature was not sponsored by any employment exchange. The Tribunal distinguished the judgments of this Court in *Excise Superintendent, Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao and others* (1996) 6 SCC 216 and of the Orissa High Court in *Susanta Kumar Kar v. Registrar (Judicial), Orissa High Court, Cuttack,* 83(1997) CLT 335 by making the following observations:

> "In support of his contention the learned counsel for the petitioner has relied on the decision of the Hon'ble High Court of Orissa in the case of *Susanta Kumar Kar vs. Registrar (Judicial), Orissa High Court, Cuttack,* 83(1997) CLT 335. In that case, going by the decision of the Hon'ble Supreme Court ion the case of *Excise Superintendent, Malkapatnam, Krishna District, Andhra Pradesh vs. KBN Viweshwara Rao and others,* 19965 (7) SCC 201, the Hon'ble High Court have held that for the post of Junior Assistant in the High Court of Orissa, compulsory sponsoring arrangement by employment exchange, if insisted upon, affects interests of those candidates who have not been able to register their names or are awaiting to be so registered, and therefore, the opposite parties

were directed to consider the cases of those candidates who have applied directly to the High Court. IN the instant case, the respondents in their counter have stated that applications were invited in 1987 and written test held on 2.7.1989 and viva voce was held on 28.8.1989 and 6.11.1989. Thus, the selection process in this was undertaken much before the decision of the Hon'ble Supreme Court and therefore the law as laid down by the Hon'ble Supreme Court in the above case is not applicable to the present case. We accept the above stand of the respondents."

11. The respondent challenged the aforesaid order in O.J.C. No.9958/2001. The Division Bench of the High Court referred to the pleadings of the parties and observed:

"In view of the aforesaid stand taken by the Railway authority, the averments made by the petitioner remain uncontroverted and are affirmed. The recruitment process started in the year 1987 through an advertisement and thereafter, written test and viva voce test were held in the year 1989 and the select list of candidates was published on 14.1.1992. It is indeed necessary to note the very sorry state of affairs of the manner in which the authorities concerned are dealing with the life and livelihood of common citizens. It needs to be reiterated that whereas physical handicapped candidates are required to be approached with a more compassionate manner, the authorities seem to have acted in a callous and heartless manner.

Once the petitioner's application was accepted by the authorities and she was allowed to appear in the written and viva voce tests and after name find mention at serial No.11 of the merit list, it was no longer open to the authorities concerned to raise any question relating to petitioner's application for the purpose of dis-entitling her from the benefit of issuing her with an appointment letter.

We consider it to be a gross abuse of the statutory power. In the case at hand, the plight of the petitioner is writ large in the averments contained in the writ application and accompanying documents and unfortunately, the utter callous attitude of the authorities are writ large in the counter affidavit filed on behalf of Opp. Party No.5. It is indeed unfortunate that a physically handicapped female candidate who had applied in the year 1989 and more than 20 years have lapsed by now, has been denied appointment by the Railway authorities which is none else, but the Union of India, which is supposed to be an ideal employer."

12. The Division Bench then referred to the two judgments on which reliance was placed by the respondent and observed:

"It is reiterated herein that once the Court has held that compulsory sponsoring arrangement by Employment Exchange, if insisted upon, affects interest of those candidates who have not been able to register their names or are awaiting to be so registered, the same principle is final and binding on all courts and Judicial Tribunals and would apply fully to any pending case. We are of the view that the Tribunal, in the present case has approached the subject in pedantic manner by treating the aforesaid judgment has only prospective operation even though the challenge was pending before it even after the judgments were pronounced both by the Hon'ble Supreme Court and the High Court. It is averred by the petitioner and not denied by the Opp. Parties that the petitioner had registered her name in the Employment Exchange, Puri and had been granted a Registration number. Apart from it, all necessary certificates in support of her being a handicapped candidate has been appended to her application along with her certificates of educational qualification.

We are of the view that the petitioner satisfied all

requirements of the advertisement inviting applications by the Railways and after accepting her application and ultimately preparing a select list which contained her name, not issuing appointment letter to her amounts to travesty of justice."

13. The Division Bench finally allowed the writ petition in the following terms:

"In view of the discussions made herein above, the writ application is allowed and the order impugned under Annexure-1 is quashed and we direct Opp. Parties 4 and 5 to issue the petitioner with necessary letter of appointment and such appointment shall be given effect to from the date on which her juniors have been given appointment. We further direct that the petitioner shall also be entitled to full back wages and seniority. The letter of appointment be issued to the petitioner within a period of 30 (thirty) days from the date of this judgment and all arrears be computed and paid to the petitioner within a period of six months from today."

14. Shri Mohan Jain, learned Additional Solicitor General referred to the advertisement issued by the office of Divisional Railway Manager to show that the names of the candidates were required to be sponsored by any special or ordinary employment exchange and argued that the appellants rightly refused to appoint the respondent because her name had not been sponsored by the employment exchange. Learned Additional Solicitor General further argued that even though the application of the respondent was entertained without insisting on sponsoring her name by the employment exchange and her name was included in the merit list, she did not acquire a to be appointed against the advertised post and the High Court committed serious error by ordaining her appointment with retrospective effect along with monetary benefits.

15. In our opinion, there is no merit in the arguments of the

learned Additional Solicitor General. In the first place, we consider it necessary to observe that the condition embodied in the advertisement that the candidate should get his/her name sponsored by any special employment exchange or any ordinary employment exchange cannot be equated with a mandatory provision incorporated in a statute, the violation of which may visit the concerned person with penal consequence. The requirement of notifying the vacancies to the employment exchange is embodied in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 (for short, 'the 1959 Act'), but there is nothing in the Act which obligates the employer to appoint only those who are sponsored by the employment exchange. Section 4 of the 1959 Act, which provides for notification of vacancies to employment exchanges reads as under:

"4(1) After the commencement of this Act in any State or area thereof, the employer in every establishment in public sector in that State or area shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed.

(2) The appropriate government may, by notification in the Official Gazette, require that from such date as may be specified in the notification, the employer in every establishment in private sector or every establishment pertaining to any class or category of establishments in private sector shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed, and the employer shall thereupon comply with such requisition.

(3) The manner in which the vacancies referred to in sub-section (1) or sub-section (2) shall be notified of the employment exchanges and the particulars of employments in which such vacancies have occurred or are about to

occur shall be such as may be prescribed.

(4) Nothing in sub-sections (1) and (2) shall be deemed to impose any obligation upon any employer to recruit any person through the employment exchanges to fill any vacancy merely because that vacancy has been notified under any of those sub-sections."

16. A reading of the plain language of Section 4 makes it clear that even though the employer is required to notify the vacancies to the employment exchanges, it is not obliged to recruit only those who are sponsored by the employment exchanges. In *Union of India v. N. Hargopal* (1987) 3 SCC 308, this Court examined the scheme of the 1959 Act and observed:

"*It is evident that there is no provision in the Act which obliges an employer to make appointments through the agency of the Employment Exchanges. Far from it, Section 4(4) of the Act, on the other hand, makes it explicitly clear that the employer is under no obligation to recruit any person through the Employment Exchanges to fill in a vacancy merely because that vacancy has been notified under Section 4(1) or Section 4(2).* In the face of Section 4(4), we consider it utterly futile for the learned Additional Solicitor General to argue that the Act imposes any obligation on the employers apart from notifying the vacancies to the Employment Exchanges."

xxx xxx xxx xxx

"It is, therefore, clear that the object of the Act is not to restrict, but to enlarge the field of choice so that the employer may choose the best and the most efficient and to provide an opportunity to the worker to have his claim for appointment considered without the worker having to knock at every door for employment. *We are, therefore, firmly of the view that the Act does not oblige any*

employer to employ those persons only who have been sponsored by the Employment Exchanges."

(emphasis supplied)

17. In *K.B.N. Visweshwara Rao's* case, a three-Judge Bench of this Court considered a similar question, referred to an earlier judgment in *Union of India v. N. Hargopal* (supra) and observed:

"It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the employment exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority/ establishment to intimate the employment exchange, and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

18. By applying the ratio of the above noted judgments to the case in hand, we hold that the concerned authorities of the South Eastern Railway committed grave illegality by denying

appointment to the respondent only on the ground that she did not get her name sponsored by an employment exchange.

19. The issue deserves to be considered from another angle. It was neither the pleaded case of the appellants before the Tribunal and the High Court nor any evidence was produced by them to prove that notification/advertisement dated 31.1.1987 was sent to all the employment exchanges including the special employment exchanges in the State of Orissa. Before this Court also, no document has been produced to show that the advertisement was circulated to the employment exchanges in the State. In this backdrop, it is not possible to approve the stance of the appellants that the respondent was not appointed because she did not get her candidature sponsored by an employment exchange.

20. We also agree with the High Court that once the candidature of the respondent was accepted by the concerned authorities and she was allowed to participate in the process of selection i.e., written test and viva voce, it was not open to them to turn around and question her entitlement to be considered for appointment as per her placement in the merit list on the specious ground that her name had not been sponsored by the employment exchange.

21. In our considered view, by denying appointment to the respondent despite her selection and placement in the merit list, the appellants violated her right to equality in the matter of employment guaranteed under Article 16 of the Constitution.

22. However, there is a small aberration in the operative part of the impugned order. While the High Court was fully justified in directing the appellants to appoint the respondent from the date persons lower in merit were appointed, but it is not possible to confirm the direction given for payment of full salary with retrospective effect. In our view, the High Court should have directed the appellants to notionally fix the pay of the respondent with effect from the date person placed at Sl.

No.12 at the merit list was appointed and give her all monetary benefits with effect from that date.

23. In the result, the appeal is dismissed. However, the operative part of the impugned order is modified in the following terms:

(1) The concerned competent authority of the South Eastern Railway shall, within a period of two weeks from today, issue order appointing the respondent on a Class III post. The appointment of the respondent shall be made effective from the date person placed at Sl. Nos.12 in the merit list was appointed. The pay of the respondent shall be notionally fixed with effect from that date and she shall be given actual monetary benefits with effect from 5.9.2008 i.e., the date specified in the order passed by the High Court.

(2) The pay of the respondent shall also be fixed in the revised pay scales introduced from time to time and she be paid arrears within a period of four months.

(3) The seniority of the respondent among Class III employees shall be fixed by placing her below the person who was placed at Sl. No.10 in the merit list.

(4) If during the intervening period, any person junior to the respondent has been promoted on the next higher post, then her candidature shall also be considered for promotion and on being found suitable, she shall be promoted with effect from the date any of her junior was promoted and she be given all consequential benefits.

(5) The General Manager, South Eastern Railway is directed to ensure that the respondent is not victimised by being posted in a remote area.

(6) Since the respondent has been deprived of her rights for almost 21 years, we direct the appellants to pay her cost of Rs.3,00,000/-. The amount of cost shall be paid within 2 months from today.

24. The Divisional Railway Manager, South Eastern Railway, Khurda Road shall send compliance report to this Court on or before 22nd November, 2010. The Registry shall bring the report to the notice of the Court by listing the case on judicial side.

25. Copies of this order be sent to General Manager, South Eastern Railway, Garden Reach, Calcutta, Divisional Railway Manager (P), Khurda Road, Jatni, District Khurda and respondent, Miss Pritilata Nanda, D/o Mr. Nityananda Nanda, Nanda Nivas-II, Dutta Tola, Post Office/District – Puri, Orissa.

R.P. Matter Adjourned.

MAHANADI COAL FIELDS LTD. & ANR.
v.
MATHIAS ORAM & ORS.
(SLP (Civil) No. 6933 of 2007)

JULY 19, 2010

[AFTAB ALAM AND DR. B.S. CHAUHAN, JJ.]

Land Acquisition:

Acquisition of land in tribal areas – Resolving of socio-economic issues – Need for – Explained – HELD: In the instant case, the lands were taken in acquisition as far back as in the year 1987, but the land-owners were never paid any compensation for their lands – After more than 20 years of acquisition, de notification of lands proposed – It has been stated that even no steps were taken for determining the market value of the lands – At the instance of the Court, the Solicitor General of India framed a scheme through which the whole matter could be resolved and compensation be paid not only to writ petitioners-respondents but to all the land those whose lands were acquired – The scheme stated to have been agreed to by the Central Government and the company for which the lands were acquired – Counsel for the writ petitioners-respondents has given his express consent to the Scheme – The scheme approved by the Court with certain clarifications and modifications as stated in the order – Coal Bearing Areas (Acquisition and Development) Act, 1957 – ss. 4(1), 7, 9, 11 and 13 – Mines and Mineral (Development & Regulation) Act, 1957 – Indian Forest Act, 1927 – Forest Conservation Act, 1980 – Land Acquisition Act, 1894.

Words and Phrases:

'Grss Domestic Product' and 'Human Development Index' in Indian context—Need to maintain a balance—Discussed.

Constituent Assembly debate dated 25.11.1949—referred to.

Human Development Report 2009 (published by UNDP)—referred to.

CIVIL APPELLATE JURISDICTION : SLP (CIVIL) No. 6933 of 2007.

From the Judgment & Order dated 13.11.2006 of the High Court of Orissa in W.P. (C) No. 11463 of 2003.

Mahabeer Singh, Aishwarya Bhati, Rashid Khan, Karan Singh Bhati for the Petitioners.

Gopal Subramanium, Sol. General, Balaji Subramanian, J.R. Das, S. Mishra, P.P. Nayak for the Respondents.

The order of the Court was delivered by

O R D E R

AFTAB ALAM,J. 1. Speaking in the Constituent Assembly on November 25, 1949 Dr. B.R. Ambedkar, the chief architect of the Constitution of India made one of the most incisive remarks on it:

> "On the 26th of January 1950, India would be a democratic country in the sense that India from that day would have a government of the people, by the people and for the people. The same thought comes to my mind. What would happen to her democratic Constitution? Will she be able to maintain it or will she lose it again? This is the second thought that comes to my mind and makes me as anxious as the first…
>
> …On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up."
>
> What would have been Dr. Ambedkar's reaction to the facts of this case? This is one of the thoughts in our mind while dealing with the case.

2. Since independence India has indeed covered a long way on the path of development and economic growth. It continues to take long strides on that path. But how far have we been able to live down the fears expressed by Dr. Ambedkar about our democratic Constitution? How far have we been able to get rid of the contradictions in our life? This case raises these difficult questions.

3. We are anxious that India should develop and grow fast and become strong to take its rightful place in the comity of nations.

4. Development is reckoned in terms of investments in urban infrastructure, roads and highways, communication, technology, extraction and commercial exploitation of minerals, generation of power, production of steel and other essential metals and alloys. Creation of wealth is of utmost importance. Redemption lies in GDP (Gross Domestic product).

5. India does not lack material resources required for development. There are vast treasures of minerals lying buried deep inside its earth. But excavation of minerals from the

bosom of the earth and putting them to good industrial and commercial use require lots of initial investment and highly advanced technology. Those too are now available as blessings of globalization. The imperialist's formula of "philanthropy plus five percent" is the accepted norm. Public-Private Partnership (PPP) is the latest mantra. For some reasonable profits, companies and corporations, both Indian and multinational are willing and ready not only to do the mining for us but also to undertake the development of the region by providing schools, hospitals, and many similar amenities and facilities to the local population. Even the public sector undertakings are not lagging far behind in the race.

6. But there is one catch. There is also the involvement of the human factor. Most of the mineral wealth of India is not under uninhabited wasteland. It lies mostly under dense forests and areas inhabited by people who can claim to be the oldest dwellers of this ancient country. Any large scale mining, therefore, needs not only huge investments and application of highly developed technology but also en masse relocation of the people dwelling upon the land that needs to be mined or at any rate getting the land freed from its inhabitants, for whom it may be the only source of sustenance. But then we have the laws to handle such situations. There is the Mines and Minerals (Development & Regulation), Act 1957, the Indian Forest Act, 1927, the Forest Conservation Act, 1980, (in many States) laws restricting and regulating trade in forest produce and above all the Land Acquisition Act, 1894 and its clone the Coal Bearing Areas (Acquisition and Development) Act, 1957 that envisage compulsory acquisition of land by the government for any public purpose on payment of its market value (plus solatium for the compulsory nature of acquisition!) to the land holder. The law is based on the twin sound principles of the eminent domain of the sovereign and the largest good of the largest number.

7. Seen thus, the whole issue of development appears to be so simple, logical and commonsensical. And yet, to millions

of Indians, development is a dreadful and hateful word that is aimed at denying them even the source of their sustenance. It is cynically said that on the path of 'maldevelopment' almost every step that we take seems to give rise to insurgency and political extremism (which along with terrorism are supposed to be the three gravest threats to India's integrity and sovereignty).

8. The resistance with which the state's well meaning efforts at development and economic growth are met makes one to think about the reasons for such opposition to the state's endeavours for development. Why is the state's perception and vision of development at such great odds with the people it purports to develop? And why are their rights so dispensable? Why do India's GDP and HDI (Human Development Index, which is broadly used as measure of life expectancy, adult literacy and standard of living) present such vastly different pictures? With the GDP of $ 1.16Trillion (for 2008) Indian economy is twelfth largest in US Dollar terms and it is the second fastest growing economy in the world. But according to the Human Development Report 2009 (published by UNDP), the HDI for India is 0.612 (for 2007) which puts it at the 134th place among 182 countries. India has maintained the same HDI and rank since the previous year, and it continues to be categorized under "Medium Human Development".

9. The counter argument goes like this. It is very often the process of development that most starkly confirms the fears expressed by Dr. Ambedkar about our democracy. A blinkered vision of development, complete apathy towards those who are highly adversely affected by the development process and a cynical unconcern for the enforcement of the laws lead to a situation where the rights and benefits promised and guaranteed under the constitution hardly ever reach the most marginalized citizens.

10. This is not to say that the relevant laws are perfect and

very sympathetic towards the dispossessed. There are various studies that detail the impact of dispossession from their lands on tribal people. It is pointed out that even when laws relating to land acquisition and resettlement are implemented perfectly and comprehensively (and that happens rarely!), uncomfortable questions remain. For a people whose lives and livelihoods are intrinsically connected to the land, the economic and cultural shift to a market economy can be traumatic.

11. On many occasions laws are implemented only partially. The scheme of land acquisition often comes with assurances of schools, hospitals, roads, and employment. The initial promises, however, mostly remain illusory. The aims of income restoration and house resettlement prove to be very difficult. Noncompliance with even the basic regulations causes serious health problems for the local population and contamination of soil and water.

12. But there is yet another far worse scenario where even the most basic obligation under the law is not complied with and even the fig leaf of legality is dispensed with.

13. The case in question is a textbook example.

14. But before going into the facts of the case two other things need to be stated. This case comes from Orissa which is one of the seven states where a particularly violent group of political extremists, has been able to gain sufficient strength to pose a threat to Constitutional governance of the state. This group openly defies the democratic system of the country and is committed to overthrow the Constitution by brutal and murderous means. According to news paper reports, in the district of Sundergarh, where the acquired lands are situated, the extremist group looted 550 kilograms of explosives in April 2003 and in August 2009 blew up a railway station.

15. The other fact is that this is not an isolated case. We

have come across many such cases of land acquisition.

16. Now, to the facts of the case: Mahanadi Coalfields Ltd., the petitioner before this Court, is one of the subsidiaries of Coal India Ltd., the biggest coal producing organisation in the country and one of the 'Navratnas' among India's public sector undertakings. Mahanadi Coalfields Ltd. has filed this SLP against the judgment and order passed by Orissa High Court on November 13, 2006 in Writ Petition (Civil) No.11463 of 2003. By the impugned judgment the High Court directed the Central Government and the petitioner (respondent no.1 before the High Court) to "proceed forthwith in accordance with the provisions of the [Coal Bearing Areas (Acquisition and Development) Act, 1957] to determine the compensation payable to the land owners including the (writ) petitioners and make payment of the compensation as would be determined in accordance with law as expeditiously as possible, preferably within six months from the date of receipt of our order."

17. This order was passed in connection with lands of the writ petitioners (respondents 1 to 27 before this court) and others that were taken in acquisition as far back as in the year 1987.

18. The Central Government issued the preliminary notification under section 4(1) of the Coal Bearing Areas (Acquisition and Development) Act, 1957 Act on February 11, 1987, giving notice of its intention to prospect for coal in Revenue Village Gopalpur, District Sundergarh, Orissa. The notification also covered the lands of the respondents. This was followed by another notification under section 7(1) of the Act on July 27, 1987 giving notice of the Government's intention to acquire the notified lands. Finally, the declaration of acquisition under section 9 of the Act was made by the notification issued on July 10, 1989 as the result of which the notified lands, along with all rights therein, vested absolutely in the Central Government. On March 20, 1993, the Central Government

issued the notification under section 11 of the Act vesting the acquired land and all rights therein in the petitioner company, retrospectively, with effect from November 17, 1991. It is undeniable that the lands of the writ petitioners (respondents before this court) were covered by the notifications under sections 7, 9 and 11 of the Act. Nevertheless, the writ petitioners, and others whose lands were similarly acquired, were never paid any compensation for their lands. After a futile running from pillar to post for about fourteen years, the writ petitioners knocked the doors of the High court, claiming compensation for their lands. Before the High Court, the relevant facts as noted above, were all admitted. But it seems that the claim of the writ petitioners was over shadowed by the dispute between the coal company and the Central Government. The coal company took the stand that the lands of the writ petitioners, and some other lands, were not required by it and it proposed de-notification of those lands (This, after more than twenty years of acquisition!). On behalf of the Central Government, however, it was stated that the coal company's proposal for de-notification was rejected by order dated September 12, 2006. The High Court then referred to section 13(5) of the Act and pointed out that any person whose land is acquired under section 9 of the Act must be paid compensation after taking into consideration the factors enumerated under that sub-section of section 13. The High Court expressed its concern that the writ petitioners were not paid compensation for their lands taken away from them more than two decades ago and disposed of the writ petition with the direction to both the coal company and the Central Government, as noted above.

