



**INDIAN SUPREME COURT LAW REPORTER**  
A Supreme Court Judgment Weekly Journal

# **INDIAN SUPREME COURT LAW REPORTER**

**March 5, 2007 (Monday) – March 11, 2007 (Sunday)**  
**10<sup>th</sup> week of the year 2007**  
**Volume 1, Issue 10**  
**ISCLR/2007/10/01 – ISCLR/2007/10/22**



**HONOURABLE SUPREME COURT OF INDIA**



SUPREME COURT OF INDIA

## Indian SC Law Reporter

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Volume 1, Issue 10

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ISCLR/Year/issue no/assigned case no

ISCLR/2007/10/01-22

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- State of Gujarat v. Patel Raghav Natha, (1969) 2 SCC 187
- Lazarus Estates Ltd. v. Beasley, (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502
- S.P. Chengalvaraya Naidu (dead) by LRs. V. Jagannath (dead) by LRs. & Ors. (1994) 1 SCC 1 : JT 1994 (6) SC 331

- Indian Bank v. Satyam Fibres (India) Pvt. Ltd., (1996) 5 SCC 550 : JT 1996 (7) SC 135,
- Lazarus Estates and Smith v. East Elloe Rural District Council, 1956 AC 336 : (1956) 1 All ER 855 : (1956) 2 WLR 888
- United India Insurance Co. Ltd. v. Rajendra Singh & Ors., (2000) 3 SCC 581 : JT 2000 (3) SC 151
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- Meenakshi Mills, Madurai vs. The Commissioner of Income Tax, Madras [1956 SCR 691]
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- Pandey and Co. Builders Pvt. Ltd. v. State of Bihar and Anr. 2006 (11) SCALE 665
- Rashtriya Ispat Nigam Limited and Anr. v. Verma Transport Company (2006) 7 SCC 275
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- Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd. 2006 (14) SCALE 267
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### Authorities referred/mentioned/discussed in this issue

- Duchess of Kingstone, Smith's Leading Cases, 13th Edn., p.644
- V.G. Ramachandran, 'Law of Writs'; Revised by Justice C.K. Thakker & Mrs. M.C. Thakker; Sixth Edn; Vol.2; pp.1440-1528
- 'A Treatise on The Law Governing Injunctions' by Spelling and Lewis
- 'Principles of Statutory Interpretation', by Justice G. P. Singh (Tenth Edition, 2006)
- P. Ramanatha Aiyar's Advanced Law Lexicon, page 1170

### Legal Doctrines/Principles/Theories Referred/mentioned/Discussed in this issue

- The principle of 'finality of litigation'
- Doctrine of Merger

**ISCLR/2007/10/01**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: Janardhan Narasimha Nayak**  
**Vs.**  
**RESPONDENT: Balwant Venaktesh Kulkarni & Anr**

Appeal (civil) 5807 of 2000

Date of Judgment: 07/03/2007

Bench: Dr. Arijit Pasayat & Lokeshwar Singh Panta

Subject: Civil

Legislation Referred:

- Code of Civil Procedure, 1908 – Section 100

**JUDGMENT:**

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Karnataka High Court allowing the second appeal filed by the respondent no.1 under **Section 100 of the Code of Civil Procedure, 1908** (in short the 'CPC').

2. Respondent No.1 is the plaintiff and had filed the **suit for specific performance of the contract of sale** dated 31.1.1972. Suit was decreed by the Trial Court and the appeal was dismissed by the First Appellate Court. The second defendant-respondent no.2 took the stand that he was the purchaser subsequent to the agreement for sale, he had no knowledge of the agreement and had no notice of the sale and he is not bound by the earlier agreement of sale. The Trial Court came to hold that defendant no.2 had knowledge of the agreement. The First Appellate Court held that either he had dishonest notion or had notice. At the time of the admission in the second appeal the following question of law was formulated:

3. **"Whether the Court below was just in placing reliance on the order of the Assistant Commissioner, who rejected the permission of sale of the land and thus hold against the appellant?"**

4. Thereafter with the following observations/conclusions the **second appeal was allowed.**

"When the trial court on evidence has come to the conclusion on seeing the witness in the box, appreciated the demeanor, the appellate court without considering the points raised by the trial court went on discussing the legal position and came to a different conclusion which I have no hesitation, to set aside on the ground that they are not warranted by the

facts of the case. The entire approach of the appellate court is vitiated by the pre-considered mind that the agreement of sale cannot be given effect to once there was a sale in between the parties. This view is certainly wrong and under such pre-considered notion, the approach made by the appellate court which has resulted in wrong delivery of the judgment."

5. Learned counsel for the appellant submitted that the second appeal was allowed without indicating any basis and reason. The conclusions are also without any foundation. It was erroneously held that the entire approach of First Appellate Court was vitiated by pre-conceived mind that the agreement of sale cannot be given effect once there was a sale in between the parties. No such finding was recorded by the First Appellate Court.

6. Learned counsel for the respondents on the other hand submitted that though the judgment of the High Court is not happily worded, yet in essence the High Court has found First Appellate Court's conclusion to be vitiated.

7. Perusal of the order of the High Court quoted above shows that there was total non-application of mind. There is practically no reason indicated as to why the High Court took the view that First Appellate Court's order was on account of a pre-conceived mind. Merely because the Trial Court had occasion to see the witness that cannot be a ground to hold that First Appellate Court had pre-conceived notion. No reasons had been indicated by the High Court to set aside the order of the First Appellate Court even without analysing the evidence and the respective stand.

8. We, therefore, set aside the order of the High Court, remit the matter to the High Court for fresh disposal on merits. As the matter is pending since long, we request the High Court to dispose of the second appeal as early as practicable preferably by the end of August, 2007.

9. The appeal is allowed with no order as to costs.



**ISCLR/2007/10/02**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: M. Vishweshwara Shastry**  
**Vs.**  
**RESPONDENT: M. Gopalakrishna Bhat & Ors**

Appeal (civil) 5809 of 2000

Date of Judgment: 07/03/2007

Subject: Civil

Bench: Dr. Arijit Pasayat & Lokeshwar Singh Pantia

Legislations Referred:

Code of Civil Procedure, 1908 – Or. XLIII R 1(r), Or. IX R 13, Or. XVII R 2

**JUDGMENT:**

Dr. ARIJIT PASAYAT, J.

1. Appellant calls in question legality of the order passed by a learned Single Judge of the Karnataka High Court, dismissing the application filed by the appellant for extension of time to comply with the earlier order dated 25.6.1999.

2. A brief reference to the factual aspects would suffice:

Appellant filed Misc. First appeal under **Order XLIII Rule 1(r)** of the Code of Civil Procedure, 1908 (in short the 'Code') against order dated 30.5.1997 passed by the learned Civil Judge Puttur (D.K.) dismissing petition filed under **Order IX Rule 13** read with **Order XVII Rule 2** of the Code for restoration of the suit which had been decreed ex-parte. Appellant was defendant No. 5 in the suit.

3. By order dated 25.6.1999 the learned Single Judge allowed the appeal, inter-alia, with the following directions:

*"In the result, the appeal is allowed on payment of cost of Rs.1,000/-. The impugned order is set aside. The appellant is directed to file the written statement within 2 weeks from the date of this order and the trial court shall dispose of the suit within 3 months from the date of receipt of this order, after framing necessary issues."*

4. It is the case of the appellant that his advocate on 30.6.1999 wrongly informed him that the written statement was to be filed within two months and the cost was to be paid within the said time. The written statement was tendered on 2.8.1999 and cost was offered to the learned counsel for the plaintiffs. The said learned counsel refused to accept the amount on the ground that the same was offered after the due date. Appellant filed a memo before the Civil Judge for accepting the deposit. However, the learned Civil

Judge called for the records of the original suit no. 17/1995 and directed that the deposit can be made only after receipt of the records.

5. On going through the certified copies, the appellant noticed that actual time granted was two weeks and not two months. He, therefore, made an application before the High Court to extend the time. The same has been rejected by the following order:

OFFICE NOTE

*"I.A. II for extension of time Advocate for appellant has filed an I.A. and affidavit praying to extend the time set for filing of the written statement and payment of cost by 2 months for the reasons stated in the I.A. Post I.A II for orders before S.J.*

*Orders of Court*

*Heard. IA 2 is dismissed."*

6. Learned counsel for the appellant submitted that because of the bona fide mistake the directions of the High Court could not be complied with and the fact that the written statement was tendered and the cost offered within two months proves the bona fides. The High Court without indicating any reason has dismissed the application.

7. There is no appearance on behalf of the respondents in spite of service of notice.

8. We find that the appellant had indicated sufficient reasons as to why there was non-compliance with the order of the High Court. The bona fides have been spelt out in detail and, in fact, there was no reply denying the averments made by the plaintiff who was the opposite party no. 1 in the application.

8. That being so, the High Court was not justified in summarily rejecting the application. Therefore, we set aside the order of the High Court. Let the written statement be filed within four weeks from today, if not already filed on record of the trial court. The costs shall be paid within the aforesaid time. If the aforesaid conditions are fulfilled the order dated 25.6.1999 in MFA No. 2323 of 1997 shall be treated to be operative.

9. The appeal is allowed with no order as to costs.



**ISCLR/2007/10/03**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: M/s. Wyawahare & Sons and Ors**  
**Vs.**  
**RESPONDENT: Madhukar Raghunath Bhawe**

Appeal (civil) 1187 of 2007  
(Arising out of SLP (C) Nos. 3711 /2005)

Date of Judgment: 07/03/2007

Bench: Dr. Arijit Pasayat & Lokeshwar Singh Panta

Subject: Civil

Legislations Referred:

- Code of Civil Procedure, 1908 – Section 100

Cases Referred:

- Ishwar Dass Jain v. Sohan Lal (2000 (1) SCC 434)
- Roop Singh v. Ram Singh (2000 (3) SCC 708)
- Thakur Kishan Singh v. Arvind Kumar (1994 (6) SCC 591)
- Kanhaiyalal and Ors. v. Anupkumar and Ors. (2003(1) SCC 430)
- Mathakala Krishnaiah v. V. Rajagopal (2004(10) SCC 676)
- Smt. Ram Sakhi Devi v. Chhatra Devi & Ors. (JT 2005 (6) SC 167)
- Sasikumar & Ors. v. Kunnath Chellappan Nair & Ors. (2005(12) SCC 588)
- Gian Dass v. The Gram Panchayat Village Sunner Kalan & Ors. (2006 (6) SCC 271)
- Shah Mansukhlal Chhaganial (d) through Lrs. V. Gohil Amarsing Govindbhai (d) through Lrs. (2006(13) SCALE 99)

**JUDGMENT:**

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by the learned Single Judge of the Bombay High Court allowing the **second appeal** filed by the respondent under **Section 100 of the Code of Civil Procedure, 1908** (in short 'CPC').

3. **Factual background** in a nutshell is as follows:

The respondent-plaintiff filed a Special civil suit bearing No.2 of 1986 in the Court of Civil Judge, Sr. Division, Buldana against the appellants-defendants. The Trial Court by

the judgment and order dated 19.9.1987 partially decreed the suit. Aggrieved by the judgment and decree of the Trial court, the appellants-defendants preferred an appeal in the Court of Additional District Judge, Buldana. By judgment and order dated 28.9.1990 the first appellate court allowed the appeal and set aside the decree passed by the Trial Court. The respondent-plaintiff preferred a second appeal before the High Court of Bombay, Nagpur Bench. By the impugned judgment the learned Single Judge allowed the second appeal.

4. Though many points have been urged in support of the appeal, the primary stand of the learned counsel for the appellants is that the second appeal was allowed without framing any substantial question of law as mandated by Section 100 CPC. Learned counsel for the respondent submitted that though the High Court's judgment does not show that any substantial question of law was framed yet the learned Single Judge at the time of admission of the second appeal had referred to certain points urged.

5. Section 100 of CPC deals with "Second Appeal". The provision reads as follows:

***"Section 100-Second Appeal:***

*(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.*

*(2) An appeal may lie under this section from an appellate decree passed ex parte.*

*(3) In an appeal under this Section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.*

*(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.*

*(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:*

*Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."*

6. A perusal of the impugned judgment passed by the High Court does not show that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated. That being so, the judgment cannot be maintained.

7. In **Ishwar Dass Jain v. Sohan Lal (2000 (1) SCC 434)** this Court in para 10, has stated thus:

*"10. Now under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate Court without doing so."*

8. Yet again in **Roop Singh v. Ram Singh (2000 (3) SCC 708)** this Court has expressed that the jurisdiction of a High Court is confined to appeals involving substantial question of law. Para 7 of the said judgment reads:

*"7. It is to be reiterated that under section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under section 100 CPC. That apart, at the time of disposing of the matter the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. Further, the fact findings courts after appreciating the evidence held that the defendant entered into the possession of the premises as a batai, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. These findings recorded by the two courts below were based on proper appreciation of evidence and the material on record and there was no perversity, illegality or irregularity in those findings. If the defendant got the possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession (**Thakur Kishan Singh v. Arvind Kumar (1994 (6) SCC 591**). Hence the High Court ought not to have interfered with the findings of fact recorded by both the courts below."*

The position has been reiterated in **Kanhaiyalal and Ors. v. Anupkumar and Ors. (2003(1) SCC 430)**, **Mathakala Krishnaiah v. V. Rajagopal (2004(10) SCC 676)**, **Smt. Ram Sakhi Devi v. Chhatra Devi & Ors. (JT 2005 (6) SC 167)**, **Sasikumar & Ors. v. Kunnath Chellappan Nair & Ors. (2005(12) SCC 588)**, **Gian Dass v. The Gram Panchayat Village Sunner Kalan & Ors. (2006 (6) SCC 271)**, **Shah Mansukhlal Chhaganial (d) through Lrs. V. Gohil Amarsing Govindbhai (d) through Lrs. (2006(13) SCALE 99)**.

9. The appeal stands disposed of in the above terms. There will be no order as to costs.



**ISCLR/2007/10/04**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: A.V. PAPAYYA SASTRY & ORS**

**Vs.**

**RESPONDENT: GOVERNMENT OF A.P. & ORS**

Appeal (civil) 5097-5099 of 2004

Date of Judgment: 07/03/2007

Bench: C.K. Thakker & Lokeshwar Singh Panta

Subject: Property

Legislations Referred:

- Land Acquisition Act, 1894 – Ss 4(1), 6, 17(4)
- Urban Land (Ceiling and Regulation) Act, 1976 – Ss 2(o), 2(q), 34
- Andhra Pradesh Lands Tenancy Act
- Andhra Pradesh Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972
- Indian Constitution – Article 136, 141
- C.P.C., 1908 – O 47, R 1(1)

Cases Referred:

- State of Gujarat v. Patel Raghav Natha, (1969) 2 SCC 187
- Lazarus Estates Ltd. v. Beasley, (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502
- S.P. Chengalvaraya Naidu (dead) by LRs. V. Jagannath (dead) by LRs. & Ors. (1994) 1 SCC 1 : JT 1994 (6) SC 331
- Indian Bank v. Satyam Fibres (India) Pvt. Ltd., (1996) 5 SCC 550 : JT 1996 (7) SC 135,
- Lazarus Estates and Smith v. East Elloe Rural District Council, 1956 AC 336 : (1956) 1 All ER 855 : (1956) 2 WLR 888
- United India Insurance Co. Ltd. v. Rajendra Singh & Ors., (2000) 3 SCC 581 : JT 2000 (3) SC 151
- Abbai Maligai Partnership Firm & Anr. v. K. Santhakumaran & Ors., (1998) 7 SCC 386 : JT 1998 (6) SC 396
- Kunhayammed & Ors. v. State of Kerala & Anr., (2000) 6 SCC 359 : JT 2000 (9) SC 110
- S. Shanmugavel Nadar v. State of T.N. & Anr., (2002) 8 SCC 361 : JT 2002 (7) SCC 568
- Baiganna v. Deputy Collector of Consolidation, (1978) 2 SCR 509 : (1978) 2 SCC 461

Authorities Referred:

- Duchess of Kingstone, Smith's Leading Cases, 13th Edn., p.644
- V.G. Ramachandran, 'Law of Writs'; Revised by Justice C.K. Thakker & Mrs. M.C. Thakker; Sixth Edn; Vol.2; pp.1440-1528

Legal Doctrines/Principles/Theories Referred/Discussed

- The principle of 'finality of litigation'
- Doctrine of Merger

**JUDGMENT:**

C.K. THAKKER, J.

1. All these appeals have been preferred by the appellants against common judgment and order passed in WAMP No. 1879 of 2001 in W.A. No. 109 of 1997, WAMP No. 1880 of 2001 in W.A. No. 292 of 1998 and Contempt Case No. 1008 of 2001. By the said order, the High Court recalled common judgment and order passed on April 27, 2000 in Writ Appeal Nos. 109 of 1997 and 292 of 1998. A direction was also issued to the authorities under the **Urban Land (Ceiling and Regulation) Act, 1976** (hereinafter referred to as 'the Ceiling Act') to complete proceedings within the stipulated period.

2. The case has a long and checkered history starting from early seventies of the last century. Appellants herein are the owners of land bearing Survey Nos. 3/1, 3/2 and 4 admeasuring 18 acres, 39 cents of Village Kancharapalem, District Visakhapatnam. It was their case that Visakhapatnam Port Trust ('Port Trust' for short) wanted to acquire land for public purpose, namely, for construction of quarters for its employees. The Chairman of the Port Trust, therefore, sent a requisition letter to the District Collector, Visakhapatnam for acquiring land admeasuring 45 acres, 33 cents of Survey Nos. 1, 2, 3 and 4 of Kancharapalem Village. Advance possession of the land of the appellants, bearing Survey Nos. 3/1, 3/2 and 4 admeasuring 18 acres, 39 cents was taken over by the Estate Manager of the Port Trust on August 29, 1972 by private negotiations. The State Authorities, thereafter, were requested by the Port Trust Authorities to take appropriate proceedings for acquisition of land under the **Land Acquisition Act, 1894**. According to the appellants, in the statement recorded on August 29, 1972, Akella Suryanarayana Rao stated that he had handed over possession of the land to the Estate Manager of the Port Trust. Mr. Akella also stated that there was a dispute regarding land with tenant Koyya Gurumurthy Reddy under **Andhra Pradesh Lands Tenancy Act**. It was also the case of the appellants that the Port Trust deposited with the Government the amount of compensation payable to the owners of the land. The land acquisition proposals were approved by the Port Trust as also by the Government of India.

3. It was further case of the appellants that a preliminary notification under sub-section (1) of Section 4 of the Land Acquisition Act was for the first time issued on August 10, 1973 but nothing further was done in the matter. The Ceiling Act came into force in the State of Andhra Pradesh on February 17, 1976. It, inter alia, covered the Visakhapatnam

Urban Agglomeration. The appellants filed their declarations taking the stand that possession of land had already been handed over to Port Trust Authorities even before the Act came into force and the provisions of the Ceiling Act, therefore, would not apply to such land. In the light of the above factual position and the case of the appellants, the Special Officer and Competent Authority, Urban Land Ceiling, Visakhapatnam vide his order dated May 25, 1981 in C.C. No. 6143 of 1976 declared that the land-owners of Survey Nos. 3/1, 3/2 and 4 were 'non-surplus land holders'. Then the Government again issued notification under sub-section (1) of Section 4 of the Act on August 29, 1981. Urgency clause under Section 17(4) was not invoked since the possession of land was already with the Port Trust Authorities. A declaration under Section 6 was issued on October 12, 1982. No award, however, was passed.

4. According to the appellants, the Chief Engineer of Port Trust in reply to a query by the Land Acquisition Officer, clarified vide his letter dated December 19, 1985 that actual and physical possession of the land was not taken by Port Trust as the tenant did not vacate possession of the land. It appears that in view of the above letter that physical possession of land was not with the Port Trust Authorities, the Special Officer and Competent Authority, Urban Land Ceiling, Visakhapatnam referred the matter to the Commissioner, Land Reforms and Urban Land Ceiling, Government of Andhra Pradesh, Hyderabad in February, 1987 to take up the matter under Section 34 of the Ceiling Act in suo motu revision. The Collector, Visakhapatnam also vide his D.O. letter No. 433/78, dated June 27, 1987 requested the Commissioner to reopen the case and start enquiry. On August 21, 1989, Chairman, Visakhapatnam Port Trust addressed a letter to the Commissioner, Land Reforms & Urban Land Ceiling, Government of A.P. categorically stating that land admeasuring 18 acres, 39 cents of Survey Nos. 3/1, 3/2 and 4 of Kancherapalem village had already been taken over by the Port Trust and there was no cause to reopen the case under Section 34 of the Ceiling Act. Once again, the Government approved the proposal for acquisition of land and notification under Section 4(1) of the Land Acquisition Act was issued on May 17, 1991.

5. It appears that the proceedings for reopening of the case by invoking Section 34 of the Ceiling Act were initiated. On July 20, 1994, notice was issued to the owners to show cause as to why revisional powers should not be exercised and the order passed by the Special Officer and Competent Authority under the Ceiling Act should not be set aside. It was also stated in the notice that it was brought to the notice of the Government that title to the land was undisputedly with the declarants on the appointed day under the Ceiling Act as the Land Acquisition Proceedings were not concluded by that date. As such land was required to be computed in the holdings of the declarants even if it was admitted by the Port Trust Authorities that they were in possession of the land in 1972. The land-owners submitted the reply to the notice.

6. Meanwhile, however, the land-owners filed a petition being Writ Petition No. 11754 of 1994 praying therein that the High Court may direct the State Authorities to complete proceedings under the Land Acquisition Act and pass an award. During the pendency of the writ petition the revision was allowed by the State Government under Section 34 of the Ceiling Act on January 20, 1995 and the order passed by the Special Officer and

Competent Authority, Urban Land Ceiling, Visakhapatnam declaring that the appellants had no surplus land had been set aside. The appellants, therefore, filed another petition, being Writ Petition No. 3102 of 1995 questioning the legality of the order passed in revision. The learned single Judge allowed both the petitions i.e. Writ Petition Nos. 11754 of 1994 and 3102 of 1995 and by order dated June 4, 1996 directed the authorities to complete Land Acquisition Proceedings and pass award within three months. The learned single Judge also held that the order under the Ceiling Act was passed by the Special Officer and Competent Authority, Urban Land Ceiling, Visakhapatnam in 1981 while suo motu revisional powers were exercised in 1994-95 i.e. after thirteen years. Such action was, therefore, illegal, unlawful and unwarranted. Accordingly, the order passed in revision was set aside. Writ appeals filed by the State were dismissed. A direction was issued by the Division Bench to fix market value on the basis of notification under Section 4(1) issued on May 17, 1991. Special Leave Petition (Civil) Nos. 14860-14861 of 2000 filed by the State Authorities were dismissed by this Court on October 20, 2000.

7. The State Authorities, thereafter, filed recall-applications on June 13, 2001. In the recall applications, it was stated inter alia that fraud was committed by the land-owners and material facts were suppressed by them. It was alleged that possession of land was never handed over to Port Trust Authorities, nor Port Trust Authorities received such possession of land and yet it was asserted by the owners that possession of land was given to Port Trust Authorities in 1972 which was not correct. It was only in December, 1985 that the correct fact came to the knowledge of the State Authorities from a letter by the Chief Engineer of Port Trust. Hence, the order was taken in suo motu revision under Section 34 of the Ceiling Act. It was further stated that even if the Port Trust Authorities would be deemed to be in possession of land on the day the Ceiling Act came into force, Land Acquisition Proceedings were not concluded and no award was passed. The Port Trust Authorities, in the circumstances, would be in possession of the land for and on behalf of the land-owners and the land was required to be declared surplus and vacant under the Ceiling Act.