19. The Central Government, apparently, did not take much notice of the High Court order but the coal company brought the matter to this court. It seeks to challenge the High Court order on the plea that it has no liability to pay compensation for the lands acquired by the Central Government since they are of no use for the purpose of mining operations nor are they likely to be needed in the near future as per the

mining plan approved by the Central Government. Apart from this, the petitioner has taken some rather strange pleas. It is pleaded that the acquisition proceedings were still incomplete because no steps were taken for determining the market value of the lands and no compensation was paid to the land holders. If this is not adding insult to injury we do not know what else is! It is also alleged the lands are not in possession of the coal company and they are still in the possession of the land holders, including the writ petitioners. This last allegation is strongly denied by the writ petitioners.

20. The SLP remains pending in this Court for the last three years. Now, twenty three years have passed and the writ petitioners remain unpaid of the compensation for their lands. In the meanwhile some of them (respondents 5 and 24) are reported to be dead. It was in these circumstances that on January 9, 2010 we requested Mr. Gopal Subramanium, the Solicitor General for India, to assist the court on behalf of the Central Government. He immediately realised the gravity of the matter and the deep distress caused to the court by this case. He asked for some time to try to resolve the matter between the Central Government and the coal company at his own level and to ensure that the land holders whose lands were acquired are paid lawful compensation without any further delay. On the last date (May 13, 2010) he informed this Court that he had been able to make the Central Government and the coal company agree to a scheme through which the whole matter may be resolved and compensation may be paid not only to the writ petitioners but to all the land holders whose lands were acquired. The scheme proposed by Mr. Subramanium and agreed upon by the Central Government and the Coal Company is as follows:

> "1. The land in Village Gopalpur, District Sundergarh, Orissa stands acquired by the Central Government and ownership is vested with MCL, which will determine and pay compensation to the erstwhile landowners.

"2. In respect of vast portions of the acquired land (excluding the area where mining activities are being undertaken), actual physical possession was never taken. The State of Orissa and its officers are directed to assist MCL in taking actual physical possession of the acquired land.

"3. Since the matter pertains to an acquisition of 1987 i.e. more than two decades ago, the extent of actual physical possession needs to be re-ascertained, it is necessary that the genuine landowners, amount of compensation payable, status of possession, use to which the land has been put in the last two decades, is discovered. The entire land needs to be surveyed again.

"4. In accordance with the advice of the learned Solicitor General, a Claims Commission needs to be set up with representatives of the Central Government as well as MCL. It is submitted that the Claims Commission will consist of 3 Members:-

(a) A former Judge of the High Court of Orissa (Chairman);

(b) An officer who has held a post/office equivalent to the rank of Secretary to the Government of India;

(c) An officer to be nominated by Chairman, Coal India Ltd.

The Claims Commission will carry out the exercise referred to above and submit a report on the compensation payable and the persons to whom it should be paid, within a period six months.

"5. The above-said report will be submitted to the Central Government, and upon formal approval by the Central Government, MCL will make payment within a further period of two months.

"6. Some portions of the land have been determined to be unsuitable for the Petitioner having regard to physical features (mining being impossible, area being heavily populated, etc.). The Claims Commission will examine whether possession of such portions has been taken over by the Petitioner. It would be open to the Claims Commission to recommend de-notification/release of the said land from acquisition.

"7. In view of the special facts obtaining above, the Central Government may be permitted to de-notify the said land from the acquisition as a special case, since the land is not required and possession also was never taken.

"8. Even in the case of the de-notified land, suitable compensation, in appropriate cases, may have to be paid to the landowners. The Claims Commission may also give a report on this aspect of the matter.

"9. The learned Solicitor General has opined that such matters of uncertain acquisition or pending compensation claims lead to unnecessary social tensions and the Petitioner must act in a spirit of good governance. Upon examination of all the surrounding villages, in the light of the opinion of the learned Solicitor General, for the sake of uniformity as well as fairness, the above exercise would be carried out for the following villages as well:

i. Sardega

ii. Jhupurunga

iii. Ratansara

iv. Tikilipara

v. Siarmal

vi. Tumulia

vii. Karlikachhar

viii. Kulda

ix. Bankibahal

x. Balinga

xi. Garjanbahal

xii. Bangurkela

xiii. Kiripsira

xiv. Lalma R.F.

"It must be noted that in the case of Sardega and Tikilipara Villages, part-payment has already been made. Further, in the case of Bankibahal and Balinga Villages, full payment has already been made but possession has not been fully taken.

"10. The Petitioner and the Central Government shall assist in the establishment of the Commission including the provision of suitable infrastructure. The honorarium payable to the Commission may be determined by this Hon'ble Court.

"11. This Order is being passed with the agreement of all parties and in the peculiar facts and circumstances of this case. The said order shall not operate as a precedent."

21. The scheme proposed by Mr. Subramanium was shown to Mr. Janaranjan Das, counsel, appearing for the writ petitioners-respondents and he also gave his express consent to it. We, accordingly, approve the scheme but with certain clarifications and modifications as stated below.

22. We nominate Mr. Justice A.K. Parichha, a former

Judge of the High Court of Orissa as Chairman of the Commission. Mr. Solicitor General in consultation with the Secretary, Ministry of Coal, Government of India, shall nominate an officer who has held a post/office equivalent to the rank of Secretary to the Government of India as one of the members of the Commission within two weeks from today. Similarly, the Chairman, Coal India Ltd. shall nominate an officer as the other member of the Commission. Mr. Justice A.K. Parichha, shall be paid honorarium, equal to the monthly salary of a sitting High Court Judge and he shall be entitled to all other facilities as available to a sitting judge of the High Court. The officer nominated by Mr. Subramanium/Secretary, Ministry of Coal, Government of India, shall similarly be entitled to honorarium and other facilities available to a serving officer of his rank. All the expenses of the Commission shall be borne by Coal India Ltd. The Commission shall prepare its report as envisaged in the scheme, first in respect of the lands in village Gopalpur, District Sundergarh, Orissa, as soon as possible and in any event not later than four months from today. In case the Commission recommends de-notification/release of any portion of the lands earlier acquired, it would also determine the rate or the amount of compensation/mesne profit payable to the land holder. The Commission shall submit its report not to the Central Government but to this Court for approval and further directions. Any de-notification/release of the land would be only subject to further orders passed by this Court in light of the Commission's report. The Commission may proceed with the survey in relation to the acquired lands in other villages, as suggested in paragraph 9 of the scheme only after submitting its report in respect of village Gopalpur and subject to further orders by this court.

23. The officers of the State Government and the coal company shall extend full help and cooperation to the Commission in preparing the report and in the discharge of their duties in terms of the scheme.

24. We record our deep appreciation of Mr. Subramanium for sharing the feelings of the court and for his effort to resolve this matter. We may, however, remind him that his task is not over. It has only begun.

25. Put up on receipt of the Commission's report.

R.P. Matter Adjourned.

AUTOMOBILE PRODUCTS INDIA LTD.
v.
DAS JOHN PETER & ORS.
(Criminal Appeal No. 1304 of 2010)

JULY 20, 2010

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Constitution of India, 1950 – Article 142 – Inherent power of Supreme Court – Servant quarter attached to the company's flat given to respondent-employee by virtue of his service, with a condition to hand over the possession on retirement – Retirement in 1992 – Possession not handed over by respondent – An undertaking given in 2000 to handover peaceful possession within one month – However, possession still not given – Complaint filed by appellant-company under s.630 of Companies Act – Dismissed on technical ground by trial court – High Court upheld the order of trial court – On appeal, held: Courts below erred in dismissing the complaint on technical ground – There was manifest illegality in the impugned orders which resulted in palpable injustice to the company curable under Article 142 of the Constitution – It was incumbent on the respondent to honour the undertaking given in 2000 – Equity also not in favour of respondent as he showed adamant and dilatory attitude – More than 18 years passed since his retirement and he still remained in possession of the quarter – Respondent directed to vacate the quarter – Equity – Companies Act, 1956 – s.630 – Licence.

The appellant-company filed a complaint, *inter alia*, under Section 630 of the Companies Act, 1956 against accused-respondent no.1. The allegation in the complaint was that respondent no.1 was working as a caretaker in the appellant-company to look after the company's flat. Respondent no.1 was alloted a servant quarter near

garage belonging to the appellant-company by virtue of his service in the company. He retired from service of the appellant-company on 6.3.1992. However, he did not vacate the quarter and instead gave its possession to his daughter, accused-respondent no.2. A written undertaking was said to have been tendered by respondent no.1 on 5.1.2000 to the effect that he would vacate the quarter within one month thereof. However, he did not vacate the quarter. The complaint was thus filed by the company through the factory manager on the basis of the power of attorney executed by the company on 31.12.2001. The trial court dismissed the complaint on the ground that the power of attorney was a fictitious document. The High Court rejected the appellant's application for leave to appeal. Aggrieved, the company filed the appeal.

Allowing the appeal, the Court

HELD: 1. The Power of Attorney was executed on 31.12.2001, and was scribed on a stamp paper purchased on 18.4.2002. But it was notarised on 5.6.2002 and not on 5.6.2001 as was noted by the trial court. The Rubber stamp seal put by the notary clearly depicted it as 5.6.2002. The examination of the originals of the resolution dated 31.12.2001 as also Power of Attorney executed in favour of the factory manager lead to the conclusion that the Power of Attorney was genuine and it duly authorised the factory manager to file and prosecute the complaint against the accused. [Paras 18, 19] [771-F-H]

2.1. Admittedly, neither the trial court nor the High Court had gone into the merits of the matter. A reading of Section 630 of the Companies Act, 1956 makes it clear that a criminal complaint seeking possession of the servant quarter at the instance of company against the

accused was maintainable and cognizance thereof was rightly taken by the Magistrate but he committed a grave error in rejecting it on technical grounds, instead of deciding it on merits. [Paras 20, 23] [772-C; 773-E]

2.2. It was not disputed that the accused no.1 was appointed as a caretaker to look after the flat of the appellant/company. It was further not disputed that accused no. 1 had retired from the company w.e.f. 6.3.1992. At the time of entering into service, he had entered into agreement with the company on 22.9.1980, which specifically granted permission to the company to revoke the licence of the servant quarter at any time and to take the possession. On 5.1.2000, accused no.1 wrote a letter to the Chairman of the Company specifically and categorically agreeing to vacate the servant quarter by 31.1.2000. Thus, it was incumbent on his part to honour the same. However, he did not honour his own commitment rather defied it on various grounds. [Paras 21, 27] [772-D-F; 775-C]

3. The provisions of Article 142 of the Constitution cast a duty on the Court to do complete justice between the parties. It is clear from the impugned orders that there was manifest illegality in the same and resulted in palpable injustice to the appellant/company curable under Article 142 of the Constitution as the said powers are inherent on the Supreme Court as a guardian of the Constitution. No useful purpose would be served if the matter is remitted to the Magistrate for trial on merits. This would be so because equity also did not swing in favour of the accused, who displayed adamant and dilatory attitude. From the date of retirement of accused no. 1, more than 18 years have passed by and he has been using the servant quarter without having any right to do so. No further mercy or sympathy should be shown to

such an accused. Thus, the order passed by the Magistrate as also by the High Court cannot be sustained in law. The accused is granted time to vacate the servant quarter on or before 1.10.2010 and to hand over its peaceful and vacant possession to the appellant-company. [Paras 30-35] [775-G-H; 776-A-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1304 of 2010.

From the Judgment & Order dated 14.07.2008 of the High Court of Judicature at Bombay in Criminal Application No. 450 of 2007.

Altaf Ahmed, Ankit Swarup, K.K. Mani, P.J. Desai for the Appellant.

R.S. Hegde, Amit Wadhwa, P.P. Singh, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted.

2. Under the web of hypertechnicalities justice has taken a back seat as is projected in the order dated 22.11.2006, passed by Additional Chief Metropolitan Magistrate, Girgaum, Mumbai in Crl. Case No. 38/S/2005 filed by appellant herein against accused respondent No.1 and 2, whereby and whereunder the appellant's criminal complaint filed under Section 406 read with Section 34 of the Indian Penal Code [hereinafter referred to as "IPC"] and under Section 630 of the Companies Act, 1956 (hereinafter referred to as "the Act") was dismissed. Against the said order of dismissal, the appellant herein filed an application before the learned Single Judge of the High Court in Criminal Application No. 450 of 2007 seeking leave to file the appeal which was also dismissed on 14.7.2008, giving rise to filing of this appeal by the original complainant.

Unfortunately, the accused have also with vehemence supported hypertechnicalities adopted by the aforesaid two courts, to contend that no interference is called for in the light of the facts as found in the aforesaid two orders.

3. Facts shorn of unnecessary details are mentioned herein below:

4. Appellant is a Company (hereinafter shall be referred to as "the Company") duly registered under the Act and is carrying on business of manufacturing two and three wheelers' automobile products. Mr. V.S. Parthasarthy is the Factory Manager of the Appellant-Company and has been posted in Mumbai. A resolution has been passed by the Company on 31.12.2001 to authorise Mr. V.S. Parthasarathy, Factory Manager to represent the company and to sign, verify, execute and deliver all vakalatnamas, pleadings, complaints, affidavits, declarations, petitions, written statements, rejoinders, papers, deeds, receipts, assurances etc. in a court of law. On the same day, he has been duly authorised by virtue of the Power of Attorney executed in his favour by the Appellant Company to file and prosecute the aforesaid complaint.

5. On the complaint having been filed before the Additional Chief Metropolitan Magistrate, the same was registered. The allegation in the complaint is that company is having a flat situated at 17, Carmichael Road (behind Jaslok Hospital), Mumbai. One room near the garage (hereinafter shall be referred as the 'servant quarter') is also under the ownership of the company for being used by its servants. Even though, the complaint was filed under Section 406 / 34 of the IPC as also under Section 630 of the Act, but cognizance was taken by the trial court only under Section 630 of the Act.

6. Respondent No. 1 (accused No.1 herein) was working as a caretaker with the Company to look after the flat. It is not in dispute that he has retired from the service of the Company with effect from 6.3.1992. The servant quarter was allotted to

accused No. 1 by virtue of his service in the company. Obviously, after his attaining age of superannuation, he was supposed to have delivered its peaceful and vacant possession to the appellant/company. Instead of doing so, he gave its possession to his daughter, accused No.2, and shifted to Ambernath. As on date, it is accused No. 2, daughter of accused No.1, who is in actual physical possession of the said servant quarter.

7. It is pertinent to note that a written undertaking is said to have been tendered by respondent no.1 on 5.1.2000 to the effect that he will vacate the servant quarter within one month thereof.

8. Since despite serving several legal notices to the accused, they refused to hand over its peaceful vacant possession to the appellant, it was constrained to file the aforesaid complaint.

9. Shri V.S. Parthasarthy, appeared as PW-1, and deposed before the Court circumstances under which accused No.1 was handed over possession of the servant quarter, where he had worked as caretaker. After his retirement, despite promise made to the Company he has failed to vacate the servant quarter. His evidence has been dealt with extensively by the trial court but it is not required to be considered at this stage as Appellant's Criminal Complaint has been dismissed on technical ground.

10. Defence of the accused in short was that the complaint as filed by company through Mr. V.S. Parthasarthy is not maintainable inasmuch as the Power of Attorney dated 31.12.2001, said to have been executed in favour of Mr. V.S. Parthasarthy is a fictitious document. The services of accused No.1 were never terminated and even after retirement he came to be re-appointed. Thus, he has a right to continue in its possession. As regards his undertaking given to the Chairman of the Company on 5.1.2000, wherein he specifically agreed

to vacate the premises on or before 31.1.2000, he contended the same was not tendered voluntarily, meaning thereby the same was given under coercion, threat, undue influence, thus it was not binding.

11. Learned trial court critically examined the Power of Attorney and came to the conclusion that the same was executed on 31.12.2001, was notarised on 5.6.2001, and the stamp papers were purchased on 18.4.2002, which gives rise to suspicion with regard to genuineness and correctness of Power of Attorney. Ultimately, it held that the said Power of Attorney is a fictitious document. Thus, on the strength of it, complaint could not be filed. As regards resolution of the company passed on 31.12.2001 was concerned, it was held that complainant failed to file the same, while he was in the witness box. Admittedly, the company faced financial crisis and has since been closed with effect from 21.1.1993 under the orders of BIFR.

12. Ultimately, after appreciating oral and documentary evidence available on record, the following order came to be passed by Additional Chief Metropolitan Magistrate, Mumbai.

> "The accused No.1 Mr. Das John Peter and accused No.2 Ms. Grace Peter are hereby acquitted for the offence punishable u/s.630 of the Companies Act."
>
> Their bail bonds, if any, stands cancelled."

13. Feeling aggrieved thereof, the appellant filed an Application before the learned Single Judge of the High Court seeking leave to file appeal, against the order of acquittal of the accused. Unfortunately, the learned Single Judge did not examine the matter in proper perspective and fell into grave error, in refusing to grant leave and rejected the appellant's application, for prosecution of the accused under Section 630 of the Act.

14. Feeling aggrieved thereof, this appeal has been

preferred by the complainant company.

15. We have accordingly heard Mr. Altaf Ahmed learned Senior Counsel for the appellant, Mr. Sanjay Kharde for respondent No.1 and 2 and Ms. Asha Gopalan Nair, for respondent No. 3-State of Maharashtra at length. Perused the record.

16. At the outset, we inquired from learned counsel for the accused, whether he would be ready and willing to vacate the premises, provided reasonable and sufficient time is granted to them but learned counsel vehemently opposed any such suggestion and contended that the complaint has rightly been dismissed on technical grounds which went to the root of the matter, therefore no interference is called for.

17. With an intention to satisfy ourselves with regard to the correctness, genuineness and authenticity of the resolution dated 31.12.2001 passed by appellant company in favour of Mr. V.S. Parthasarthy and the Power of Attorney of the even date, we requested the appellant to produce the originals for our perusal. They have produced the same before us. We have critically and with microscopic eye examined the same. After doing so, we do not find either of the two documents can be termed as fictitious or manufactured documents so as to oust the appellant from the arena of justice.

18. No doubt, it is true that Power of Attorney was executed on 31.12.2001, but has been scribed on a stamp paper purchased on 18.4.2002. But it has been notarised on 5.6.2002 and not on 5.6.2001 as has been noted by the trial court. The Rubber stamp seal put by the notary clearly depicts it as 5.6.2002.

19. Thus, after going through the same, it leaves no shadow of doubt in our mind that the same are genuine and duly authorised Mr. V.S. Parthasarthy to file and prosecute the complaint against the accused. We had also passed on the

originals to the learned counsel for the respondent-accused to satisfy himself but still, after going through the same he persisted in his arguments tooth and nail that the date of Power Attorney in fact is 5.6.2001 and not 5.6.2002. However, we are unable to agree to the argument as advanced by the learned counsel for the accused as he is trying to stretch it beyond our comprehension.

20. Admittedly, neither the Trial Court nor the High Court have gone into the merits of the matter. Thus with an intention to do complete justice to the parties, we have heard the counsel for the parties at length and gone through the merits of this appeal.

21. It is not in dispute that accused No. 1 was appointed as a caretaker to look after the flat of the appellant/company at 'Kamal Mahal' Co-operative Housing Society Ltd., Carmichael Road, Bombay 400 026 owned and possessed by the Company. It is further not in dispute that accused No. 1 had retired from the company w.e.f. 6.3.1992. At the time of entering into service, respondent No. 1 had entered into agreement with the company on 22.9.1980, which specifically granted permission to the company to revoke the licence, of the servant quarter at any time and to take possession. It is further not in dispute that on 5.1.2000 accused No.1 wrote a letter to the Chairman of the Company specifically and categorically agreeing to vacate the servant quarter by 31.1.2000. However, he did not deem it fit and proper to honour his own commitment rather has defied it on various grounds. To appreciate the arguments as advanced by learned senior counsel Shri Altaf Ahmed for the appellant, it is necessary to examine the relevant provisions of the Act under which, the company's complaint was filed.

22. Section 630 of the Act reads as under:

"630. Penalty for wrongful withholding of property property.-
(1) If any officer or employee of a company.-

(a) wrongfully obtains possession of any property of a company; or

(b) having any such property in his possession, wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorised by this Act,

he shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine which may extend to ten thousand rupees.

(2) The Court trying the offence may also order such officer or employee to deliver up or refund, within a time to be fixed by the Court, any such property wrongfully obtained or wrongfully withheld or knowingly misapplied, or in default, to suffer imprisonment for a term which may extend to two years."

23. A reading of the aforesaid provision makes it clear that a criminal complaint seeking possession of the servant quarter at the instance of company against the accused was maintainable and in our opinion cognizance thereof was rightly taken by the Magistrate but committed a grave error in rejecting it on technical grounds, instead of deciding it on merits.

24. Learned counsel for appellant has also placed reliance on Section 621 of the Act, dealing with offences against the Act to be cognizable only on complaint by Registrar, share holder or government. To appreciate the arguments in this regard, the said Section 621 of the Act is reproduced hereinbelow:

"621. Offences against Act to be cognizable only on complaint by Registrar, shareholder or Government.

(1) No court shall take cognizance of any offence against this Act, which is alleged to have been committed by any company or any officer thereof, except on the complaint

in writing of the Registrar, or of a shareholder of a company, or of a person authorised by the Central Government in that behalf:

Provided that nothing in this sub-section shall apply to a prosecution by a company of any of its officers:

Provided further that the court may take cognizance of offence relating to issue and transfer of securities and non-payment of dividend on a complaint in writing by a person authorised by the Securities Exchange Board of India.

(1A) Notwithstanding anything contained in the Code of Criminal Procedure 1898 (5 of 1898), where the complainant under sub-section (1) is the Registrar or a person authorised by the Central Government, the personal attendance of the complainant before the Court trying the offence shall not be necessary unless the Court for the reasons to be recorded in writing requires his personal attendance at the trial.

(2) Sub-section (1) shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters included in Part VII (sections 425 to 560) or in any other provisions of this Act relating to the winding up of the companies.

(3) A liquidator of a company shall not be deemed to be an officer of the company, within the meaning of sub-section (1)."

25. However, it is not necessary to examine the applicability of the aforesaid Section 621 of the Act to the present case as it appears to be doubtful to categorise accused No. 1, who was admittedly working as caretaker, as an officer of the company. Thus, we deem it fit and proper to leave the said question open at this stage.

26. We have carefully examined the originals of the resolution dated 31.12.2001 as also Power of Attorney of the even date executed in favour of Mr. V.S. Parthasarthy and the irresistible conclusion is that the same are genuine and do not come under the cloud of suspicion at all.

27. That being so, in the light of the admitted position that accused No. 1 retired in the year 1992 and has also given an undertaking to the Company as far as back as 5.1.2000 categorically admitting and agreeing to vacate the premises on or before 31.1.2000, it was incumbent on his part to honour the same.

28. The letter of the accused No. 1 dated 05.01.2000 is reproduced herein below:-

> "In regard to the above subject I the undersigned would be grateful to you if you would give me one month time till January 31st 2000 to vacate the premises that was given to me while I was in service with your esteemed organisation."
>
> Das John Peter

29. Even after taking into consideration all the defences taken by accused, their eviction from the servant quarter is inevitable. Since he has committed default of his own promise, we have no other choice or option but to direct the accused persons to vacate the premises by or before 1st October, 2010 and to hand over its peaceful vacant possession to the Company.

30. We have done so exercising the powers conferred on us by virtue of provisions of Article 142 of the Constitution which cast a duty on us to do complete justice between the parties.

31. It is clear from the impugned orders that there is manifest illegality in the same and have resulted in palpable injustice to the Appellant/Company curable at this stage under

Article 142 of the Constitution as the aforesaid powers are inherent on this Court as guardian of the Constitution.

32. According to us, no useful purpose would be served even if the matter is remitted to Magistrate for trial on merits. We hold so because equity also does not swing in favour of the accused, who have displayed adamant and dilatory attitude.

33. From the date of retirement of accused No. 1 till date, more than 18 years have passed by and he has used the servant quarter without having any right to do so. No further mercy or sympathy can be shown to such an accused.

34. Thus, looking to the matter from all angles we are of the considered opinion that the order passed by Metropolitan Magistrate as also by the High Court cannot be sustained in law. Same are hereby set aside and quashed. This we have to do to give quietus to the litigation which had commenced long years back.

35. Appellant's complaint filed under section 630 of the Act is hereby allowed and accused is granted time to vacate the servant quarter as mentioned hereinabove on or before 1.10.2010 and to hand over its peaceful and vacant possession to the appellant company. In default thereof accused shall have to suffer imprisonment for a term of one year and fine of Rs. 10,000/-. In default of payment of fine, the accused shall suffer further imprisonment of one month.

36. We hope and trust at least good sense shall prevail on the accused and instead of running the risk of being sent to jail, they would abide by the first part of the order and do the needful. If the accused persons fail to do so then the appellant shall be entitled to take police help to get our order executed.

37. Appeal stands allowed accordingly.

D.G. Appeal allowed.

SYED MOHIDEEN & ANR.

v.

RAMANATHAPURA PERIA MOGALLAM JAMATH & ORS.

(Civil Appeal No. 492 of 2003)

JULY 21, 2010

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

Wakf Act, 1995:

s.83(5) – Wakf Tribunal – Power of – HELD: Wakf Tribunal is deemed to be a civil court and has the same powers as are exercised by civil court under the Code of Civil Procedure while trying a suit or executing a decree or order – Civil courts are competent to issue injunctions in terms of Or. 39, rr. 1 and 2 and s.151 CPC – Similar orders can, therefore, be passed by the Wakf Tribunal also in suits that are legally triable by it – If the Wakf Tribunal, upon consideration of relevant facts and circumstances, comes to the conclusion that a case for grant of interim injunction has been made out, it shall be free to issue any such injunction – Code of Civil Procedure, 1908 – Or. 39, rr. 1 and 2 and s.151 – Injunctions.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 492 of 2003.

From the Judgment & Order dated 24.01.2002 of the High Court of Judicature at Madras in CRP No. 1430 of 2001.

K.V. Viswanathan, B. Ragunath (for Vijay Kumar) for the Appellants.

K. Ramamoorthy, Hari Shankar K., Vikas Singh Jangra for the Respondents.

The following order of the Court was delivered

ORDER

The application for substitution is allowed.

Heard learned counsel for the parties.

This appeal has been filed against the impugned order of the High Court of Judicature at Madras dated 24th January, 2002 passed in C.R.P. No.1430 of 2001.

The facts in detail have been set out in the impugned order and hence we are not repeating the same here.

Having gone through the impugned order, we noticed from paragraphs 20 & 21 of the impugned order that the High Court has only observed that certain points were not considered by the Wakf Tribunal which should have been taken into consideration. Hence, the High Court remanded the matter.

We agree with the aforesaid observations of the High Court and see no reason to interfere with the same. We, however, may make it clear that in terms of Section 83(5) of the Wakf Act, 1995 the Wakf Tribunal is deemed to be a civil court and has the same powers as are exercised by civil court under the Code of Civil Procedure, 1908 while trying a suit or executing a decree or order. The civil courts are in turn competent to issue injunctions in terms of Order XXXIX Rules 1 and 2 and Section 151 C.P.C. Similar orders can, therefore, be passed by the Wakf Tribunal also in suits that are legally triable by it if a case for grant of such injunction or direction is made out by the party concerned. These observations shall not, however, be understood to mean that we are expressing any opinion on whether a case for grant of an injunction had been made out in the matter at hand. All that we wish to clarify is that if the Wakf Tribunal upon consideration of all the relevant facts and circumstances comes to the conclusion that a case for grant of interim injunction has been made out it shall be free to issue any such injunction. With these observations the appeal is dismissed. The Tribunal shall take a view uninfluenced by any observations made in this order or the order impugned before us. No costs.

R.P. Appeal dismissed.

NARINDER KUMAR
v.
STATE OF JAMMU & KASHMIR
(Criminal Appeal No. 2093 of 2008)

JULY 21, 2010

[AFTAB ALAM AND T.S. THAKUR, JJ.]

Ranbir Penal Code – s.302 – Culpable homicide amounting to murder – Exchange of hot words and abuses between the accused-appellant and the victim leading to death of the latter due to gunshot injury –Testimony of four eye witnesses – Conviction of appellant – Justification of – Held: On facts, justified – The version given by all the eye witnesses was consistent in regard to the genesis of the incident leading to the death of the victim – Ocular evidence of the witnesses was also fully corroborated by the medical evidence – In the absence of anything to suggest that the witnesses had any reason to screen the real offender and falsely implicate the appellant, the courts below were justified in accepting their version – Plea of private defence raised by the appellant not sustainable – Conviction upheld.

Evidence – Testimony of interested witness – Appreciation of.

FIR – Delay in the dispatch of a copy of the FIR to the Jurisdictional Magistrate – Held: Is not per se fatal to the case of the prosecution –Effect of the delay has to be determined in the context of the facts and circumstances of each case.

According to the prosecution , when a 'bhangra' party was returning from the ' Baisakhi' Mela, one reveller (the elder brother of the first informant) trampled the foot of the accused-appellant, on which an exchange of hot words and abuses ensued between the two. The

appellant left the spot in anger but returned a short while later with a 12 bore gun in his hand, whereafter he fired at the elder brother of the first informant from close range and fled from the spot carrying the weapon with him. The victim was removed to hospital where he was declared dead. The trial court held the appellant guilty under Section 302 RPC, and sentenced him to undergo imprisonment for life. The High Court affirmed the conviction of the appellant.

Before this Court, the appellant contended that he had been falsely implicated and that there were serious flaws in the prosecution story that entitled him to the benefit of doubt.

Dismissing the appeal, the Court

HELD:1. There is no room for interference with the judgment and order passed by the courts below. The trial court as well as the High Court have in their respective judgments critically evaluated the evidence adduced by the prosecution and the defence and correctly arrived at the conclusion that the prosecution had succeeded in bringing home the charge of culpable homicide amounting to murder against the appellant beyond any shadow of doubt. [Para 6] [787-A-C]

2.1. The prosecution case stands proved on the basis of the testimony of four out of five eye-witnesses examined at the trial. The deposition of the first informant (the younger brother of the deceased) which was recorded before the trial court gave a graphic account of the genesis of the incident leading to the death of the victim. Despite extensive cross-examination on various aspects nothing, that could possibly shatter his testimony, was extracted by the defence. The witness stuck to his version that it was the appellant who had

fired at the deceased leading to his death. [Paras 6 and 7] [787-D-E; 788-D-E]

2.2. The statement made by the second witness, PW 4, is also to the same effect. The cross-examination of this witness has also been extensive but nothing that could affect the credibility of this witness or the truthfulness of the version of the prosecution has been extracted by the defence. [Para 8] [788-C-D]

2.3. The third eye witness examined by the prosecution is not related to the deceased or his family in any way and, cannot, therefore, be described as partisan in any manner. This witness too has given a similar account as the one given by the first informant about the genesis of the incident that led to the death of the deceased. The cross-examination of this witness has, like the other two eye witnesses, been extensive but there is nothing worthy of any criticism for the defence as regards his credibility or the truthfulness of his version. The witness was firm that it was the appellant who had fired at the deceased. [Para 9] [787-D-E]

2.4. To the same effect is the statement of the fourth witness who testified that consequent to the event, the deceased received gun shot injury at the hands of the appellant. There is nothing in the cross-examination to discredit his version either. [Para 10] [789-E]

2.5. In the light of the consistent version given by all these eye witnesses, both the courts below were justified in holding that the prosecution had beyond any shadow of doubt proved the guilt of the accused-appellant especially when there was no prior enmity between the appellant and the witnesses or their respective families to even suggest the possibility of false implication. [Para 11] [789-F]

3.1. In the present case, the ocular evidence of the witnesses was also fully corroborated by the medical evidence. The deposition of the Scientific Assistant proved that the 12 bore SBBL gun sent to the Forensic Science Laboratory for examination, was in normal working condition and had been fired through prior to its receipt in the lab and that the cartridge case had been fired from the gun in question. The witness further deposed that the suspected holes present on the clothes of the deceased were gunshot holes. The prosecution led evidence that the weapon in question was licensed in the name of the father of the appellant. [Paras 12, 13] [789-G-H; 790-D-E]

3.2. Moreover, the defence has not disputed the place of occurrence or the fact that the deceased died due to a gunshot injury. On the contrary, the suggestions made in the cross-examination of the prosecution witnesses and the depositions of the defence witnesses acknowledged that the deceased did collapse on the spot because of a gunshot injury received by him. What the defence suggested was that the gunshot was fired by some one from the crowd and not the appellant which part of the version has been rightly turned down by the trial court as well as the High Court. [Para 14] [790-F-H; 791-A-B]

4. Merely because two witnesses were related to the deceased, does not make them unreliable witnesses particularly when in the statement recorded by the police at Hospital immediately after the occurrence, the version in all its essential details was given out by the witness attributing the gunshot injury to the appellant. In the absence of anything to suggest that the said four witnesses had any reason to screen the real offender and falsely implicate the appellant, the courts below were justified in accepting their version and holding the charge against the appellant proved. [Para 14] [791-B-D]

5. There is no doubt some delay in the dispatch of a copy of the FIR, but the same is not *per se* fatal to the case of the prosecution. It is fairly well settled that delay in the dispatch of a copy of the FIR to the jurisdictional Magistrate does not by itself render the case doubtful. What is important is whether there is an explanation for the delay and, if so, how plausible it is any such explanation. Suffice it to say that whether or not delay has led to the false implication of an innocent person would depend upon and has to be determined in the context of the facts and circumstances of each case. No hard and fast rule can in that regard be prescribed. The explanation offered by the prosecution in the present case has been rightly accepted by the courts below. [Para 15] [791-E-H; 792-A]

6. As regards the contention that statements of some of the eye witnesses were recorded belatedly, this aspect too has to be seen in the background of the facts and circumstances of the case. Whether or not the delay has affected the credibility of the prosecution is a matter on which no strait-jacket formula can be evolved nor any thumb rule prescribed for universal application. The courts below have correctly appreciated this aspect and rejected the contention that the delay in the recording of the statements of some of the witnesses was fatal to the case. That is specially so when the prosecution version, based on the statement made by the first informant was known on the date of the incident itself. The first informant had in the said statement attributed the gunshot injury sustained by deceased to the appellant. Delay in the recording of the statements of the other eye witnesses, two of whom were brothers of the deceased, was not, therefore, used to falsely implicate the appellant. [Para 16] [792-B-E]

7. In regard to the submission that the injury inflicted

on the deceased was in exercise of the right of private defence of the appellant, there is nothing on record to suggest that the deceased had at any stage either assaulted the appellant or otherwise caused any injury to him to justify infliction of gunshot injury upon him in defence. The depositions of the witnesses examined at the trial are consistent that after the initial exchange of hot words and abuses on account of the deceased trampling the foot of the appellant, the appellant left the place and re-appeared sometimes later with a gun in his hand. It also appears from the depositions of the witnesses that the appellant without any provocation pushed the brother of the deceased with the barrel of the gun and shot the appellant. It is, therefore, difficult to appreciate how such an act could be described as one in self-defence. The trial court as also the High Court have come to the conclusion that the deceased was not armed nor was any attempt made by him on the life of the appellant. The plea of the private defence, therefore, fails and is hereby rejected. [Para 17] [792-F-H; 793-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2093 of 2008.

From the Judgment & Order dated 27.9.2007 of the High Court of Jammu and Kashmir at Jammu in Criminal Appeal No. 09 of 1996.

J.C. Gupta, Tushar Bakshi, Sunita Sharma and Naresh Bakshi for the Appellant.

Anis Suharwardy, Shamama Anis, S. Mehdi Imam, Tabez Ahmed, Pervej Dabas and Wadi D. Kasana for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave arises

out of an order passed by the High Court of Jammu and Kashmir in Criminal Appeal No.9 of 1996 and confirmation No.21/1996 whereby the appellant's conviction and sentence for an offence punishable under Section 302 RPC has been upheld and the appeal filed by the appellant dismissed.

2. Briefly stated, the case of the prosecution is that on 13th April 1992, the deceased Shri Kola Ram along with his brothers, Shri Balwant Raj and Tirath Ram the appellant and a large number of other people belonging to Village Nagri Parole, Tehsil and District Kathua were returning home after celebrating Baisakhi Mela at Arawan a village at a distance of a few kilometers from Nagri. The mela goers from the village had it appears formed a small procession and were dancing their way back to the beats of a drum. The prosecution case is that when the participants reached near a rice mill, owned by one Shri Dharampal, the deceased, Kola Ram who was also one of the revellers trampled the foot of the accused-appellant, Narinder Kumar. This led to exchange of hot words and abuses between the deceased and the appellant. Other members of the party intervened to cool the tempers but the appellant left the spot in anger only to return a short while later with a 12 bore gun in his hand. By that time the dancing party had reached a place near the shop of Vijay Kumar in Nagri Parole. The appellant is alleged to have pushed aside the brother of Kola Ram with the barrel of his gun, fired at the deceased from close range and fled from the spot carrying the weapon with him. The deceased fell to the ground after receiving the gunshot injury and was quickly removed to Kathua hospital where he was declared dead.

3. On receipt of information from the hospital regarding the arrival of a medico legal case, Shri Darbari Lal Sharma, ASI swung into action and rushed to the hospital along with other police personnel only to be told that the deceased had already passed away. The assistant sub-inspector recorded the statement of Balwant Raj, PW which was taken as the FIR

regarding commission of the offence that kick started investigation into the whole episode. A challan was eventually filed before the Illaqa Magistrate against the appellant who committed him to the Court of Sessions for being tried for offences punishable under Sections 302/323 RPC and Section 3 read with Section 25 of Arms Act. Before the Sessions Court the accused pleaded not guilty to the charges and claimed a trial. A trial accordingly followed at which the prosecution examined as many as 20 witnesses including PWs Balwant Raj, Khazan Chand, Babu Ram, Tirath Ram and Jia Lal who had, according to the prosecution, witnessed the incident. Among the others examined by the prosecution were Dr. K.P. Singh who conducted the post-mortem of the deceased, Dr. J.L. Fotedar, the forensic expert and the police officer who conducted the investigation. In his defence the appellant examined DWs Ashok Kumar, Ravindra Kumar and Ajay Sharma alia Bilu and Dr. Daljeet Singh as his witnesses.

4. Appreciation of the evidence adduced before it led the trial court to hold that the prosecution had established the commission of an offence punishable under Section 302 RPC against the appellant beyond any shadow of doubt. The Court, however, found no evidence to support the charge regarding the commission of the offence punishable under Section 3 read with Section 25 of the Arms Act and Section 323 of the RPC. The appellant was accordingly acquitted on those counts. By a separate order appellant was sentenced to undergo imprisonment for life and a fine of Rs.5,000/- subject to confirmation by the High Court.

5. Aggrieved by his conviction and sentence the appellant preferred criminal appeal no.9 of 1996 which was heard along with confirmation reference No.21 of 1996 received from the Sessions Court. By the judgment impugned in this appeal the High Court has dismissed the appeal filed by the appellant and confirmed his conviction and sentence as already noticed earlier.

6. Having heard Mr. Gupta, learned senior counsel for the appellant and counsel for the respondent – State at length we are of the view that there is no room for our interference with the judgment and order passed by the Courts below. The trial Court as well as the High Court have in their respective judgments critically evaluated the evidence adduced by the prosecution and the defence and correctly arrived at the conclusion that the prosecution had succeeded in bringing home the charge of culpable homicide amounting to murder against the appellant beyond any shadow of doubt. In the course of the hearing before us the entire evidence available on record was once again read out by learned counsel for the appellant in an attempt to show that the appellant had been falsely implicated and that there were serious flaws in the prosecution story that entitled the appellant to the benefit of doubt. We regret our inability to accept that submission. In our opinion, the prosecution case stands proved on the basis of the testimony of four out of five eye witnesses examined at the trial. The fifth witness namely Khazan Chand did not support the prosecution version and was declared hostile. The deposition of Shri Balwant Raj, the first informant which was recorded before the trial Court gave a graphic account of the genesis of the incident leading to the death of the victim Kola Ram. This witness happens to be the younger brother of the deceased. According to him, he along with his brothers Tirath Ram and Kola Ram, the deceased and Jia Lal had gone to village Arwan to see the Baisakhi Mela. On their way back the participants were dancing Bhangra. When the bhangra party reached a place near the flour mill of Dharampal, the deceased trampled the foot of the appellant leading to exchange of hot words and abuses between the two. The appellant thereafter went away from the bhangra party to his house while the remaining members of the bhangra party continued dancing their way back to their houses. When they arrived near the shop of Vijay Kumar the appellant returned to the spot with a gun, pushed the witnesses aside and fired at the deceased. The gun shot struck the deceased in the belly and chest. He started

bleeding, and collapsed to the ground. The appellant ran away from the place of occurrence with the gun. The deceased was taken to the Nagri Hospital from where he was referred the hospital at Kathua. On his way to Kathua the deceased breathed his last. Police from Kathua came to the hospital and recorded his statement marked Ex. PW BR.

7. In cross-examination of this witness, a number of suggestions were put to him like whether the bhangra party members had consumed alcohol, which suggestion was denied by the witness. The witness further stated that within two to four minutes of the skirmish between the deceased and the appellant, the appellant had returned to the place opposite to Vijay Kumar's shop where the dancing party had reached in the meantime. Despite extensive cross-examination on various other aspects nothing, that could possibly shatter his testimony, was extracted by the defence. The witness denied the suggestion that he and his brothers were armed with Takwas (sharp edged weapons). The suggestion that the deceased and Jia Lal had beaten Anju and Billo on the spot was also denied. So also the suggestion that some one from the crowd had fired a shot which hit the deceased was denied by this witness. The witness stuck to his version that it was the appellant who had fired at the deceased leading to his death.

8. The statement made by PW 4 Tirath Ram, is also to the same effect. This witness has, like PW Balwant Raj, narrated the sequence of events that led to the incident resulting in the death of the deceased. According to this witness when the bhangra party reached near the shop of Vijay Kumar, the appellant came with a gun, pushed aside Balwant Raj the younger brother of the deceased with the barrel of the gun, aimed the gun at the deceased and fired at him as a consequence whereof the deceased collapsed to the ground. He was taken to the Nagri Hospital who referred him to Kathua Hospital where he was declared dead. The cross-examination of this witness has also been extensive but nothing that could

affect the credibility of this witness or the truthfulness of the version of the prosecution has been extracted by the defence.

9. That brings us to the deposition of Babu Ram, the third eye witness examined by the prosecution in support of its case. This witness is not related to the deceased or his family in any way and, cannot, therefore, be described as partisan in any manner. This witness too has given a similar account as the one given by Balwant Raj about the genesis of the incident that led to the death of the deceased. The cross-examination of this witness has like the other two eye witnesses been extensive but there is nothing worthy of any criticism for the defence as regards his credibility or the truthfulness of his version. This witness has also denied the suggestion that the deceased was armed with any weapon or he had caused any injury to Anju or Billo nor some unknown person had fired at the deceased from the crowd. The witness was firm that it was the accused who had fired at the deceased.

10. To the same effect is the statement of Jia Lal, PW who has testified that consequent to the event, the deceased received gun shot injury at the hands of the appellant. There is nothing in the cross-examination to discredit his version either.

11. In the light of the consistent version given by all these eye witnesses, both the Courts below were justified in holding that the prosecution had beyond any shadow of doubt proved the guilt of the accused appellant especially when there was no prior enemity between the appellant and the witnesses or their respective families to even suggest the possibility of false implication.

12. Two other aspects need to be noted at this stage. The first is that the ocular evidence of the witnesses mentioned above gets fully corroborated by the medical evidence adduced in the case. Dr. K.P. Singh, Registrar in the Government Medical College, Jammu, who conducted the post mortem examination and reported the gun shot injury to be the cause

of death. The witness reported as under:

> "A gun shot wound in the epigastria below the Xygphi sternum on the right side 3 cm from midline. Wound in the round from measuring circular with lacertated and averted margins with charring of skin in 1 cm area around it and black suiting around the skin. No wound of exit seen. On opening abdomen peritorium ruptured irregularly about 2 area below wound of entry of gun shot. Liver ruptured in the form of laceration all over Gall Bladder also was ruptured and pellets were recovered. Upper pole of right kidney was ruptured and pellets were recovered Funds of stomach having perorations 4 in number and pellets were recovered."