8. It was further averred that the High Court ordered inquiry by the Central Bureau of Investigation (CBI) and Mr. Y. Anil Kumar, IPS, Superintendent of Police, CBI, Visakhapatnam submitted a detailed report in the High Court when the Writ Appeals were placed for hearing. Unfortunately, however, the attention of the Court was never invited to the said report which clearly revealed that there was total fraud on the part of the land-owners in collusion with Port Trust Officers as also Officers acting under the Ceiling Act. It was, therefore, submitted that the orders passed by the Division Bench on April 27, 2000 was required to be recalled by directing the authorities under the Ceiling Act to conclude proceedings.

9. The High Court, after hearing the learned counsel for the parties and considering the records and proceedings including the report submitted by CBI, held that the case was of a fraud and by suppressing material facts, several orders were passed and actions were taken. In view of correct and true facts and reports which clearly established that the

authorities were misled, that proceedings were initiated to revise the order, dated May 25, 1981. The Court, therefore, held that the order dated April 27, 2004 passed by the Division Bench was required to be recalled and recall applications were allowed.

The Court therefore passed the following order;

*"Considering all the aspects as stated above, we are of the considered view that the recall petitions have to be allowed. Accordingly we allow the recall petitions by setting aside the common judgment passed in the aforesaid writ appeals.*

*We further direct that the proceedings under ULC Act have to be completed within a period of one month from the date of receipt of this order by the concerned authorities by giving opportunity to the petitioners and respondents herein to put forward their cases and after final decision is taken by the authorities under ULC Act, the further proceedings have to be initiated under Land Acquisition Act depending upon the result under the ULC Act. The proceedings under the Land Acquisition Act if initiated, compensation to be awarded to the respondents herein within a period of three months from the date of order of the authorities under the ULC Act. The Land Acquisition Officer is also directed to consider the legal date of possession of the land taken by the VPT Authorities after conclusion of the enquiry under the ULC Act".*

10. The appellants have challenged the aforesaid order of the High Court. On August 5, 2002, notice was issued by this Court. Affidavits and counter affidavits were filed. On August 6, 2004, leave was granted and hearing was expedited and the matters were placed before us for final hearing.

11. We have heard learned counsel for the parties.

Mr. K.K. Venugopal, Senior Advocate, appearing for the appellants contended that the High Court committed an error in law in passing the impugned order. It was clear from the evidence on record and various communications that before the proposal was submitted by the Port Trust Authorities for acquisition of land for a public purpose (construction of quarters for its employees), advance possession of land had been taken over by Port Trust Authorities and land-owners were not in possession of the property. The said fact was noted by the Special Officer and Competent Authority, Urban Land Ceiling, Visakhapatnam and an order was passed in May, 1981 that the appellants were 'not surplus land owners'. In or about 1985, however, there appeared to be encroachment over the land and some officers of the Port Trust, with a view to save their skin, wrote a letter on December 19, 1985 that the possession of land had not been handed over to Port Trust Authorities since tenants were occupying the land. The said statement was not correct and could not have been considered for initiating proceedings under the Ceiling Act. It was also submitted by the counsel that suo motu power was sought to be exercised after a decade. As per settled law, revisional powers should be exercised within 'reasonable time'. By no stretch of imagination, more than ten years can be said to be 'reasonable time'. According to the learned counsel, learned single Judge was wholly justified in allowing both the writ petitions filed by the land-owners and in issuing directions, namely, (i) to complete land acquisition proceedings and pass award; and (ii) exercise of revisional powers after about thirteen years was wholly unwarranted. The said order was confirmed by the Division Bench in Writ Appeals. Special Leave

Petitions were also dismissed by this Court. After dismissal of Special Leave Petitions, neither it was open to the authorities to make an application for recalling earlier orders as has been done in June, 2001, nor it was permissible for the Court to grant such relief. It was also submitted that the Division Bench, while dealing with Writ Appeals took note of the fact that the land was 'agricultural land' and was having fruit bearing trees i.e. a garden land. The said finding had not been disturbed even by this Court in SLPs. The Division Bench ought to have taken into account that fact as well. By not doing so, an illegality had been committed and the order deserves to be set aside.

12. The learned counsel for the State Authorities as also Port Trust Authorities supported the order passed by the High Court and action of recalling of the order dated April 27, 2000. It was submitted that the authorities proceeded on the basis that advance possession of the land was given by land-owners to Port Trust Authorities in August, 1972. But the statement was not correct and the authorities were misled. The order passed by the Special Officer and Competent Authority under the Ceiling Act declaring that the owners did not possess surplus land was founded on the above statement that the land-owners were not in possession of land, which was false. But even otherwise, the order passed by the Special Officer and Competent Authority was not in consonance with law inasmuch as even if the owners were not in possession of land, proceedings under the Land Acquisition Act were not finalized. The legal position is that the ownership of the land-owners continued and in the eye of law, Port Trust Authorities remained in possession for and on behalf of the land-owners. It was, therefore, incumbent on Special Officer and Competent Authority under the Ceiling Act to declare land to be excess and surplus under the Ceiling Act so that appropriate consequential action could be taken. No such action, however, was taken. Moreover, it was made clear by the Chief Engineer, Port Trust vide his letter dated December 19, 1985 that actual and physical possession of land was never taken by Port Trust Authorities as it remained with tenants and disputes were going on. The matter, therefore, required detailed investigation.

13. The CBI made an enquiry and the report was submitted by the Police Inspector which revealed startling facts. From the report, it is clear that fraud was committed by the land owners in collusion with officers of the respondents. Criminal proceedings were also initiated and they are pending. It was, therefore, submitted that the High Court was right in recalling its earlier order.

14. Regarding non-applicability of the provisions of the Ceiling Act as the land being garden land and hence agricultural land under the Ceiling Act, it was submitted that it was never the case of the land-owners when proceedings under the Ceiling Act had been initiated that the Act would not apply because the land was used for agriculture. The sole ground put forward by the land- owners was that possession of land had already been given to Port Trust Authorities and hence the Ceiling Act had no application. It was, therefore, submitted that the appeals deserve to be dismissed and the impugned order calls for no interference.

15. Having given anxious consideration to the rival contentions of the parties, in our opinion, no case has been made out by the appellants for interference with the order

passed by the High Court allowing the applications and recalling earlier order. The High Court has considered the matter in detail. The case of land-owners was that advance possession was taken over by Port Trust Authorities in August, 1972. The subsequent facts and letter by Chief Engineer of Port Trust in 1985 clearly revealed that it was not so. Possession of land was never with the land-owners and was not given to Port Trust Authorities. From the record it is clear that neither the land-owners nor the Port Trust Authorities were in actual or physical possession of land, but it was occupied by tenants and disputes were also going on between the tenants and land-owners. Therefore, the basis on which the Special Officer and Competent Authority, Urban Land Ceiling proceeded to decide the matter was non-existent and non est.

16. In our opinion, the learned counsel for the respondents are also right in submitting that even if the statement of land-owners and Port Trust Authorities is believed and it is held that actual and physical possession of land was handed over by land-owners and taken over by Port Trust Authorities, it does not change the legal position. It was not the case of land-owners themselves that proceedings under the Land Acquisition Act were finalized and award was passed. From the record, it is clear that no notification under the Land Acquisition Act was issued in 1972. Such notifications were issued subsequently in the years 1973, 1981, 1991 and 1996. At more than one occasion, notifications were issued only because the proceedings were not finalized and award was not passed. It is also clear that in the writ petitions filed by the land-owners in 1994-95, a single Judge of the High Court directed the authorities to complete land acquisition proceedings by initiating fresh action commencing from issuance of notification under Section 4(1) of the Act and to complete them within a period of three months. In our opinion, therefore, the High Court was right in holding that the provisions of the Act would apply to the land and Special Officer and Competent Authority, Urban Land Ceiling was wholly wrong in excluding the land said to have been in possession of the Port Trust Authorities.

17. We are further of the view that the State Government, in the facts and circumstances of the case, was right in exercising revisional jurisdiction under Section 34 of the Act. Mr. Venugopal is indeed right in submitting that even though no period of limitation is prescribed for exercise of revisional jurisdiction by the State Government suo motu, such power must be exercised within a reasonable time [vide [State of Gujarat v. Patel Raghav Natha, \(1969\) 2 SCC 187](#)]. But taking into account the facts and circumstances in their entirety and in particular, a letter of Chief Engineer, Visakhapatnam Port Trust of December 19, 1985, it cannot be said that the power had not been exercised within a reasonable period. It is also pertinent to note that the subsequent development shows as to how some of the Officers of the Port Trust were parties to fraud said to have been committed by land-owners. In this connection, the respondents are right in inviting our attention to a letter dated August 21, 1989 by the Port Trust Authorities to the Commissioner of Land Reforms stating therein that the Government intended to exercise suo motu power under Section 34 of the Act but there was no necessity to reopen proceedings and suitable directions were required to be issued to District Collector, Visakhapatnam to pass an award in respect of land sought to be acquired under the Land Acquisition Act. In view of these developments, in our opinion, the High Court was fully justified in recalling the earlier order.

18. The High Court has dealt with the contention regarding fraud said to have been committed by land- owners in collusion with officers of the respondents. It is stated as to how the High Court ordered CBI enquiry on prima facie satisfaction that there was a fraud and report was submitted by Mr. Y. Anil Kumar, IPS, Superintendent of Police, CBI, Visakhapatnam. In the said report, CBI had stated that possession was never taken over by the Port Trust Authorities and tenancy cases were pending. Even if there was transfer of possession, it was in violation of the **Andhra Pradesh Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972** which came into force on June 5, 1972. (It may be recalled that according to the land owners as well as Port Trust Authorities, possession was taken over by the Port Trust by private negotiations on August 29, 1972). CBI, therefore, observed that transfer of possession in favour of Port Trust did not constitute legal transfer under 1972 Act. CBI also noted that proceedings under the Andhra Pradesh Tenancy Act were pending.

19. Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed;

*"Fraud avoids all judicial acts, ecclesiastical or temporal".*

It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order □by the first Court or by the final Court□ has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

20. In the leading case of **Lazarus Estates Ltd. v. Beasley, (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502**, Lord Denning observed:

*"No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud."*

21. In **Duchess of Kingstone, Smith's Leading Cases, 13th Edn., p.644**, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was 'mistaken', it might be shown that it was 'misled'. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

22. It has been said; Fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent).

23. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one

gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.

24. In *S.P. Chengalvaraya Naidu (dead) by LRs. V. Jagannath (dead) by LRs. & Ors.* (1994) 1 SCC 1 : JT 1994 (6) SC 331, this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained preliminary decree. During the pendency of an application for final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that "there was no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". B approached this Court.

25. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as 'wholly perverse', Kuldip Singh, J. stated:

*"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax- evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation"*.

(emphasis supplied)

26. The Court proceeded to state: "A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party".

The Court concluded: "**The principle of 'finality of litigation'** cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants".

27. In *Indian Bank v. Satyam Fibres (India) Pvt. Ltd.*, (1996) 5 SCC 550 : JT 1996 (7) SC 135, referring to *Lazarus Estates and Smith v. East Elloe Rural District Council*, 1956 AC 336 : (1956) 1 All ER 855 : (1956) 2 WLR 888, this Court stated;

*"The judiciary in India also possesses inherent power, specially under Section 151 C.P.C., to recall its judgment or order if it is obtained by Fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the Decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers*

*spring not from legislation but from the nature and the Constitution of the Tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the Court's business".*

(emphasis supplied)

28. In **United India Insurance Co. Ltd. v. Rajendra Singh & Ors.**, (2000) 3 SCC 581 : JT 2000 (3) SC 151, by practising fraud upon the Insurance Company, the claimant obtained an award of compensation from the Motor Accident Claims Tribunal. On coming to know of fraud, the Insurance Company applied for recalling of the award. The Tribunal, however, dismissed the petition on the ground that it had no power to review its own award. The High Court confirmed the order. The Company approached this Court.

Allowing the appeal and setting aside the orders, this Court stated;

*"It is unrealistic to expect the appellant company to resist a claim at the first instance on the basis of the fraud because appellant company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the company to file a statutory appeal against the award. Not only because of bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.*

*Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No Court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim. The allegation made by the appellant Insurance Company, that claimants were not involved in the accident which they described in the claim petitions, cannot be brushed aside without further probe into the matter, for, the said allegation has not been specifically denied by the claimants when they were called upon to file objections to the applications for recalling of the awards. Claimants then confined their resistance to the plea that the application for recall is not legally maintainable. Therefore, we strongly feel that the claim must be allowed to be resisted, on the ground of fraud now alleged by the Insurance Company. If we fail to afford to the Insurance Company an opportunity to substantiate their contentions it might certainly lead to serious miscarriage of justice".*

(emphasis supplied)

29. Mr. Venugopal, no doubt, contended that when the order passed by the earlier Division Bench was not interfered with by this Court and SLPs were dismissed, it was not open to the High Court thereafter to entertain recall-applications and grant the relief of recalling of earlier orders. According to him, such an exercise of power was unlawful and abuse of process of law. In this connection, our attention has been invited by the learned counsel to a decision of this Court in **Abbai Maligai Partnership Firm & Anr. v. K. Santhakumaran & Ors.**, (1998) 7 SCC 386 : JT 1998 (6) SC 396. In that case, after

dismissal of Special Leave Petition by this Court, review petition was entertained by the High Court and earlier judgment was recalled. When the matter reached this Court, setting aside the order passed by the High Court, the Court observed:

*"The manner in which the learned Single Judge of the High Court exercised the review jurisdiction, after the special leave petitions against the self-same order had been dismissed by this court after hearing learned counsel for the parties, to say the least, was not proper. Interference by the learned single Judge at that stage is subversive of judicial discipline. The High Court was aware that SLPs against the orders dated 7.1.87 had already been dismissed by this court. This High Court, therefore, had no power or jurisdiction to review the self same order, which was the subject matter of challenge in the SLPs in this court after the challenge had failed. By passing the impugned order on 7.4.1994, judicial propriety has been sacrificed. After the dismissal of the special leave petitions by this court, on contest, no review petitions could be entertained by the High Court against the same order. The very entertainment of the review petitions, in the facts and circumstances of the case was an affront to the order of this Court. We express our strong disapproval and hope there would be no occasion in the future when we may have to say so. The jurisdiction exercised by the High Court, under the circumstances, was palpably erroneous. The respondents who approached the High Court after the dismissal of their SLPs by this court, abused the process of the court and indulged in vexatious litigation. We strongly deprecate the manner in which the review petitions were filed and heard in the High Court after the dismissal of the SLPs by this court."*

(emphasis supplied)

30. The respondents, on the other hand, placed reliance upon **Kunhayammed & Ors. v. State of Kerala & Anr.**, (2000) 6 SCC 359 : JT 2000 (9) SC 110, wherein this Court had an occasion to consider the application of the doctrine of merger to orders passed by this Court while exercising jurisdiction under **Article 136 of the Constitution**. The Court there observed that exercise of jurisdiction by this Court under Article 136 is in two stages;

- (i) granting of a special leave to appeal; and
- (ii) hearing of appeal.

31. The Court went on to observe that **the doctrine of merger** does not apply to first stage i.e. at the stage of granting of special leave to appeal. It applies only at the second stage of hearing of appeals. The Court in the light of above position, laid down the following principles:

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of **Article 141 of the Constitution**. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties,

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by **Sub-rule (1) of Rule (1) of Order 47 of the C.P.C.**

32. In *Kunhayammed, Abbai Maligai* was considered and it was observed that in the facts and circumstances of that case, this Court did not approve the order passed by the High Court. The Court noted that in *Abbai Maligai*, this Court did not consider the doctrine of merger. According to the Court, a careful reading of *Abbai Maligai* "brings out the correct statement of law and fortifies us in taking the view" as taken. [see also **S. Shanmugavel Nadar v. State of T.N. & Anr., (2002) 8 SCC 361 : JT 2002 (7) SCC 568**]. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent Court of Law after hearing the parties and an order is passed in favour of the

applicant/plaintiff which is upheld by all the courts including the final Court. Let us also think of a case where this Court does not dismiss Special Leave Petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior. Hence, the argument of Mr. Venugopal cannot be upheld. Even if he is right in submitting that after dismissal of SLPs, the respondent herein could not have approached the High Court for recalling its earlier order passed in April, 2000 and the High Court could not have entertained such applications, nor the recalling could have been done, in the facts and circumstances of the case and in the light of the finding by the High Court that fraud was committed by the land-owners in collusion with the officers of the Port Trust Authorities and Government, in our considered view, no fault can be found against the approach adopted by the High Court and the decision taken. The High Court, in our opinion, rightly recalled the order, dated April 27, 2000 and remanded the case to the authorities to decide the same afresh in accordance with law. Mr. Venugopal also submitted that the Division Bench of the High Court in an order dated April 27, 2000 observed that the land being a garden land having fruit bearing trees which had been cultivated by a tenant, it did not fall within the description of 'urban land' or 'vacant land' within the meaning of **Section 2(o) or 2(q) of the Ceiling Act** and the said aspect had not been gone into at all by the State Government. The High Court thereafter considered the provisions of the Ceiling Act and held that the land was agricultural land and required to be excluded from the operation of the Ceiling Act.

33. As to the above, we may only observe that it was never the case of land-owners while filling a form under Section 6 of the Act that the provisions of the Act were not applicable to the land in question because the land was used for agriculture or horticulture purposes or that it was having fruit bearing trees. The exclusion or non-operation of the Act was sought only on the ground that the possession of the land had already been handed over to Port Trust Authorities in 1972 and hence the land cannot become subject matter of the Ceiling Act. In view of the above fact, in our opinion, the High Court was right in passing the impugned order directing the authorities to consider all aspects and pass an appropriate order in accordance with law. Last but not the least. We are exercising jurisdiction under Article 136 of the Constitution. It is discretionary and equitable in nature. Clause (1) of the said Article confers very wide and extensive powers on this Court to grant special leave to appeal against any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in

India. The Article commences with a non-obstante clause, "Notwithstanding anything in this Chapter" (i.e. Chapter IV of Part V). These words are of overriding effect and clearly indicate the intention of the Framers of the Constitution that it is a special jurisdiction and a residuary power unfettered by any statute or other provisions of Chapter IV of Part V of the Constitution. It is extraordinary in its amplitude. Its limit, when it chases injustice, is the sky. Such power, therefore, may be exercised by this Court whenever and wherever justice demands intervention by the highest Court of the country.

Article 136, however, does not confer a right of appeal on any party. It confers discretion on this Court to grant leave to appeal in appropriate cases. In other words, the Constitution has not made the Supreme Court a regular Court of Appeal or a Court of Error. This Court only intervenes where justice, equity and good conscience require such intervention. In *Baiganna v. Deputy Collector of Consolidation*, (1978) 2 SCR 509 : (1978) 2 SCC 461; Krishna Iyer, J. pithily stated;

*"The Supreme Court is more than a Court of appeal. It exercises power only when there is supreme need. It is not the fifth court of appeal but the final court of the nation. Therefore, even if legal flaws may be electronically detected, we cannot interfere sans manifest injustice or substantial question of public importance".*

(emphasis supplied)

[see also *V.G. Ramachandran, 'Law of Writs'; Revised by Justice C.K. Thakker & Mrs. M.C. Thakker; Sixth Edn; Vol.2; pp.1440-1528*]

34. Keeping in view totality of facts and attending circumstances including serious allegations of fraud said to have been committed by the land-owners in collusion with officers of the respondent-Port Trust and Government, report submitted by the Central Bureau of Investigation (CBI), prima facie showing commission of fraud and initiation of criminal proceedings, etc. if the High Court was pleased to recall the earlier order by issuing directions to the authorities to pass an appropriate order afresh in accordance with law, it cannot be said that there is miscarriage of justice which calls for interference in exercise of discretionary and equitable jurisdiction of this Court. We, therefore, hold that this is not a fit case which calls for our intervention under Article 136 of the Constitution. We, therefore, decline to do so. Before parting with the matter, we may state that all the observations made by us hereinabove have been made only for the purpose of deciding the legality and validity of the order passed by the High Court. We may clarify that we may not be understood to have expressed any opinion on merits of the matter one way or the other.

Therefore, as and when the matter will be considered by the authorities in pursuance of the directions of the High Court, it will be decided on its own merits without being inhibited by the observations made by us in this judgment. For the foregoing reasons, the appeals deserve to be dismissed and are accordingly dismissed with costs.



**ISCLR/2007/10/05**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: Regional Provident Fund Commissioner**  
**Vs.**  
**RESPONDENT: M/s Raj's Continental Exports (P) Ltd**

Appeal (civil) 7345 of 2000

Date of Judgment: 07/03/2007

Bench: Dr. Arijit Pasayat & Lokeshwar Singh Pantia

Subject: Labour and Industrial

Legislations Referred:

- Employees' Provident Funds & Miscellaneous Provisions Act, 1952 - Section 2A, 7A
- Factories Act, 1948
- Central Sales Act 1956,
- Income Tax Act, 1961
- Employees' State Insurance Act, 1948

Cases Referred:

- Pratap Press, etc. v. Their Workmen (1960 (1) LLJ 497)
- Regional Provident Fund Commissioner and Anr. v. Dharamsi Morarji Chemical Co. Ltd. (1998 (2) SCC 446)

**JUDGMENT:**

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment rendered by a Division Bench of the Karnataka High Court dismissing the Writ appeal filed by the appellant. The learned Single Judge, whose order was under challenge before Division Bench had allowed the writ petition filed by the respondent holding that the order passed under **Section 7A of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952** (in short the 'Act') was not sustainable.

2. **Background facts** in a nutshell are as follows:

Respondent claimed in-fancy protection under the provisions of the Act. It started production in 1984. The respondent was of the view that it was an extension on the branch of M/s Continental Exporters, a proprietorship concern of one Sampathraj Jain, who was also the Managing Director of the respondent-company. Appellants' view was that the respondent was nothing but a department of the aforesaid "M/s. Continental

Exporters". Assailing the adjudication, respondent filed a writ petition stating that there was no financial integrity. It was separately registered under the **Factories Act, Central Sales Act 1956, Income Tax Act, 1961 and the Employees State Insurance Act**. The concerns are separate and distinct. They have separate Balance Sheets and audited statements. The High Court accepted the contention and held that there was total independent exercise of power in the two concerns. Though the manufacturing of goods was in respect of the same article, that by itself was not sufficient to hold that it was a branch or department of M/s Continental Exporters. The High Court as a matter of fact found that there was total independence exercise of the management and control of the affairs, the employees were separately appointed and controlled. Taking into account these factors it was held that that the respondent company and M/s Continental Exporters were not one and the same.

3. Challenge was made to the order of learned Single Judge in the Writ Appeal. The High Court after analyzing the factual position came to hold that there was nothing in common between the two establishments. Merely because the proprietor of the one concern was the Managing Director of the other that by itself is not sufficient to establish that one was branch of the other. Accordingly the Writ Appeal was dismissed.

4. In support of the appeal, learned counsel for the appellant submitted that factual scenario clearly establish that the respondent was a branch of M/s. Continental Exporters. Learned counsel for the respondent on the other hand submitted that in view of the findings recorded by both the learned Single Judge and the Division Bench of the High Court, there is no scope for any interference.