13. Deposition of Rajinder Singh Jamwal, Scientific Assistant, proved that the 12 bore SBBL gun bearing No.5080 sent to the Forensic Science Laboratory for examination, was in normal working condition and had been fired through prior to its receipt in the lab and that cartridge case marked F/174/92 had been fired from the gun in question. The witness further deposed that the suspected holes present on the clothes of the deceased were gunshot holes. The prosecution led evidence that the weapon in question was licensed in the name of the father of the appellant.

14. The second aspect which is equally significant is that the defence has not disputed the place of occurrence or the fact that the deceased died due to a gunshot injury. On the contrary, the suggestions made in the cross-examination of the prosecution witnesses and the depositions of the defence witnesses acknowledged that the deceased did collapse on the spot because of a gunshot injury received by him. All that was disputed was whether the appellant was the author of the injury. What is important is that the essential facts constituting the substratum of the story of the prosecution namely that the bhangra party had visited Aarwan in connection with the Baishaki Mela, that they were returning from Aarwan to Nagri

Parole, that when the party reached a place near Vijay Kumar's shop a gunshot hit the deceased because of which he died are not in dispute. What the defence suggested was that the gunshot was fired by some one from the crowd and not the appellant which part of the version has been turned down by the trial Court as well as the High Court, and in our opinion, rightly so. It is true that Babu Ram and Tirath Ram are brothers of the deceased but merely because they were related to the deceased, does not make them unreliable witnesses particularly when in the statement recorded by the police at Kathua Hospital immediately after the occurrence, the version in all its essential details was given out by the witness attributing the gunshot injury to the appellant. In the absence of anything to suggest that Balawant Raj, Babu Ram, Tirath Ram and Jia Lal had any reason to screen the real offender and falsely implicate the appellant, the Courts below were justified in accepting their version and holding the charge against the appellant proved.

15. Mr. Gupta made a valiant attempt to argue that there was a grave suspicion about the truthfulness of the prosecution case on account of the delay in the dispatch of a copy of the FIR to the Illaqa Magistrate. The FIR was registered on 13th April, 1992 whereas a copy of the same was received by the Magistrate only on 15th April, 1992 at 11 a.m. This according to the learned counsel, cast a cloud over the veracity of the prosecution case. A similar contention was urged by the defence before the Courts below which was repelled. There is no doubt some delay in the dispatch of a copy of the FIR, but the same is not *per se* fatal to the case of the prosecution. It is fairly well settled that delay in the dispatch of a copy of the FIR to the jurisdictional Magistrate does not by itself render the case doubtful. What is important is whether there is an explanation for the delay and if so, how plausible it is any such explanation. Suffice it to say that whether or not delay has led to the false implication of an innocent person would depend upon and has to be determined in the context of the facts and circumstances of each case. No hard and fast rule can in that

regard be prescribed. The explanation offered by the prosecution in the present case has been accepted by the Courts below. We see no reason to take a different view.

16. It was also contended by Mr. Gupta that statements of some of the eye witnesses were recorded belatedly. This aspect too has to be seen in the background of the facts and circumstances of the case. Whether or not delay has affected the credibility of the prosecution is a matter on which no strait-jacket formula can be evolved nor any thumb rule prescribed for universal application. The Courts below have, in our opinion, correctly appreciated this aspect and rejected the contention that the delay in the recording of the statements of some of the witnesses was fatal to the case. That is specially so when the prosecution version, based on the statement made by Balwant Raj was known on the date of the incident itself. PW Balwant Raj had in the said statement attributed the gunshot injury sustained by deceased to the appellant. Delay in the recording of the statements of the other eye witness two of whom were brothers of the deceased was not, therefore, used to falsely implicate the appellant.

17. A feeble attempt was made by Mr. Gupta to argue that even if the appellant is proved to have fired at the deceased there was a possibility that any such gunshot injury was caused by him in private defence. The circumstances appearing in the case, argued Mr. Gupta, probablised that the injury inflicted on the deceased was in exercise of the right of private defence of the appellant. We have no hesitation in rejecting that submission also. The argument has, in our opinion, been made in total despair. We say this because there is nothing on record to suggest that the deceased had at any stage either assaulted the appellant or otherwise caused any injury to him to justify infliction of gunshot injury upon him in defence. The depositions of the witnesses examined at the trial are consistent that after the initial exchange of hot words and abuses on account of the deceased trampling the foot of the appellant, the appellant had

left the place and re-appeared sometimes later with a gun in his hand. It also appears from the depositions of the witnesses that the appellant had without any provocation pushed the brother of the deceased with the barrel of the gun and shot the appellant. It is, therefore, difficult to appreciate how such an act could be described as one in self defence. The trial Court as also the High Court have come to the conclusion that the deceased was not armed nor was any attempt made by him on the life of the appellant. The plea of the private defence, therefore, fails and is hereby rejected.

18. In the totality of the above circumstances, we see no reason to interfere with the judgment of the High Court. The appeal fails and is accordingly dismissed.

B.B.B. Appeal dismissed.

DHAN SINGH
v.
STATE OF HARYANA
(Criminal Appeal No. 488 of 2009)

JULY 22, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

***Penal Code, 1860**: ss.148, 149, 323, 506, 452 and 304 (Part II) – Dispute over property between deceased and his brother – Accused persons including the brother of deceased and the appellant attacking the deceased – Appellant inflicting blow on the head of the deceased with an iron rod – Other accused also inflicted injuries on deceased and his wife – Doctor recorded endorsement that the deceased was fit to make a statement – Statement recorded by Head Constable – Case registered u/s.323 –Deceased died in hospital after few days – Case converted into one u/s.302 – Statement of deceased treated as dying declaration – Conviction under s.302 based on the declaration – Challenged – Held: Dying declaration was clear and satisfactory and was fully corroborated by medical evidence – Although the wife and the daughter of the deceased were declared hostile, but, that by itself, would not demolish the case of prosecution – There was no reason for the deceased to falsely implicate his brother and the appellant – Thus, prosecution was able to bring home the guilt of appellant – However, the collective analysis and examination of the evidence showed that appellant had no intention to kill the deceased and did not give him a blow with the intention to kill or with the knowledge that it was likely to cause death – In the circumstances, conviction altered from s.302 to s.304 (Part II) – Evidence Act, 1872 – s.32 – Witness – Hostile witness.*

***Evidence Act, 1872**: s.32 – Dying declaration – Statement of victim recorded by Head Constable – Victim*

died within few days – Admissibility of the statement as dying declaration – Held: In terms of s.32(1), the statement made by a person as to the cause of his death or such circumstances is admissible – Provisions of s.32 do not mandatorily require that dying declaration has to be recorded by any designated or particular person – Doctor declared that victim was fit to make the statement – Statement endorsed by closest relation of the victim – Such statement admissible in the facts and circumstances of the case – Penal Code, 1860 – ss.148, 149, 323, 506, 452 and 302 – Code of Criminal Procedure, 1973 – s.162(2).

The prosecution case was that the deceased had dispute with his brother over a residential house. On the date of incident, the deceased, his wife (PW-3) and his daughters were present in the house. The accused persons including the brother of the deceased and the appellant entered the house. The appellant was holding an iron rod and he inflicted a blow with the same on the head of the deceased. The brother of the deceased gave a lathi blow on the other parts of the body of the deceased. The other accused also gave lathi blows on his back. Injuries were also inflicted on PW-3. Thereafter the accused persons ran away. The injured were taken to hospital. PW-8, the Head Constable was intimated about the incident. PW-8 reached the hospital and recorded statement (Ex.PE 1) of the deceased. On the basis of the statement, an FIR was recorded under Sections 148, 452, 323, 506 r.w. Section 149 IPC. After about a week, the deceased died in the hospital. The case was converted into one under Section 302 IPC. The trial court recorded a finding that the head injury which was attributed to the appellant was sufficient to cause the death of the deceased and the case fell under clause "thirdly" of Section 300 and accordingly convicted the appellant under Sections 148, 149, 323, 506, 452 and 302 IPC. The High Court refused to interfere with the order of

trial Court.

In the instant appeal, it was contended for the appellant that the statement recorded by the Head Constable was not reliable as a dying declaration, as the same ought to have been recorded by a Magistrate; that the son and the daughter of the deceased were not examined as witnesses and the findings were based on no evidence and were perverse; and that in the alternate, the conviction ought to have been under Section 304 (Part II) IPC and not under Section 302 IPC.

Partly allowing the appeal, the Court

HELD: 1.1. The doctor, PW-1 had recorded an endorsement on the Ex.PE 1, that the deceased was fit to make a statement and that the statement was read over to him and after he found the statement as correct, his signature were obtained on the statement which were duly signed even by the children of the deceased. Mere fact that the doctor had declared the deceased fit to make a statement would not mean that there was no eminent danger of death to his life. In fact, he died within few days. The trial court also noticed those facts as well as the fact that the deceased had specifically stated the role that was attributable to different accused persons. His statement, in the form of dying declaration, was clear and unambiguous about the role of the appellant and was fully corroborated by medical evidence. [Para 7] [804-D-E; G-H; 805-A]

1.2. The provisions of Section 32 of the Evidence Act, by themselves, do not mandatorily require that dying declaration has to be recorded by any designated or particular person. The investigating agency has to keep in mind the provisions of Section 32 of the Act read with Section 162 (2), Cr.P.C. as well as the settled principle of law and act in accordance with the established practice

while recording the dying declaration. It is normally accepted that such declaration would be recorded by a Magistrate or by a doctor to eliminate the chances of any doubt or false implication by the prosecution during investigation. In terms of Section 32 (1) of the Act, the statement made by a person as to the cause of his death or to such circumstances is admissible. There is no doubt on the facts of the instant case that the statement of the deceased was recorded only after he was declared fit to make the statement by the doctor. The dying declaration was endorsed by none other than the closest relation of the deceased present at the relevant time. The FIR itself was registered on the statement of the deceased, which was recorded by the Head Constable, who was competent to do so at the relevant time. Thus, there is no legal infirmity in the admissibility of such statement *per se* in the facts and circumstances of the present case. [Para 7] [805-C-H; 806-A]

Dalip Singh v. State of Punjab **(1979) 4 SCC 332 – relied on.**

Cherlopalli Cheliminabi Sahed v. State of A.P. **(2003) 2 SCC 571;** *Kanti Lal v. State of Rajasthan* **(2004) 10 SCC 113 – distinguished.**

State (Delhi Administration) v. Laxman Kumar **(1985) 4 SCC 476 – referred to.**

2.1. There was dispute between the deceased and his brother. After the death of the deceased, the family seemed to have resolved their dispute. The prosecution gave a satisfactory explanation that the son and the daughter of the deceased were not examined by the prosecution as they were won over by the accused. PW 3 and PW 4, the wife and the daughter of the deceased did not support the case of the prosecution and were declared hostile. But, that by itself, would not demolish

the case of the prosecution. The Court has also to keep in mind that no such persons are permitted to defeat the course of justice and if sufficient evidence exists and the prosecution was able to establish its case beyond any reasonable doubt, the Court should punish the guilty irrespective of the fact that some witnesses had turned hostile. [Para 8] [806-H; 807-A-D]

2.2. There was no reason for the deceased to make a false statement. Despite the fact that he was seriously injured with a very strong blow on his head by the iron rod, he was able to specify role of each accused in the occurrence. It was a case where head injury proved to be fatal leading to the death of the deceased. The injuries suffered by the wife and the daughter of the deceased, as per the statement of other witnesses including the Investigating Officer, were received during the course of occurrence and in the house of the deceased. There was no occasion for the deceased to falsely implicate any person, particularly, his brothers and the appellant. The injuries suffered by the deceased were fully corroborated by the statement of PW 1. There was no reason to not believe these witnesses and the medico legal report. Merely, because the members of the family of the deceased wanted to state incorrectly before the Court, it would not give any advantage to the appellant, as prosecution was able to bring home the guilt of the accused with cogent and proper evidence. Thus, there was no merit in the challenge to the findings recorded in the impugned judgment. [Para 9] [808-E-H; 809-A-B]

Jagriti Devi v. State of H.P. **(2009) 14 SCC 771;** *Gurmukh Singh v. State of Haryana* **(2009) 15 SCC 635 – referred to.**

3. There was no evidence to show that the appellant and the other persons had gone to the house of the deceased with the intention to kill him. In fact, it was a

family dispute with regard to the property. Appellant gave one blow on the head of the deceased. There was no intention to kill the deceased which was obvious from the fact that a case under Section 323 of the IPC was registered at the very outset and the Head Constable had consulted PW 1, the doctor who had declared the condition of the deceased to be stable as well as certified that he was in a fit state of mind to make statement, which ultimately became the dying declaration. The collective analysis and examination of the evidence on record shows that the appellant had no intention to kill the deceased and did not give him a blow with the intention to kill or with the knowledge that it was likely to cause death. In the circumstances, the offence of the appellant is altered from Section 302 to Section 304 (Part II) of the IPC, with a sentence of rigorous imprisonment for a period of 10 years and fine of Rs. 20,000/-.[Paras 10, 11] [809-F-H; 810-A-D]

Case Law Reference:

(2003) 2 SCC 571	**distinguished**	**Paras 6, 7**
(2004) 10 SCC 113	**distinguished**	**Paras 6, 7**
(1979) 4 SCC 332	**relied on**	**Para 6**
(1985) 4 SCC 476	**referred to**	**Para 6**
(2009) 14 SCC 771	**referred to**	**Para 10**
(2009) 15 SCC 635	**referred to**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 488 of 2009.

From the Judgment & Order dated 30.04.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 324/DB/1999.

Biswajit Swain (for Rajesh Prasad Singh) for the Appellant.

B.S. Mor (for T.V. George) for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of conviction and order of sentence of the High Court of Punjab and Haryana at Chandigarh dated 30th of April, 2008, wherein the High Court confirmed the judgment of the Trial Court dated 17th of May 1999, punishing the appellant in accordance with law by awarding him sentence of rigorous imprisonment for a period of one year for the offence under Section 148 Indian Penal Code (hereinafter referred to as 'IPC'), rigorous imprisonment of two years and fine in the sum of Rs.1000/- for the offence under Section 452 IPC and rigorous imprisonment for a period of six month for the offence under Section 323 IPC and life imprisonment and fine of Rs. 2000/- for the offence under Section 302 IPC and also awarded punishments in default of payment of fines for these offences.

2. We may refer to the facts of the case giving rise to the present appeal. On 15.07.1997, Head Constable, Ram Rattan (PW 8) was performing his petrol duty at Sohna Road, Palwal, when at about 5 PM he received intimation (Ex.PE) from Government Hospital, Palwal that three persons, namely, Shiv Ram, Bimla and Jai Kishan were lying injured in the casualty ward of the said hospital. Upon receiving this information he reached the hospital and met Dr. B.L. Chimpa (PW-1) and asked him whether the injured were in a fit state to make statements. After the doctor declared the injured fit to make statement at about 6.20 PM vide medical opinion Ex.PE/1, he recorded the statement of Shiv Ram being Ex. PF. In his statement, Shiv Ram stated that he had a dispute with his brother Khem Chand over a residential house. Though, Khem Chand only had a share in the property but he had maintained

his residence in the entire house. At about 2.00 PM, on the date of occurrence, his wife Omkali (PW 3) and daughters, Bimla (PW 4) and Rachna were present in the house and at that time the accused Khem Chand, Jai Kishan, Jai Parkash, Jagdish, Jai Bhagwan, sons of Khem Chand, his wife Raj Bala alongwith Dhan Singh, Devinder and Rajakali, entered their house and opened attack upon him and on his family members. Accused Dhan Singh was holding an Iron Rod and he inflicted a blow with the same on the head and left ear of Shiv Ram. Accused Jai Kishan gave lathi blows on his back and accused Jai Parkash also inflicted a lathi blow on fingers of his right hand. Lathi blows were also given by Khem Chand and Rajkali on his hips and other parts of the body. Injuries were also inflicted by lathi blows on Bimla, who was later examined as PW 4. The injured persons raised hue and cry and people from nearby started gathering, but by that time, the accused persons ran away from the spot and while leaving, they also threatened the injured persons that they would kill them on the next available opportunity. After collecting the medico-legal reports of Shiv Ram, his wife Omkali and daughter Bimla, the Investigating Officer also took the endorsement and signatures of Omkali and Bimla on the statement of Shiv Ram being Ex. PF/1. On the basis of this statement, FIR No. 573 under Section 148, 452, 323 and 506 read with Section 149 IPC was registered at about 6.15 PM on 15.07.1997 at Police Station City, Palwal by Virender Singh, ASI (PW2). The FIR was exhibited as PF/2.

3. The accused persons had caused injuries on the body of the deceased as well as the injured by blunt weapons. Shiv Ram was kept under observance in the hospital. The Investigating Officer prepared the rough site plan of the place of occurrence and recorded the statement of witnesses under Section 161 of the Criminal Procedure Code (hereinafter refer to as 'Cr.PC'.) and the accused persons were taken into custody. However, in the meanwhile, the condition of Shiv Ram became serious and he was referred to Safdarjung Hospital,

New Delhi, where he ultimately expired on 22nd of July, 1997 at about 7:30 AM. ASI Sri Niwas (PW 11), who was then posted in Police Post, Safdarjung Hospital, New Delhi, conducted the inquest proceedings vide Ex. PJ. Thereafter, the body was sent for post-mortem, which was conducted by Dr. Chandra Kant (PW 5) on 23rd July, 1997. After the death of Shiv Ram, his son Praveen Kumar gave information at Police Station City, Palwal about his death and Head Constable Jagdish Chand (PW 7) converted the case into one under Section 302 IPC and a special report Ex.PK was sent to the Area Magistrate. After the case was registered under Section 302, the investigation of the case was taken over from Head Constable by SI/SHO Puran Chand, PW 9 and all the accused except Dhan Singh were re-arrested. Then the Investigating Officer recorded the statement of various witnesses. The disclosure statements Ex.PM to Ex.PU were also made by accused persons, which led to the recoveries of 7 lathis and 2 dandas and seizure memo Ex. PV was prepared. After completion of the investigation, the chargsheet was filed under sections 148, 149, 323, 506, 452 and 302 IPC. Since an offence under Section 302 IPC is triable exclusively by the Court of Sessions, the case was committed to that court. All the nine accused were then chargsheeted. Accused Dhan Singh was declared as a proclaimed offender. He was taken into custody on 18.12.1997. Whereafter the supplementary challan was filed in the Court and both these cases, having arisen out of the same incident, were clubbed together for trial. Upon completion of prosecution evidence, the statement of the accused under Section 313 of Cr.P.C. was recorded. All the accused declined to lead any evidence in their defence. The learned Sessions Judge, by a detailed judgment dated 17th of May 1999, recorded a finding that the head injury, which has been attributed to accused Dhan Singh, was found sufficient to cause death of Shiv Ram and his case falls under clause 'thirdly' of Section 300 IPC. The Trial Court recorded its findings on the question of guilt as follows:

"As a result of my aforesaid discussion , I conclude that

the accused Rajkali, Jai Kishan, Jagdish, Khem Chand, Jai Bhagwan, Devender, Raj Bala, Jai Prakash and Balram have committed offences under sections 148, 452, 325 and 323 read with Section 149 IPC whereas the accused Dhan Singh has committed offences under sections 148, 452, 323 read with section 149 IPC and section 302 IPC. I hold them guilty accordingly. Now for hearing these accused on the quantum of sentence to come up on 17.5.1999."

xxxx xxxx xxxx

4. The judgment of the Court of Session was only questioned by Dhan Singh unsuccessfully before the High Court. The High Court vide its judgment dated 30th of April, 2008 held that the death was a direct result of the impact of injuries attributable to the appellant by relying upon the statement of PW 5 and declined to interfere with the conviction and sentence of the appellant, thus giving rise to the filing of the present appeal. The appeal has been preferred only by accused Dhan Singh. Other accused did not challenge the judgment of the Trial Court.

5. Having noticed the complete facts necessary for determining the question raised in the present appeal, now we shall proceed to discuss the different legal and factual submissions made by the appellants before this Court.

6. **Dying declaration**:- The learned Counsel appearing for the appellant has vehemently argued that the statement in question (Ex.PF/1) cannot be relied upon as dying declaration of deceased Shiv Ram in the facts of the case. In any case, Head Constable Ram Rattan could not have recorded the dying declaration and as per established practice it has to be recorded by a competent Magistrate and the prosecution having failed to place any explanation on record as to why the statement was recorded by Head Constable Ram Rattan, therefore, the said statement would be inadmissible in evidence

and it could not be made the basis of conviction of the appellant. The counsel has also placed reliance upon the judgments of this Court in *Dalip Singh v. State of Punjab* [(1979) 4 SCC 332)], *Cherlopalli Cheliminabi Sahed v. State of A.P.* [(2003) 2 SCC 571)], *State (Delhi Administration) v. Laxman Kumar* [(1985) 4 SCC 476)] and *Kanti Lal v. State of Rajasthan* [(2004) 10 SCC 113). It is obvious from the above narrated facts that this was not a case which, to begin with, has been registered under Section 302 IPC. The FIR was registered under Sections 148, 452, 323 and 506 read with Section 149 IPC, which could not be investigated by a Police Officer of the rank of Head Constable. This fact is not in dispute before us.