5. At this juncture it would be appropriate to take note of **Section 2A** of the Act. The same reads as follows:-

*"For the removal of doubts, it is hereby declared the where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment."*

6. In **Pratap Press, etc. v. Their Workmen (1960 (1) LLJ 497)** it was inter-alia held as follows :

*"The question whether the two activities in which the single owner is engaged are one industrial unit or two distinct industrial units is not always easy of solution. No hard and fast rule can be laid down for the decision of the question and each case has to be decided on its own peculiar facts. In some cases the two activities each of which by itself comes within the definition of "industry" are so closely linked together that no reasonable man would consider them as independent industries. There may be other cases where the connection between the two activities is not by itself sufficient to justify an answer one way or the other, but the employer's own conduct in mixing up or not mixing up the capital, staff and management may often provide a certain answer."*

7. In **Regional Provident Fund Commissioner and Anr. v. Dharamsi Morarji Chemical Co. Ltd. (1998 (2) SCC 446)**, it was held that unless there is clear evidence to show that there was any supervisory financial or managerial control, it cannot be said that one is the branch of the other. As noted by learned Single Judge, the respondent was separately registered under the Factories Act. It was separately registered under the Central Sales Tax Act and the Employees State Insurance Act. It has also been found by learned Single Judge that there was total independence of the two units. The learned Single Judge and the Division Bench were right in their conclusion that the respondent is not a branch of M/s. Continental Exporters.

8. The appeal is sans merit, deserves dismissal, which we direct. There will be no order as to costs.



**ISCLR/2007/10/06**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: State of Punjab & Ors. (Appellants)**

**Vs.**

**RESPONDENT: Swaran Kaur and Ors. (Respondents)**

Appeal (civil) 1185 of 2007  
(Arising out of SLP (C ) Nos. 17661-17662/05)

Date of Judgment: 07/03/2007

Bench: Dr. Arijit Pasayat & Lokeshwar Singh Panta

Subject: Service

Subsidiary Legislations Referred:

- Punjab State Class IV Service Rules, 1963 – Rule 5

**JUDGMENT:**

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in these appeals is to the orders passed by a Division Bench of the Punjab and Haryana High Court. One of them relates to the orders passed in the writ petition while other one relates to the order passed in a review application.

3. The basic question raised in the writ petition filed by the respondents was whether the authorities were justified in holding that they did not possess the requisite qualification for appointment under the **Punjab State Class IV Service Rules, 1963** (in short the 'Rules'). The State of Punjab had taken over Chanan Devi Memorial girl High School, Saleem Tabri, Ludhiana under certain conditions so far as the employment of the members of staff concerned. The Director Public Instructions, Punjab wrote to the District Education Officer, Chandigarh to ensure that all the members of the staff fulfil the requisite qualification for recruitment to the relevant post. Taking exception to the view expressed by the District Education officer that the writ petitioners who are the respondents in these appeals did not possess requisite qualification. Writ petition was filed stating that said view is not sustainable in law. Purportedly acting on a basis of a concession made by learned Additional Advocate General, who was appearing in the writ petition, the writ petition was allowed. The learned Additional Advocate General, Punjab purportedly conceded that the rules were not applicable to the case of the writ petitioner. Subsequently a review petition was filed stating that the concession was uncalled for because the letter of the Director, Public Instructions, Punjab dated 17.11.1995 addressed to the District Education officer, Chandigarh clearly stipulated the terms for continuance in service. The High Court dismissed the review application on the ground that there was no prescription in the said letter which would indicate applicability of the rules.

4. In support of the appeals, learned counsel for the appellants submitted that the view of the High Court is clearly untenable. The Director, Public Instructions had clearly stipulated in the said letter that it was the duty of the District Education Officer to ensure that all the members of the staff of the taken over educational institute fulfil the requisite qualification for recruitment to the relevant posts. With reference to the rules it is pointed out that certain educational qualifications have been prescribed which the respondents did not possess.

5. In response learned counsel for the respondents submitted that more than a decade has since elapsed and it would not be proper to interfere with the order of the High Court which was based initially on concession and subsequently on a finding recorded that there was no prescription in the letter dated 17.11.1995 relating to educational qualifications.

6. At this juncture it is necessary to take note of the relevant provisions in the Rules which read as follows:

" **Rule 5** : *No person shall be recruited to the Service by direct appointment unless he* □

*(a) produces certificates of character from two responsible persons, not being his relatives, who are well acquainted with him in private life;*

*(b) is not less than 16 years and not more than 35 years of age on the date of appointment;*

*(c) has not more than one wife living and in the case of a woman, is not married to a person already having a living wife:*

*Provided that the Government may, if satisfied that there are special grounds for doing so, exempt any person from the operation of this clause; and*

*(d) possesses the requisite knowledge of the regional languages and of English as may be prescribed by the Government from time to time:*

*Provided that the appointing authority may, if it is of the opinion that the candidate is otherwise fit to discharge his duties satisfactorily, relax any of the qualification prescribed under this clause."*

7. Similarly in the letter of Director of Public Instructions it was clearly stated as follows:  
"□..it is the duty of the District Education Officer to see that all of them fulfil the requisite qualification for recruitment in the relevant posts."

8. The effect of the afore-stated rule and the indication in the letter has not been considered by the High Court. In the circumstances, we set aside the orders of the High Court and remit the matter to it for fresh consideration. We make it clear that we have not expressed any opinion on the merits. The High Court is requested to dispose of the writ petition as early as practicable.

9. The appeals are allowed to the aforesaid extent without any order as to costs.



**ISCLR/2007/10/07**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: Ishwar Chandra & Ors**

**Vs.**

**RESPONDENT: The Oriental Insurance Co. Ltd. & Ors**

Appeal (civil) 1213 of 2007  
[Arising out of SLP (Civil) No. 16437 of 2006]

Date of Judgment: 08/03/2007

Bench: S.B. Sinha & Markandey Katju

Subject: Motor Vehicle

Legislations Referred:

- Motor Vehicles Act, 1988 - Section 2, 3, 10, 14, 15(1), 19, 20, 21, 22, 23, 24 166

Cases Referred:

- Oriental Insurance Co. Ltd. Vs. Nanjappan and Others, AIR 2004 SC page 1630
- National Insurance Company Limited v. Swaran Singh and Others [(2004) 3 SCC 297]
- National Insurance Company v. Kusum Rai & Others [(2006) 4 SCC 250]

**JUDGMENT:**

S.B. SINHA, J :

1. Leave granted.

2. One Reshma Devi, aged about 40 years, was going to take bath at Rajghat Ganga with her son, Respondent No.3 herein. Driver of an Eicher Tractor bearing Registration No. U.P.30/8423 was driving the said vehicle rashly and negligently hit her as a result whereof, she fell down. She died on 01.05.1995. A [claim petition under Section 166 of the Motor Vehicles Act, 1988](#) (for short, 'the Act) was filed by Respondent No. 2 herein. The said tractor was insured with Respondent No.1, the Insurance Company. The [Motor Accidents Claims Tribunal](#) by an award dated 14.10.2004 determined the amount of compensation payable to the said respondent at Rs.1,06,000/-. Out of the said amount, a sum of Rs.75,000/- was to be paid to Respondent No. 2 (husband of the deceased) and Rs.31,000/- to her son, Respondent No.3 herein.

3. Respondent No.1, however, preferred an appeal thereagainst, which was dismissed by an order dated 24.01.2005, stating :

*"We, therefore, while dismissing the aforesaid appeal give liberty to the appellant to initiate appropriate proceedings against the owner and driver of the vehicle for realization of the amount, which is to be paid by the Insurance Company in terms of the award to the third party-claimant subject to establishing its case before the Tribunal.*

*We further provide that the amount, which is in deposit before this Court as well as before the Tribunal shall be allowed to be withdrawn by the claimants/respondents. The balance amount shall be deposited by the Insurance Company within two months from today before the Tribunal. On deposit so being made, the claimants/respondents shall be allowed to withdraw the same also without furnishing any security.*

*It will, however, be open to the Insurance Company to recover the amount in question from the insured. For the purpose of recovering the same from the insured owner of the vehicle, the insurer shall not be required to file a suit. It may initiate a proceedings before the Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. It is further directed that before releasing the amount, the insured owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount, which the insurer will pay to the claimants. This observation is in consonance with the view taken by the Apex Court in case of **Oriental Insurance Co. Ltd. Vs. Nanjappan and Others, AIR 2004 SC page 1630.**"*

4. Respondent No.1, however, filed [an application for review of the said order](#), inter alia, on the premise that as on the date of the accident, admittedly, the driver was not holding any valid licence in terms of the judgment of this Court in **National Insurance Company Limited v. Swaran Singh and Others [(2004) 3 SCC 297]**. Relying on or on the basis of the decision of this Court in **Oriental Insurance Co. Ltd. v. Nanjappan and Others [AIR 2004 SC 1630]**, the said application for review was dismissed.

5. The learned counsel appearing on behalf of the appellants would submit that although the licence held by the driver of the tractor expired on 27.08.1994, the same later on having been renewed, the Insurance Company was liable to reimburse the amount of compensation payable by the appellants to the claimant-respondents.

6. The learned counsel appearing on behalf of the respondents, however, supported the impugned judgment.

7. [Section 15\(1\) of the Act](#) and the first proviso appended thereto reads as under :

*"15. Renewal of driving licences. (1) Any licensing authority may, on application made to it, renew a driving licence issued under the provisions of this Act with effect from the date of its expiry:*

*Provided that in any case where the application for the renewal of a licence is made more than thirty days after the date of its expiry, the driving licence shall be renewed with effect from the date of its renewal:"*

From a bare perusal of the said provision, it would appear that the licence is renewed in terms of the said Act and the rules framed thereunder. The proviso appended to Section 15(1) of the Act in no uncertain terms states that whereas the original licence granted despite expiry remains valid for a period of 30 days from the date of expiry, if any application for renewal thereof is filed thereafter, the same would be renewed from the date of its renewal. The accident took place 28.04.1995. As on the said date, the renewal application had not been filed, the driver, did not have a valid licence on the date when the vehicle met with the accident.

8. In **Swaran Singh (supra)**, whereupon the learned counsel appearing on behalf of the appellants relied upon, it is stated :

*"45. Thus, a person whose licence is ordinarily renewed in terms of the Motor Vehicles Act and the Rules framed thereunder, despite the fact that during the interregnum period, namely, when the accident took place and the date of expiry of the licence, he did not have a valid licence, he could during the prescribed period apply for renewal thereof and could obtain the same automatically without undergoing any further test or without having been declared unqualified therefor. Proviso appended to Section 14 in unequivocal terms states that the licence remains valid for a period of thirty days from the day of its expiry.*

*46. Section 15 of the Act does not empower the authorities to reject an application for renewal only on the ground that there is a break in validity or tenure of the driving licence has lapsed, as in the meantime the provisions for disqualification of the driver contained in Sections 19, 20, 21, 22, 23 and 24 will not be attracted, would indisputably confer a right upon the person to get his driving licence renewed. In that view of the matter, he cannot be said to be delicensed and the same shall remain valid for a period of thirty days after its expiry."*

9. This aspect of the matter is now covered by a decision of this Court in **National Insurance Company v. Kusum Rai & Others [(2006) 4 SCC 250]**, wherein this Court referring to Swaran Singh (supra), opined :

*"14. This Court in Swaran Singh clearly laid down that the liability of the Insurance Company vis-a-vis the owner would depend upon several factors. The owner would be liable for payment of compensation in a case where the driver was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle. The question as regards the liability of the owner vis-a-vis the driver being not possessed of a valid licence was considered in Swaran Singh stating: (SCC pp. 336-37, para 89)*

*89. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of the said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are: (a) motorcycle without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller, and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are goods*

*carriage, heavy goods vehicle, heavy passenger motor vehicle, invalid carriage, light motor vehicle, maxi-cab, medium goods vehicle, medium passenger motor vehicle, motor-cab, motorcycle, omnibus, private service vehicle, semi-trailer, tourist vehicle, tractor, trailer and transport vehicle. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal as a person possessing a driving licence for motorcycle without gear, [sic may be driving a vehicle] for which he has no licence. Cases may also arise where a holder of driving licence for light motor vehicle is found to be driving a maxi-cab, motor-cab or omnibus for which he has no licence. In each case, on evidence led before the Tribunal, a decision has to be taken *whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that the accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with the driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence.*"*

[See Nanjappan (supra)]

10. In this view of the matter, there is no merit in this appeal, which is dismissed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.



**ISCLR/2007/10/08**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: Sanjay**  
**Vs.**  
**RESPONDENT: State of Maharashtra**

Appeal (crl.) 292 of 2007  
(Arising out of SLP (Criminal) No. 5397/2006)

Date of Judgment: 08/03/2007

Bench: S. B. Sinha & Markandey Katju

Subject: Criminal

Legislations Referred:

- Indian Penal Code, 1860 – Sections 34, 306, 498A

**JUDGMENT:**

MARKANDEY KATJU, J.

1. Leave granted.
2. This appeal has been filed against the impugned judgment of the Bombay High Court (Nagpur Bench) dated 17.8.2006 in Criminal Appeal No.135 of 1996.
3. Heard learned counsel for the parties and perused the record.
4. The facts of the case are that the father of the appellant and the father of Seema were serving in Forest Department. They were also related. The appellant and Seema fell in love with each other. However, since they were within the prohibited degrees of relationship, the parents of both the appellant as well as Seema were against their marriage. Hence the appellant and Seema eloped from their parental houses and got married at Katol on 9.4.1991. After marriage they came back to Mouda. For some time, they resided separate from the appellant's parents, but after intervention of some relatives, they went to reside with the parents of the appellant. However, they could not pull on there for long and they again started residing separately in a rented house owned by one Sunil Anandrao Nimje.
5. The appellant has a shop of electronic goods and he is also doing the work of repairing T.V. and giving cable connections. His shop is just in front of the rented premises.

6. On 21.2.1992 the appellant and Seema were blessed with a son namely Mandar. However, it is alleged that the relations between the appellant and Seema did not remain cordial. It was noticed by Seema that the appellant returned late at night and that too in a drunken state. The appellant also neglected his business. He started neglecting his wife Seema and son Mandar. Seema complained to her parents by sending them letters.

7. On the fateful night intervening between 28.12.1994 and 29.12.1994, it is alleged that the appellant returned home in the midnight in a drunken state. There was a quarrel between him and Seema with the result that Seema poured kerosene on her person and set herself ablaze. She was immediately taken to the hospital of Dr. Chandak in Nagpur and thereafter to Government Medical College and Hospital, Nagpur.

8. On 29.12.1994 in the noon, H.C. Pimpalkar (PW-6) recorded the dying declaration of Seema (Ex.51). On the same day in the afternoon, Shri Manekar, Executive Magistrate (PW-9) recorded her dying declaration (Ex.61). On the next day i.e. on 30.12.1994, H.C. Nirgulkar (PW-4) recorded her statement (Ex.40). On 5.1.1995, Seema succumbed to the burn injuries. The post mortem examination revealed that the burns were 79% and the cause of death was septicemia as a result of infected burns.

9. Initially offences under **Section 498-A read with Section 34 of I.P.C.** were registered at P.S. Mouda and subsequently offence under **Sections 306/34 of I.P.C.** was added.

10. The trial court after considering the evidence held that the offences have been proved against the appellant but acquitted the appellant's father and mother.

11. Against the said judgment the appellant filed an appeal which has been dismissed by the High Court and hence this appeal by special leave.

12. In our opinion this appeal deserves to be allowed by giving the **benefit of doubt** to the appellant. The only evidence against the appellant are the three alleged dying declarations of the appellant's wife Seema. In the first dying declaration Seema stated that while she was pumping the stove it suddenly burst and her saree caught fire. She shouted loudly and then her husband rushed towards her and extinguished the fire by pouring water on her. This is the first dying declaration and nothing has been alleged against the appellant in it. Rather it shows that the appellant tried to save his wife Seema. In the subsequent dying declaration Seema is said to have stated that she poured kerosene on her in person and set herself ablaze because she was angry with her husband.

13. The prosecution version is that the subsequent dying declarations made by Seema alleging that she committed suicide because there used to be quarrels between her and her husband (the appellant) are corroborated by two letters alleged to have been written by Seema to her parents. The first letter (Ex.28) appears to be dated 24.1.1994. It shows that her husband (the appellant) does not behave properly with her, he daily returns home late at night in a drunken state and because of it there used to be quarrels between her and the appellant. She also expressed in the said letter that the appellant was also willing to give

her divorce. Seema expressed that she felt repentful as she married the appellant of her own will. She further expressed that she felt no charm in leading such life.

Another letter (Ex.29) is dated 26.7.1994 i.e. about five months before the incident of suicide. The said letter reiterates the same state of affairs mentioned in the earlier letter (Ex.28). The evidence of PW-1 Vimal (the mother of Seema) and PW-2 Wamanrao (the father of Seema) corroborates the unhappiness faced by Seema. Hence it is alleged that the so called first written dying declaration (Ex.51) would not render the voluminous evidence untrustworthy.

15. The trial court, as well as High Court, were of the view that the evidence on record shows there was cruelty on the part of the appellant which drove his wife to suicide.

16. In our opinion in view of the different dying declarations it would not be safe to uphold the conviction of the appellant and we have to give him the benefit of doubt. It cannot be said in this case that the prosecution has proved the appellant's guilt under **Section 306 I.P.C.** of abetting the suicide **beyond reasonable doubt**.

17. For the reasons given above the appeal is allowed. The judgments of the High Court and trial court are quashed. The appellant is directed to be released forthwith if not wanted in connection with any other case.



**ISCLR/2007/10/9**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: Swami Prasad**  
**Vs.**  
**RESPONDENT: State of Madhya Pradesh**

Appeal (crl.) 731 of 2000

Date of Judgment: 08/03/2007

Bench: S.B. Sinha & Markandey Katju

Subject: Criminal

Legislations Referred:

- Indian Penal Code, 1860 – Section 302
- Code of Criminal Procedure, 1973 - Section 161

Cases Referred:

- Samghaji Hariba Patil v. State of Karnataka [AIR 2007 SC 28]
- Chandrappa & Ors. v State of Karnataka [2007 (3) SCALE 90]

**JUDGMENT:**

S.B. SINHA, J :

1. This appeal is directed against a judgment and order dated 24.11.1999 passed by a Division Bench of the Madhya Pradesh High Court at Jabalpur in Criminal Appeal No. 762 of 1988 whereby and whereunder a judgment of the learned Sessions Judge, Taikamgarh, Madhya Pradesh dated 30.12.1987 in Sessions Trial No. 4 of 1987 acquitting the appellant from the charge of commission of an offence punishable under **Section 302 of the Indian Penal Code**, was set aside.

2. The basic fact of the matter is not in dispute. One Devakinandan (PW-3) is the father of the appellant as also the deceased Rameshwar. Appellant herein is his son through his first wife. After the death of his first wife, Devakinandan married one Binna. The deceased and Ram Sahay (PW-4) were his sons and Ramsri (PW-6) was his daughter through Binna, the second wife of Devakinandan.

3. On 08.11.1986 at about 10 a.m. Paras Ram (PW-1) Devakinandan (PW-3), Raj Kumar (PW-2) and the appellant were talking beneath a 'neem' tree near the house of PW-3 as regards partition of the lands belonging to him. Appellant herein claimed = share in the property of PW-3. PW-3, however, declined to give him = share stating that he had three sons and all the sons would get equal shares.

4. PW-4 Ram Sahay, (brother of the deceased) and the deceased at that point of time were minors. They were taking bath at a well. PW-4 after taking bath left for his house. Appellant, in the meanwhile, went towards the well with an axe in his hand. While the deceased was taking bath, he allegedly assaulted him by giving two or three blows with his axe on his neck saying that 'he had done the division in two parts'. He also gave an exhortation that whoever would come would be killed; upon hearing of which, PW-1, PW-2 and PW-3 allegedly entered their respective houses. PW-6, Ramshri (sister of the deceased and PW-4), who was standing near her house, heard the alarm that the appellant had killed Rameshwar, came to the spot and found her brother lying in an injured condition. She immediately alarmed her brother PW-4 not to come from his house. Appellant from the place of occurrence went to the Police Station, Niwari. He purported to have made a statement before the officer in charge at the Police Station, disclosing that Rameshwar had been killed with the axe carried by him in his hand. At that point of time, one Rajendra Shekhar, who was an advocate as also a journalist was present in the Police Station. He examined himself as PW-11.

5. On the basis of the said information, the officer in charge of the Police Station came to the spot. PW-1 made the following statement before him :

*"I am doing agriculture in Byavata □ Ram Sahai, Rameswar, Swami Prasad are sons of my uncle. Swami Prasad was the son of elder wife and Rameswar was the son of younger wife. Swami Prasad is in possession of half the land. While Devaki Nandan wanted to give one-third share to Swami. Today at about 10' O' clock in the morning, Swami Prasad, Dewaki Nandan, Raj Kumar Yadav and I were sitting under Neem Tree. Swami Prasad said "I am son of married lady (wife), give me half share of the land", Dewaki said "you are three brothers". Therefore you will get only one third share. At that time, Ram Sahai, Rameswar were taking bath on the well. After a short time, Ram Sahai went to, Swami Prasad armed with an axe reached the well where Rameswar was bathing and suddenly make strike with axe two three times and shouted "see", there are two parts. We saw dying Rameswar thereafter Swami shouted "come" all to be killed. Raj Kumar, Dewaki Nandan and I ran and entered in the house. Swami Prasad kept on waiting with axe for some time and then moved towards Niwari. Till now, I stayed at the home on account of fear. Having come there, I saw, there were axe injuries on Rameswar's neck and he had died. Therefore, I lodge this report. Investigation may be done."*

6. A First Information Report was drawn on the basis of the said statement.

7. At the trial, however, not only PW-1 but also PW-2 and PW-3 turned hostile. They resiled from their earlier statements. PW-4 was not an eye-witness. The learned Trial Judge disbelieved the statement of PW-6, inter alia, on the premise that she had made improvement thereupon. A judgment of acquittal, therefore, on the said findings, was passed.

8. On an appeal made by the State before the High Court against the said judgment of acquittal, however, a Division Bench of the High Court examined the matter in details

and held the appellant guilty of commission of murder of Rameshwar and sentenced him to undergo rigorous imprisonment for life.

9. Mr. Yashank P. Adhyaru, the learned Senior Counsel appearing on behalf of the appellant, would submit that having regard to the nature of evidences brought on records by the prosecution, the High Court must be held to have committed a manifest error in reversing a judgment of acquittal particularly in view of the fact that both the learned Trial Judge as also the High Court did not rely upon the testimony of the sole eye-witness PW-6 on the ground that she had not made any statement before the Investigating Officer under **Section 161 of the Code of Criminal Procedure, 1973** to the effect that she had seen the appellant assaulting the deceased with an axe.

10. The learned counsel would submit that even the informant PW-1 had not made any statement before the court that he had seen the actual incident, and he merely disclosed that he had heard an alarm and on cross-examination, made a categorical statement that somebody had told him thereabout, but the name of the person from whom he had known had not been disclosed.

11. Our attention has further been drawn to the fact that even PW-2 refused to claim himself to be an eye-witness. PW-3, the father of the deceased, categorically stated that he had not seen the incident. He thus, was a witness to the dispute. According to the learned counsel PW-4 was admittedly not an eye-witness. Mr. Siddhartha Dave, learned counsel for the State, however, supported the judgment of the High Court.

12. The death of Rameshwar being homicidal in nature is not in dispute. Dr. Vimal Kumar Jain, (PW-5) conducted the post-mortem examination. He found the following external injuries on the person of the deceased :

*"(1) There was incised wound 5" x 4" x 3" with clear cut margin on right back and lateral upper portion of the neck. There was clotted blood and main artery was cut.*

*(2) There was incised wound 3" x 2" x 2" in the back lower side of neck and in lateral portion and the margin of the wound was clearly cut. There was clotted blood and blood vein cut.*

*(3) There was incised wound with clearly cut margin 3" x 2" x 1" in the right side of back and Scapular region and there was clotted blood."*

13. Death of Rameshwar, therefore, being homicidal in nature is not in doubt. It is also not in dispute that the incident took place at 10 a.m. on 08.11.1986. The place of occurrence is also not in dispute. Appellant admittedly came to the Police Station, Niwari at about 11 a.m. He came there with an axe in his hand. It was stained with blood. He stated that a murder had been committed by the axe which he had been holding. The said axe was seized by the officer in charge of the Niwari Police Station, Shri N.C. Tiwari.