7. The Head Constable had received intimation from the hospital and had gone to the hospital where he came to know about the kind of injuries which have been inflicted upon the three injured persons. Dr. B.L. Chimpa (PW 1) had recorded an endorsement on Ex. PE 1 that in his opinion, Shiv Ram was fit to make a statement and that the statement of the injured was read over to him and after he found the statement as correct, his signatures were obtained on the statement which were duly signed even by the children of the deceased. After his death on 22nd of July 1997, the FIR was converted to that under Section 302 IPC amongst other sections and the investigation was conducted accordingly by the officer competent in accordance with law to conduct such an investigation. It is not a case where no explanation whatsoever has been rendered by the prosecution. It is in evidence that the condition of the deceased was worsening at Government Hospital, Palwal, therefore, he was shifted to Safdarjung Hopsital, New Delhi, where he died. The information of the death of deceased was given by his son Praveen Kumar at the Police Station City, Palwal. Mere fact that the doctor had declared Shiv Ram fit to make a statement does not mean that there was no eminent danger of death to his life. In fact, he died within couple of days. The learned Trial Court had also noticed these facts as well as the fact that Shiv Ram had specifically

stated the role that was attributable to different accused persons. His statement, in the form of dying declaration, was clear and unambiguous about the role of Dhan Singh. His statement was fully corroborated by medical evidence. In these circumstances, the appellant can hardly take any advantage in this regard. In the case of *Dalip Singh* (supra), this Court held that the dying declaration recorded by Police Officer during course of investigation is admissible under Section 32 of the Indian Evidence Act (for short the 'Act'). In view of the exception provided in sub-section 2 of Section 162 Cr.P.C., it is better to leave such dying declaration out of consideration, until and unless the prosecution satisfies the Court, as to why it was not recorded by the Magistrate or by a doctor. We may note that the provisions of Section 32 of the Act, by themselves, do not mandatorily require that dying declaration has to be recorded by any designated or particular person. The investigating agency has to keep in mind the provisions of Section 32 of the Act read with Section 162 (2) of the Cr.P.C. as well as the settled principle of law and act in accordance with the established practice while recording the dying declaration. It is more because of development of law through pronouncement of Court's judgement that guidelines for recording of dying declarations have been settled. Despite their being no mandate, it is normally accepted that such declaration would be recorded by a Magistrate or by a Doctor to eliminate the chances of any doubt or false implication by the prosecution during investigation. In terms of Section 32 (1) of the Act, the statement made by the person as to the cause of his death or to such circumstances, are admissible. There is no doubt on facts of the present case that statement of Shiv Ram, deceased was recorded only after he was declared fit to make the statement by the concerned doctor. The dying declaration was endorsed by none other than the closest relation of the deceased person present at the relevant time. The FIR itself was registered on the statement of Shiv Ram, which was recorded by the Head Constable, who was competent to do so at the relevant time. We are unable to find any legal infirmity

in the admissibility of such statement *per se* in the facts and circumstances of the present case. In the case of *Cherlopalli Cheliminabi Sahed* (supra), this Court clearly stated that it is not absolutely mandatory that in every case, dying declaration ought to be recorded only by a Magistrate and it depends on the facts and circumstances of the case. When there was no eminent danger to life of the deceased, preferably the statement should be recorded by the Magistrate. The judgment of that case cannot be of much assistance to the appellant. In the case of *Kantilal* (supra), the other judgment relied upon by appellant, this Court was, primarily concerned with the facts where the condition of the deceased to make a statement was not satisfactorily recorded by the concerned persons. In that case, the Court held that admissibility of dying declaration as to any of the circumstances which resulted in death must have some close and proximate relation with the actual occurrence and such proximity would depend upon the circumstances of each case. The dying declaration should be voluntary and should not be a prompted one. The physical as well as mental fitness of the maker has to be proved by the prosecution to the satisfaction of the Court. In that case, the doctor had neither made any endorsement nor had issued any certificate that the deceased was fit to make a statement. It is certainly not the case here. Here the Doctor had not only issued a certificate but also had expressed his opinion as is clear from Ex. PF1. Thus, this case also has no application to the facts of the case in hand.

8. **Appreciation of evidence**:- It is argued that the judgments of the Courts under appeal are liable to be set aside as their findings are based on no evidence and are perverse. The son of the deceased and his daughter Rachna have not been examined as a witness. No independent witness was examined and no definite role has been attributed to any of the accused and, as such, the accused were entitled to acquittal. This contention, to say the least, is without any merit and substance. Firstly, it is clear from the record that there was a

dispute between two brothers. After the death of Shiv Ram, it appears that the family had resolved their dispute and the prosecution gave a satisfactory explanation on record that Praveen and Rachna were not examined by the prosecution as they were won over by the accused. Both the family members of the deceased did not support the case of prosecution and were declared hostile. Keeping in view the statement of family members, other witnesses, doctor's statement and medico-legal report as relevant, it was felt by the Investigating Officer not to examine the other two family members. The statement of Shiv Ram was clear and satisfactory. PW 3 and PW 4 did not support the case of the prosecution and were declared hostile. But, that by itself, would not demolish the case of the prosecution. The Court has also to keep in mind that no such persons are permitted to defeat the course of justice and if sufficient evidence exists and the prosecution has been able to establish its case beyond any reasonable doubt, the Court should punish the guilty irrespective of the fact that some witnesses have turned hostile. The dying declaration of Shiv Ram clinches the entire issue when read with the statement of the doctor and his medico-legal report Ex. PA where injuries upon the deceased have been detailed as under:

1. A lacerated wound on the right parietal region 5 x 2.5 cm into skin deep with irregular margins and fresh bleeding.

2. A lacerated would on the left eye-brow 0.5 x 0.25 cm into skin deep with irregular margins and fresh bleeding.

3. A lacerated would on the anterior side of the left pinna 0.50 x 0.25 cm into skin deep with irregular margins and fresh bleeding.

4. A contusion on the left side of the face 1 cm anterior to the left ear 5 x 4 cm and reddish in colour.

5. A lacerated would on the dorsal surface of right ring finger 2 x 0.25 cm into skin deep with fresh bleeding.

6. A contusion over the left scapular region measuring 6 x 2 cm in size and red in colour.

7. A contusion over the right scapular region measuring 5 x 2 cm in size and red in colour.

8. A contusion on the posterior side of the chest 1 cm below the scapular margins. It measures 5 x 2 cm and was in red colour.

9. A contusion over the posterior side of the left wrist joint measuring 4 x 3 cm and reddish in colour.

10. A contusion over the anterior side of the left thigh in its lower third measuring 4 x 2 cm and reddish in colour."

9. There was no reason for Shiv Ram to make a false statement, on the contrary. Despite the fact that he was seriously injured with a very strong blow on his head by the iron rod, he was able to specify role of each accused in the occurrence. As per the statement of PW1, wife and daughter of deceased Shiv Ram namely, Omkali and Bimla had received injuries, which fully supported the case of the prosecution. It was a case where head injury proved to be fatal leading to the death of Shiv Ram. The injuries suffered by Omkali and Bimla, as per the statement of other witnesses including the Investigating Officer, have been received during the course of occurrence and in the house of Shiv Ram. There was no occasion for Shiv Ram to falsely implicate any person, particularly, his brothers and Dhan Singh, in the present case. The injuries suffered by the deceased are fully corroborated by the statement of PW 1. There was no reason or justification before the Court, not to

believe these witnesses and the medico legal report. Merely, because the members of the family of the deceased wanted to state incorrectly before the Court, it would not give any advantage to the appellant, as prosecution has been able to bring home the guilt of the accused with cogent and proper evidence. Thus, for these reasons, we do not find any merit in the challenge to the findings recorded in the impugned judgment.

The conviction ought to be under Section 304 Part II of IPC and not under Section 302 of IPC

10. The counsel for the appellants has placed reliance upon the case of J*agriti Devi v. State of H.P.* [(2009) 14 SCC 771], where this Court had permitted to alter the offence of 302 IPC to 304 Part II IPC while recording the finding that the khukri used in the commission of offence was kept by the deceased under her pillow, while she was sleeping in the veranda outside the house. Clearly, there was no intention on the part of the accused to kill the deceased. In the Case of *Gurmukh Singh v. State of Haryana* [(2009) 15 SCC 635], there was a single lathi blow on the spur of the moment resulting in death of the deceased and Court permitted altering of the offence. There cannot be any dispute to the principles stated in the judgments relied upon on behalf of the appellant. But equally true is that there cannot be any straightjacket formula which can be universally applied to all cases of this kind. It will always depend upon the facts and circumstances of each case. In the present case, there is no evidence to show that the appellant and other persons had gone to the house of Shiv Ram with the intention to kill him. In fact, it was a family dispute with regard to property. They had gone equipped with lathi and Dhan Singh was carrying an iron rod. He had given one blow on the head of the deceased and there was no intention to kill the deceased which is obvious from the fact that a case under Section 323 of the IPC was registered at the very outset and Head Constable, Ram Rattan had consulted PW 1 who had declared the condition of the

deceased to be stable as well as certified that he was in a fit state of mind to make statement, which ultimately became the dying declaration. From the collective analysis and examination of the evidence on record, it appears that the appellant had no intention to kill the deceased and did not give him a blow with the intention to kill or with the knowledge that it was likely to cause death.

11. For these circumstances and in line with the judgments afore referred, we are of the considered view that the offence of the appellant could be altered from Section 302 to Section 304 Part II of the IPC. Consequently, we hold the appellant guilty of offence under Section 304 Part II and award him rigorous imprisonment for a period of 10 years with fine of Rs. 20,000/-. In default of payment of fine the accused shall undergo rigorous imprisonment for a period of six months.

12. The appeal stands disposed off in the above terms.

D.G. Appeal partly allowed.

MANNU SAO
v.
STATE OF BIHAR
(Criminal Appeal No. 1165 of 2009)

JULY 22, 2010

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Penal Code, 1860 – ss. 302 and 201 – Murder – Causing disappearance of evidence of offence – Accused's case that he found his wife lying in burnt condition and thereafter, she expired – Conviction and sentence u/ss. 302 and 201 by courts below – Interference with – Held: Not called for – In the case of circumstantial evidence, besides the entire prosecution case, the statement made by accused u/s. 313 Cr.P.C. can be important – Accused admitted in clear terms that deceased was his wife and she died of burn injuries – However, stated that she committed suicide by burning herself – Accused also stated that victim was still alive and her burnt body was lying outside the cabin – He sought help of a person to take victim to the doctor but the person was not examined nor his name referred in the statement u/s. 313 – Medical evidence that death was caused by strangulating and then the body was burnt – Motive suggested by prosecution reasonable – Also it is difficult to believe that a person would commit suicide without any provocation or incident immediately preceding the occurrence – Circumstances proved by prosecution are of a conclusive nature – Evidence – Criminal law – Motive.

Code of Criminal Procedure, 1973:s.313 – Essential features of –Explained.

According to the prosecution case, the appellant lodged a report in the police station that he was living with his wife-BD in his cabin. On the fateful day, the

appellant found BD lying in serious burnt condition in front of his cabin. The appellant sought help of BB to take BD to the doctor. However, BD expired. PW 3-doctor conducted the postmortem. He opined that BD expired on account of throttling and ante-mortem injuries and thereafter burn injuries were caused. Thereupon a case for offences punishable u/ss. 302 and 201 IPC was registered. The trial court convicted the appellant u/ss. 302 and 201 IPC. He was awarded rigorous imprisonment for life u/s. 302 IPC and three years rigorous imprisonment u/s. 201 IPC. The High Court upheld the order of the trial court. Therefore, the accused filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. It is a case of circumstantial evidence as there was no eye-witness to the occurrence. An accused can be punished if he is found guilty even in cases of circumstantial evidence, provided, the prosecution is able to prove beyond reasonable doubt, complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye-witness to the case. An accused can be convicted on the basis of circumstantial evidence subject to satisfaction of accepted principles in that regard. [Para 3] [821-B-C]

Sharad v. State of Maharashtra **AIR 1984 SC 1622, referred to.**

1.2. It is not a circumstance or some of the circumstances which by itself, would assist the court to base a conviction, but all circumstances put forth against the accused once are established beyond reasonable doubt then conviction must follow and all inordinate circumstances would be used for corroborating the case

of the prosecution. It is of similar significance for the court to examine whether the requirements to be established in a case of circumstantial evidence are satisfied in the case before it or not. The cases of circumstantial evidence have to be dealt with greater care and by microscopic examination of the documentary and oral evidence on record. It is then alone that the court will be in a position to arrive at a conclusion upon proper analysis of the evidence in relation to the ingredients of an offence. [Paras 6 and 7] [823-G-H; 824-A-C]

Anant Lagu v. State of Bombay **AIR 1960 SC 500;** *Dayanidhi Bisoi v. State of Orissa* **AIR 2003 SC 3915, referred to.**

2.1. In the case of circumstantial evidence, particularly, besides the entire case of the prosecution, even the statement of the accused made under section 313 of Cr.P.C. can be of substantial help. The object of recording the statement of the accused under section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and besides ensuring the compliance thereof the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or in the alternative to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or

right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. [Paras 7 and 8] [824-A-H; 825-A-B]

2.2. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313 (4) explicitly provide that the answers given by the accused may be taken into consideration in such enquiry or trial and put as evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution; however, such statements made under this Section should not be considered in isolation but in conjunction with the evidence adduced by the prosecution. Another important caution that courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Code as it cannot be regarded as a substantive piece of evidence. The statement made by the accused is capable of being used in the trial though to a limited extent. But the law also places an obligation upon the court to take into consideration the stand of the accused in his statement and consider the same objectively and in its entirety. [Paras 8 and 10] [825-

B-F; 827-D-E]

Vijendrajit Ayodhya Prasad Goel v State of Bombay **AIR 1953 SC 247;** *Ajay Singh v. State of Maharashtra* **(2007) 12 SCC 341;** *Hate Singh Bhagat Singh v. State of Madhya Bharat* **AIR 1953 SC 468, referred to.**

3.1. It is clear that the appellant did not dispute the factum of the deceased being his wife and she had died because of burn injuries. However, his version was that she committed suicide by pouring kerosene on her and burning herself. While according to the prosecution primarily relying upon the statement of PW3-doctor, it was a case of causing death of the deceased by strangulating and then burning the body of the deceased. Even the trial court noticed and discussed these facts. The findings of facts and appreciation of evidence by the trial court was not interfered by the High Court and, in fact, it recorded its concurrence by reiterating these findings. [Paras 12 and 15] [828-C-E; 831-G]

3.2. Some emphasis was placed on the fact that PW-2 a co-villager, in his evidence, stated that he did not know about the occurrence and had signed on the report at the behest of the Investigating Officer. The accused could hardly derive any advantage from this because this witness was to primarily prove the death of the deceased after she had been burnt. Even according to the prosecution he was not an eye-witness and there was nothing much which he would contradict, as the prosecution had mainly relied upon the statement of PW3 and PW4. [Para 16] [831-H; 832-A-B]

3.3. PW3-doctor, who had performed the postmortem upon the deceased's body, wrote that deceased was killed by throttling or strangulating and thereafter she suffered the burn injuries. In the cross-examination of

PW-3, nothing material could be pointed out which would help the case of the accused. The accused admitted that the deceased was his wife and was living with him in the cabin. On the basis of the record, the High Court also noticed the fact that deceased had separated from her earlier husband and was living with the accused who was also staying away from his family. The villagers objected to the accused living with the deceased in that manner. In these circumstances, the onus to explain the cause of death of the deceased was upon the husband. He offered an explanation that she had committed suicide by burning herself but this explanation has been disbelieved. The husband on his own stated that when he noticed that the deceased was still alive and her burnt body was lying just outside their cabin in the chilly plantation, he took the help of BB. He neither referred the name of BB in his statement under section 313 Cr.PC. nor did he examine him as a witness. In the normal course, thus, it will have to be presumed that if this witness was produced and examined in court, he might have spoken the truth which was not suitable or favourable to the accused. For reasons best known and which remained unexplained, BB was not examined though the accused, in his statement under section 313 of Cr.P.C. in answer to the last question, stated that he was innocent and would give in writing whatever he wanted to say. Despite this, no defence was led by the appellant. [Para 16] [831-H; 832-A-H]

3.4. PW1 stated in his examination-in-chief that the tube well of the accused was located north of his 'khalian' in village M and that the deceased was living with the accused and when about 10.00 A.M. on the date of occurrence, he had gone there, he saw the deceased in a burnt condition. According to him, the police came and prepared an inquest report which was signed by him. The statement of PW 1 is that of the truthful witness and he

did not try to add or subtract anything in his statement what he stated before the police during investigation. In face of his statement, the relevancy of PW2 being declared hostile is hardly of any consequence. Strangely, even to PW 1 a question was not posed in his cross examination that one BB was present at the site from whom the accused had sought help to take the deceased to the hospital. [Para 16] [832-H; 833-A-C]

3.5. The evidence of PW 3-doctor that death was due to xphyxia, shock and hemorrhage as a result of throttling and the injuries stated, clearly satisfies the conditions in a case of circumstantial evidence. The circumstances proved by the prosecution are of a conclusive nature and they do exclude the possibility of any other view which could be taken rationally and reasonably. The fact of the matter is that the deceased died while living with the appellant and he ought to explain his conduct and he was expected to render some explanation which was reasonably possible in the facts and circumstances of the case in regard to cause of her death. [Paras 17 and 18] [833-G-H]

4. The motive is not absolutely essential to be established for securing conviction of an accused who committed the offence, provided the prosecution was able to prove its case beyond any reasonable doubt. In the instant case, the deceased left her earlier husband and was living with the appellant, who was also staying away from his family in the cabin in his agricultural fields, where that incident occurred. There was definite protest raised by the villagers to their living together. The statement of PW4 is relevant. Even the medical evidence showed that the deceased was strangulated or throttled before her body was burnt. The social embarrassment could be a plausible motive for the appellant to commit the crime. Furthermore, the appellant took an incorrect,

if not a false stand before the court that the incident occurred in his absence. His conduct in naming BB from whom he sought help to take the deceased to the hospital also does not appear to be correct. The appellant made no effort whatsoever to examine any witness to establish the fact. He admitted that the deceased died in front of his eyes and he did nothing except reporting the matter to the police at a subsequent stage. The motive suggested by the prosecution appears to be reasonable and is in consonance with the behaviour of a person placed in a situation like the appellant and it is also difficult to believe that a person would commit suicide without any provocation or incident immediately preceding the occurrence. Both the courts rightly disbelieved the explanation rendered by the appellant and there is no reason to take a different view. [Para 19] [834-D-H; 835-B-H]

Bhimapa Chandappa Hosamani v. State of Karnataka **(2006) 11 SCC 323, referred to.**

5. There is no infirmity in law or otherwise in the judgment. The finding of guilt as well as the order of sentence also does not call for any interference. [Para 20] [835-D]

Case Law Reference:

AIR 1984 SC 1622	**Referred to.**	**Para 5**
AIR 1960 SC 500	**Referred to.**	**Para 5**
AIR 2003 SC 3915	**Referred to.**	**Para 6**
AIR 1953 SC 247	**Referred to.**	**Para 8**
(2007) 12 SCC 341	**Referred to.**	**Para 9**
AIR 1953 SC 468	**Referred to.**	**Para 10**
(2006) 11 SCC 323	**Referred to.**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1165 of 2009.

From the Judgment and Order dated 11.09.2008 of the High Court of Judicature at Patna in Criminal Appeal No. 62 of 1988.

A.K. Srivastav and Sanjay Verma (for Ambhoj Kumar Sinha) for the Appellant.

Chandan Kumar (for Gopal Singh) for the Respondent

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. On 14th December, 1985 at about 11.00 A.M. a fardbeyan was recorded by Sub-Inspector of the Police Station, Nalanda at the behest of Manu Sao who informed that he is living with his wife Bimla Devi in his cabin at his agricultural lands in village Mohanpur. He was carrying on agricultural activity as he was possessed of agricultural land. On that very date at about 9.00 A.M., he had gone over to Nalanda for some personal work and after he returned to his cabin at about 10.00 A.M., he found his wife Bimla Devi lying in burnt condition in amidst chilly plantation in front of his cabin. There were serious burn injuries on her body, however, Manu Sau found her somewhat alive at that time and he asked one Bhola Babu for help to take her to a doctor for treatment. By the time, she could be lifted to be taken for treatment, she died. In these circumstances, while he was planning to go to the police station, the Sub-Inspector Hirdya Narain Singh came there who was subsequently examined as PW4. The Investigating Officer started the inquest proceedings and the dead body was sent for postmortem to Sadar Hospital, Biharsharif. The postmortem was conducted and the report Ex.4 was prepared on 14th December, 1985. It was noticed that she had suffered from burn injuries, both her eyes were closed and the tongue was protruding. Keeping in view the postmortem report, the Investigating Officer had a suspicion in

mind and thereafter an FIR was recorded with reference to the postmortem report, it was found that Bimla Devi had died on account of throttling and ante-mortem injuries and, with an intention to cause disappearance of evidence, the body was burnt. The F.I.R. was Ext.5 and a case under Section 302 and 201 of the Indian Penal Code (herein after referred to as 'IPC') was registered. The suspect of commission of this crime was found to be Mannu Sao himself, the appellant herein. The Investigating Officer recorded the statement of the witnesses including that of the doctor and presented the charge-sheet before the Court of competent jurisdiction. The appellant was charged with both the afore-stated offences. He pleaded innocence and was subjected to trial. The prosecution only examined four witnesses PW1 and PW2 co-villagers, PW3 Dr. Bidhu Bhushan Singh and PW4 Hirdya Narain Singh, Investigating Officer. The learned Trial Court, vide its judgment dated 21st December, 1987, convicted the accused for both the offences and awarded the punishment rigorous imprisonment for life under Section 302, IPC and three years rigorous imprisonment under Section 201 IPC. Both the sentences were ordered to run concurrently. This judgment of the Trial Court was challenged before the High Court of Patna, though unsuccessfully. The High Court concurred with the finding of facts recorded by the Court and it sustained the finding of guilt as well as order of sentence awarded by the Trail Court. Vide judgment of the High Court dated 11th September, 2008 thus giving rise to the present appeal.

2. While impugning the judgment under appeal, the contention raised before us is that the case being that of circumstantial evidence, the prosecution has not established complete chain of events and circumstances leading to the commission of the crime and involvement of the appellant. It was further contended that there was no motive as to why the appellant should have committed the crime and lastly, that it was a clear case of suicide by the deceased and there was no material evidence on record to arrive at the conclusion stated

in the judgments under appeal.

3. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye witness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence, provided, the prosecution is able to prove beyond reasonable doubt, complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye-witness to the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of accepted principles in that regard.

4. Three Judge Bench in the case of *Sharad v. State of Maharashtra,* [AIR 1984 SC 1622] held as under:

> "**152**. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant* v. *State of Madhya Pradesh*[1]*.* This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail* (*alias*) *Simmi* v. *State of Uttar Pradesh* and *Ramgopal* v. *State of Maharashtra.* It may be useful to extract what Mahajan, J. has laid down in *Hanumant case*:
>
> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should

> be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."
>
> **153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]
>
> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (*3*) the circumstances should be of a conclusive nature and tendency,
>
> (*4*) they should exclude every possible hypothesis except

the one to be proved, and

(*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

5. In the cases of circumstantial evidence, this Court has even held accused guilty where the medical evidence did not support the case of the prosecution. In *Anant Lagu v. State of Bombay* [AIR 1960 SC 500] where the deceased died of poisoning, the Court held that as there were various factors which militate against a successful isolation of the poison and its recognition. It further noticed that while circumstances often speak with unerring certainty, the autopsy and the chemical analysis taken by them may be most misleading. No doubt, due weightage must be given to the negative findings at such examination which the man of medicine performs and the limitations under which he works, his failure should not be taken as an end of the case, for on good and probative circumstances an irresistible inference of guilt can be drawn.

6. Similar view was taken by a Bench of this Court in the case of *Dayanidhi Bisoi v. State of Orissa,* [AIR 2003 SC 3915], where in a case of circumstantial evidence the Court even confirmed the death sentence as being rarest of rare cases. The Court clearly held that it is not a circumstance or some of the circumstances which by itself, would assist the Court to base a conviction but all circumstances put forth against the accused once are established beyond reasonable doubt then conviction must follow and all the inordinate circumstances would be used for corroborating the case of the prosecution.

7. It is of similar significance for the Court to examine whether the requirements to be established in a case of circumstantial evidence are satisfied in the case before it or not. The cases of circumstantial evidence have to be dealt with greater care and by microscopic examination of the documentary and oral evidence on record. It is then alone that the Court will be in a position to arrive at a conclusion upon proper analysis of the evidence in relation to the ingredients of an offence. In the case of circumstantial evidence, particularly, besides the entire case of the prosecution, even the statement of the accused made under Section 313 of Cr.P.C. can be of substantial help.

8. Let us examine the essential features of this Section 313 Cr.P.C. and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Code. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and besides ensuring the compliance thereof the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or in the alternative to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in

accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313 (4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put as evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Code as it cannot be regarded as a substantive piece of evidence. In the case of *Vijendrajit Ayodhya Prasad Goel v State of Bombay,* [AIR 1953 SC 247], the Court held as under:

> "**3**. …….As the appellant admitted that he was in charge of the godown, further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under Section 342 as supporting the prosecution case concerning the

> possession of the godown. The contention that the Magistrate made use of the inculpatory part of the accused's statement and excluded the exculpatory part does not seem to be correct. The statement under Section 342 did not consist of two portions, part inculpatory and part exculpatory. It concerned itself with two facts. The accused admitted that he was in charge of the godown, he denied that the rectified spirit was found in that godown. He alleged that the rectified spirit was found outside it. This part of his statement was proved untrue by the prosecution evidence and had no intimate connection with the statement concerning the possession of the godown."

9. On similar lines reference can be made in quite a recent judgment of this Court in the case of *Ajay Singh v. State of Maharashtra,* [(2007) 12 SCC 341] where the Court held as under:

> "**11.** So far as the prosecution case that kerosene was found on the accused's dress is concerned, it is to be noted that no question in this regard was put to the accused while he was examined under Section 313 of the Code.
>
> **12.** The purpose of Section 313 of the Code is set out in its opening words – "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him". In *Hate Singh Bhagat Singh v. State of Madhya Bharat* it has been laid down by Bose, J. (AIR p. 469, para 8) that the statements of the accused persons recorded under Section 313 of the Code "are among the most important matters to be considered at the trial". It was pointed out that:
>
> "8…The statements of the accused recorded by the committing Magistrates and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the

witness box [and that] they have to be received in evidence and treated as evidence and be duly considered at the trial."

This position remains unaltered even after the insertion of Section 315 in the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there.

13. The object of examination under this section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus."

10. The statement made by the accused is capable of being used in the trial though to a limited extent. But the law also places an obligation upon the Court to take into consideration the stand of the accused in his statement and consider the same objectively and in its entirety. This principle of law has been stated by this Court in the case of *Hate Singh Bhagat Singh v. State of Madhya Bharat* [AIR 1953 SC 468].

11. Let us now examine the relevant part of the statement made by the accused under Section 313 of the Code as it would to some extent narrow the controversy before the Court. The appellant had clearly and in unambiguous terms admitted that the deceased was his wife and she died of burn injuries. The questions put to the accused were very few and the two important questions which were put to the accused by the Court and his answers read as under:

"Question:- It is the case of the prosecution that after committing murder you in order to disappear the evidence of the murder set the dead body on fire and also tried to disappear the same to screen yourself from punishment.

Ans:- No.

Question:- You had stated in the information that your wife Bimla Devi had died being burnt due to fire. In postmortem examination it has been found that her death has been caused by throttling her neck. What have you to say?

Ans:- I had given information to the police regarding burning. She has not been murdered. Her death has been caused due to throttling her neck is wrong."

12. As already noticed from the above answers, it is clear that the appellant does not dispute the factum of the deceased being his wife and had died because of burn injuries. However, his version is that she committed a suicide by pouring kerosene on her and burning herself. While according to the prosecution primarily relying upon the statement of PW3, it was a case of causing death of the deceased by strangulating and then burning the body of the deceased. Even the learned Trial Court had noticed and discussed these facts and as well as noticed the admission and argument of the learned Counsel appearing for the accused before that Court. It will be useful to refer to those findings in paragraph 8 and 9 of the Trial Court Judgment:-

"**8**. This case is based on circumstantial evidence as there is no eye witness of the occurrence, which had taken place in the cabin belonging to the accused. So far the occurrence is concerned, the stand of the accused had been in the beginning that his wife Bimla Devi had committed suicide during his absence by sprinkling K.Oil. Before I proceed to discuss the evidence brought on the record by the prosecution as well as the circumstances, I find it necessary in the outset to mention some of the facts which are not denied nor disputed in this case. The learned defence counsel has not disputed the fact that the deceased, Bimla Devi was the wife (concubine) of the

accused, Manu Sao, and that the accused was living with her in his cabin at village Mohanpur. It is also not disputed that the woman had died and had burnt injury on her person. U.D. case on the statement of Manu Sao as informant, was institute which was converted into a case under section 302/301 I.P.C. on the written report of the officer-in-charge on the receipt of the post-mortem report (Ext.2) on the dead body of Bimla Devi.

9. From Ext.6, it appears that the officer-in-charge, P.W.4, had gone to the place of occurrence on hearing rumour after making station diary entry regarding a woman lying burnt at village Mohanpur near the cabin of the accused. P.W.4 Hirdya Narain Singh, the officer-in-charge, who had gone to the place of occurrence had found the dead body of a woman lying in a chilly field near the cabin of the informant and she had burnt injury. Manu Sao, accused, had maintained that till 9.30 A.M. and when he returned at 10.30 A.M. he found his wife Bimla Devi lying burnt in a chili field near his cabin and had also seen trace of K. oil. extending from well near the cabin up to the door of the cabin……."

13. In light of the above undisputed position, now let us proceed to examine whether complete chain of events has been established by the prosecution beyond reasonable doubt.

14. This aspect of the case was also squarely dealt with by the learned Trial Court which had the benefit of recording the entire evidence noticed the demeanour and conduct of the witnesses as well as the expert witnesses satisfactorily. In para 19 and 20, these circumstances have been noticed by the Trial Court in an appropriate manner. We may refer to them:

"**19**. It is true that there is no eye witness account but there are circumstances which prove beyond doubt that the accused had killed his wife and in order to escape punishment and in order to disappear the evidence of

death set fire to the dead body and gave out that his wife committed suicide by burning in between 9 A.M. to 10.30 A.M. on 14.12.1985.

20. The following circumstances clearly show that the accused committed the crime:

(1) He was found in the cabin with his wife when the throttling was done. The evidence of throttling according to P.W.3 taken place in the right (sic) of 13/14.12.1985.

(2) The accused furnished false information in his fardbeyan propounding a case of suicide of his wife by setting fire, on the basis of which an U.D. case was instituted. The deceased Bimla Devi had died due to throttling which can be attributed to the accused and not due to burn injury which was post-mortem.

(3) The accused did not give any information to the police about the occurrence and police on its own information had gone to the place of occurrence where Manu Sao (accused) gave out that his wife has committed suicide. If this be so, then he ought to have immediately informed the police. The fact that he had informed one Bhola Paswan about it also cannot be believed because he has not been examined to prove this part of the defence version.

(4) From the inquest report as well as from the evidence of the doctor, P.W. 3 it is clear that tongue of the deceased was found protruding and swollen. There was fracture of right parietal skull bone and the Larynx and treachea congested. There was no possibility of pressing of neck by the deceased herself as P.W. 3 has negatived such a situation.

(5) The motive for the occurrence is also not far to seek. It is in the evidence that the castmen of the accused were against the keeping of Bimla Devi by the accused. It is

urged by the learned counsel for the defence that the possibility of the hand of the father of the deceased woman and his family member cannot be ruled out. There is nothing on the record to show that there was at any time protest by the father of the deceased rather there is evidence on record to show that the accused conduct was constantly opposed by his own castmen.

(6) If the woman had burnt herself for which evidence created by the husband (accused) then how could she inflict injury on her person and how there could be trolling (sic) which the doctor had found during the post-mortem examination.

(7) The learned defence counsel urged that the fard-beyan of the accused recorded by police inadmissible and this cannot be used against him as this statement was made to a police officer. This case has not been instituted on the basis of the fardbeyan of the accused rather on the statement and written information of the P.W. 4. The written report of the U.D. case and the information given by Manu Sao cannot be equated with first information of confession by the accused. I his (sic) statement was made by him when he was not accused rather an informant. Therefore, I find no substance in the above argument. Moreover, accused has also not denied his earlier statement and has even in this statement under section 313 Cr.P.C. admitted to have given information regarding suicide by his wife by setting fire."

15. These findings of facts and appreciation of evidence by the Trial Court was not interfered by the High Court and in fact, it recorded its conccurrence by reiterating these findings.

16. Some emphasis was placed on the fact that PW2 a co-villager, in his evidence, had said that he did not know about the occurrence and he had signed on the report Ext.1/1 at the behest of the Investigating Officer. The accused can hardly

derive any advantage from this because this witness was to primarily prove the death of the deceased after she had been burnt. Even according to the prosecution he was not an eye-witness and there was nothing much which he would contradict, as the prosecution had mainly relied upon the statement of PW3 and PW4. The most important witness of the present case was PW3 Dr. Bidhu Bhushan Singh who had performed the postmortem upon the deceased's body and had written that she had been killed by throttling or strangulating and thereafter she suffered the burn injuries. In the cross-examination of this witness, nothing material could be pointed out which would help the case of the accused. The accused has admitted the deceased was his wife and was living with him in the cabin. On the basis of the record, the High Court has also noticed the fact that deceased had separated from her earlier husband and was living with the accused who was also staying away from his family. The villagers had objected to the accused living with the deceased in that manner. In these circumstances, the onus to explain the cause of death of the deceased was upon the husband. He did offer an explanation that she had committed suicide by burning herself but this explanation has been disbelieved. Another very material factor is that as per his own statement when he noticed that the deceased was still alive and her burnt body was lying just outside cabin in the chilly plantation, he had taken the help of Bhola Babu. The name of this person he neither referred in his statement under Section 313 Cr.PC. nor he examined this person as a witness. In the normal course, thus, it will have to be presumed that if this witness was produced and examined in Court, he might have spoken the truth which was not suitable or favourable to the accused. For reasons best known and which remained unexplained, this witness was not examined though in his statement under Section 313 of Cr.P.C. in answer to the last question he had stated that he was innocent and would give in writing whatever he wanted to say. Despite this, no defence was led by the appellant. PW1 stated in his examination-in-chief that the tube well of the accused Manu Sao was located north

of his khalian in village Mohanpur and that Bimla Devi was living with the accused and when about 10.00 A.M. on the date of occurrence, he had gone there he had seen Bimla Devi in a burnt condition. According to him, the police had come and prepared an inquest report which was signed by him. The statement of this witness is that of the truthful witness and he has not tried to add or subtract anything in his statement what he stated before the police during investigation. In face of his statement, the relevancy of PW2 being declared hostile is hardly of any consequence. Strangely, even to this witness even a question was not posed in his cross examination that one Bhola Babu was present at the site from whom the accused had sought help to take the deceased to the hospital.

17. Resultantly and in any case nothing worth noticing much less favourable to the accused came in his cross-examination. PW3 Dr. Bidhu Bhushan Singh expressed his opinion as to the accused of death as follows:

> "In my opinion death was due to xphyxia (sic) shock and haemarrage (sic) as a result of throttling (sic) and above mentioned injuries. Time elapsed since death was 12 to 16 hours. The bruise on the right forehead region was possible by hard blunt substance."

18. The above evidence clearly satisfies the conditions stated by this Court, which need to be satisfied in a case of circumstantial evidence in the case of *Sharad* (supra). The circumstances proved by the prosecution are of a conclusive nature and they do exclude the possibility of any other view which could be taken rationally and reasonably. The fact of the matter is that the deceased died while living with the appellant and he ought to explain his conduct and he was expected to render some explanation which was reasonably possible in the facts and circumstances of the case in regard to cause of her death.

19. Lastly, now we should revert to the discussion on as

to what was the motive of the appellant to kill the deceased. It has come in evidence that the deceased had left her earlier husband and was living with the appellant, who was also staying away from his family in the cabin in his agricultural fields, where that incident occurred. There was definite protest raised by the villagers to their living together. The statement of PW4 in this regard is of relevance. Besides this, even the medical evidence had shown that the deceased was strangulated or throttled before her body was burnt. The social embarrassment could be a plausible motive for the appellant to commit the crime. Furthermore, the appellant took an incorrect, if not a false stand before the Court that the incident occurred in his absence. His conduct in naming Bhola Babu from whom he had sought help to take the deceased to the hospital also does not appeared to be correct. Appellant made no effort whatsoever to examine any witness to establish this fact. The appellant has admitted that the deceased died in front of his eyes and he did nothing except reporting the matter to the police at a subsequent stage. With the development of law, now it is a settled principle that motive is not absolutely essential to be established for securing conviction of an accused who has committed the offence, provided the prosecution has been able to prove its case beyond any reasonable doubt. In the present case, the motive suggested by the prosecution appears to be reasonable and is in consonance with the behaviour of a person placed in a situation like the appellant and it is also difficult to believe that a person would commit suicide without any provocation or incident immediately preceding the occurrence. The explanation rendered by the appellant has correctly been disbelieved by both the Courts as we see no reason to take a different view. Furthermore, in the case of *Bhimapa Chandappa Hosamani v. State of Karnataka,* [(2006) 11 SCC 323], this Court has taken the view that it is not always mandatory for the prosecution to establish motive as it is just one of the ingredients for convicting an accused, the Court held as under:

"**13.** The trial court as well as the High Court have not accepted the evidence regarding existence of motive as alleged by PW 1 in the first information report. In fact she herself in the course of her deposition denied the existence of such a motive. The High Court has agreed with the view of the trial court on this issue. It is well settled that in order to bring home the guilt of an accused, it is not necessary for the prosecution to prove the motive. The existence of motive is only one of the circumstances to be kept in mind while appreciating the evidence adduced by the prosecution. If the evidence of the witnesses appears to be truthful and convincing, failure to prove the motive is not fatal to the case of the prosecution. The law on this aspect is well settled."

20. In view of the above reasoning, we do not find any infirmity in law or otherwise in the judgment under appeal. The finding of guilty as well as the order of sentence also do not call for any interference. Hence, the appeal is dismissed.

N.J. Appeal dimissed.

SHALINI SHYAM SHETTY AND ANOTHER
v.
RAJENDRA SHANKAR PATIL
(Civil Appeal No. 5896 of 2010)

JULY 23, 2010

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

Constitution of India, 1950:

Articles 226, 227 and 32 – Dispute between landlord and tenant – Writ petition by tenant challenging the decree passed by trial court and affirmed by first appellate court – Dismissed by High Court – On appeal, held: High Court erred in entertaining the writ petition – In cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown, that private individual is acting in collusion with a statutory authority – Writ petition was filed in a pure dispute between landlord and tenant amongst private parties and the only respondent is plaintiff landlord – Petition filed under Article 227 cannot be called a writ petition – Writs can be issued by High Courts only under Article 226 and by the Supreme Court only under Article 32 – No writ petition can be moved under Article 227 nor can a writ be issued under Article 227 – Bombay High Court (Appellate Side) Rules, 1960.

Articles 226 and 227 – Jurisdiction under Articles 226 and 227 – Distinction between – Explained.

Article 227 – Power of superintendence over all courts and tribunals by the High Court – Exercise of – Principles formulated.

Article 226 – Writ – Issuance of – Held: Writ petition is a remedy in public law – High Court can issue writ to any

person, but person against whom writ will be issued must have some statutory or public duty to perform – Main respondent should be either Government, Governmental agencies or a State or instrumentalities of a State within the meaning of Article 12 – Private individuals cannot be equated with State or instrumentalities of State – All respondents in a writ petition cannot be private parties – But private parties acting in collusion with State can be respondents in a writ petition.

The respondent-landlord filed a suit for eviction on various grounds against the appellant-tenants. The trial court decreed the suit in favour of the respondent. The first appellate court upheld the order of the trial court. The tenants then filed a writ petition before the High Court and prayed for a writ of certiorari. The High Court dismissed the writ petition. Therefore, the tenants filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 In cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown, that a private individual is acting in collusion with a statutory authority. A private person becomes amenable to writ jurisdiction only if he is connected with a statutory authority or only if he/she discharges any official duty. In the instant case, none of the said features are present. Even then a writ petition was filed in a pure dispute between landlord and tenant amongst private parties and the only respondent is the plaintiff landlord. Therefore, the High Court erred in entertaining the writ petition. The course adopted by the High Court cannot be approved. Certainly, the High Court's order of non-interference in view of concurrent findings of facts is unexceptionable. [Paras 72, 73, 79 and 83] [877-G-H; 876-B-D; 878-G]

1.2 A writ petition is a remedy in public law which may be filed by any person but the main respondent should be either Government, Governmental agencies or a State or instrumentalities of a State within the meaning of Article 12. Private individuals cannot be equated with State or instrumentalities of the State. All the respondents in a writ petition cannot be private parties. But private parties acting in collusion with State can be respondents in a writ petition. Under the phraseology of Article 226, High Court can issue writ to any person, but the person against whom writ will be issued must have some statutory or public duty to perform. It is only a writ of Habeas Corpus which can be directed not only against the State but also against private person. The writ of Habeas Corpus is issued not only for release from detention by the State but also for release from private detention. [Paras 64 and 70] [873-F-G; 875-F]

Sohan Lal vs. Union of India and Anr. **AIR 1957 SC 529 – followed.**

Engineering Mazdoor Sabha and Anr. vs. Hind Cycles Ltd. **AIR 1963 SC 874;** *Rohtas Industries Ltd. and Anr. vs. Rohtas Industries Staff Union and Ors.* **(1976) 2 SCC 82 – referred to.**

1.3 A proceeding under Article 226 is not the appropriate forum for adjudication of property disputes or disputes relating to title. [Paras 74 and 75] [876-D-F]

Mohammed Hanif vs. The State of Assam **1969 (2) SCC 782;** *T.C. Basappa vs. T. Nagappa and Anr.* **AIR 1954 SC 440;** *M/s. Hindustan Steel Limited, Rourkela vs. Smt. Kalyani Banerjee and Ors.* **(1973) 1 SCC 273;** *State of Rajasthan vs. Bhawani Singh and Ors.* **1993 Supp. (1) SCC 306** *Mohan Pandey and Anr. vs. Usha Rani Rajgaria and Ors.* **(1992) 4 SCC 61** *Prasanna Kumar Roy Karmakar vs. State of W.B and Ors.* **(1996) 3 SCC 403;** *P.R. Murlidharan and Ors. vs. Swami*

Dharmananda Theertha Padar and Ors. **(2006) 4 SCC 501 – referred to.**

2.1 The submission that petitions under Article 227 of the Constitution are filed against orders of civil court and even in disputes between landlord and tenant, under the Bombay High Court (Appellate Side) Rules, 1960, such petitions are called writ petitions, cannot be accepted. It does not appear from the Bombay High Court Rules that petitions under Article 227 are called writ petitions. It is provided under the said Rules that petitions under Article 227 filed in respect of certain category of cases would be heard by a Division Bench hearing writ petitions. That is merely indicative of the forum where such petitions will be heard. Chapter XVII of the Rules deals with the petitions under Articles 226 and 227 and applications under Article 228 and rules for issue of writs and orders under those Articles. [Paras 16, 21, 22 and 23] [852-D; 853-E-H]

2.2 The petitions under Article 226 and those under Article 227 are treated differently. To a proceeding under Article 227 of the Constitution of India only the appellate side Rules of the High Court apply. But to a proceeding under Article 226, either the original side or the appellate side Rules, depending on the situs of the cause of action, would apply. Therefore, High Court Rules treat the two proceedings differently in as much as a proceeding under Article 226, being an original proceeding, can be governed under Original Side Rules of the High Court, depending on the situs of the cause of action. A proceeding under Article 227 is never an original proceeding and can never be governed under Original Side Rules of the High Court. Apart from that, writ proceeding by its very nature is a different species of proceeding. [Paras 24, 27, 28 and 29] [854-B; 857-H; 858-A-C]

Jhaman Karamsingh Dadlani vs. Ramanlal Maneklal Kantawala **AIR 1975 Bombay 182 – referred to.**

3.1 Before the coming of the Constitution on 26th January, 1950, no Court in India except three High Courts of Calcutta, Bombay and Madras could issue the writs, that too within their original jurisdiction. Prior to Article 226 of the Constitution, under Section 45 of the Specific Relief Act, the power to issue an order in the nature of mandamus was there. The power to issue writs underwent a sea-change with the coming of the Constitution from 26th January, 1950. Now writs can be issued by High Courts only under Article 226 of the Constitution and by the Supreme Court only under Article 32 of the Constitution. No writ petition can be moved under Article 227 of the Constitution nor can a writ be issued under Article 227 of the Constitution. Therefore, a petition filed under Article 227 of the Constitution cannot be called a writ petition. This is clearly the Constitutional position. No Rule of any High Court can amend or alter this clear Constitutional scheme. In fact the Rules of Bombay High Court have not done that and proceedings under Articles 226 and 227 have been separately dealt with under the said Rules. [Paras 30, 31 and 32] [858-D-H; 859-A-C]