14. On the basis of the said information, Shri Tiwari came to the spot and recorded the First Information Report.

16. It is true that three prosecution witnesses were declared hostile, but the same by itself, in our considered opinion, would not lead to the conclusion that the High Court committed any error in passing the impugned judgment. It is well settled that a Court in a given situation even may rely on the statements of the witnesses, who had been permitted to be cross-examined by the prosecution.

17. It may be true that the evidence of PW-6 had not been believed in its entirety by the learned Trial Judge. Her evidence has, however, been believed at least in part by the High Court. The reason for not believing her evidence is said to be that in her statement under Section 161 Cr. P.C. before the Investigating Officer, she had not stated to have seen the appellant assaulting the deceased with an axe. Her statement, however, before the police as also before the trial court should be considered in its entirety. It is not in dispute that at least she had heard a cry that Rameshwar had been killed by the appellant. She ran to the place of occurrence. She even before going to the place of occurrence asked her brother not to come there. PW-4 in his evidence supported that part of the testimony of PW-6. He stated :

*"By that time I finished taking bath and then I left for my home and at that time still Rameshwar was taking the bath at the well. The distance between my house and the pump is 500 ft. and as soon as I sat in my house to take the meal, then my sister Ramshri, who was outside, raised the alarm that Swami killed Rameshwar by giving blow of the axe and she asked to close the gate and to remain indoor."*

18. There are several other circumstances which, in our opinion, lead to the conclusion that the appellant and the appellant alone is guilty of commission of murder of Rameshwar. The dispute in regard to the share in the property has been proved by all the prosecution witnesses, namely, PW-1, PW-2 and PW-3.

19. PW-3 is the father of the deceased as also the appellant. He, however, resiled from his earlier statement; but he had assigned reasons therefor, stating :

*"I think whatever destined has happened and now there should not be bad consequences for the family of Swami."*

20. It shows as to why he had turned hostile. It also indicates why PW1 and PW2 turned hostile. Even PW4 did not tell the whole truth.

21. Let us now consider as to what extent PW3 can be believed. Although he resiled from his statement that he had seen the appellant assaulting the deceased, but he had proved the other part of his earlier statement, namely, the demand of = share in the property by the appellant and on his refusal to accept the said demand, the appellant went towards the well with an axe in his hand.

22. PW-1, the informant, is also a witness to the aforementioned incident. He was present when Appellant made a claim of = share in the property. He was also seen going towards the well with axe in his hands. According to him when he reached home, he had heard an alarm that Rameshwar had been murdered. He did not in his cross-examination, dispute his earlier statements. He stated :

*"It is correct to say that I and Rameshwar used to sit together in the village and even we used to go together in the marriage. Rajkumar does not belong to my family. Rajkumar got the share and he belongs to our family. The First Information Report of the occurrence were shown to T.I. I got it mentioned by T.I. in the report Ext. P-1 marked as 'A' to 'A' that at that time Ramsahay and Rameshwar were taking bath at the well. Ramsahay left for the home after some time. Thereafter Swami Prasad armed with Axe and he reached in the well, where Rameshwar was taking bath and he immediately gave 2-3 blows of Axe at the neck of Rameshwar and he raised the voice telling that see that now there are two shares. I saw Rameshwar while falling. Later Swami raised the voice and he invited all persons to come as he wanted to kill all. It is correct to say that I did not see Swami Prasad while giving blows of axe at Rameshwar. I did not give the attention that whether Swami was armed with axe at that time when he left. It is correct to say that I saw Swami while going towards the well. I did not see Ramsahay and Rameshwar while taking bath. As I heard the alarm, so I got it dictated that Swami killed Rameshwar with the axe."*

23. Similarly, he furthermore stated :

*"It is correct to say that I disclosed in my statement in the portion 'B to 'B' of Ext. P-4 that after some time Ramsahay left for the home and then Swami Prasad suddenly came armed with the axe towards the well. I did not disclose in my statement to the T.I. in the portion 'C' to 'C' of Ext. P-4 that Swami Prasad suddenly gave blow of the axe at Rameshwar and when he gave second blow, then he told that see there are two portions"*

24. Even in cross-examination made on behalf of the appellant, he accepted that he heard an alarm that Rameshwar was killed and the appellant had killed him.

25. From the evidences on records, apart from PW-6, who is an eye-witness, in our opinion, the following facts must be held to have been sufficiently proved :

- 1) Appellant had demanded = share in the property from his father at about 10 a.m. on 08.11.1986; and having been told that the property would be divided equally amongst the three sons, he became angry;
- 2) PW-4 while in his house heard a cry that Rameshwar had been killed by the appellant.
- 3) Appellant was seen at the place of occurrence with an axe. He went to the Police Station with the axe and blood-stained clothes;

26. Although he did not make any categorical statement that he had killed the deceased, his statement to the effect that Rameshwar had been killed with the axe which he had been holding is sufficiently indicative of the fact that it was he who had killed the deceased. His statement is to be read reasonably and in its entirety. So read no other meaning can be attributed thereto.

27. There cannot be any doubt whatsoever, that a judgment of acquittal should not be interfered with, if two views are possible. This has recently been stated in **Samghaji Hariba Patil v. State of Karnataka [AIR 2007 SC 28]**.

28. However, it is equally true that the High Court while entertaining an appeal against a judgment of acquittal would be entitled to consider the entire materials on records for the purpose of analyzing the evidence. There is a presumption that an accused is innocent, unless proved otherwise. When he is acquitted, the said presumption, becomes stronger. But it may not be correct to contend that despite overwhelming evidence available on records, the appellate court would not interfere with a judgment of acquittal. {See **Chandrappa & Ors. v State of Karnataka [2007 (3) SCALE 90]**}.

29. For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly.

30. Appellant is on bail. He is directed to surrender forthwith and serve out the remaining sentence, failing which, the Chief Judicial Magistrate concerned shall take proper steps for his apprehension.



**ISCLR/2007/10/10  
IN THE SUPREME COURT OF INDIA**

**PETITIONER: Anilbhai M. Patel & Ors**

**Vs.**

**RESPONDENT: Suryapur Bank Agent D.B.H. Samiti & Ors**

Appeal (Civil) 1210 Of 2007  
[Arising Out Of S.L.P. (C) No. 17465 of 2004]  
With

CIVIL APPEAL NOS. 1211/2007 @ S.L.P.(C)Nos. 18362-18363 Of 2004  
CIVIL APPEAL NOS. 1212/2007 @ S.L.P.(C)Nos. 19602-19603 Of 2004

Date of Judgment: 08/03/2007

Bench: S.B. Sinha & Markandey Katju

Subject: Banking, Trusts and Society

Legislations Referred:

- Banking Regulation Act, 1949- Sections 35(A), 45, 71, 86
- Gujarat Cooperative Societies Act, 1961 – Sections 71, 81(3), 86, 115A
- Indian Constitution – Article 226

Cases Referred:

- Union of India & Anr. v. S.B. Vohra & Ors. [(2004) 2 SCC 150]
- State of UP vs. Section Officer Brotherhood & Anr. [(2004) 8 SCC 286]
- Muni Suvrat Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad [AIR 2007 SC 38]
- Comptroller and Auditor General of India, Gian Prakash, New Delhi & Anr. v. K.S. Jagannathan & Anr. [(1986) 2 SCC 679]
- G. Veerappa Pillai v. Raman Ltd. [AIR 1952 SC 192]
- State of U.P. v. Raja Ram Jaiswal [(1985) 3 SCC 31]
- U.P. State Road Transport Corporation and Another v. Mohd. Ismail and Others [(1991) 3 SCC 239]
- Mehsana District Central Bank Ltd. & Ors. v. State of Gujarat & Ors. [(2004) 2 SCC 463]

**JUDGMENT:**

S.B. SINHA, J.

1. Leave granted.

2. These appeals involving identical questions of law and fact and arising out of the same judgment, were taken up for hearing together and are being disposed of by this common judgment.

3. Appellants herein are Directors of a Cooperative Bank known as the City Cooperative Bank Ltd. A loan was sanctioned by the said Cooperative Bank to Suryapur Cooperative Bank as also one Pragati Alco-Chem Pvt. Ltd. in the year 2002. The Registrar's Board of Nominees, Surat passed awards for recovery of the amount advanced to the loanees.

4. The Bank, as also its Managing Directors, filed a writ petition wherein rule nisi was issued. An interim relief was also granted. One Suryapur Bank Agent Dainik Bachat Hitvardhak Samiti, respondent No. 1, without approaching the Registrar, for ventilating its grievances in regard to the purported mismanagement of the affairs of the said Bank, filed a writ petition before the High Court of Gujarat at Ahmedabad. Admittedly, no prayer was made therein for appointment of an Administrator. A learned Single Judge of the said Court, however, purported to be keeping in view the fact that the Reserve Bank of India had undertaken a statutory inspection, a report in respect whereof was filed in the Court, directed appointment of an Administrator in place of the elected body stating :-

"9.2) By *ad-interim* order, it is directed that respondent No. 2 shall appoint Administrator in place of elected body of respondent No. 3 Bank within a period of one week from today and respondent No. 2 shall appoint a person as Administrator, who is well conversant with the banking business and if required, respondent No. 2 may also consult RBI in this regard.

9.3) Until the Administrator is appointed, respondent No. 2 is directed to ensure that the charge from the elected body is taken over by the District Registrar, Surat as In-charge Administrator tomorrow at the opening time of the Bank i.e between 10.30 to 11 O'Clock in the morning.

9.4) It is further directed that respondent No. 2 shall inquire regarding the aforesaid illegal actions and misapplication of the funds which is *prima facie* considered by the Court, for the purpose of taking Civil as well as Criminal action against the office-bearers of respondent No. 3 Bank. Such inquiry shall be completed within a period of fifteen days from the date of receipt of the order of this Court and if, as an outcome of the said inquiry, it is found by respondent No. 2 that the office-bearers of respondent No. 3 Bank, while in office, have committed offences or have misapplied the funds or have committed illegality, necessary action shall be taken within a period of fifteen days thereafter and the report shall be submitted to this Court within two weeks after taking action.

9.5) The respondent No. 3 by further order, is restrained from allowing functioning of its office-bearers from tomorrow i.e. 12.8.2004 onwards..."

5. We may at the outset notice that the Registrar of Cooperative Societies in its affidavit filed before the High Court, stated:-

"9. With reference to paragraph (7) of the petition, it is submitted that the respondent No. 1 after conducting the inspection of the respondent No. 4, Suryapur Cooperative Bank Ltd., Surat with respect to its financial position as on 30.6.2002 and the liquidity problem faced by the bank in September, 2002, issued direction under **Section 35(A) of Banking Regulation Act, 1949**□

10. With reference to paragraph (8) to (32) of the petition, it is submitted that respondent No. 2 has received the inspection reports relating to the City Cooperative Banks Ltd., Surat through RBI on 4.4.2003 and other letters dated 8.7.2003, 18.7.2003, 4.9.2003, 17.9.2003, 28.10.2003, 19.11.2003 and 13.12.2003. Respondent No. 2 had initiated proper actions on the basis of the D.R.C.S. Surat report dated 11.11.2003 regarding the managerial aspects of the Bank. Thereafter, the official of the bank were called for necessary explanation on Dt. 24.11.2003 and 5.12.2003 respectively in respect of the point raised in the matter. Thereafter, the City Cooperative Bank filed SCA No. 17116/03 before the Hon'ble Court on 10.12.2003, whereby respondents were restrained to take civil or criminal action against the officials of the Bank. The Hon'ble Court is pleased to dispose of the matter on 29.7.04. Hence, the Registrar will take appropriated

*action against the official of the City Cooperative Bank for the violation of Sections 45 and 71 of the Act, now as per the audit report and inquiry to be conducted under Section 86 of the Act□"*

6. The RBI, however, in its counter affidavit stated :-

*"10. With reference to paragraph 5 of the petition, it is submitted that the Reserve Bank does not audit the cooperative banks. The auditing of the cooperative bank falls within the domain of Registrar of Cooperative Societies under Gujarat Cooperative Societies Act. However, Reserve Bank conducts inspection of the cooperative banks under Section 35 of Banking Regulation Act, 1949 (AACS)."*

7. It is alleged that some directions have been issued by it under Section 35A of the Bank Regulation Act, 1959. It also refers to the inspections conducted by it, in regard to its financial position of the co-operative society on 31.12.2002. It was furthermore averred :-

*"16. With reference to paragraphs 11 to 18 of the petition, it is submitted that several petitions have been filed by the borrowers against the City Cooperative Bank and Suryapur Cooperative Bank challenging attachment of their property and alleging fraud by the members of the board which are subjudice before this Hon'ble Court. In compliance with the inspection report of the Reserve Bank, the respondent No. 4 vide its letter dated 31.5.2003 reported that the money was given to banks including Suryapur Coop. Bank against security of bankers' cheque and the bank was not lending any more for such purpose. The explanation of the Respondent No. 4 was considered to be unsatisfactory. The respondent No. 4 was called upon by letter dated 27.6.2003 to explain in detailed to RCS the circumstances leading to grant of such loan. The reply given by the respondent No. 4 vide its letter dated 8.7.2003 was not acceptable and was again asked vide letter 25.7.2003 to explain to the Registrar the position. Reserve Bank vide letter dated 4.4.2003, 1/8.7.2003, 4.9.2003, 17.9.2003, 28.10.2003, 19.11.2003 and 13.12.2004 required the Registrar to take necessary action and inform us the action taken by him. The Reserve Bank has not received any response from the Registrar Cooperative Societies."*

8. An intra court appeal preferred thereagainst was also dismissed by reason of the impugned judgment by a Division Bench of the said Court, opining that although no specific prayer was made in the writ petition for appointment of an Administrator but such a relief could be granted as a general relief viz. "passing such and other further relief as may be deemed just and proper by the Court", was prayed for. The Division Bench without going into the merit of the matter held that the remedy of the appellants was to approach the learned Single Judge by way of proper application for recalling or modifying or vacating the interim order and on the said finding the appeal was dismissed.

9. Mr. Soli J. Sorabjee, the learned senior counsel appearing on behalf of the appellants submitted that ;

- 1) No prayer for appointment of Administrator having been made, no such interim order could have been passed.
- 2) The High Court should not have exercised the statutory functions of the Registrar as in terms of Section 81 of the Gujarat Cooperative Societies Act, 1961, he is the only appropriate authority empowered to supersede the Committee.
- 3) No copy of the report of the RBI having been furnished to the appellants, reliance thereupon by the learned Single Judge was wholly illegal.

10. The writ petitioners-respondents, despite service of notice, have not appeared before us.

11. Mr. R.N. Trivedi, learned senior counsel appearing on behalf of the RBI, however, would submit that the appellants herein committed severe financial irregularities, and in that view of the matter and furthermore in view of the fact that the term of the appellants herein, as Directors of the said Bank is over, the question of their being reinstated in their elected office(s) does not arise.

12. **Gujarat Cooperative Societies Act, 1961** (The said Act) was enacted to consolidate and amend the law relating to Cooperative Societies in the State of Gujarat. It is a self contained Code. Registrar under the said Act is a statutory authority. Indisputably, it has power to supersede an elected body to manage the affairs of a Cooperative Society in terms of **Section 81 of the said Act, Sub-section (3)** whereof reads as under :-

*"(3) If at any time during any period or extended period referred to in sub-section (1), it appears to the Registrar that it is no longer necessary to continue to carry on the affairs of the society as aforesaid, he may, by an order published in the Official Gazette, direct that the management shall terminate; and on such order being made, the management of the society shall be handed over to a new committee duly constituted."*

13. **Section 86** of the Act provides for an inquiry by the Registrar in regard to the constitution, working and financial conditions of a Society. The procedure for holding such an inquiry has been laid down in the said Act. **Section 115A** empowers the Reserve Bank of India, to take action for winding up, reconstruction, supersession of the Committee in the following terms :-

*"3. If so required by the Reserve Bank of India in the public interest or for preventing the affairs of the bank being conducted in a manner detrimental to the interests of the depositors or for securing the proper management of the bank, an order shall be made by the Registrar for supersession of the committee and the appointment of an administrator in place thereof for such period or periods, not exceeding five years in the aggregate, as may from time to time be specified by the Reserve Bank of India, and the administrator so appointed shall, after the expiry of his term of office, continue in office until the day immediately preceding the date of the first meeting of the new committee of such bank."*

14. It is not in dispute that the writ petitioners had not approached the Registrar for inquiring into the alleged mismanagement of the affairs of the Bank and/or members of the Committee. They did not say so even before the High Court. Mr Trivedi submitted that the RBI had drawn the attention of the Registrar by its letters in regard to financial irregularities of the disputes of the society but the said letters are not before us. It is, thus, not clear that as to whether the RBI had called upon the Registrar to inquire into the affairs of the Bank or cause such an inquiry to be made by a competent authority. It is true that an inspection had been made by the authorities of the RBI but it is not clear as to whether copy of its report have been served upon the Cooperative Bank and/its Directors or not. Although before us, a contention has been raised that a copy of the report had been served but from a perusal of the impugned judgment of the learned Single Judge, it appears, that in the writ proceedings RBI refused to serve the copy of its report upon the Bank on the specious plea that the same was a confidential document. Section 35(1-A) of the Banking Regulation Act provides for furnishing of such a copy of a report upon the party concerned in the following terms:-

*"35 (1-A) (a) Notwithstanding anything to the contrary contained in any law for the time being in force and without prejudice to the provisions of sub-section (1), the Reserve Bank, at any time, may also cause a scrutiny to be made by any one or more of its officers, of the affairs of any banking company and its books and accounts; and*

*(b) a copy of the report of the scrutiny shall be furnished to the banking company if the banking company makes a request for the same or if any adverse action is contemplated against the banking company on the basis of the scrutiny."*

15. Indisputably, no prayer was made in the writ petition for appointment of an Administrator. Ordinarily, a Court would allow a statutory functionary to perform its statutory function. We have noticed hereinbefore that the Registrar of the Cooperative Societies in no uncertain terms had stated before the High Court that it could not earlier initiate any inquiry in the matter as a stay order was operating and as the said order of stay was vacated, an inquiry would be instituted by it.

16. The learned Single Judge did not apply his mind in regard to the said statements of the Registrar. He relied upon the purported inspection report of the RBI, treating the same to be sacrosanct. Even the necessary ingredients for passing an interim order were not taken into consideration.

17. A Cooperative Society should ordinarily be allowed to function through its elected representatives. This although does not mean that the members of the Committee have a right to mismanage the affairs of the Cooperative Society but there cannot be any doubt whatsoever that allegations in relation to the mismanagement and commission/omission of illegalities, or irregularities or other acts of omission and commission, the remedies as contemplated under the statute should ordinarily be resorted to. This Court held so in [Union of India & Anr. v. S.B. Vohra & Ors. \[\(2004\) 2 SCC 150\]](#), stating :

*"22. The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under [Article 226 of the Constitution](#), the actions of the authority need to fall in the realm of public law*

□ be it a legislative act of the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. The question is required to be determined in each case having the aforementioned principle in mind. However, it may not be possible to generalize the nature of the action which would come either under public law remedy or private law field nor is it desirable to give exhaustive list of such actions."

**18.** This Court yet again in **State of UP vs. Section Officer Brotherhood & Anr. [(2004) 8 SCC 286]** held :-

"30. Judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic feature of the Constitution. The court in exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens right of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds which could be expended on building hospitals, roads and the like, or overseas aid, or compensating victims of crime□.

\* \* \*

32. It is not possible to lay down the standard exhaustively as to in what situation a writ of mandamus will issue and in what situation it will not. In other words, exercise of its discretion by the court will also depend upon the law which governs the field, namely, whether it is a fundamental law or an ordinary law.

33. It is, however, trite that ordinarily the court will not exercise the power of the statutory authorities. It will at the first instance allow the statutory authorities to perform their own functions and would not usher the said jurisdiction itself."

**19.** Recently this Court in **Muni Suvrat Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad [AIR 2007 SC 38]** held :-

"52. The grievance of the appellant herein has been that without issuing a notice under **Section 351** of the Act and without giving an opportunity to the appellant of being heard the structure of the temple could not be ordered to be demolished by the High Court. The power under Section 351 of the Act, in our opinion, has to be exercised only by the Municipal Commissioner and it is left to the Municipal Commissioner under the provisions of Section 351(2) either to order or not to order the demolition of the alleged unauthorized temple."

**20.** We furthermore are of the view that when such serious questions were raised before a Division Bench of the High Court, the same should not have been considered in a casual or cavalier fashion. The Division Bench did not hold that an appeal was not maintainable and, thus, it was obligatory on its part to address itself to the merit of the matter.

**21.** The learned Single Judge passed the order after hearing counsel for the appellants. It was, therefore, of no use directing them to go back to the learned Single Judge by filing an application for vacating the interim order of injunction impugned before it. In all fairness, the Division Bench should have considered the matter itself particularly when the effect of such an order was grave inasmuch as appellants were displaced from their

posts of Directors of the Cooperative Bank to which they were otherwise entitled to. We, however, by saying so, do not intend to mean that the Court can never issue such a direction in a rare and exceptional case which the public authority should have passed vide **Comptroller and Auditor General of India, Gian Prakash, New Delhi & Anr. v. K.S. Jagannathan & Anr.** [(1986) 2 SCC 679] and other decisions following the same, but the High Court while passing such orders must consider each case on its own merit.

22. Ordinarily, the statutory functionaries alone can perform their statutory functions and the court cannot arrogate to itself the functions of the statutory authority vide **G. Veerappa Pillai v. Raman Ltd.** [AIR 1952 SC 192], **State of U.P. v. Raja Ram Jaiswal** [(1985) 3 SCC 31], **U.P. State Road Transport Corporation and Another v. Mohd. Ismail and Others** [(1991) 3 SCC 239], **S.B. Vohra** (supra), **Arun Nathuram Gaikward** (supra) etc. Only in case of inaction on their part and in rare and exceptional cases, the Court can exercise its jurisdiction in such cases. This is not a case where the Registrar of the Cooperative Societies refused or neglected to take any action. It could not do so in view of an interim order passed against it. The interest of the Bank could have been safeguarded by passing other orders; even the Registrar should have permitted to look into the matter and pass an appropriate order. The manner in which the impugned order had been passed by the learned Single Judge betrays fairness. It not only directed appointment of an Administrator but he was asked to take over the affairs of the Cooperative Bank on the same day.

23. The question, however, which remains to be considered is, as to whether in view of the fact that the terms of the appellants are over, what relief this Court should grant. Before, however, we issue necessary directions in this behalf upon the said question, we may notice that a Division Bench of this Court in **Mehsana District Central Bank Ltd. & Ors. v. State of Gujarat & Ors.** [(2004) 2 SCC 463] observed as under :-

"14. Briefly stated the facts are :

A complaint was filed by the respondents herein to the effect that the Central cooperative bank is governed by the provisions contained in the Gujarat Cooperative Societies Act, 1961 and the Rules framed thereunder. It is further alleged that Mehsana District Central Cooperative Bank had violated the provisions contained in Section 71 of the Gujarat Cooperative Societies Act by investing large sums in undertakings other than those enumerated in Sections 71(a) to (f). Consequently, Mehsana District Central Cooperative Bank had lost substantial amount. Though the matter had been brought to the notice of the State Government, the Registrar of Cooperative Societies and the District Registrar, no action had been initiated against Mehsana District Central Cooperative Bank and the members of the Board of Directors. A prayer was also made for issuance of a writ of mandamus directing the authorities under the Gujarat Cooperative Societies Act to initiate necessary proceedings against the respondents/appellants herein for having committed breach of the provisions contained in **Section 71** of the Act. It was further alleged that Mehsana District Central Cooperative Bank had invested a sum of Rs 95 crores in four different establishments which do not fall within the ambit of institutions enumerated in **Sections 71(a) to (f)** of the Act without the approval of the State Government or the appropriate authority.