Law of Writs by V.G. Ramchandran, Eastern Book Company Volume 1 – **referred to.**

3.2 Articles 226 and 227 stand on substantially different footing. Prior to the Constitution, the Chartered High Courts as also the Judicial Committee of the Privy Council could issue prerogative writs in exercise of their original jurisdiction. However, after the Constitution every High Court has been conferred with the power to issue writs under Article 226 and these are original proceeding. The jurisdiction under Article 227 on the other hand is not original nor is it appellate. This jurisdiction of

superintendence under Article 227 is for both administrative and judicial superintendence. Therefore, the powers conferred under Articles 226 and 227 are separate and distinct and operate in different fields. Under Article 226, the High Court normally annuls or quashes an order or proceeding but in exercise of its jurisdiction under Article 227, the High Court, apart from annulling the proceeding, can also substitute the impugned order by the order which the inferior tribunal should have made. [Paras 57, 58, 59 and 60] [868-F-H; 869-A-C]

Jahnabi Prosad Banerjee and Anr. vs. Basudeb Paul and Ors. **AIR 1950 Calcutta 536;** *Sukhdeo Baiswar vs. Brij Bhushan Misra and Ors.* **AIR 1951 Allahabad 667;** *Dalmia Jain Airways Limited vs. Sukumar Mukherjee* **AIR 1951 Calcutta 193;** *Manmatha Nath Biswas vs. Emperor* **AIR 1933 Calcutta 132;** *Jodhey and Ors. vs. State through Ram Sahai* **AIR 1952 Allahabad 788;** *Nagendra Nath Bora and Anr. vs. Commissioner of Hills Division and Appeals, Assam and Ors.* **AIR 1958 SC 398;** *State of Gujarat etc. vs. Vakhatsinghji Vajesinghji Vaghela (dead) Thr LRs and Ors.* **AIR 1968 SC 1481;** *Mani Nariman Daruwala @ Bharucha (deceased) through Lrs. and Ors. vs. Phiroz N. Bhatena and Ors. etc.***(1991) 3 SCC 141;** *Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram* **(1986) 4 SCC 447;** *Laxmikant Revchand Bhojwani and Anr. vs. Pratapsingh Mohansingh Pardeshi* **(1995) 6 SCC 576;** *Sarpanch, Lonand Grampanchayat vs. Ramgiri Gosavi and Anr.* **AIR 1968 SC 222;** *Jijabai Vithalrao Gajre vs. Pathankhan and Ors.* **(1970) 2 SCC 717;** *Ahmedabad Manufacturing and Calico Ptg. Co. Ltd. vs. Ram Tahel Ramnand and Ors.* **(1972) 1 SCC 898;** *Surya Dev Rai vs. Ram Chander Rai and Ors.* **(2003) 6 SCC 675;** *Radhey Shyam and Anr. vs. Chhabi Nath and Ors.* **(2009) 5 SCC 616 – referred to.**

State of U.P. and Ors. vs. Dr. Vijay Anand Maharaj **AIR 1963 SC 946;** *Surya Dev Rai vs. Ram Chander Rai and Ors.* **(2003) 6 SCC 675;** *Hari Vishnu Kamath vs. Ahmad Ishaque and Ors.* **AIR 1955 SC 233 – relied to.**

3.3 Jurisdiction under Article 226 normally is exercised where a party is affected but power under Article 227 can be exercised by the High Court suo motu as a custodian of justice. In fact, the power under Article 226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. Jurisdiction under Article 227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State. In certain cases where there is infringement of fundamental right, the relief under Article 226 can be claimed *ex-debito justicia* or as a matter of right. But in cases where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a Single Judge passed under Article 226, a Letters Patent Appeal or an intra Court Appeal is maintainable. But no such appeal is maintainable from an order passed by a Single Judge of a High Court in exercise of power under Article 227. In almost all High Courts, Rules have been framed for regulating the exercise of jurisdiction under Article 226. No such Rule appears to have been framed for exercise of High Court's power under Article 227 possibly to keep such exercise entirely in the domain of the discretion of High Court. [Para 61] [869-D-H]

3.4 The principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot

be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227.

(c) High Courts cannot, ordinarily, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in *Waryam Singh's* case which have been repeatedly followed by subsequent Constitution Benches and various other decisions of this court.

(e) According to the ratio in *Waryam Singh's* case, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and courts subordinate to it, 'within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) The High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts

subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence, the High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised *suo motu*.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery

of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality. [Para 62] [870-A-H; 871-A-H; 872-A-H; 873-A-D]

Waryam Singh and Anr. vs. Amarnath and Anr. **AIR 1954 SC 215;** *L. Chandra Kumar vs. Union of India and Ors.* **(1997) 3 SCC 261 – followed.**

4.1 It is discerned that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases High Courts, in a routine manner, entertain petition under Article 227 over such disputes and such petitions are treated as writ petitions. Even if the scope of s. 115 CPC is curtailed that has not resulted in expanding High

Court's power of superintendence. In exercising its jurisdiction, the High Court must follow the regime of law. [Paras 78 and 80] [877-E-H; 878-A-C]

4.2 As a result of frequent interference by the High Court either under Article 226 or 227 with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227, the High Court will follow the time honoured principles. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest Courts of justice within their jurisdiction will adhere to them strictly. [Paras 81 and 82] [878-D-E]

Case Law Reference:

AIR 1975 Bombay 182	**Referred to.**	**Para 25**
AIR 1950 Calcutta 536	**Referred to.**	**Para 38**
AIR 1951 Allahabad 667	**Referred to.**	**Para 38**
AIR 1951 Calcutta 193	**Referred to.**	**Para 40**
AIR 1933 Calcutta 132	**Referred to.**	**Para 43**
AIR 1952 Allahabad 788	**Referred to.**	**Para 44**
AIR 1958 SC 398	**Referred to.**	**Para 46**
AIR 1968 SC 1481	**Referred to.**	**Para 48**
(1991) 3 SCC 141	**Referred to.**	**Para 50**
(1986) 4 SCC 447	**Referred to.**	**Para 51**
(1995) 6 SCC 576	**Referred to.**	**Para 52**
AIR 1968 SC 222	**Referred to.**	**Para 53**

(1970) 2 SCC 717	**Referred to.**	**Para 53**
(1972) 1 SCC 898	**Referred to.**	**Para 53**
(2009) 5 SCC 616	**Referred to.**	**Para 54**
AIR 1963 SC 946	**Relied on.**	**Para 58**
AIR 1955 SC 233	**Relied on.**	**Para 60**
(2003) 6 SCC 675	**Relied on.**	**Para 60**
AIR 1954 SC 215	**Followed.**	**Para 62**
(1997) 3 SCC 261	**Followed.**	**Para 62**
AIR 1957 SC 529	**Followed.**	**Para 68**
AIR 1963 SC 874	**Referred to.**	**Para 69**
(1976) 2 SCC 82	**Referred to.**	**Para 71**
1969 (2) SCC 782	**Referred to.**	**Para 74**
AIR 1954 SC 440	**Referred to.**	**Para 75**
(1973) 1 SCC 273	**Referred to.**	**Para 76**
1993 Supp. (1) SCC 306	**Referred to.**	**Para 76**
(1992) 4 SCC 61	**Referred to.**	**Para 76**
(2006) 4 SCC 501	**Referred to.**	**Para 76**
(1996) 3 SCC 403	**Referred to.**	**Para 77**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5896 of 2010.

From the Judgment and Order dated 09.02.2009 of the High Court of Judicature at Bombay in WP No. 7926 of 2008.

Jitendra Mohan Sharma, Sandeep Singh and Sandeep Malik for the appellants.

Shivaji M. Jhadav for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. This appeal has been filed by the original defendant challenging the judgment and order dated 09.02.2009 of the Bombay High Court rendered in the Writ Petition filed under Article 226 of the Constitution of India. The High Court dismissed the writ petition in view of concurrent finding of two lower courts and High Court thought that no interference in exercise of its writ jurisdiction is warranted.

3. The facts of the case are that the respondent/plaintiff filed a suit for eviction on the grounds of breach of terms of tenancy, damage to the property as well as causing nuisance and annoyance to the plaintiff and the other occupants. As per the plaintiff the original defendant was the tenant in respect of Room No.3 (hereinafter as suit premises) and was paying monthly rent of Rs.20/- including the water charges and excluding the electricity charges. The case of the plaintiff is that only the suit premises was let out though the original tenant was allowed to use a covered space of 10'x 4', but the same was for common usage and for access to W.C and water tap along with the other tenants.

4. Plaintiff claims that somewhere in January 2000, the defendant had requested the plaintiff to give keys of the two doors to clean the 'Sherry' portion. But the said keys were not returned even after 2-3 days and the plaintiff became suspicious and requested the defendant for returning the keys, but in vain. Suspecting some foul play, the plaintiff entered the 'sherry' to find that the defendant had placed his items over there and removed the drainage cover which was there in the Sherry. A police complaint was made with regard to the unauthorized possession but nothing happened. The plaintiff then requested the defendant to remove those articles but the request of the

plaintiff was not heeded.

5. The defendant/appellant's father is said to have filed a suit for relief of declaration as tenant in the premises and to further restrain the landlord from interfering in the tenanted premises. In the said suit injunction was granted. Thereafter, the plaintiff had demolished a wall that was there in the Sherry and put up a new door.

6. The original defendant expired during the pendency of the suit and his LRs were brought on record and they, in their written statement, admitted the relationship between the parties, but they denied all the allegations against them. They made a claim that the space measuring about 10'x4' abutting the entrance door of suit premises was in their exclusive use. As regards the suit filed by the appellant's father it was submitted that the same was settled outside the court with the understanding that the defendant would withdraw his suit, whereas the plaintiff will withdraw his suit simultaneously. An affidavit dated 16.03.01 was filed to that effect.

7. The learned Court of Small Causes at Mumbai, Bandra Branch, vide its judgment dated 30.10.07 decreed the suit of the plaintiff/respondent and directed the defendantS to hand over the vacant and peaceful possession of the suit premises to the plaintiff within a period of four months from the date of the order. It was held that at the time of filing of the present suit, as per evidence on record, the defendants were in unlawful occupation of the sherry portion of the suit property, which was admittedly not let out. As regards the settlement outside court it was held that the affidavit, Exhibit 'E', relied on by the defendants merely speaks of withdrawal of the suit of defendants and settlement of dispute. There is no mention about the present suit being settled. It was noted that admittedly the plaintiff has no documentary evidence to prove that the defendants had encroached and occupied the sherry portion of the suit property. But it was observed that there is corroborative evidence in this behalf in the form of NC Slip

Exhibit 'G' which shows that the complaint was filed immediately after the plaintiff learnt about this unlawful possession. Reliance was also placed on paragraph 10 of the examination-in-chief of the D.W.1 which supports the plaintiff's version.

8. It was held that the defendants admit that at some point prior to the filing of the present suit the 'sherry portion' was in the occupation of the deceased defendant. This has to be read in the light of the fact that the aforesaid portion was never let out to the deceased defendant. As such the occupation of the deceased defendant over the said portion was unlawful as he had no right to occupy the same.

9. Further reference was made to the suit filed by the appellant's father wherein an injunction order was passed in his favour. It was after the said injunction order that the defendants had demolished the wall in the sherry and constructed a door. They had also removed chamber covers and replaced it with tiles. As such it was held that the conduct of the defendants resulted in unhygienic conditions as it was impossible to clean the drains. On behalf of the defendants there was no whisper or challenge to the entire testimony on this point anywhere in the cross-examination. The result of this was nuisance and annoyance to the plaintiff as well as to other occupants of the suit property and this testimony has also not been challenged.

10. An appeal was filed against this order. The First Appellate Court vide its order dated 11.09.08 partly allowed the appeal. The trial Court's judgment was confirmed on the ground of causing waste and damage as contemplated under Section 16 (1) (a) of the Maharashtra Rent Control Act, but the findings of the trial Court on the ground of nuisance and annoyance were set aside.

11. The Appellate Court noticed that in the suit filed by the defendants against the plaintiff, the defendants have specifically come out with the case that the dispute between the deceased

defendant and the plaintiff with regard to the alleged Sherry premises, was settled and an affidavit to this effect dated 16.03.01 was executed by the defendant. The Appellate Court thought it would be just and proper to take on record the certified copy of the order of dismissal of suit filed by the defendants dated 03.03.07 under provisions of Order 41 Rule 27 (b) CPC. On perusal of the same it was found that the same was dismissed for default.

12. The Appellate Court placing reliance on para 10 of the affidavit of examination-in-chief of the defendants came to a conclusion that it was mentioned therein that the possession of the Sherry was with him and the said defendants handed over the possession to the plaintiff, as per affidavit dated 16.03.01. As such it was for the defendants to explain how they were occupying the said premises, to which there has been no reasonable explanation offered. It was concluded that the defendants had encroached upon the Sherry premises which was not let out to them and the said act definitely amounted to causing waste and damage to plaintiff's property.

13. With respect to the finding of nuisance it was observed by the Appellate Court that admittedly, none of the neighbouring occupier was examined by the plaintiff, which was necessary. As such under such circumstances, just because version of plaintiff is not challenged seriously it cannot be concluded that the plaintiff has established his case. The Appellate Court set aside the finding of the trial Court on this ground only but confirmed the finding on other grounds of eviction.

14. The appellants then moved to the High Court with a prayer to issue a writ of certiorari and/or any other writ, order or command and call for the papers and proceedings from the lower courts. The High Court dismissed the Writ Petition only on the ground that against concurrent finding of facts by the Courts below the exercise of writ jurisdiction is not warranted.

15. The facts of the case have been discussed in detail in order to show that in a pure dispute of landlord and tenant between private parties, a writ petition was entertained by the High Court. It did not pass any order on the writ petition, inter alia, on the ground that there are concurrent findings of fact. If the findings have not been concurrent, the High Court might have interfered. In any event High Court did not hold that a writ petition is not maintainable in a dispute between landlord and tenant in which both are private parties and the dispute is of civil nature.

16. It was urged before this Court that petitions under Article 227 of the Constitution are filed against orders of Civil Court and even in disputes between landlord and tenant. Under the Bombay High Court Rules, such petitions are called writ petitions.

17. This Court is unable to appreciate this submission. First of all this Court finds that the petition which was filed before the High Court was a pure and simple writ petition. It was labeled as Writ Petition No.7926 of 2008 (page 75 of the SLP paper book).

18. In paragraph 6 of the writ petition it had been categorically stated:

> "That no efficacious remedy is available to the petitioners than the present petition under Article 226 of the Constitution of India. (page 89 of SLP paper book)"

19. In the prayer portion also a writ of certiorari has been prayed for in the following terms:

> "(a) That this Hon'ble Court be pleased to issue a writ of certiorari and/or any other writ, order or command and call upon the papers and proceedings of Appeal No.314 of 2007 together with Exh.8 in RAE Suit No.146 of 2001 and also R.A.D. Suit Stamp No.61 of 2001 (Suit No.6/8 of 2001) and after going through the legality, validity and

propriety of the said Appeal and the said other matters, this Hon'ble Court be pleased to quash and/or set aside the judgment and decree dated 11th September, 2008 passed by the Hon'ble Appeal Court in Appeal No.314 of 2007 of the Petitioners and allow the same in toto".

20. Therefore, the petition filed before the High Court was a writ petition.

21. Now coming to the Bombay High Court Rules, this Court finds that in Chapter I Rule 2B of the Bombay High Court (Appellate Side) Rules, 1960 (hereinafter referred to as rules) it is provided:

"**2B. Petitions/applications under Article 226 an/or 227 of the Constitution of India, arising out of/or relating to an order of penalty or confiscation etc. passed under any special statute**

All petitions/applications under Article 226 an/or 227 of the Constitution of India, arising out of or relating to an order of penalty or confiscation or an order in the nature thereof an order otherwise of a penal character and passed under any special statute shall be heard and decided by a Division Bench hearing Writ Petitions."

22. It does not appear from the said Rules that petitions under Article 227 are called writ petitions. What has been provided under the said Rules is that petitions under Article 227 filed in respect of certain category of cases will be heard by a Division Bench hearing writ petitions. That is merely indicative of the forum where such petitions will be heard.

23. Chapter XVII of the Rules deals petitions under Articles 226 and 227 and applications under Article 228 and rules for issue of writs and orders under those Articles. In Chapter XVII, Rules 1 to 16 deal with petitions under Article 226 of the Constitution.

24. Rule 17 deals with application under Articles 227 and 228. If a comparison is made between Rule 1 of Chapter XVII and Rule 17 of the same Chapter it will be clear that petitions under Article 226 and those under Article 227 are treated differently. Both these Rules are set out one after the other:

"1. (i) Applications for issue of writs, directions, etc. under Article 226 of the Constitution

Every application for the issue of a direction, order or writ under Article 226 of the Constitution shall, if the matter in dispute is or has arisen substantially outside Greater Bombay, be heard and disposed of by a Division Bench to be appointed by the Chief Justice. The application shall set out therein the relief sought and the grounds on which it is sought, it shall he solemnly affirmed or supported by an affidavit In every such application, the applicant shall state whether he has made any other application to the Supreme Court or the High Court in respect of the same matter and how that application has been disposed of.

(ii) Applicant to inform Court, if during pendency of an application, the Supreme Court has been approached.

If the applicant makes an application to the Supreme Court in respect of the same matter during the pendency of the application in the High Court, he shall forthwith bring this fact to the notice of the High Court filing an affidavit in the case and shall furnish a copy of such affidavit to the other side.

(iii) Hearing may be adjourned pending decision by Supreme Court.

The Court may adjourn the hearing of the application made to it pending the decision of the Supreme Court in the matter."

"17. (i) Applications under Article 227 and 228

An application invoking the jurisdiction of the High Court under Article 227 of the Constitution or under Article 228 of the Constitution, shall be filed on the Appellate Side of the High Court and be heard and disposed of by a Division bench to be appointed by the Chief Justice. The application shall set out therein the relief sought and the grounds on which it is sought. It shall be solemnly affirmed or supported by an affidavit. In every such application, the applicant shall state whether he has made any other application to the Supreme Court or the High Court in respect of the same matter and how that application is disposed of.

(ii) Application to inform Court, if, during pendency of an application, the Supreme Court is approached.

If the applicant makes an application to the Supreme Court in respect of the same matter during the pendency of the application in the High Court, he shall forthwith bring this fact to the notice of the High Court by filing an affidavit in the case and shall furnish a copy of such affidavit to the other side.

(iii) Hearing may be adjourned pending decision by Supreme Court

The Court may adjourn the hearing of the application made to it pending the decision of the Supreme Court in the matter.

(iv) Rule 2 to 16 to apply mutatis mutandis

Provision of Rules 2 to 16 above shall apply mutatis mutandis to all such applications.

25. The distinction between the two proceedings also came up for consideration before the Bombay High Court and

in the case of *Jhaman Karamsingh Dadlani vs. Ramanlal Maneklal Kantawala* (AIR 1975 Bombay 182) the Bombay High Court held:

"2. This High Court since its establishment in 1862 under the Letters Patent has been exercising original as well as appellate jurisdiction and its functioning is regulated by 'the Bombay High Court (Original Side) Rules, 1957' and 'Rules of the High Court of Judicature at Bombay, Appellate Side, 1960' (hereinafter referred to respectively as 'O. S. Rules' and 'A. S. Rules'). Rules also provide for disposal of petitions under Articles 226 and 227 of the Constitution. Supervisory jurisdiction of the High Court under Article 227 of the Constitution is exclusively vested in a Bench on the Appellate Side and jurisdiction of either of the two wings of this Court under Article 226, however, depends upon whether "the matter in dispute" arises substantially in Greater Bombay or beyond it, the same being exercisable by the original Side in the former case and by the Appellate Side in the latter case. This is not made dependent on the matter being in fact of an original or appellate nature. The contention of the learned Advocate General and Mr. Desai is that the matter in dispute, on averments in the petition, must be said to have arisen at any rate, substantially within the limits of Greater Bombay and the petitioner cannot be permitted to avoid the impact of these Rules and choose his own forum by merely quoting Article 227 of the title and prayer clause of the petition, when it is not attracted or by merely making a pretence of the dispute having arisen beyond Greater Bombay by referring to non-existing facts to attract the Appellate Side jurisdiction under Article 226"

26. In paragraph 4 of *Jhaman* (supra), the High Court further distinguished the nature of proceeding under Article 226 of the Constitution to which, depending upon the situs of the cause of action, Rule 623 of Bombay High Court original Side

Rules will apply. The said rule is set out below:

> "623. Every application for the issue of a direction, order or writ under Article 226 of the Constitution other than an application for a writ of Habeas Corpus shall, if the matter in dispute is or has arisen substantially within Greater Bombay, be heard and disposed of by such one of the Judges sitting on the Original Side or any specially constituted Bench as the Chief Justice may appoint. The application shall be by petition setting out therein the relief sought and the grounds on which it is sought. The petition shall be supported by an affidavit. In every such petition the petitioner shall state whether he has made any other application to the Supreme Court or the High Court in respect of the same matter and how that application has been disposed of. The petitioner shall move for a Rule Nisi in open Court.
>
> If the Petitioner makes an application to the Supreme Court in respect of the same matter during the pendency of the petition in the High Court, he shall forthwith bring this fact to the notice of the High Court by filing an affidavit in the case and shall furnish a copy of such affidavit to the other side.
>
> The Court may adjourn the hearing of the application made to it pending the decision of the Supreme Court in the matter."

27. From a perusal of paragraph 4 of *Jhaman* (supra) it is clear that to a proceeding under Article 227 of the Constitution of India only the appellate side rules of the High Court apply. But to a proceeding under Article 226, either the original side or the appellate side rules, depending on the situs of the cause of action, will apply.

28. Therefore High Court rules treat the two proceedings differently in as much as a proceeding under Article 226, being

an original proceeding, can be governed under Original Side Rules of the High Court, depending on the situs of the cause of action. A proceeding under Article 227 of the Constitution is never an original proceeding and can never be governed under Original Side Rules of the High Court.