24. In the above facts and circumstances of this case, we are therefore of the opinion that interest of justice would be subserved if these appeals are disposed of with the following directions:-

1. The Administrator would continue to hold office as an officer of the Court.
2. The Administrator must, however, get the election of the Committee Members held, as expeditiously as possible, and preferably within a period of three months from the date of communication of this order.
3. The inquiry initiated by the Registrar pursuant to the order of the learned Single Judge shall continue as if the same had been initiated by the Registrar on his own motion and not on the basis of the order passed by the High Court.
4. The RBI would be entitled to take such action (s) as it may deem fit and proper under the provisions of **Section 115 A** of the Act or under any other Statute and as may be permissible in law if it so desires, including one under the **Deposit Insurance Act**.

25. These appeals are accordingly disposed of with the aforementioned directions. However, in the facts and circumstances of the case, there shall be no order as to costs.



**ISCLR/2007/10/11**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: Commissioner of Customs (Preventive)**

**Vs.**

**RESPONDENT: Vijay Dasharath Patel**

Appeal (civil) 1204 of 2007  
(Arising out of S.L.P. (C) No. 7947 of 2006)

With

CIVIL APPEAL NO. 1206/2007 @ S.L.P.(C)No.10603 of 2006

CIVIL APPEAL NO. 1207/2007 @ S.L.P.(C)No.11522 of 2006

CIVIL APPEAL NO. 1208/2007 @ S.L.P.(C)No.13000 of 2006

CIVIL APPEAL NO. 1209/2007 @ S.L.P.(C)No.14311 of 2006

CIVIL APPEAL NO. 1205/2007 @ S.L.P.(C)No.14312 of 2006

Date of Judgment: 08/03/2007

Bench: S.B. Sinha & Markandey Katju

Legislation Referred:

- Customs Act, 1962 - Section 66(1), 108, 111(d), 123, 130E, 167(81), 178-A

Cases Referred:

- Madan Lal vs. Mst. Gopi & Anr. [AIR 1980 SC 1754]
- Collector of Customs, Bombay vs. Swastic Woollens (P) Ltd. & Ors. [(1988) Supp. SCC 796]
- Metroark Ltd. vs. Commissioner of Central Excise, Calcutta [(2004) 12 SCC 505]
- West Bengal Electricity Regulatory Commission vs. CESC Ltd. [(2002) 8 SCC 715]
- Commissioner of Customs, Mumbai vs. Bureau Veritas & Ors. [(2005) 3 SCC 265]
- M/s. Dutta Cycle Stores & Ors. vs. Gita Devi Sultania & Ors. [(1990) 1 SCC 586]
- Hukma vs. State of Rajasthan [AIR 1965 SC 476]
- P. Pratap Rao Sait versus Collector of Customs, Cochin reported at 1988 (33) ELT 433 (Trib.)
- Meenakshi Mills, Madurai vs. The Commissioner of Income Tax, Madras [1956 SCR 691]

**JUDGMENT:**

S.B. Sinha, J.

1. Leave granted in S.L.Ps.

2. These appeals are directed against a judgment and order dated 30th January, 2006 passed by the High Court of Gujarat at Ahmedabad in Tax Appeal Nos. 1923, 1924, 1925, 1930, 1928 and 1929 of 2005 respectively, whereby and whereunder the appeal preferred by the appellant herein was dismissed holding that no substantial question of law for its consideration had arisen therein. The factual matrix obtaining herein is not in dispute. Eight persons including the respondents herein were detained for carrying 551 gold biscuits of foreign origin, the details whereof are as under :

Sr.No.	Name	Foreign Mark of gold	Quantity	Nature of possession of gold bars
1	Sh. Shailesh Ratilal Patel, Proprietor of M/s. S.K. Jewellers	ARGOR SUISSE	100	Kept in 4 plastic packets each of 25 bars
2	Sh. Vijaybhai Dashrathlal Patel, Proprietor of M/s. Paras Bullion (Respondent herein)	CREDIT HERAEUS	90	A small green bag carried by him
3	Smt. Rasilaben Rathod	ARGOR	95	Under her attire tied

		HERAEUS		with a waist belt
4	Shri Jaswantbhai K. Patel	ARGOR HERAEUS PAMP SUISSE JOHNSON MATHEY	95  09 09	Hidden in sole of the shoes
5	Bhikhabhai T.K. Patel	CREDIT SUISSE	55	Hidden in sole of the shoes
6	Arvindbhai K.K. Patel	ARGOR HERAEUS	55	Hidden in sole of the shoes
7	Shri Nandubhai Brijlal Soni	UBS	51	Hidden in sole of the shoes
8	Nathubhai @ Nitinbhai B. Patel	CREDIT SUISSE	55	Hidden in sole of the shoes

3. Out of the said 551 of gold biscuits, 200 belonged to Shri Vijaybhai Dashrathlal Patel, Proprietor of M/s. Paras Bullion, whereas 351 belonged to Shri Shailesh Ratilal Patel, Proprietor of M/s. S.K. Jewellers. Both of them were arrested. They made their statements under **Section 108 of the Customs Act, 1962** ('the Act', for short). Shri Vijaybhai Dashrathlal Patel, respondent herein, allegedly, in his statement disclosed that he had purchased the said 200 gold biscuits from one Ridhi Siddhi Bullion Ltd. who had produced a delivery challan of ABN AMRO Bank issued in its favour. Other than the said delivery challan, allegedly, he could not produce any other document. The purported letter of ABN AMRO Bank dated 12.11.1999 addressed the Assistant Commissioner of Customs, Ahmedabad is in the following terms :

*"We wish to inform you that we had sold 100 Ten Tola Gold Bars and 150 Ten Tola Gold Bars to the captioned company under our invoice numbers 99/BAR/138 dated 25th October, 1999 for Rs.55,53,640/- and 99/BAR/139 dated 25th October, 1999 for Rs.81,49,025/-.*

*The above Ten Tola Gold Bars were out of the consignment stock of 1000 TT bars imported by us from Credit Suisse First Boston, Zurich under AWB No.085-1490-2753 dated 20th September, 1999. We had paid the applicable customs duty at the time of clearance of the consignment on 22nd September, 1999. We also confirm that the delivery was effected on our behalf by M/s. Brinks Arya (India) Pvt. Ltd., Ahmedabad.*

*This letter has been issued at the request of M/s. Riddhisiddhi Bullions Ltd. We hope the above information is sufficient and shall be glad to furnish any further information you may require."*

4. According to him, he had sold 200 gold biscuits to one Devangbhai Patel on 23.10.1999, but had no document to establish the same or that he had not received any payment therefor. It was the further statement of the said respondent that he had sold 300

gold biscuits to Shailesh Patel, but again therefor no commercial invoice or delivery challan had been issued. A further statement was made to the effect that out of the said 300 gold biscuits, 130 having UBS marking were purchased from one K.L. Chokshi and remaining 170 were purchased from different parties, but again therefor no payment was made either in cash or cheque. Statement of Shailesh Patel was recorded on 24.10.1999 under Section 108 of the Act when he disclosed that he had purchased 300 gold bars from Paras Bullion but no bill had been issued therefor nor any payment has been made by him. On the said date, statement of Naresh Chokshi was also recorded, wherein, allegedly, he did not make any statement to the effect that he had sold any gold bar of UBS mark to Paras Bullion. The second statement of Shailesh Patel was recorded on 29.10.1999, wherein he reiterated his earlier statement, stating :

*"...On being further questioned, I have to state that the details of the receipt/purchase of the said foreign mark gold biscuits are narrated in the prior statement given by me..."*

5. In his statement recorded on 28.10.1999, Vijay Dasharath Patel had made a statement that details of purchases of the gold biscuits could be furnished only upon perusal of his books of accounts.

6. We need not refer to the other statements made by other persons recorded by the Customs Officers on that date, being not relevant for the purpose of this case. We may, however, notice that proceedees retracted from their statements on 11.11.1999, alleging that he had the requisite documents to support their contentions that gold seized were not smuggled ones.

7. However, according to Vijay Dasharath Patel, 300 gold bars were sold to M/s. S.K Jewellers, out of which 201 were purchased from M/s. K.L. Chokshi and the rest were purchased from other jewellers. According to him, he did not maintain any stock register. He further stated that he had sold 200 gold bars to Patel Bullion on 23.10.1999, although he had not received any payment from the said vendee.

8. A show cause notice was issued upon the respondents on 1.3.2000 asking them to show cause as to why the seized gold bars should not be confiscated and penalty should not be imposed. Cause having been shown and the matter having been heard, the Commissioner, by his order dated 28.2.2001, inter alia, held :

*"....substantial number of foreign marked gold bars i.e. 361 pieces, were found to have been concealed in the shoes, body parts of the noticees....."*

\* \* \* \*

*....In their initial statements recorded before the Customs Officers on 24.10.99 both Shri Shailesh R. Patel and Shri Vijay D Patel admitted that they had no documents for legal importation...."*

\* \* \* \*

*....Section 123 of the Customs Act, 1962, which casts the burden in respect of "Gold", on the person from whose possession it is recovered, to prove that it is not smuggled..."*

....Statements were not recorded under any duress or mental torture."

9. According to the Commissioner of Customs, the respondents had not discharged their burden of proof in terms of **Section 123 of the Act**, in support whereof the following findings were recorded :

? The delivery challan issued by ABN AMRO Bank to Riddi Siddi Bullion does not in any way account for the possession of gold bars by Vijay Dashrath Patel.

? Shailesh Patel although stated that he had purchased 300 gold bars from Paras Bullion, no bill was issued in his name by the aforesaid firm nor he has made any payment towards purchase of 300 foreign marked gold bars.

? Statements dated 24.0.1999 were retracted on 29.10.1999 but retractions cannot be relied upon.

? In the absence of any mention of identity or brand specifications of the gold bars and also in face of a clear admission that no payments have been made or received and no bills having been issued, it is fully established that all 500 gold bars were not legally imported or acquired.

? The bills bearing Nos.5877, 5960 and 5936 which have been produced by Vijay Patel to prove his possession of 200 gold biscuits cannot be relied upon at all. The gold biscuits seized are not of the same brand for which the bills have been produced.

? On 24.10.1999, Vijay Dasharath Patel has stated that he had purchased 200 pieces of foreign mark gold bars of "CREDIT SUISSEE" mark from M/s Riddi Siddi Bullion on 23.10.1999. However, from the statement of Shri Dinesh authorised signatory of M/s Riddi Siddi Bullion did not mention whether the gold biscuits delivered to Mr. Vijay Dasharath Patel were of CREDIT SUISSEE mark. It was also observed that the alleged Bill No.294/GL/99/2000 dated 23.10.1999 also does not show the markings of the brand name of the gold biscuits.

? Statement of Ashwinbhai Patel is relied upon to show that Bill No.11931 was a complete after thought and it had been in fact prepared on 24.10.1999. Ashwinbhai Patel had stated that his maternal nephew Shri Devang Patel had phoned him on 24.10.1999 and informed him about the recovery of the gold biscuits by police and on being called by him, he had gone to the residence of Shri Vijay Dasharath Patel on 24.10.1999 and he had prepared the Bill No.11931.

? Both Vijay Dasharath Patel, Proprietor of Paras Bullion and Shailesh Patel admitted that no payment has made for the 300 pieces of foreign mark gold bars covered by Bill No.11931. Further, the alleged Bill No.294/GL/99/2000 purported to be issued by Riddi Siddi Bullion in favour of Paras Bullion for 350 gold bars does not contain the details regarding identity/brand of the gold bars nor the printed or pre-printed Sl.No. of the Bill. Also no evidence of payment made by M/s Paras Bullion to M/s Riddi Siddi Bullion has been produced.

? M/s Riddi Siddi Bullion had relied upon Bill No.2753 dated 22.10.1999 issued by Anjali Exim Pvt. Ltd. in favour of M/s. Riddi Siddi Bullion for 200 gold bars of UBS mark. However, it is found that there are no gold biscuits of foreign origin of UBS brand among the 500 gold biscuits and, therefore, the said bill has no relevance with the gold biscuits under seizure.

? The plea taken by Vijay Dasharath Patel in his statement dated 11.11.2004 regarding the gold biscuits in his possession, is an after thought and the same is not acceptable. In view of the facts which have been initially stated in the statement dated 24.10.1999 and which have been corroborated by Shailesh Patel in his statement dated 24.10.1999, it is established that there was no document to show the source of 300 gold bars sold by Vijay to Shailesh Patel.

? It was found on close scrutiny of the documents that bills, delivery challans, vouchers produced by the notices that none of these is serial numbered or pre-serial numbered. Ad hoc numbers have been given to these documents and hence these do not inspire confidence and hence the documents produced have no credibility.

? Although it was admitted by Vijay Dasharath Patel and Shailesh Patel that no bills, vouchers, delivery challans were issued in respect of the sale of 300 gold bars. Entries have been made and Bill No.11930 and 11931 have been subsequently prepared on 24.10.1999 to legalise the sale.

? 72 entries of purchase and sale have been made in the stock account of M/s Paras Bullion after the alleged transactions of bills No.11930 and 11931. It is humanly impossible that all these entries can be made within one hour and that the entries in which stock register of M/s Paras Bullion were made with a view to create the impression of legal purchase and sale of 500 foreign mark gold biscuits.

? No man of ordinary prudence will transport legally imported foreign mark gold biscuits in the way notices have been found to be doing. The facts and circumstances of the recovery of the gold bars by way of concealment in shoes and other body parts of the notice is a positive circumstantial evidence to suggest that the gold was illegally acquired and hence it was transported in a surreptitious and clandestine manner more often adopted by smugglers.

? Satishbhai Patel, who is the accountant of M/s S.K. Jewellers, was also liable as he had abetted Shailesh Patel in contravention of the various provisions of the Customs Act.

? All the carriers of gold bars had not demanded any document in support of the illicit import/ acquisition of the gold biscuits received by them from Satish Patel and Vijay Dasharath Patel and as such have abetted Shailesh Patel and Vijay Dasharath Patel in committing contravention of law.

? Accordingly, it was directed that the 500 gold bars weighing 58.320 Kgs. valued at Rs.2,70,00,000/- be confiscated under section 111(D) of the Customs Act. Penalties were also imposed on the notices."

10. Appeals filed by Respondents before the Tribunal, by reason of an order dated 5.6.2003 were dismissed.

11. Applications for rectification of mistakes were filed alleging that various aspects had not been considered in the original order. Special Civil Application No. 5468 of 2004 was also filed before the High Court of Gujarat at Ahmedabad against the said order of 5.6.2003.

12. The Tribunal by an order dated 7.1.2004 allowed the applications for rectification of mistakes filed by the respondents.

13. Against the said order dated 7.1.2004, the Revenue filed Special Civil Application No.2640 of 2004.

14. The High Court set aside the order dated 7.1.2004 passed by the Tribunal in the applications for rectification of mistakes and on the same day allowed the said Special Civil Application filed by the respondents, in terms whereof the order of the Tribunal was set aside and the matter was directed to be considered afresh.

15. The Tribunal, thereafter, passed an order on 30.9.2005, wherein, inter alia, it was held :

*".....This finding of the Commissioner cannot be upheld since the Appellant has produced documentary evidence of having purchased/procured the 200 bars from RBL who in turn have got the same from M/s. ABL Amro Bank, Ahmedabad, the importers of TT bars at Ahmedabad, one of the permissible route as per the findings of the Commissioner. In any case, the Commissioner and the department do not reject the letter dt.12.11.99 of ABN Amro Bank certifying "CREDIT SUSSE" TT bars to RBL nor does the Commissioner find RBL to have given forged/fabricated delivery challan/invoices to the appellants, ABN Amro Bank or RBL or M/s. K.L. Chokshi or and M/s. Amrapali Industries are not being questioned on their credibility the TT bars supplied by them cannot be found to be non duty paid or and cleared from an unauthorized port without payment of duty and thus liable to confiscation under **Section 111(d) of the Customs Act, 1962...***

\* \* \* \*

*...Therefore, there was no reason to believe that gold covered by the ABN Amro Bank document was not duty paid....."*

*Dealing with the submissions made on behalf of the proceedees, it was held :*

*"....These submissions have force and discharge the burden of the TT bars to be duty paid and not smuggled...*

\* \* \* \*

*...Further, in their statements recorded on 24.10.1999 itself, everybody i.e. Dinesh C. Jain of RBL, Sh. Naresh K. Chokshi of M/s. K.L. Chokshi and Shri Yeshwant A. Thakkar of Amrapali Ltd., not only admitted having sold the gold to the appellants but also provided documentary evidence of having purchased the gold from Banks. By not issuing any Show Cause Notice to those persons, we find that the Revenue agrees and were fully satisfied that the gold was legally acquired by them and supplied to the appellants.*

\* \* \* \*

? *Nandubhai Soni, one of the carriers was let off although he was similarly placed as other carriers.*

? *Transportation of gold in shoes appears to be a normal fashion of transporting gold bars, by carriers in the bullion market, irrespective of the fact whether they have bills or vouchers.*

? *Satishbhai Patel, the Accountant of S.K. Jewellers cannot be said to have abetted Shaileshbhai Patel by preparing ante dated bills. The proven practice of sales in this market would led us to find nothing amiss in invoices being written/prepared with or without brand marks.*

? *ABN AMRO Bank letter dated 12.11.99 confirms that the gold was legally imported.*

? *Although the documents do not show that the gold bars were of a particular origin, there is no statutory requirement which prescribe invoices to describe foreign marks.*

? *Admitted fact that no payments were made as on the date of seizure in respect of the seized gold bars. However no adverse inference could be drawn.*

? *We do not consider anything to be amiss in payments for the 500 bars not having been effected.*

? *We are arriving at our findings that the entire 551 gold TT bars..... To be duty paid gold....*

? *Dinesh Jain, Naresh Chokshi and Yeshwant Thakkar of Amrapali admitted having sold gold bars to the Appellants. The Revenue had not issued any show cause to these persons.*

? *Confiscation order and penalty set aside."*

16. As indicated hereinbefore, on an appeal preferred against the said judgment by the Revenue, the High Court refused to interfere on the premise that no substantial question of law arise for its consideration.

17. Mr. Mohan K. Parasaran, learned Additional Solicitor General appearing for the Union of India would contend that the High Court committed a manifest error in opining that no substantial question of law arose for its consideration, although, it is evident that the Tribunal had failed to consider the well reasoned judgment of the Commissioner of Customs in its proper perspective. The learned counsel urged that the High Court failed to notice that the Tribunal had referred to several trade practices in support whereof the proceedees did not adduce any evidence. It was submitted that the Tribunal furthermore failed to consider the question as to whether the proceedees had discharged their burden of proof cast upon them in terms of Section 123 of the Act.

18. Mr. Joseph Vella Palli and Mr. Anand Narain Haksar, learned Senior Counsel appearing on behalf of the respondents, on the other hand, would submit that from a bare perusal of the order of the learned Tribunal, it would appear that the reasonings of the Commissioner of Customs had been considered in great details therein and, thus, this Court should not interfere therewith. It was urged that no question of law was raised in relation to the specific findings of fact arrived at by the Tribunal and in that view of the matter, having regard to the provisions of Section 130 of the Act, the findings of fact being binding on the High Court, no error has been committed by it in opining that no substantial question of law arise for its consideration.

19. **Section 130E of the Customs Act**, as it stood then, provided for an appeal from an order passed in appeal by the Appellate Tribunal, save and except those specifically mentioned therein, only in the event a satisfaction is arrived at by the High Court that the same involves a substantial question of law.

20. Before the High Court, as also before us, several questions of law have been raised. We, however, in view of the order proposed to be passed, need not deal with all of them in details.

21. We are not oblivious of the fact that the High Court's jurisdiction in this behalf is limited. What would be substantial question of law, however, would vary from case to case.

22. Moreover, although, a finding of fact can be interfered with when it is perverse, but, it is also trite that where the courts below have ignored the weight of preponderating circumstances and allowed the judgment to be influenced by inconsequential matters, the High Court would be justified in considering the matter and in coming to its own independent conclusion. {See **Madan Lal vs. Mst. Gopi & Anr.** [AIR 1980 SC 1754].}

23. The High Court shall also be entitled to opine that a substantial question of law arises for its consideration when material and relevant facts have been ignored and legal principles have not been applied in appreciating the evidence. Arriving at a decision, upon taking into consideration irrelevant factors, would also give rise to a substantial question of law. It may, however, be different that only on the same set of facts the higher court takes a different view. {See **Collector of Customs, Bombay vs. Swastic Woollens (P) Ltd. & Ors.** [(1988) Supp. SCC 796]; and **Metroark Ltd. vs. Commissioner of Central Excise, Calcutta** [(2004) 12 SCC 505].}

24. Even in a case where evidence is misread, the High Court would have power to interfere. {See **West Bengal Electricity Regulatory Commission vs. CESC Ltd.** [(2002) 8 SCC 715]; and also **Commissioner of Customs, Mumbai vs. Bureau Veritas & Ors.** [(2005) 3 SCC 265].}

25. In **M/s. Dutta Cycle Stores & Ors. vs. Gita Devi Sultania & Ors.** [(1990) 1 SCC 586], this Court held :

*"Whether or not rent for the two months in question had been duly paid by the defendants is a question of fact, and with a finding of such fact, this Court does not ordinarily interfere in proceedings under Article 136 of the Constitution, particularly when all the courts below reached the same conclusion. But where the finding of fact is based on no evidence or opposed to the totality of evidence and contrary to the rational conclusion to which the state of evidence must reasonably lead, then this Court will in the exercise of its discretion intervene to prevent miscarriage of justice."*

26. We have hereinbefore noticed the judgment of Tribunal as also the one rendered by the Commissioner of Customs. The Commissioner of Customs, inter alia, has gone into the entire materials brought on records by the parties. It has taken into consideration a

number of circumstances in arriving at its findings. The Tribunal, however, as noticed hereinbefore, inter alia, not only proceeded on the basis that one of the carriers had been let off but also the purported normal fashion of transport of gold bars for which no evidence was brought on records.

27. Mr. Joseph Vella Palli would submit that the Tribunal consists not only of judicial member but also of technical member and in that view of the matter the Tribunal could take judicial notice of the trade practice prevailing in a particular trade and, thus, no illegality has been committed thereby. No evidence, however, admittedly, was laid in relation to the purported trade practices. We, therefore, cannot accept the said contention. This Court, in [Hukma vs. State of Rajasthan \[AIR 1965 SC 476\]](#), laid down the law in the following terms :

*".....Learned counsel rightly pointed that while S.178-A has the result of placing the burden of proof that the gold was not smuggled on the accused, it is of no assistance to the prosecution to prove that the accused was carrying the gold knowingly to evade the prohibition which was for the time being in force with respect to the import of gold into India. Once, however, it is found, as it must be found in this case, in consequence of the provisions of S.178-A (the accused has not tried to discharge the burden that lay on him that the gold was not smuggled) that he was carrying smuggled gold, the circumstances under which the gold was discovered, the manner in which he was carrying the gold, the considerable quantity of the gold that was being carried and the form in which gold was being carried, namely, blocks and bars in which the major portion of the gold was found, all these circumstances establish beyond a shadow of doubt that the accused was carrying the gold knowingly and with the intention of evading the prohibition that was in force with respect to the import of gold into the country. Mr. Kapur tried to argue that when gold is carried by persons, they often carry it in this manner in a nouri concealed under trousers. That may well be so. Here, however, there is an additional circumstance that a pointsman of the Railway, not expected to have so much gold in his possession, was carrying the gold which was, as already mentioned, in six blocks and 22 bars apart from some small pieces and one pair of murkees. The total quantity was as much as 286 tolas and 11 annas, that is, about three kilograms. When all these circumstances are taken together, it is not possible to accept learned counsel's suggestion that he might be carrying the gold innocently having purchased it from somebody. In our opinion, the High Court has rightly held that all the ingredients of the offence under S.167(81) of the Sea Customs Act have been established...."*

28. The Tribunal furthermore noticed only the last statements made by the proceedees. The purported subsequent statements, in the light of their earlier statements, were not taken into consideration.

29. It had furthermore not taken into consideration in regard to the connectivity of the gold bars imported, in respect whereof the custom duty had been paid and the gold bars seized.

30. We, therefore, do not accept the contention of Mr. Vella Palli that no question of law had been raised. It was done by the Revenue in its grounds, stating :

*"That the Ld. Tribunal has erred in holding that the finding of the commissioner is not sustainable because Shri Vijay D. Patel, Prop. of M/s. Paras Bullion has produced documentary evidence of purchasing 200 bars from M/s. Riddhisidhi Bullion Ltd., which was received by the said Riddhisidhi Bullion Ltd. from ABN Amro Bank, Ahmedabad. It is worthwhile to note that the document was not accompanying the consignment at time of detection by the police and was produced subsequently at the time of statement of Shri Vijay D. Patel, on 24-10-1999. The Ld. Tribunal has recorded this finding by stating reasons that the commissioner and the department has not rejected the letter dated 12.11.1999 of the ABN Amro Bank certifying "Credit Suisse" TT bars to RBL nor they have alleged that RBL has given false/fabricated delivery challans/invoices to the noticees. It is respectfully submitted that the Ld. Tribunal has recorded the above finding without any material or evidence on record and without even looking into the content of the letter dated 12.11.1999 of the ABN Amro Bank. It is submitted that the bank's letter referred to invoices dated 25.10.1999 and in such circumstances the question of effecting delivery by the bank to the authorized dealer under delivery challan dated 23.10.1999 which is two days prior to the date of invoice is not credit worthy. It is also against normal trade practice and makes the transaction suspect. Further, a bare glance at the documents of the bank undoubtedly establishes that the stock of FM GB shown in the delivery challan does not establish that the said challan relates to the gold pieces seized under panchnama dated 28/29.10.1999. It is submitted that no convincing record/evidence is led before the competent authority that the 200 seized pieces of gold bars are clearly linked/part (including the same brand name) of the stock shown in the aforesaid delivery challans and invoices. Thus, a vital link of sale transaction of the seized gold is not fully established. It is the duty of the person purchasing foreign mark gold bars to see that the correct description of the goods is entered in the respective challans"*

31. The aforementioned letter dated 12.11.1999 issued by the ABN AMRO Bank was the main fulcrum of the reasonings of the Tribunal. It was, therefore, in our considered view, required to be considered at some details. Even the error of law committed by the Tribunal in relying upon the trade practices had expressly been taken by the Revenue, stating :

*"The Ld. Tribunal has erroneously held that the proven practice of sales in gold/bullion market lead to finding that there is nothing amiss in invoices being written/prepared with or without brand marks, subsequent to sales and deliveries and thus the penalty as arrived on the Shri Satishbhai A. Patel is to be set aside. It is submitted that Shri Satishbhai A. Patel has also actively concerned himself in abetting the smuggling of the seized gold as no prudent buyer or seller will buy or sell such a huge quantity of gold without mentioning individual mark or details."*

32. Similarly, in regard to the fact of non-payment of consideration had been raised by the Revenue in its grounds.

33. In regard to the purported retracted statements, the Commissioner dealt with the matter elaborately, opining :

*"....The retractions are in the form of two separate (almost identical) letters both dated 29.10.99 from Shri Shailesh R. Patel and Shri Vijay D. Patel wherein they have merely stated that their statements were taken forcibly. They also said that the Police and the Customs Officers had illegally detained them in "their own premises". Similarly, telegrams have been received on 29.10.99 from other Noticees alleging wrongful confinement by the Police & Customs officers.....*

\* \* \* \*

*It is observed that all these retractions are belated, i.e. after 6 days, during which the investigations had been carried out. The Noticees or their family members could have sought the intervention of the senior officers of the department during this period i.e. 23.10.99 to 28.10.99 if there was any truth in their allegations of wrongful confinement or detention. This has not been done. Moreover, they have not produced any evidence to support that any physical or mental torture was inflicted on them.*

34. The CEGAT in their decision in the case of **P. Pratap Rao Sait versus Collector of Customs, Cochin reported at 1988 (33) ELT 433 (Trib.)** had held that:

*"The detailed statement before Customs officers prima facie merits acceptance and by mere retraction, the original statement does not lose all evidentiary value."*

*Since the retractions are made belatedly and without any supporting evidences, these have no evidentiary value in the eyes of law."*

35. It was furthermore held by the Tribunal that the bills had been prepared subsequently.

36. The learned Commissioner had opined that their existed serious discrepancies in the bills or vouchers. The Tribunal, in our opinion, should have dealt with the aforementioned findings of the Commissioner.

37. Mr. Vella Palli has strongly relied upon **Meenakshi Mills, Madurai vs. The Commissioner of Income Tax, Madras [1956 SCR 691]**, wherein it was held :

*".....On these facts, the Tribunal came to the conclusion that the contentions of the Department had been fully established, namely, that the intermediaries were dummies brought into existence by the appellant for concealing its profits, that the sales standing in their names were sham and fictitious, and that the profits ostensibly earned by them on those transactions were, in fact, earned by the appellant, and should be added to the amounts shown as profits in its accounts. The point for decision is whether there arises out of the order of the Tribunal any question which can be the subject of reference under **section 66(1) of the Act**. Under that section, it is only a question of law that can be referred for decision of the court, and it is impossible to argue that the conclusion of the Tribunal is anything but one of fact."*

38. There is no dispute as regards the proposition of law but, as noticed hereinbefore, same question of law did arise for consideration of the High Court.

39. For the reasons aforementioned, we are of the opinion that the High Court may not be entirely correct in holding that no substantial question of law arise for its consideration. Ordinarily, although, we have referred the matters back to the High Court, having regard to the fact that we have ourselves examined the findings of the Tribunal and the findings of the Commissioner, we are of the opinion that instead of remitting the matter back, interest of justice would be met if upon setting aside the judgment of the High Court and Tribunal the matters are remitted to the latter for considering them afresh. The parties shall be entitled to raise their respective contentions before the Tribunal. We intend to make it clear that our reference to the findings of the Commissioner as also the Tribunal was made only for the purpose of considering as to whether any substantial question of law arose for consideration before the High Court and for no other purpose. We may not therefore be understood to arrive at any finding in regard to any question which would arise for the consideration of the Tribunal.

40. For the reasons aforementioned, the appeals are allowed. The impugned judgments of the High Court as well as the order of the Tribunal are set aside. The matter is remitted to the Tribunal for consideration thereof afresh.



**ISCLR/2007/10/12  
IN THE SUPREME COURT OF INDIA**

**PETITIONER: Commnr.of Sales Tax, Orissa & Ors**

**Vs.**

**RESPONDENT: Crown Re-roller (P) Ltd. & Ors.**

Appeal (civil) 1215 of 2007  
(Arising out of SLP (C) No. 7300 of 2004)  
With  
Civil Appeal Nos. 1216 /2007 @ S.L.P.(C)Nos. 14707-14708/2005

Date of Judgment: 08/03/2007

Bench: S.B. Sinha & Markandey Katju

Legislations Referred:

- Orissa Sales Tax Act, 1947 - Section 5, 8, 14
- Central Sales Tax Act, 1956 – Section 14

- Sea Customs Act, 1878 - Section 20
- Central Excises and Salt Act, 1944 - Section 3
- Bihar Finance Act - Section 7

Subsidiary Legislations Referred:

- Orissa Sales Tax Rules, 1947 - Rule 39, 42-A

Cases Referred:

- State of Bihar & Others v. Suprabhat Steel Ltd. and Others, (1999) 1 SCC 31
- Amrit Banaspati Co.Ltd. & Anr. vs. State of Punjab & Anr. (1992) 2 SCC 411

**JUDGMENT:**

S.B. SINHA, J.

1. Leave granted.

2. Respondent herein, a company registered under the Indian Companies Act, known as M/s. Crown Re-rolling (P) Ltd., is the owner of a Re-rolling mill. It is a re-rolling mill manufacturing M.S. rounds and flats, out of iron and steel scrap materials. Indisputably, the State of Orissa made an industrial policy wherefor a resolution was adopted on 13.5.1986, pursuant whereof and in furtherance whereof, exemption was granted from payment of sales tax on raw materials sold to or purchased by a registered dealer and certified by the General Manager, District Industrial Corporation to be a small scale industry set up on or after 1.4.1986 and commencing commercial production thereafter. It is furthermore not in dispute that by reason of a notification dated 22.12.1989, the State Government in exercise of its powers conferred upon it under **Section 8 of the Orissa Sales Tax Act, 1947**, notified 'Iron and steel' to be taxable at the first point of sale, in a series of sale by successive dealers, when such sale is effected by a dealer liable to pay tax under the Act. It is also not in dispute that prior to issuance of the said notification the taxable event was the last purchase. It has not been denied or disputed before us that the exemption notification dated 13.5.1986 is applicable in the case of the assessee. It is also not in dispute that the said exemption relates to transaction of purchase or sale of raw material which go into the composition of the finished product manufactured by the assessee in the State.

3. Respondent had been making purchases from the Rourkela Steel Plant of the Steel Authority of India Ltd. Admittedly, the benefit of the exemption notification in respect of such purchases have been granted to the respondent-assessee. Admittedly, Respondent had made purchases also from the registered dealers of iron scrap. However, the problem arose in obtaining the said exemption as on and from 1.1.1990 steel was made taxable at the first sale point by reason of the said notification dated 22.12.1989 issued under Section 8 of the Act. The mechanism for availing of exemption was by way of statutory declaration by the buyer/manufacturer to the taxable seller, thereby purchasing the raw material free of tax.

4. It is furthermore not in dispute that the respondent had purchased tax paid raw materials. He filed an application for refund of the sales tax purported to be in terms of **Section 14 of the Orissa Sales Tax Act, 1947** (for short, 'the Act) which reads as under :-

"14. *Refunds* -

*The Commissioner shall, in the prescribed manner, refund to a dealer applying in this behalf any amount of tax penalty or interest paid by such dealer in excess of the amount due from him under this Act, either by cash payment or by deduction of such excess from the amount of tax, penalty or interest due in respect of any other period :*

*Provided that no claim to refund of any tax, penalty or interest paid under this Act, shall be allowed unless it is made within twenty-four months from the date on which the order of assessment or order imposing penalty, as the case may be, was passed or from the date of the final order passed on appeal, revision or reference in respect of the order earlier mentioned, whichever period is later:*

*Provided further that no claim to refund of any tax, penalty or interest paid under this Act shall be allowed in cases where there is an order for re-assessment, until the re-assessment is finalized."*

5. As the said prayer of the respondent was denied, he filed a writ petition before Orissa High Court praying inter alia for the following reliefs-

*"Further direct the Opposite Party No.5 & 6 to refund the entire amount of Sales Tax collected from the petitioner amounting to Rs. 15 lacs approximately pursuant to the notification vide Annexure-5."*

6. The said writ petition was allowed holding :

*"6. In view of the aforesaid undisputed position, since the petitioner has already lodged representation for refund and no decision has been taken on it, we dispose of the writ application by directing that on the petitioner filing application in the prescribed form, opposite parties 5 and 6 without taking any objection of limitation will consider the question of the exact amount of refund to which the petitioner is entitled to under the Industrial Policy Resolution, 1986 and the Finance Department Notification No 5389 dated 13.2.1987 and communicate their decision within a period of three months of receipt of the application in the prescribed form."*

7. However, the assessing officer in its order dated 18.12.1997 upon examining the matter opined that :-

*"...Being asked whether the sellers from whom he purchased the "Iron and Steel" are the first or subsequent sellers, Sri Agarwal expressed his inability to say whether they were first or subsequent sellers. His only submission was that they have purchased "tax paid" materials.*

*On scrutiny of the refund applications with reference to relevant purchase bills of "Iron & Steel" and other connected documents furnished by the dealer and after giving him reasonable opportunity of being heard, it is found that :-*

*Firstly, the dealer M/s. Crown Re-rollers (P) Ltd. has not paid any amount of Orissa Sales Tax on purchase of any goods which are declared U/s. 14 of the Central Sales Tax Act, 1956. He has purchased "first point tax paid" Iron & Steel from registered dealers of Orissa who are the subsequent sellers. The sellers have not collected any sales tax from the instant dealer which is evident from the purchase bills furnished by him. The dealer himself has simply calculated 4% tax on such purchase of "Iron & Steel" and claimed refund.*

*Therefore, the claim of the dealer vide Col.2 and 5 of his refund applications relating to date of payment of tax and the amount of tax paid U/s. 5 of the O.S.T. Act respectively is not based on any documentary evidence and as such found to be incorrect. In fact, the amount of tax paid by the dealer U/s. 5 of the O.S.T. Act is found to be "Nil".*

8. Questioning the legality or validity of the said order, another writ petition was filed by the respondent herein before the High Court which by reason of the impugned judgment dated 21.11.2003 was allowed holding :-

*"13. Hence, the applications of the petitioner should not have been made in Form XII-A under rule 42-A. The petitioner will have to make fresh applications for refund in Form XII under Rule 39 of the Orissa Sales Tax Rules, 1947 for refund of tax under Section 14 of the Orissa Sales Tax Act, 1947. Since the petitioner himself had not submitted the applications in the correct form and under the correct rule, the petitioner will not be entitled to interest from the date of the applications as claimed by him in this writ petition.*

*14. For the aforesaid reasons, we quash the impugned order dated 18.12.1997 of the Sales Tax Officer, Rourkela Circle-II, Panposh in Annexure-1 to the writ petition and direct that the petitioner will submit fresh applications for the periods in question in Form XII under Rule 39 of the Orissa Sales Tax Rules, 1947 and the Sales Tax Officer, Rourkela Circle-II, Panposh will compute the amount of tax paid by the petitioner on the tax paid goods purchased by it as raw materials for its industry on the basis of the copies of the purchase bills produced before him by the petitioner and determine such amount to be refunded and refund the same to the petitioner within 90 (ninety) days from the date of such application failing which the petitioner will be entitled to interest at the rate mentioned in Section 14-C of the Orissa Sales Tax Act, 1947 with effect from the date of expiry of the said period of ninety days."*

9. The High Court, however, did not grant any interest in favour of the respondent-assessee. Both the parties are, thus, before us.

**10.** Mr. Joseph Vellapally, the learned senior counsel appearing on behalf of the appellant, in support of this appeal raised the following contentions :-

1. The High Court committed a manifest error in passing the impugned judgments insofar as it failed to take into consideration that the taxable event in sales tax law being the transaction of sale, exemption to pay tax, if any, would be available only where a transaction is taxable.

2. Exemption notification would apply only when the manufacturer establishes that he had purchased raw material from a registered dealer which had gone into the composition of the finished product manufactured by it in the State.

3. The order of the High Court passed in OJC No. 8052/1992 did not confer any right on the assessee to get any specific amount by way of refund and, thus, the High Court misdirected itself in assuming that it was so entitled.

4. Exemption notification read with the Industrial policy does not give any right to claim refund from the State as the Sales Tax Officer being a creature of Statute can grant refund only in the event the conditions therefor are fulfilled and not otherwise.

5. The problem had arisen on account of the taxable seller having sold the goods to another dealer of steel from whom the assessee have purchased the scrap and the application for grant could have been allowed subject to the proof of the respondent that the raw material used by it for manufacturing purposes was the goods in respect whereof the tax was paid by the first seller.

6. There is no practical way in which either the assessee or the department can ascertain as to whether any tax has been paid in the State of Orissa on the precise quantity of steel purchased by the assessee from non-taxable dealer; nor there is any practical way to quantify and determine the exact amount of tax paid by the first seller on the steel in question as the identity or the quantum of sales turn over is not known to the department.

**11.** Mr. B.A. Mohanty, learned senior counsel appearing on behalf of the respondent, on the other hand, would submit that admittedly the respondent had purchased goods from the registered dealers and the goods in question are tax paid goods. Drawing our attention to the earlier judgment of the High Court dated 23.6.1997, the learned counsel contended that the application filed by the respondent for refund of tax should have been considered in terms of the observations made by the High Court and in that view of the matter the assessing authority could not have sat in appeal over the judgment of the High Court on the following grounds :

a) The Finance Department Notification provides for exemption from payment of tax on purchase of raw material and not refund.

b) The respondent has not paid any tax on purchase of raw material from subsequent dealers as such raw material had already suffered first point tax an earlier event of sale and therefore the respondent is not entitled to any refund.

c) The application of the respondent for refund was in the wrong form i.e. form no. XII A and Rule 42-A of the Orissa Sales Tax Rules, which are applicable to refund of tax

paid on declared goods sold in the course of inter state trade and commerce under Section 14-B of the Orissa Sales Tax Act, which was therefore not applicable to the respondents.

**12.** Applicability of the exemption notification, in the instant case, is not in dispute. The fact that the dealers, from whom the respondent had made purchases of raw material are registered, is also not in dispute. The goods purchased by the respondent are tax paid goods. Taxable event, however, under sales tax laws is the transaction of sale. Exemption, thus, would be available only where such a transaction takes place. So long as the taxable event was the last purchase, no problem arose. The State, however, altered the taxable event. The validity of the notification altering the taxable event at the first sale point by notification dated 22.12.1989 with effect from 1.1.1990 cannot also be disputed.

**13.** In Re. The [Bill to Amend S. 20 of the Sea Customs Act, 1878](#), and [S. 3 of the Central Excises and Salt Act, 1944 \[\(1964\) 3 SCR 787\]](#) this Court held :

*"This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast Sales Tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and Sales Tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or Sales Tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income."*

**14.** We will assume that the application for refund of tax, filed by the respondent, was maintainable. The question, however, is what should be the methodology therefor. The dealer effecting the first sale point may have sold the raw materials at a price 'A'. The subsequent dealer might have sold at a price to 'B'. Respondent might have purchased from 'C' who had in turn purchased the raw material from 'B'. In terms of Section 14 of the Central Sales Tax Act, the rate of tax is 4%. The tax was paid on the value of goods sold by the dealer effecting first point sale. The amount of tax realized for the purpose of refund thus must be on the said basis. The value of the goods of substantive transactions, upon which no tax was paid, thus could not have been taken into consideration for the purpose of grant of exemption. If that be so, the respondent for the purpose of establishing its claim for refund was required to establish : (1) what is the quantum of tax paid to the Department by the dealer effecting first point of sale and; and (2) whether the tax paid goods have been utilized for the purpose of manufacture of its product by the respondent.

**15.** The question of refund could arise provided tax has been paid, the logical corollary whereof would be that the claim for the refund of the tax must be calculated on the basis of the value of the goods at the first point of sale and not thereafter.

16. The respondent had claimed the amount of refund being a sum of Rs.15 lacs only on the basis that as the goods purchased by it are the tax paid once, 4% thereof should be directed to be refunded as if the actual tax paid was on the price paid by it. It is not so. It is no doubt true that as the point of levy of tax was the first point of sale which being exempted from the notification, none of the subsequent sales thereof could be subjected to levy of sales tax.

17. In **State of Bihar & Others v. Suprabhat Steel Ltd. and Others, (1999) 1 SCC 31** this Court has held :-

*"7. Coming to the second question, namely, the issuance of notification by the State Government in exercise of power under Section 7 of the Bihar Finance Act, it is true that issuance of such notifications entitles the industrial units to avail of the incentives and benefits declared by the State Government in its own industrial incentive policy. But in exercise of such power, it would not be permissible for the State Government to deny any benefit which is otherwise available to an industrial unit under the incentive policy itself. The industrial incentive policy is issued by the State Government after such policy is approved by the Cabinet itself. The issuance of the notification under Section 7 of the Bihar Finance Act is by the State Government in the Finance Department which notification is issued to carry out the objectives and the policy decisions taken in the industrial policy itself. In this view of the matter, any notification issued by government order in exercise of power under Section 7 of the Bihar Finance Act, if is found to be repugnant to the industrial policy declared in a government resolution, then the said notification must be held to be bad to that extent. In the case in hand, the notification issued by the State Government on 4-4-1994 has been examined by the High Court and has been found, rightly, to be contrary to the Industrial Incentive Policy, more particularly, the policy engrafted in clause 10.4(i)(b). Consequently, the High Court was fully justified in striking down that part of the notification which is repugnant to sub-clause (b) of clause 10.4(i) and we do not find any error committed by the High Court in striking down the said notification. We are not persuaded to accept the contention of Mr Dwivedi that it would be open for the Government to issue a notification in exercise of power under Section 7 of the Bihar Finance Act, which may override the incentive policy itself. In our considered opinion, the expression "such conditions and restrictions as it may impose" in sub-section (3) of Section 7 of the Bihar Finance Act will not authorise the State Government to negate the incentives and benefits which any industrial unit would be otherwise entitled to under the general policy resolution itself. In this view of the matter, we see no illegality with the impugned judgment of the High Court in striking down a part of the notification dated 4-4-1994."*

18. But, we have no doubt in our mind that the exemption could be granted on the basis of the price of the goods on first sale thereof. We, however, do not accept the submissions of Mr. Vellapally based on the decision of this Court in **Amrit Banaspati Co.Ltd. & Anr. vs. State of Punjab & Anr. (1992) 2 SCC 411** that although the respondent was entitled to exemption from payment of tax, it was not entitled to any refund. In **Amrit Banaspati (supra)**, this Court held :-

"11. *Exemption from tax to encourage industrialization should not be confused with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason. For instance tax holiday or concession to new or expanding industries is well known to be one of the methods to grant incentive to encourage industrialization. Avowed objective is to enable the industry to stand up and compete in the market. Sales tax is an indirect tax which is ultimately passed on to the consumer. If an industry is exempt from tax the ultimate beneficiary is the consumer. The industry is allowed to overcome its teething period by selling its products at comparatively cheaper rate as compared to others. Therefore, both the manufacturer and consumer gain, one by concession of non-levy and other by non-payment. Such provisions in an Act or Notification or orders issued by Government are neither illegal nor against public policy.*

*12. But the refund of tax is made in consequence of excess payment of it or its realization illegally or contrary to the provisions of law. A provision or agreement to refund tax due or realized in accordance with law cannot be comprehended. No law can be made to refund tax to a manufacturer realized under a statute. It would be invalid and ultra vires.*

.."