29. Apart from that, writ proceeding by its very nature is a different species of proceeding.

30. Before the coming of the Constitution on 26th January, 1950, no Court in India except three High Courts of Calcutta, Bombay and Madras could issue the writs, that too within their original jurisdiction. Prior to Article 226 of the Constitution, under Section 45 of the Specific Relief Act, the power to issue an order in the nature of mandamus was there. This power of Courts to issue writs was very truncated and the position has been summarized in the law of writs by V.G. Ramchandran, Volume 1 (Easter Book Company). At page 12, the learned author observed:

> "...The power to issue writs was limited to three High courts. The other High Courts in India, however, were created by the Crown under Section 16 of the High Courts Act, 1861 but they had no such power. It is necessary to mention that under Section 45 of the Specific Relief Act, 1877, even the High Courts of Madras, Calcutta and Bombay could not issue the writs of prohibition and certiorari or an order outside the local limits of their original civil jurisdiction."

31. The power to issue writs underwent a sea-change with the coming of the Constitution from 26th January, 1950. Now writs can be issued by High Courts only under Article 226 of the Constitution and by the Supreme Court only under Article 32 of the Constitution.

32. No writ petition can be moved under Article 227 of the

Constitution nor can a writ be issued under Article 227 of the Constitution. *Therefore, a petition filed under Article 227 of the Constitution cannot be called a writ petition*. This is clearly the Constitutional position. No rule of any High Court can amend or alter this clear Constitutional scheme. In fact the rules of Bombay High Court have not done that and proceedings under Articles 226 and 227 have been separately dealt with under the said rules.

33. The High Court's power of superintendence under Article 227 of the Constitution has its origin as early as in Indian High Courts Act of 1861. This concept of superintendence has been borrowed from English Law.

34. The power of superintendence owes its origin to the supervisory jurisdiction of King's Bench in England. In the Presidency towns of the then Calcutta, Bombay, Madras initially Supreme Court was established under the Regulating Act of 1793. Those Courts were endowed with the power of superintendence, similar to the powers of Kings Bench under the English Law. Then the Indian High Courts in three Presidency towns were endowed with similar jurisdiction of superintendence. Such power was conferred on them under Section 15 of the Indian High Courts Act, 1861.

35. Section 15 of the Indian High Courts Act of 1861 runs as under:

> "15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its Appellate Jurisdiction, and shall have Power to call for Returns, and to direct the Transfer of any Suit or Appeal for any such Court to any other Court of equal or superior Jurisdiction, and shall have Power to make and issue General Rules for regulating the Practice and Proceedings of such Courts, and also to prescribe Forms for every Proceeding in the said Courts for which it shall think necessary that a form be provided, and also for

> keeping all Books, Entries, and Accounts to be kept by the officers, and also to settle Tables of Fees to be allowed to the Sheriff, Attorneys, and all Clerks and Officers of Courts, and from Time to Time to alter any such Rule or Form or Table; and the Rules so made, and the Forms so framed, and the Tables so settled, shall be used and observed in the said Courts, provided that such General Rules and Forms and Tables be not inconsistent with the Provisions of any law in force, and shall before they are issued have received the Sanction, in the Presidency of Fort William of the Governor-General in Council, and in Madras or Bombay of the Governor in Council of the respective Presidencies."

36. Then in the Government of India Act, 1915 Section 107 continued this power of superintendence with the High Court. Section 107 of the Government of India Act, 1915 was structured as follows:

> "**107. Powers of High Court with respect to subordinate Courts. -** Each of the High courts has superintendence over all High Courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say:-
>
> (a) call for returns;
>
> (b) direct the transfer of any suit or appeal from any such court any other court of equal or superior jurisdiction;
>
> (c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts;
>
> (d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; and

(e) settle tables of fees to be allowed to the sheriff, attorneys and all clerks and officers of courts:

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval, in the case of the high court at Calcutta, of the Governor-General in council, and in other cases of the local government."

37. In the Government of India Act, 1935 the said Section 107 was continued with slight changes in Section 224 of the Act, which is as follows:

"224. Administrative functions of High Courts.- (1) Every High Court shall have superintendence over all Courts in India for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,-

(a) call for returns;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts;

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; and

(d) settle tables of fees to be allowed to the sheriff, attorneys and all clerks and officers of courts:

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval of the Governor.

(2) Nothing in this Section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision."

38. The history of this power has been elaborately traced by a Division Bench of Calcutta High Court in the case of *Jahnabi Prosad Banerjee and another vs. Basudeb Paul & others*, reported in AIR 1950 Calcutta 536 and that was followed in a Division Bench Judgment of Allahabad High Court in *Sukhdeo Baiswar vs. Brij Bhushan Misra and others* in AIR 1951 Allahabad 667.

39. The history of Article 227 has also been traced by this Court in its Constitutional Bench judgment in *Waryam Singh and another vs. Amarnath and another* [AIR 1954 SC 215]. In paragraph 13 at page 217 of the report this Court observed:

"...The only question raised is as to the nature of the power of superintendence conferred by the article".

40. About the nature of the power of superintendence this Court relied on the Special Bench judgment delivered by Chief Justice Harries in *Dalmia Jain Airways Limited vs. Sukumar Mukherjee* (AIR 1951 Calcutta 193).

41. In paragraph 14 page 217 of *Waryam Singh* (supra) this Court neatly formulated the ambit of High Court's power under Article 227 in the following words:

"This power of superintendence conferred by article 227 is, as pointed out by Harries C.J., in *'Dalmia Jain Airways Ltd. v. Sukumar Mukherjee'*, AIR 1951 Cal 193 (SB) (B), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors."

42. Chief justice Harries in the Full Bench decision in *Dalmia* (supra) stated the principles on which the High Court

can exercise its power under Article 227 very succinctly which, we would better, quote:

> "6. Though this Court has a right to interfere with decisions of Courts and tribunals under its power of superintendence, it appears to me that that right must be exercised most sparingly and only in appropriate cases. The matter was considered by a Bench of this Court in *Manmathanath v. Emperor,* AIR 1933 Cal 132. In that case a Bench over which Sir George Rankin C. J. presided held that Section 107, Government of India Act (which roughly corresponds to Article 227 of the Constitution), does not vest the High Court with limitless power which may be exercised at the Court's discretion to remove the hardship of particular decisions. The power of superintendence it confers is a power of a known and well-recognised character and should be exercised on those judicial principles which give it its character. In general words, the High Court's power of superintendence is a power to keep subordinate Courts within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner."
>
> (page 193-194 of the report)

43. In stating the aforesaid principles, Chief Justice Harries relied on what was said by Chief Justice George Rankin in *Manmatha Nath Biswas vs. Emperor* reported in AIR 1933 Calcutta 132. At page 134, the learned Chief Justice held:

> "...superintendence is not a legal fiction whereby a High Court Judge is vested with omnipotence but is as Norman, J., had said a term having a legal force and signification. The general superintendence which this Court has over all jurisdiction subject to appeal is a duty to keep them within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner. It does not involve responsibility for the correctness of their decisions, either in fact or law.

44. Justice Nasir Ullah Beg of Allahabad High Court in a very well considered judgment rendered in the case of *Jodhey and others vs. State through Ram Sahai,* reported in AIR 1952 Allahabad 788, discussed the provisions of Section 15 of the Indian High Courts Act of 1861, Section 107 of the Government of India Act 1915 and Section 224 of the Government of India Act 1935 and compared them with almost similar provisions of Article 227 of the Constitution.

45. The learned judge considered the power of the High Court under Article 227 to be plenary and unfettered but at the same time, in paragraph 15 at page 792 of the report, the learned judge held that High Court should be cautious in its exercise. It was made clear, and rightly so, that the power of superintendence is not to be exercised unless there has been an (a) unwarranted assumption of jurisdiction, not vested in Court or tribunal, or (b) gross abuse of jurisdiction or (c) an unjustifiable refusal to exercise jurisdiction vested in Courts or tribunals. The learned judge clarified if only there is a flagrant abuse of the elementary principles of justice or a manifest error of law patent on the face of the record or an outrageous miscarriage of justice, power of superintendence can be exercised. This is a discretionary power to be exercised by Court and cannot be claimed as a matter or right by a party.

46. This Court in its Constitution Bench decision in the case of *Nagendra Nath Bora & another vs. Commissioner of Hills Division and Appeals, Assam & others* (AIR 1958 SC 398) followed the ratio of the earlier Constitution Bench in *Waryam Singh* (supra) about the ambit of High Court's power of superintendence and quoted in *Nagendra Nath* (supra) the same passage, which has been excerpted above (See paragraph 30, page 413 of the report).

47. The Constitution Bench in *Nagendra Nath* (supra), unanimously speaking through Justice B.P. Sinha, (as his Lordship then was) pointed out that High Court's power of interference under Article 227 is not greater than its power

under Article 226 and the power of interference under Article 227 of the Constitution is limited to ensure that the tribunals *function within the limits of its authority*.

(emphasis supplied)

48. The subsequent Constitution Bench decision of this Court on Article 227 of the Constitution, rendered in the case of *State of Gujarat etc. vs. Vakhatsinghji Vajesinghji Vaghela (dead) his legal representatives and others* reported in AIR 1968 SC 1481 also expressed identical views. Justice Bachawat speaking for the unanimous Constitution Bench opined that the power under Article 227 cannot be fettered by State Legislature but this supervisory jurisdiction is meant to keep the subordinate tribunal within the limits of their authority and to ensure that they obey law.

49. So the same expression namely to keep the Courts and Tribunals subordinate to the High Court 'within the bounds of their authority' used in *Manmatha Nath Biswas* (supra), to indicate the ambit of High Court's power of superintendence has been repeated over again and again by this Court in its Constitution Bench decisions.

50. Same principles have been followed by this Court in the case of *Mani Nariman Daruwala @ Bharucha (deceased) through Lrs. & others vs. Phiroz N. Bhatena and others etc.* reported in (1991) 3 SCC 141, wherein it has been held that in exercise of its jurisdiction under Article 227, the High Court can set aside or reverse finding of an inferior Court or tribunal only in a case where there is no evidence or where no reasonable person could possibly have come to the conclusion which the Court or tribunal has come to. This Court made it clear that except to this 'limited extent' the High Court has no jurisdiction to interfere with the findings of fact (see para 18, page 149-150).

51. In coming to the above finding, this Court relied on its previous decision rendered in the case of *Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram* reported in (1986) 4 SCC 447. The decision in *Chandavarkar* (supra) is based on the principle of the Constitution Bench judgments in *Waryam Singh* (supra) and *Nagendra Nath* (supra) discussed above.

52. To the same effect is the judgment rendered in the case of *Laxmikant Revchand Bhojwani and another vs. Pratapsingh Mohansingh Pardeshi* reported in (1995) 6 SCC 576. In paragraph 9, page 579 of the report, this Court clearly reminded the High Court that under Article 227 that it cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. Its exercise must be restricted to grave dereliction of duty and flagrant abuse of fundamental principle of law and justice (see page 579-580 of the report).

53. Same views have been taken by this Court in respect of the ambit of High Court's power under Article 227 in the case of *Sarpanch, Lonand Grampanchayat vs. Ramgiri Gosavi and another,* reported in AIR 1968 SC 222, (see para 5 page 222-234 of the report) and the decision of this Court in *Jijabai Vithalrao Gajre vs. Pathankhan and others* reported in (1970) 2 SCC 717. The Constitution Bench ratio in *Waryam Singh* (supra) about the scope of Article 227 was again followed in *Ahmedabad Manufacturing & Calico Ptg. Co. Ltd. vs. Ram Tahel Ramnand and others* reported in (1972) 1 SCC 898.

54. In a rather recent decision of the Supreme Court in case of *Surya Dev Rai vs. Ram Chander Rai and others*, reported in (2003) 6 SCC 675, a two judge Bench of this Court discussed the principles of interference by High Court under Article 227. Of course in *Surya Dev Rai* (supra) this Court held that a writ of Certiorari is maintainable against the order of a civil Court, subordinate to the High Court (para 19, page 668 of the report). The correctness of that ratio was doubted by another Division Bench of this Court in *Radhey Shyam and another vs. Chhabi Nath and others* [(2009) 5 SCC 616] and

a request to the Hon'ble Chief Justice for a reference to a larger Bench is pending. But in so far as the formulation of the principles on the scope of interference by the High Court under Article 227 is concerned, there is no divergence of views.

55. In paragraph 38, sub-paragraph (4) at page 695 of the report, the following principles have been laid down in *Surya Dev Rai* (supra) and they are set out:

> "38 (4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction."

56. Sub-paras (5), (7) and (8) of para 38 are also on the same lines and extracted below:

> "(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.
>
> (6) xxx xxx
>
> (7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the

> abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.
>
> (8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character."

57. Articles 226 and 227 stand on substantially different footing. As noted above, prior to the Constitution, the Chartered High Courts as also the Judicial Committee of the Privy Council could issue prerogative writs in exercise of their original jurisdiction. [See 1986 (suppl.) SCC 401 at page 469)].

58. However, after the Constitution every High Court has been conferred with the power to issue writs under Article 226 and these are original proceeding. [*State of U.P. and others vs. Dr. Vijay Anand Maharaj* – AIR 1963 SC 946, page 951].

59. The jurisdiction under Article 227 on the other hand is not original nor is it appellate. This jurisdiction of superintendence under Article 227 is for both administrative and judicial superintendence. Therefore, the powers conferred under Articles 226 and 227 are separate and distinct and operate in different fields.

60. Another distinction between these two jurisdictions is that under Article 226, High Court normally annuls or quashes an order or proceeding but in exercise of its jurisdiction under Article 227, the High Court, apart from annulling the proceeding, can also substitute the impugned order by the order which the inferior tribunal should have made. {See *Surya Dev Rai* (supra), para 25 page 690 and also the decision of the Constitution Bench of this Court in *Hari Vishnu Kamath vs. Ahmad Ishaque and others* – [AIR 1955 SC 233, para 20 page 243]}.

61. Jurisdiction under Article 226 normally is exercised where a party is affected but power under Article 227 can be exercised by the High Court suo motu as a custodian of justice. In fact, the power under Article 226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. Jurisdiction under Article 227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State. In certain cases where there is infringement of fundamental right, the relief under Article 226 of the Constitution can be claimed ex-debito justicia or as a matter of right. But in cases where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a Single Judge passed under Article 226, a Letters Patent Appeal or an intra Court Appeal is maintainable. But no such appeal is maintainable from an order passed by a Single Judge of a High Court in exercise of power under Article 227. In almost all High Courts, rules have been framed for regulating the exercise of jurisdiction under Article 226. No such rule appears to have been framed for exercise of High Court's power under Article 227 possibly to keep such exercise entirely in the domain of the discretion of High Court.

62. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in *Waryam Singh* (supra) and the principles in *Waryam Singh* (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in *Waryam Singh*

(supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, 'within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of *L. Chandra Kumar vs. Union of India & others*, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just

for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality.

63. In the facts of the present case we find that the petition has been entertained as a writ petition in a dispute between landlord and tenant amongst private parties.

64. It is well settled that a writ petition is a remedy in public law which may be filed by any person but the main respondent should be either Government, Governmental agencies or a State or instrumentalities of a State within the meaning of Article 12. Private individuals cannot be equated with State or instrumentalities of the State. All the respondents in a writ petition cannot be private parties. But private parties acting in collusion with State can be respondents in a writ petition. Under the phraseology of Article 226, High Court can issue writ to any person, but the person against whom writ will be issued must have some statutory or public duty to perform.

65. Reference in this connection may be made to the Constitution Bench decision of this Court in the case of *Sohan Lal vs. Union of India and another,* reported in AIR 1957 SC 529.

66. The facts in *Sohan Lal* (supra) are that Jagan Nath, a refugee from Pakistan, filed a writ petition in the High Court of Punjab against Union of India and Sohan Lal alleging

unauthorized eviction from his residence and praying for a direction for restoration of possession. The High Court directed Sohan Lal to restore possession to Jagan Nath. Challenging that order, Sohan Lal approached this Court. The Constitution Bench of this Court accepted the appeal and overturned the verdict of the High Court.

67. In paragraph 7, page 532 of the judgment, the unanimous Constitution Bench speaking though Justice Imam, laid down a few salutary principles which are worth remembering and are set out:

"7. The eviction of Jagan Nath was in contravention of the express provisions of Section 3 of the Public Premises (Eviction) Act. His eviction, therefore, was illegal. He was entitled to be evicted in due course of law and a writ of mandamus could issue to or an order in the nature of mandamus could be made against the Union of India to restore possession of the property to Jagan Nath from which he had been evicted if the property was still in the possession of the Union of India. The property in dispute, however, is in possession of the appellant. There is no evidence and no finding of the High Court that the appellant was in collusion with the Union of India or that he had knowledge that the eviction of Jagan Nath was illegal. Normally, a writ of mandamus does not issue to or an order in the nature of mandamus is not made against a private individual. Such an order is made against a person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of a public duty (Halsbury's Laws of England Vol. 11, Lord Simonds Edition, p. 84). If it had been proved that the Union of India and the appellant had colluded, and the transaction between them was merely colourable, entered into with a view to deprive Jagan Nath of his rights, jurisdiction to issue a writ to or make an order in the nature of mandamus against the appellant might be said to exist in a Court..."

68. These principles laid down by the Constitution Bench in *Sohan Lal* (supra) have not been doubted so far.

69. Subsequently in some other cases question arose whether writ will lie against a private person. In *Engineering Mazdoor Sabha & another vs. Hind Cycles Ltd.,* reported in AIR 1963 SC 874, it was held that an arbitrator appointed under Section 10A of Industrial Disputes Act is not a private arbitrator even though he cannot be equated with a tribunal to be amenable under Article 136 of the Constitution of India. The Court held that in discharging his duties as an arbitrator, the arbitrator is clothed with some trappings of a Court and a writ of certiorari would be maintainable against him. So even though an arbitrator, acting under Section 10A of the Industrial Disputes Act, is a private individual, he discharges public function. So the ratio in the Constitution Bench decision in *Engineering Mazdoor Sabha* (supra) is consistent with the decision in *Sohan Lal* (supra).

70. It is only a writ of Habeas Corpus which can be directed not only against the State but also against private person. Justice Hidaytullah (as his Lordship then was) on behalf of a Bench of this Court stated the principle as "the writ of Habeas Corpus issues not only for release from detention by the State but also for release from private detention." (see AIR 1964 SC 1625 at 1630).

71. In *Rohtas Industries Ltd., & another vs. Rohtas Industries Staff Union & others* [(1976) 2 SCC 82] this Court held that in view of the amendment of the Industrial Disputes Act, 1947, by amendment Act 36 of 1964 and in view of provisions like Section 27 of the Act, an arbitrator under Section 10A of the Industrial Disputes Act is virtually a part of State's sovereign dispensation of justice and his award is amenable to review under Articles 226 & 227 of the Constitution. In *Rohtas* (supra), the ratio of *Engineering Mazdoor Sabha* (supra) was followed.

72. Therefore, a private person becomes amenable to writ jurisdiction only if he is connected with a statutory authority or only if he/she discharges any official duty.

73. In the instant case none of the above features are present, even then a writ petition was filed in a pure dispute between landlord and tenant and where the only respondent is the plaintiff landlord. Therefore, High Court erred by entertaining the writ petition. However, the petition was dismissed on merits by a rather cryptic order.

74. It has repeatedly been held by this Court that a proceeding under Article 226 of the Constitution is not the appropriate forum for adjudication of property disputes or disputes relating to title. In *Mohammed Hanif vs. The State of Assam* [1969 (2) SCC 782] a three Judge Bench of this Court, explaining the general principles governing writ jurisdiction under Article 226, held that this jurisdiction is extraordinary in nature and is not meant for declaring the private rights of the parties. [See para 5, page 786 of the report].

75. In coming to the aforesaid conclusion in *Hanif* (supra), this Court referred to the Constitution Bench decision in *T.C. Basappa vs. T. Nagappa and another* [AIR 1954 SC 440].

76. Following the aforesaid principles in *Hanif* (supra)**,** this Court in *M/s. Hindustan Steel Limited, Rourkela vs. Smt. Kalyani Banerjee and others* [(1973) 1 SCC 273] held that serious questions about title and possession of land cannot be dealt with by writ court. In formulating these principles in *Kalyani Banerjee* (supra), this Court relied on Constitution Bench decision in *Sohan Lal* (supra) [See paragraph 16 page 282 of the report). Again in *State of Rajasthan vs. Bhawani Singh & others* [1993 Supp. (1) SCC 306] this Court held that a writ petition is not the appropriate forum to declare a person's title to property. [see para 7, page 309 of the report]. Subsequently, again in the case of *Mohan Pandey & another vs. Usha Rani Rajgaria & others* reported in (1992) 4 SCC 61, this Court held

that a regular suit is the appropriate remedy for deciding property disputes between private persons and remedy under Article 226 is not available to decide such disputes unless there is violation of some statutory duty on the part of a statutory authority. [See para 6, page 63 of the report].

77. Following the aforesaid ratio in *Mohan Pandey* (supra), this Court again in *Prasanna Kumar Roy Karmakar vs. State of W.B and others* [(1996) 3 SCC 403], held that in a dispute between the landlord and tenant, a tenant cannot be evicted from his possession by a writ court. Again in the case of *P.R. Murlidharan & others vs. Swami Dharmananda Theertha Padar & others* [(2006) 4 SCC 501], this Court held that it would be an abuse of the process to approach a writ court in connection with dispute on questions of title for deciding which civil court is the appropriate forum.

78. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases High Courts, in a routine manner, entertain petition under Article 227 over such disputes and such petitions are treated as writ petitions.

79. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown, that a private individual is acting in collusion with a statutory authority.

80. We may also observe that in some High Courts there is tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in

Surya Dev (supra) and in view of the recent amendment to Section 115 of the Civil Procedure Code by Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 of CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

81. As a result of frequent interference by Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice.

82. This Court hopes and trusts that in exercising its power either under Article 226 or 227, Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest Courts of justice within their jurisdiction will adhere to them strictly.

83. For the reasons aforesaid, it is held that the High Court committed an error in entertaining the writ petition in a dispute between landlord and tenant and where the only respondent is a private landlord. The course adopted by the High Court cannot be approved. Of course, High Court's order of non-interference in view of concurrent findings of facts is unexceptionable. Consequently, the appeal is dismissed. However, there shall be no order as to costs.

N.J. Appeal dismissed.