**19.** In that case, the issue was as to whether the manufacturer of Banaspati had set up an industry in the State of Punjab, on the assurance that the sales tax amount actually collected by it from the ultimate purchasers, would be refunded to it by way of incentive, can be enforced by a court of law. Such a prayer was declined on the ground that refund of tax is made in consequence of excess payment of it. This case, however, deals with completely different situation as despite the exemption notification issued in terms of a statute, the respondent was compelled to pay tax through its purchase price when it purchased the scrap material from subsequent sellers. The State cannot resile itself from the statutory provisions of exemption made by it. In our opinion, in equity, the State in a situation of this nature, must act in letters and spirit of the Act. However, State can only refund what it actually collected and not any amount which it had not collected. We, therefore, are of the opinion that the interest of justice would be subserved if an opportunity is given to the respondent to produce evidence before the assessing authority in regard to existence of the legal requirements, as noticed hereinbefore, for maintaining its claim of refund. The assessing authority shall give an opportunity to the respondent to place all materials in connection therewith or in relation thereto. It would also be open to the assessing authority, if any situation arises therefor, to call for any record from the Rourkela Steel Plant or any other 'dealer'. We, furthermore, are of the opinion that the respondent would not be entitled to any interest on the refund amount for the present as the quantum thereof is yet to be determined.

**20.** These appeals are accordingly allowed to the extent mentioned hereinbefore and with the above directions. However, in the facts and circumstances of the case, there shall be no order as to costs.



**ISCLR/2007/10/13**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: India Household and Healthcare Ltd**  
**Vs.**  
**RESPONDENT: LG Household and Healthcare Ltd**

Arbitration Petition 18 of 2005

Date of Judgment: 08/03/2007

Bench: S.B. Sinha

Subject: Arbitration

Legislations Referred:

- Arbitration and Conciliation Act, 1996 - Section 8, 11(5), 11(6), 16, 45
- Arbitration Act, 1940
- Code of Civil Procedure - Section 151, Order 34, Rule 2

Cases Referred:

- Pandey and Co. Builders Pvt. Ltd. v. State of Bihar and Anr. 2006 (11) SCALE 665
- Rashtriya Ispat Nigam Limited and Anr. v. Verma Transport Company (2006) 7 SCC 275
- Hamza Haji v. State of Kerala and Another, (2006) 7 SCC 416
- Prem Singh and Others v. Birbal and Others, (2006) 5 SCC 353
- Jai Narain Parasrampur (Dead) and Others v. Pushpa Devi Saraf and Others, (2006) 7 SCC 756
- M/s Transmission Corporation of A.P. Ltd. & Ors. v. M/s Lanco Kondapalli Power Pvt. Ltd. (2006) 1 SCC 540
- Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd. 2006 (14) SCALE 267
- Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal [AIR 1962 SC 527]
- Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Another (2003) 5 SCC 531
- Rashtriya Ispat Nigam Limited and Anr. v. Verma Transport Company [(2006) 7 SCC 275]
- National Highways Authority of India & Anr. v. Bumihiway DDB Ltd. (JV) & Ors. [(2006) 9 SCALE 564]

Authority Referred:

- 'A Treatise on The Law Governing Injunctions' by Spelling and Lewis

Counsel

For petitioner: Mr. Dushyant Dave, senior counsel

For respondent: Mr. R.F. Nariman, senior counsel

## JUDGMENT:

S.B. SINHA, J :

1. This application under **Sub-sections (5) and (6) of Section 11 of the Arbitration and Conciliation Act, 1996** (for short "the 1996 Act") has been filed for appointing an arbitrator on the respondent's purported failure to do so in spite of notice dated 15.04.2005.

2. Allegedly, an agreement was entered into by and between the parties hereto on 8.05.2004. The said agreement contained an arbitration clause being Clause 12 thereof, the relevant portion whereof reads as follows:

*"12.2 In the event of any dispute or difference arising between the parties hereto or as to the rights and obligations under this agreement or as to any claim monetary or otherwise of one party to another, such dispute or difference shall be referred to arbitration of a common arbitrator, if agreed upon, otherwise to two or more arbitrators, one to be appointed by each of the parties to this agreement and such arbitration shall be governed by the Arbitration and Conciliation Act, 1996, for the time being in force. The venue for such arbitration shall be in India or as is mutually decided otherwise. Until a finality is achieved in the arbitration or litigation, the Licensor shall have no right to cancel the agreement and appoint any third party or enter into agreement with any party for the sale/ importation or manufacture of the products/ provision of services in the territory."*

3. Respondent, however, contends that the said agreement was preceded by a Memorandum of Understanding dated 1.11.2003. Respondent further contends that the said purported Memorandum of Understanding and licence agreement dated 8.05.2004 are vitiated by a fraud of a very large magnitude fructified by a criminal conspiracy hatched between M/s. K.P. Jayram Pillai and Vijay R. Singh representing the petitioner and M/s. C.H. Kim and B.K. Jung representing the respondent. The petitioner - company bribed the said C.H. Kim and B.K. Jung for the purpose of creation of the aforesaid documents. They had already been convicted and sentenced to undergo imprisonment by the Korean Criminal Court. It was contended that they misused their official position to advance private benefit. There seems to be a substantial and reasonable nexus to promote personal advantage. There was furthermore no ostensible authority on their part to represent the company. The said Memorandum of Understanding also contravenes the Korean laws in terms whereof the execution thereof required the prior approval of and a duly executed power of attorney from the Representative Director and the Chief Executive Officer of the respondent which did not exist in the present case.

4. Respondent has also filed a suit in the Madras High Court wherein by an order dated 6.10.2005, a learned Single Judge of the said High Court directed:

"1. That 1. India Household and Health Care Limited, through Mr. Vijay R. Singh its Managing Director 2. Mr. K.P. Jayaram C/o India Household and Health Care Ltd. and 3. Mr. Vijay R. Singh, the respondents 1 to 3 herein, their agents, men, assigns, representatives, employees or any one claiming through or under them be and are hereby restrained by an order of interim injunction until further orders of this Court directly or indirectly acting on the so called MOU dated November 1, 2003, the License Agreement and the minutes dated May 8, 2004 respectively, or deriving any other benefit based upon the so called MOU, the License Agreement and Minutes, in any manner whatsoever."

5. The said interim order has been confirmed by an order dated 21.01.2006 stating:

*"That the order of interim injunction granted in pursuance of the order dated 06/10/2005 restraining the First, Second and Third Respondents, therein their agents, men, assigns, representatives, employees or any one claiming through or under them from directly or indirectly acting on the so called MOU dated November 1, 2003, the License Agreement and the minutes dated May 8, 2004, respectively, or deriving any other benefit based upon the so called MOU, the License Agreement and Minutes, in any manner whatsoever together be and is hereby made absolute."*

6. This Court's attention was further drawn to the fact that in the plaint of the said suit it had categorically been stated that the private respondents therein hatched their conspiracy to defraud the respondent and for the purpose of obtaining bribes, commissions and kickbacks and in that view of the matter the entire agreement is vitiated in law.

7. Mr. Dushyant Dave, learned senior counsel appearing on behalf of the petitioner, in support of this application, would submit:

- (i) the execution of the agreement dated 8.05.2004 has not been denied or disputed.
- (ii) The correspondences have been passed between the parties between the period 8.05.2004 and 5.02.2005 and dispute arose in regard to the use of the logo 'L.G.'
- (iii) The arbitration agreement being a part of the contract, the validity or otherwise thereof can be gone into by the arbitrator in terms of Section 16 of the 1996 Act.
- (iv) Once an arbitration agreement is found to exist; having regard to Section 5 thereof, no judicial authority can exercise any jurisdiction in the matter.
- (v) This Court, having regard to the philosophy underlying the 1996 Act should uphold the arbitration agreement between the parties.

8. Mr. R.F. Nariman, learned senior counsel appearing on behalf of the respondent, on the other hand, would submit:

- (i) in view of the Constitution Bench decision of this Court in SBP & Co. v. Patel Engineering Ltd. and Another [(2005) 8 SCC 618], this Court is obligated to go

into the question as to whether the entire agreement is vitiated by fraud as a result whereof no valid arbitration agreement came into being.

(ii) a fraud of grave magnitude having been committed insofar as the officers representing the company had used different signatures, the entire agreement is vitiated.

(iii) The original agreement has not been produced before any court so as to compare the signatures of the persons with their original.

(iv) An order of injunction having been passed by a learned Judge of the Madras High Court on 6.10.2005, this Court should not exercise its discretionary jurisdiction.

(v) The arbitration agreement is vague as it contemplates both litigation as also an arbitration.

(vi) In any event, the applicant having not appointed its arbitrator in terms of the purported arbitration agreement, the application is premature.

(vii) As some of the disputes fall outside the scope of the arbitration agreement, this application is not maintainable.

9. There cannot be any doubt whatsoever that there exists a sharp distinction between the provisions of the [Arbitration Act, 1940](#) and the 1996 Act. The philosophy of the 1996 Act is different. The 1996 Act is required to be read keeping in view the [UNCITRAL Model Rules](#). [[Pandey and Co. Builders Pvt. Ltd. v. State of Bihar and Anr. 2006 \(11\) SCALE 665](#) and [Rashtriya Ispat Nigam Limited and Anr. v. Verma Transport Company \(2006\) 7 SCC 275](#)]

10. It is also no doubt true that where existence of an arbitration agreement can be found, apart from the existence of the original agreement, the Courts would construe the agreement in such a manner so as to uphold the arbitration agreement. However, when a question of fraud is raised, the same has to be considered differently. Fraud, as is well known, vitiates all solemn acts. A contract would mean a valid contract; an arbitration agreement would mean an agreement which is enforceable in law.

11. Before embarking upon the rival contentions noticed hereinbefore, we may notice that a 7-Judge Bench of this Court in [SBP & Co. \(supra\)](#) opined that an order passed by the Chief Justice or his designate under Sub-sections (5) or (6) of Section 11 of the 1996 Act is judicial in nature. It was stated:

*"39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim*

*made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal."*

12. The power of this Court, therefore, no longer is an administrative power. The purported arbitration agreement is an international commercial arbitration agreement. **Section 16 of the 1996 Act** which is in Chapter 4 of Part I thereof may not, thus, be applicable in this case. Even if it applies, the jurisdiction of the arbitrator to determine his own jurisdiction is on the basis of that arbitration clause which may be treated as an agreement independent of the other terms of the contract and his decision that the contract is null and void shall not entail ipso jure the validity of the arbitration clause. But, the question would be different where the entire contract containing the arbitration agreement stands vitiated by reason of fraud of this magnitude. It may be noticed that Part II of the 1996 Act contains a provision for approaching the court. **Section 45 of the 1996 Act** contains a non-obstante clause. A judicial authority, therefore, may entertain an application at the instance of a party which alleges that there exists an arbitration agreement whereupon judicial authority may refer the parties to arbitration, save and except in a case where it finds that the said agreement is null and void, inoperative and incapable of being performed. **Section 8 of the 1996 Act**, however, is differently worded.

13. Thus, as and when a question in regard to the validity or otherwise of the arbitration agreement arises, a judicial authority would have the jurisdiction under certain circumstances to go into the said question.

14. Fraud, as is well known, vitiates all solemn acts. [See **Hamza Haji v. State of Kerala and Another, (2006) 7 SCC 416, Prem Singh and Others v. Birbal and Others, (2006) 5 SCC 353 and Jai Narain Parasrampuriah (Dead) and Others v. Pushpa Devi Saraf and Others, (2006) 7 SCC 756**]

15. The said issue is pending consideration before the Madras High Court. Not only the parties to the agreement but also those officers who have negotiated on behalf of the respective companies are also parties therein. LG Corporation which is the owner of the LG logo is also a party therein. Therein, an order of injunction had been passed. In terms of the said order of injunction, the applicant herein was prohibited from taking any action in terms of the said agreement which would include the arbitration clause also. The order dated 21.01.2006 has become final. No appeal has been preferred thereagainst. The applicant could have filed an appropriate application for modification of the order of injunction which it did not choose to do. The doctrine of comity or amity required a court

not to pass an order which would be in conflict with another order passed by a competent court of law. The courts have jurisdiction to pass an order of injunction not only under **Order XXXIX, Rule 2 of the Code of Civil Procedure** but also under **Section 151** thereof.

16. This aspect of the matter has been considered in '**A Treatise on The Law Governing Injunctions**' by **Spelling and Lewis**' wherein it is stated :

*"Sec. 8. Conflict and Loss of Jurisdiction. Where a court having general jurisdiction and having acquired jurisdiction of the subject-matter has issued an injunction, a court of concurrent jurisdiction will usually refuse to interfere by issuance of a second injunction. There is no established rule of exclusion which would deprive a court of jurisdiction to issue an injunction because of the issuance of an injunction between the same parties appertaining to the same subject-matter, but there is what may properly be termed a judicial comity on the subject. And even where it is a case of one court having refused to grant an injunction, while such refusal does not exclude another coordinate court or judge from jurisdiction, yet the granting of the injunction by a second judge may lead to complications and retaliatory action."*

[See also **M/s Transmission Corporation of A.P. Ltd. & Ors. v. M/s Lanco Kondapalli Power Pvt. Ltd. (2006) 1 SCC 540** and **Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd. 2006 (14) SCALE 267**]

17. In **Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal [AIR 1962 SC 527]**, this Court enjoined a party from prosecuting a suit wherein power under Section 10 of the Code of Civil Procedure could not have been exercised.

18. A court while exercising its judicial function would ordinarily not pass an order which would make one of the parties to the lis violate a lawful order passed by another court.

19. Furthermore, the applicant herein has also prayed for inter alia the following reliefs:

*"c. Whether the issue of use of LG logo is a valid and tenable ground for the termination of agreements between the parties?"*

*d. Whether the Petitioner is entitled under the agreements to continue with the production of the "Products" with LG logo as agreed between the parties?"*

20. The said prayers fall outside the arbitration agreement since LG Logo belongs to LG Corporation which is the owner of the trade mark. It is not a party to the arbitration agreement. It is allegedly has filed a separate suit. In a case of this nature, a Division Bench of this Court in **Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Another (2003) 5 SCC 531** held:

*"Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.*

It was further stated :

*"The next question which requires consideration is □ even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.*

*Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."*

21. We are, however, not oblivious of the fact that Sukanya Holdings (supra) has been distinguished in [Rashtriya Ispat Nigam Limited and Anr. v. Verma Transport Company \[\(2006\) 7 SCC 275\]](#). The present case, however, is covered by Sukanya Holdings (supra).

22. By reason of a notice dated 15.04.2005, only a request had been made to nominate a person in Chennai with whom the respondent could "interact to agree on the arbitrator to whom the claims can be made to decide the disputes between the parties".

23. Applicant has not appointed its arbitrator. Respondent has also not been called upon to appoint its arbitrator by the said notice or otherwise. An application for appointment of an arbitrator, therefore, is not maintainable unless the procedure and mechanism agreed to by and between the parties is complied with.

24. In [National Highways Authority of India & Anr. v. Bumihiway DDB Ltd. \(JV\) & Ors. \[\(2006\) 9 SCALE 564\]](#), it was opined:-

*"44. The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong."*

25. For the views, I have taken, it is not necessary to consider the other submissions made at the bar.

26. For the reasons aforementioned, this application is dismissed being not maintainable at this stage. No costs.



**ISCLR/2007/10/14  
IN THE SUPREME COURT OF INDIA**

**PETITIONER: N D P Namboodripad (Dead) by LRs  
Vs.  
RESPONDENT: Union of India & Ors**

Appeal (civil) 2327-28 of 1999

Date of Judgment: 08/03/2007

Bench: H K Sema & R V Raveendran

Subject: Service

Legislations Referred:

- High Court Judges (Conditions of Service) Act, 1954 – Section 15(1)(b), (2)
- Kerala Public Services Act, 1968 - section 2(1)

Subsidiary Legislations Referred:

- Kerala State and Subordinate Service Rules - Rule 9, 12(23), 31, 62
- Kerala Service (Amendment) Rules, 2005

Cases Referred:

- M.L. Jain (I) [AIR 1985 SC 619]
- M.L. Jain (II) [AIR 1989 SC 669]
- M.L. Jain (III) [AIR 1991 SC 928]
- 2004 (5) SCC 259
- The Regional Director, ESI Corporation vs. High Land Coffee Works - AIR 1992 SC 129
- The Municipal Council, Raipur v. State of Madhya Pradesh [AIR 1970 SC 1923]

- South Gujarat Roofing Tile Manufacturers Association vs. State of Gujarat [AIR 1977 SC 90]
- Hindustan Aluminum Corporation vs. State of Uttar Pradesh [AIR 1981 SC 1649]
- Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. [1987 (1) SCC 424]

Authority Referred:

- 'Principles of Statutory Interpretation', by Justice G. P. Singh (Tenth Edition, 2006)

## **JUDGMENT:**

RAVEENDRAN, J.

1. These appeals by special leave are filed against the judgment dated 10.7.1997 in Writ Appeal No.804 of 1992 and the order dated 10.11.1997 in Review Petition No.299/1997 passed by a Division Bench of the Kerala High Court.

2. The appellant entered the Kerala Higher Judicial Service as a directly recruited District & Sessions Judge and was later elevated as a Judge of the Kerala High Court in the year 1972. He retired on 31.7.1980 with 23 years of pensionable service which included 8 years of service as a Judge of the High Court. At the time of his retirement, the appellant was in receipt of a total emolument of Rs.4,237/- comprising Basic Pay of Rs.3,500/-, Dearness Allowance of Rs.437/- and Special Allowance of Rs.300/-.

3. The pension payable to High Court Judges is governed by Chapter III of the **High Court Judges (Conditions of Service) Act, 1954** (for short 'the Act'). **Clause (b) of sub-section (1) of section 15** provides that every Judge who was not a member of the Indian Civil Service but has held any other pensionable post under the Union or a State, shall, on his retirement, be paid a pension in accordance with the scale and provisions in Part III of the First Schedule. The proviso thereto and **sub-section (2)** require such Judge to exercise certain options. The appellant was governed by Part III of the First Schedule to the Act as he did not opt for pension under Part I of that Schedule. Part III of the First Schedule is extracted below :

"1. The provisions of this Part apply to a Judge who has held any pensionable post under the Union or a State (but is not a member of the Indian Civil Service) and who has not elected to receive the pension payable under Part I.

2. The pension payable to such a Judge shall be

(a) the pension to which he is entitled under the ordinary rules of his service if he had not been appointed a Judge, his service as a Judge being treated as service therein for the purpose of calculating that pension; and

(b) a special additional pension of Rs.1,600 per annum in respect of each completed year of service for pension but in no case such additional pension together with the additional or special pension, if any, to which he is entitled under the ordinary rules of his service, shall exceed Rs.8,000 per annum.

Provided that the pension under clause (a) and the additional pension under clause (b) together shall in no case exceed Rs.54,000 per annum in the case of a Chief Justice and Rs.48,000 per annum in the case of any other Judge."

(Note : The special additional pension was Rs.700/- per annum and the ceiling was Rs.3500/- per annum under clause (b) and these were substituted as Rs.1600/- and Rs.8000/- respectively with effect from 1.11.1986)

The pension payable to the appellant was fixed at Rs.17,300/- per annum (comprised of Rs.13,800/- as ordinary pension and Rs.3,500/- as special additional pension).

4. The Government of India vide Official Memorandum dated 16.4.1987 rationalised the pension structure of the employees who retired prior to 1.1.1986. Clause 4.1 thereof provided for additional relief for existing pensioners. Clause 5 provided for calculation of pension at 50% of average emoluments in the case of pensioners whose pension was calculated under the slab formula. Clause 6.1 related to consolidation of pension and provided that the pension of existing pensioners will be consolidated with effect from 1.1.1986 by adding together (a) the existing pension, (b) the existing dearness relief and (c) the additional benefits accruing from Paras 4 and 5 of the said O. M. dated 16.4.1987. The said O. M. was not applicable to retired High Court Judges whose pension was governed by separate rules/orders and stated that necessary orders will be issued in their cases by the respective authorities.

5. By Circular dated 18.12.1987, the Government of India notified the Accountant Generals of all States that the ordinary pension admissible to High Court Judges under Para 2(a) of Part III of the First Schedule to the High Court Judges (Conditions of Service) Act, 1954 may be revised with effect from 1.1.1986 as in the case of the employees of the Central Government. It permitted the respective State Governments to either adopt the said O.M. or issue independent orders on similar lines, subject to the maximum stipulated in Schedule III to the Act. By order dated 19.10.1989, the Government of Kerala directed that the pension of the Judges of the High Court, who have been promoted from the State Higher Judicial Service and falling under Part III of the First Schedule to the Act, shall be revised with effect from 1.1.1986 in accordance with the rates referred to in the O.M. dated 16.4.1987 issued by the Government of India.

6. By communication dated 26.10.1989, the office of the Accountant General, Kerala, informed the Central Government (with copy endorsed to appellant) that the pension of the appellant who had opted for Part III of the First Schedule to the Act, was revised and consolidated from 1.1.1986 and 1.11.1986 as follows :

(a) Pension (including additional pension) from 1.1.1986 : Rs.32,720 p.a.

(b) Pension (including additional pension) from 1.11.1986 : Rs.37,220 p.a.

The annexure to the said letter showed the calculation of pension as follows, by treating the 'emolument' reckoned for pension as Rs.3,500/- per month and qualifying service as 23 years :

Existing ordinary pension : Rs. 1150/- p.m.

Revised ordinary pension (as per 50% formula) :  $3500 \times \frac{23}{2 \times 30} = \text{Rs.}1342 \text{ p.m.}$

Increase due to Revision : Rs. 192/- p.m. or Rs. 2304/- p.a.

"Consolidation of Pension as per O.M. dt. 16.4.1987

	Amount Per Annum
1. Existing ordinary pension( 1150 x 12)	Rs. 13,800/-
2. Part consolidated ordinary pension as per Para 6.1 of O.M. dt. 16.4.87 Additional relief as per para 6.1(A) in case of pre 31.3.85 retirees (vide Col.2 of ready reckoner) : (2243 x 12)	Rs. 26,916/-
3. Increase due to recalculation at 50% of Pay	Rs. 2,304/-
4. Total consolidated ordinary pension from 1.1.1986 ( 2 + 3 )	Rs. 29,220/-
5. Additional pension admissible from 1.1.1986 (under para 2(b) of Schedule III to the Act)	Rs. 3,500/-
6. Total pension admissible from 1.1.1986 (4 + 5)	Rs. 32,720/-
7. Additional pension admissible from 1.11.1986. (under para 2(b) of Schedule III to the Act)	Rs. 8,000/-
8. Total pension admissible from 1.11.86 (4 + 7)	Rs. 37,220/-"

7. The appellant challenged the said fixation of pension in O.P. No.203/1990. According to him the ordinary pension ought to have been calculated, by taking the emoluments drawn at the time of retirement (Rs.4237/- per month) instead of Rs.3500/-. He also

contended that the additional pension under para 2(b) of Part III of First Schedule to the Act should be without reference to any ceiling. A learned Single Judge allowed the said petition by order dated 12.3.1992. He held that the appellant was entitled to a pension of Rs.35,100/- per annum (that is Rs.2,925x12) from 1.1.1986 and Rs.47,900/- per annum (that is Rs.35,100 + Rs.12,800) from 1.11.1986.

8. Union of India challenged the said order of the learned Single Judge in W.A. No.804 of 1992. The said appeal was allowed by judgment dated 10.7.1997. The Division Bench set aside the order of the learned Single Judge and affirmed the pension as fixed under communication dated 26.10.1989 (extracted in para 6 above). The Division Bench purported to follow the decisions of this Court in **M.L. Jain (I) [AIR 1985 SC 619]** and **M.L. Jain (II) [AIR 1989 SC 669]**. It, however, observed that if any excess payment had been made to the appellant on account of any wrong calculation, such excess need not be refunded by the appellant. A review petition filed by the appellant was rejected by the Division Bench by Order dated 10.11.1997.

9. The said judgment of the Division Bench and the rejection of the review petition, are challenged in these appeals by special leave. The appellant placed reliance on Rule 62 of Part III of the Kerala Service Rules, in support of his contention that average emolument of the appellant had to be taken as Rs.4237/- instead of Rs.3500/- per month for calculating the ordinary pension. In support of the contention that the special additional pension should be calculated without any ceiling, reliance was placed on **M.L. Jain (III) [AIR 1991 SC 928]**.

10. This Court, by judgment dated 16.4.2004 (reported in **2004 (5) SCC 259**) held that having regard to Rule 62, 'emolument' for calculating pension, would include dearness allowance and other special allowances. This Court further held that the ordinary pension of appellant should be calculated by taking Rs.4237/- as the monthly emolument instead of Rs.3,500/-. This Court also held that the special additional pension should be calculated under Clause 2(b) of Part III of the First Schedule to the Act without any ceiling, in view of the decision in **M.L. Jain (III)**. The respondents were directed to recalculate the pension within three months and pay the arrears to the appellant.

11. Aggrieved by the first part of the judgment relating to calculation of ordinary pension based on the interpretation of Rule 62, the State of Kerala filed a review petition in R.P.(C) Nos.1482-83/2004. The review petitions were allowed by order dated 1.4.2005, the judgment dated 16.4.2004 was recalled and the civil appeals were restored for fresh hearing. We have heard the learned counsel on both issues.

Re : Ordinary Pension :

12. The State Government contended that the term 'emolument' (for ascertaining the 'average emolument' which is the basis for determination of ordinary pension) used in **Rule 62 of Part III of Kerala Services Rules**, included only basic pay and dearness pay, if any, and did not include dearness allowance or any other allowances. It is further contended that as the appellant was not receiving any dearness pay, his last drawn basic

pay of Rs.3500/- per month alone constituted the 'emolument' for calculating the pension of the appellant.

**13.** On the other hand, it is contended on behalf of the Appellant that the word "includes" in Rule 62 is not equivalent to "means" or "only includes". According to the Appellant, the word "includes" when used in the definition of a word or phrase in a Statute, enlarges the meaning of the word or phrase and such words or phrase must be construed as comprehending not only such things as they signify according to their natural meaning, but also those things which the interpretation or definition clause declares that they shall include (vide [The Regional Director, ESI Corporation vs. High Land Coffee Works - AIR 1992 SC 129](#)). The Appellant contends that 'emolument' in its natural and ordinary sense, refers to the pay and all allowances; and the inclusive definition in Rule 62 is intended to further expand it by specifically including 'dearness pay'. It is submitted that what is already included in the general meaning of the word 'emolument', that is dearness allowance and special allowances in addition to basic pay, could not be excluded because of the addition of some other item like 'dearness pay'. The Appellant, therefore, contends that 'emolument' for purpose of pension, consists of basic pay, dearness allowance, other allowances and dearness pay.

**14.** As the entire argument of the appellant is based on [Rule 62](#), it is useful to extract it. It reads thus :

"62. The term emolument when used in this part means the emolument which the employee was receiving immediately before his retirement and includes :

- (a) pay as defined in [Rule 12\(23\) in Part I of these Rules](#) and/or pay of the appointment under [Rule 9 or Rule 31 of the Kerala State and Subordinate Service Rules](#).
- (b) the dearness pay the employee was actually in receipt of."

[Rule 12\(23\) in Part I of the Kerala Service Rules](#) defines 'pay' thus :

"Pay :- Means the amount drawn monthly by an officer as -

- (i) the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity or to which is entitled by reason of his position in a cadre, and
- (ii) personal pay and special pay, and
- (iii) any other emoluments which may be specially classed as pay by the Government.

The appellant was not receiving any Dearness Pay. It is also not in dispute that dearness allowance and special allowance were not specially classed as 'pay' by the State Government under Rule 12(23). Therefore dearness allowance and special allowances, do not form part of pay. The word 'emolument' no doubt is a wider term than basic pay. It generally refers to the salary or profits from employment or office. But the word 'emolument' is not used in the general sense in the service Rules relating to pension. The word is defined for purposes of pension. In fact, all rules governing pension, define the word 'emolument' by giving a special or specific meaning, for purposes of pension

calculation. Where a word is defined, there can be no reference or reliance on any general meaning. To bring in 'generality' instead of 'specificity' in defining the term 'emolument' will defeat the very purpose of defining 'emolument' for purposes of pension. Therefore, contextually the definition of 'emolument' should be specific and not 'expansive' or general.

15. The word 'includes' has different meanings in different contexts. Standard Dictionaries assign more than one meaning to the word 'include'. **Webster's Dictionary** defines the word 'include' as synonymous with 'comprise' or 'contain'. The **Illustrated Oxford Dictionary** defines the word 'include' as : (i) comprise or reckon in as a part of a whole; (ii) treat or regard as so included. **The Collins Dictionary of English Language** defines the word 'includes' as : (i) to have as contents or part of the contents; be made up of or contain; (ii) to add as part of something else; put in as part of a set, group or a category; (iii) to contain as a secondary or minor ingredient or element. It is no doubt true that generally when the word 'include' is used in a definition clause, it is used as a word of enlargement, that is to make the definition extensive and not restrictive. But the word 'includes' is also used to connote a specific meaning, that is, as 'means and includes' or 'comprises' or 'consists of'.

16. **Justice G. P. Singh** in his treatise '**Principles of Statutory Interpretation**', (Tenth Edition, 2006), has noticed that where a word defined is declared to 'include' such and such, the definition is prima facie extensive, but the word 'include' when used while defining a word or expression, may also be construed as equivalent to 'mean and include' in which event, it will afford an exhaustive explanation of the meaning which for the purposes of the Act must invariably be attached to the word or expression. [vide pages 173 and 175 referring to and relying on the decisions of this Court in **The Municipal Council, Raipur v. State of Madhya Pradesh [AIR 1970 SC 1923]**, **South Gujarat Roofing Tile Manufacturers Association vs. State of Gujarat [AIR 1977 SC 90]**, **Hindustan Aluminum Corporation vs. State of Uttar Pradesh [AIR 1981 SC 1649]**, and **Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. [1987 (1) SCC 424]**. It is, therefore, evident that the word 'includes' can be used in interpretation clauses either generally in order to enlarge the meaning of any word or phrase occurring in the body of a Statute, or in the normal standard sense, to mean 'comprises' or 'consists of' or 'means and includes', depending on the context.

17. If the words 'and includes' were intended to rope in certain items which would not be part of the meaning, but for the definition, then Rule 62 would have specified only 'dearness pay' as the item to be included but not 'pay'. If pay, dearness allowance and other allowances were already included in 'emolument' with reference to its general or normal meaning, as contended by appellant, there was no reason to specifically again include 'pay' in Rule

62. Inclusion of 'pay' and 'dearness pay' and non-inclusion of 'dearness allowance or other allowances' in the definition of 'emolument' is significant. The definition in Rule 62 is intended to clarify that only pay and dearness pay would be considered as 'emolument' for purposes of calculating pension. The words 'and includes' have been used in Rule 62, as meaning 'comprises' or 'consists of'.

**18.** In the view we have taken, it is unnecessary to consider the following two amendments to **Rule 62 of Part III of the Kerala Service Rules**, made during the pendency of this appeal, in exercise of power conferred by **section 2(1) of the Kerala Public Services Act, 1968** :

(i) Substitution of the words 'comprises only' in place of 'includes' in Rule 62, by Kerala Service (Amendment) Rules 2004, with effect from 1.3.1997.

(ii) Further substitution of the words 'comprises only the following' in place of the words 'comprises only' in Rule 62 of Part III of Kerala Service Rules by **Kerala Service (Amendment) Rules, 2005**, with effect from 14.11.1966.

The explanatory notes to the two amendments clarify that the State Government decided to amend the Service Rules to give more clarity and to avoid ambiguity in calculating pension and the term 'emolument' for the purpose of calculation of pension will comprise of only pay and dearness pay. We have already held accordingly while interpreting unamended Rule

62. The amendments merely reinforce our view.

**19.** We, therefore, accept the contention of the State Government that Rule 62 does not enable the addition of dearness allowance and special allowance to the pay for purposes of pension. The 'emolument' of the appellant was rightly taken as Rs.3500/- per month. We find no error in calculation of the consolidated ordinary pension at Rs.29,220/-.

Re : Special Additional Pension :

**20.** Special additional pension is provided for under Para 2(b) of Part III of first Schedule to the Act. In *M.L. Jain (III) - AIR 1991 SC 928*, the ceiling prescribed under para 2(b) was held to be unconstitutional being violative of Article 14 of Constitution of India. Therefore, neither the ceiling of Rs.8,000/- introduced with effect from 1.11.1986, nor the earlier ceiling of Rs.3500/- is valid. As a consequence, the special additional pension should be taken as Rs.5,600/- per annum (that is Rs.700x8) instead of Rs.3500/- from 1.1.1986 and Rs.12,800/- per annum (that is Rs.1600x8) instead of Rs.8,000/- from 1.11.1986. In fact, neither Union of India, nor State Government dispute this position.

**21.** We, therefore, allow these appeals in part and hold as follows :

(i) that for the purpose of calculation of pension, the 'emolument' received by the appellant was Rs.3,500/- per month and not Rs.4,237/-. Consequently, determination of consolidated ordinary pension as Rs.29,220/- per annum from 1.1.1986 is upheld.

(ii) As the ceiling on the amount to be added under clause 2(b) of Part III of First Schedule to the Act is invalid, the special additional pension per annum would be Rs.5600/- per annum from 1.1.1986 and Rs.12,800/- per annum from 1.11.1986 in the case of appellant.

(iii) Therefore, the total pension was Rs.34,820/- p.a. from 1.1.1986 and Rs. 42,020/- per annum from 1.11.1986.

22. We direct that the pension due be recalculated and settled accordingly. If any excess payment has been made to the appellant, it shall not, however, be recovered from the Legal Representatives of the deceased appellant. Parties to bear their respective costs.



**ISCLR/2007/10/15**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: New Delhi Municipal Council**

**Vs.**

**RESPONDENT: Pan Singh & Ors**

Appeal (civil) 1214 of 2007  
[Arising out of SLP(C) No. 21024 of 2005]

Date of Judgment: 08/03/2007

Bench: S.B. Sinha & Markandey Katju

Subject: Service

Legislation Referred:

- New Delhi Municipal Act, 1994
- Industrial Disputes Act, 1947 - Section 18(3)(b)
- Constitution of India - Article 226

Cases Referred:

- Punjab National Bank And Others v. Manjeet Singh And Another [(2006) 8 SCC 647]
- Govt. of W.B. v. Tarun K. Roy And Others [(2004) 1 SCC 347]
- Chairman, U.P. Jal Nigam & Anr. v. Jaswant Singh And Anr. [2006 (12) SCALE 347]
- Karnataka Power Corpn. Ltd. through its Chairman & Managing Director and Another v. K. Thangappan and Another [(2006) 4 SCC 322]
- Lipton India Ltd. And Others v. Union of India And Others [(1994) 6 SCC 524]
- M.R. Gupta v. Union of India And Others [(1995) 5 SCC 628]

- Shiv Dass v. Union of India & Ors. [ 2007(2) SCALE 325 : (2007) 1 Supreme 455]
- K.V. Raja Lakshmiah v. State of Mysore (AIR 1967 SC 993)
- State of Orissa v. Sri Pyarimohan Samantaray, (AIR 1976 SC 2617)
- State of Orissa v. Arun Kumar (AIR 1976 SC 1639)

Counsel:

For appellant: Mr. Rakesh K. Khanna, senior counsel

For respondent: Ms. Asha Jain Madan, counsel

## **JUDGMENT:**

S.B. Sinha, J.

1. Leave granted.

2. Appellant is a local authority constituted under the **New Delhi Municipal Act, 1994**. It has been performing its municipal functions in the New Delhi area; one of them being distribution of electricity to the consumers upon buying the same from the Electricity Supply Companies. For the said purpose, it has a electricity department. In the said department, there were posts of Meter Readers as also Shifts Incharge. The pay scale of Shifts In-charge was Rs. 220-400 and that of the Meter Readers Rs. 185-300. The post of Meter Readers was meant to be filled up by direct recruitment. 17 senior most Shift In charge, however, for certain reasons opted to become Meter Readers. As they were working in a higher scale of pay, their pay was protected. Such protection of pay was given to them by an Order dated 10.2.1982, stating :

*"1. The matter regarding revision of pay scale from Rs. 185-300 to Rs. 220-440 of those Meter Readers who were promoted as Meter Readers from the Cadre of Shift-In-charge II Grade was discussed in the meeting held on 15.12.81 at 11.00 AM under the Chairmanship of the Administrator. It was decided by the Administrator that the matter be examined whether higher pay scale of Rs. 220-400 could be given to the 17 such senior-most Meter Readers, purely as on ad hoc measure which would be personal to them.*

*2. Accordingly, the case was discussed in the meeting of Heads of Departments namely CE(E)/CE(C)/FA,CA, Secretary, MOH, DD(H) and LWO headed by the Administrator on 06.02.1982 and was decided that the pay scale of Rs. 220-10-300-EB-400 be allowed w.e.f. 6.2.82 to all those 17 Meter Readers who had previously worked as Shift In charge Grade II, but this revision of scale will be personal to them without making any precedent."*

3. Some other Meter Readers who were in services of the appellant at the relevant time raised an industrial dispute purported to be on the premise that they had been

discriminated against. Reference was made to the Presiding Officer, Industrial Tribunal No. 3, Delhi for determination of inter-alia the following industrial dispute:-

*"1. Whether the pay scale of Meter Readers should be revised from Rs. 520-815 to Rs. 590-1000/- as has been done in case of 17 Meter Readers namely 1) Shri Turen Singh, 2) Ram Chander Singh, 3) Shri Rameshwar Lal Bali, 4. Shri Prem Chand Sharma, 5. Raj Kumar Kalia (6) Sh. Prabhu Dayal, (7) Sh. Anand Kishore Aggarwal (8) Shri Jagannath Parshad (9) Sh. D.P. Malhotra (10) Sh. Bhu Dev Sharma (11) Sh. Sukh Dev Singh (12) Shri Ajaib Singh (13) Shri H.C. Chauhan (14) Shri K.S. Rawat (15) Shri Devi Sanai, (16) Shri Mansa Ram, (17) Shri Subhash Chand Sharma and if so what directions are necessary in this respect?"*

4. Respondents were not parties therein. They did not file any application for their impleadment. By reason of an Award dated 7.1.1998, the Industrial Court directed :-

*"In the light of the above observations of the meter readers, who were in service at the time when the benefit was given to 17 meter readers, whose names are morefully detailed in Annexure B of claim statement are entitled to get the benefit of the said order in the similar manner in which the same has been given to those 17 meter readers purely as an adhoc measure to be personal to them and discrimination made by the management amongst the same class of meter readers is an act of arbitrariness and amounts to misuse of the principles of law. The management is directed to pay the arrears of the said amount on the same analogy to which 17 meter readers have been given benefit to the same as per order dated 12.02.82 within a period of 6 months from the date the award become enforceable under law failing which the meter readers of the said period will be entitled to get an interest @ 18% per annum to the same..."*

5. The respondents were appointed after 12.2.1982 i.e during the period 1.4.1982 and 3.6.1984. They filed a Writ Petition claiming parity in the matter of grant of scale of pay by filing a Writ Petition with the Awardees before the High Court of Delhi. By reason of the impugned Judgment, the said Writ Petitions have been allowed stating that although they are not covered by the Award, the appellants being model employer must treat the employees similarly situated and, thus as the respondents had passed the test in June, 1981, they could not be denied the pay scale which has been granted to them.

6. Respondent filed the Writ Petition in July, 1999 claiming inter-alia the following reliefs:-

"a) Issue an appropriate writ, order or direction to the Respondent to grant to the petitioners the benefit of the revised pay scale, as had been granted to other meter readers vide office order dated 10.02.1982 (Annexure-B). Office order dated 23.12.1998 (Annexure-D) and office order dated 17.5.1999 (Annexure □ D-1) alongwith all the consequential reliefs.

b) Grant to the petitioners the appropriate amount of damages including cost of the present petition as also such other or further relief's as this Hon'ble Court may deem fit, proper and expedient in the facts and circumstances of the present case."

7. Mr. Rakesh K. Khanna, learned senior counsel appearing on behalf of the appellant would urge that once the cut off date was fixed by the Tribunal as on 6.2.1982, the respondents, having joined the services of the appellant thereafter, could not have been directed to be treated alike in the matter of grant of the same scale of pay. In any event, the Writ Petitions having been filed in July, 1999, the High Court committed a serious illegality in directing back wages in their favour.

8. Ms. Asha Jain Madan, learned counsel appearing on behalf of the respondent, on the other hand, would submit that the Award of the Industrial Tribunal was binding upon the appellant in terms of Section 18(3)(b) of the Industrial Disputes Act and in that view of the matter, as respondents perform same or similar nature of duties as are performed by the other workmen, they were entitled to be treated alike. The learned counsel would contend that the respondent did not raise a separate industrial dispute as they had all along been under the impression that they would be covered by the Award which may be made in the said Reference.

9. Respondents were appointed on different dates, admittedly after 6.2.1982. Entitlement of an employee to be placed on a particular scale of pay would depend upon the terms and conditions laid down in the contract of service.

10. Seventeen persons who were granted higher scale of pay as noticed hereinbefore had been working as Shifts in charge. As Shifts In charge, they were entitled to a higher scale of pay. They were given a higher scale so as to protect their pay which were personal to them and that too on an ad-hoc measure. It was not by way of a revision of scale of pay as understood in the ordinary sense of the term.

11. Those Meter Readers who were purported to be similarly situated meaning thereby those who were in service as on 12.2.1982 i.e the date when the purported pay scales of 17 senior most Meter Readers on ad-hoc basis were revised, raised an industrial dispute. The Industrial Tribunal in its Award proceeded on the basis that the concerned workmen were entitled to the benefit of higher scale as they were similarly situated to those 17 senior most Meter Readers.

12. The direction in terms of the Award was confined only to those who were in employment at the time when the said benefit was given to the said 17 Meter Readers.

13. They, thus, formed a class by themselves. A cut-off date having been fixed by the Tribunal, those who were thus not similarly situated, were to be treated to have formed a different class. They could not be treated alike with the others. The High Court, unfortunately, has not considered this aspect of the matter.

14. Submission of learned counsel for the respondent that **Section 18(3)(b) of the Industrial Disputes Act** would govern the Award, in our opinion is not correct. Section 18(3)(b) although, provides that all workmen who were employed in an establishment, subsequently become employed therein would also be bound by the Award of the Industrial Tribunal. But, they must be entitled to the similar benefits. Respondents were not parties to the said dispute. They did not raise any grievance in regard to their conditions of service.

15. Had they been parties to the Reference, the matter might have been otherwise, as was held in **Punjab National Bank And Others v. Manjeet Singh And Another [(2006) 8 SCC 647]**, whereupon Ms. Asha Jain Madan, learned counsel for respondent strongly relied upon. Section 18(3)(b) does not postulate that although the concerned workmen would form different classes, an Award made in favour of another class of workmen would automatically be extended to the other. In Punjab National Bank (supra), the workman contended that they were not bound by the Award, which contention was rejected having regard to the fact that they were similarly situated and in fact were parties in the industrial disputes and were represented through their Union.

16. There is another aspect of the matter which cannot be lost sight of. Respondents herein filed a Writ Petition after 17 years. They did not agitate their grievances for a long time. They, as noticed herein, did not claim parity with the 17 workmen at the earliest possible opportunity. They did not implead themselves as parties even in the reference made by the State before the Industrial Tribunal. It is not their case that after 1982, those employees who were employed or who were recruited after the cut-off date have been granted the said scale of pay. After such a long time, therefore, the Writ Petitions could not have been entertained even if they are similarly situated. It is trite that the discretionary jurisdiction may not be exercised in favour of those who approach the Court after a long time. Delay and laches are relevant factors for exercise of equitable jurisdiction. See **Govt. of W.B. v. Tarun K. Roy And Others [(2004) 1 SCC 347]**, **Chairman, U.P. Jal Nigam & Anr. v. Jaswant Singh And Anr. [2006 (12) SCALE 347]** and **Karnataka Power Corpn. Ltd. through its Chairman & Managing Director and Another v. K. Thangappan and Another [(2006) 4 SCC 322]**

17. Although, there is no period of limitation provided for filing a Writ Petition under **Article 226 of the Constitution of India**, ordinarily, Writ Petition should be filed within a reasonable time.

See **Lipton India Ltd. And Others v. Union of India And Others [(1994) 6 SCC 524]**, **M.R. Gupta v. Union of India And Others [(1995) 5 SCC 628]**.

18. In **Shiv Dass v. Union of India & Ors. [ 2007(2) SCALE 325 : (2007) 1 Supreme 455]**, this Court held:-

*"9. It has been pointed out by this Court in a number of cases that representations would not be adequate explanation to take care of delay. This was first stated in **K.V. Raja Lakshmiah v. State of Mysore (AIR 1967 SC 993)**. There is a limit to the time which can be considered reasonable for making representations and if the Government had*

turned down one representation the making of another representation on similar lines will not explain the delay. In *State of Orissa v. Sri Pyarimohan Samantaray*, (AIR 1976 SC 2617) making of repeated representations was not regarded as satisfactory explanation of the delay. In that case the petition had been dismissed for delay alone. See *State of Orissa v. Arun Kumar* (AIR 1976 SC 1639) also.

10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the writ petition on that score alone."

19. We, therefore, are of the opinion that it was not a fit case where the High Court should have exercised its discretionary jurisdiction in favour of the respondents herein.

20. For the reasons aforementioned, impugned Judgment cannot be sustained which is set aside accordingly. The Appeal is allowed. In the facts and circumstances of the case, however, there shall be no order as to costs.



**ISCLR/2007/10/16**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: Omkar Prasad Verma**  
**Vs.**  
**RESPONDENT: State of Madhya Pradesh**

Appeal (crl.) 293 of 2007  
(Arising out of SLP (Crl.) No. 5775 of 2006)

Date of Judgment: 08/03/2007

Bench: S.B. Sinha & Markandey Katju

Subject: Criminal

Legislations Referred:

Indian Penal Code, 1860 – Sections 375, 376

Cases: Referred:

Authority Referred:

- P. Ramanatha Aiyar's Advanced Law Lexicon, page 1170

## **JUDGMENT:**

S.B. SINHA, J.

1. Leave granted.

2. Appellant is a teacher in a government school. Vimala was a student reading in the said school. She alleged that the appellant had sexual intercourse with her on putting her to fear that she would be failed in her classes. In fact, she was studying in class VII for three years. A First Information Report was lodged. She became pregnant. Appellant took her to a hospital at Satna where an abortion took place. In the meantime a missing diary was recorded on 1.02.1997. On 11.02.1997, the prosecutrix herself came back and gave a statement before the Investigating Officer. She alleged that at the relevant time she was only 13= years old.

3. The said allegations were not found to be correct in the trial. A finding of fact was arrived at by the learned Trial Judge that she was a consenting party. She was found to be more than 18 years of age. On the basis of the said findings, it was categorically held that the accused was not guilty of the offence of commission of rape. The learned Trial Judge, however, was of the opinion that as the school, in question, was a government school, the appellant was a public servant. The prosecutrix was a student, and thus, in that capacity, was in his custody and in that view of the matter he was guilty of commission of an offence under **Section 376B of the Indian Penal Code** and sentenced him to undergo 2 years R.I. and a fine of Rs. 1000/- in default thereof to undergo sentence of 6 months R.I. An appeal preferred by the appellant herein has been dismissed by reason of the impugned Judgment by the High Court.

4. The short question which arises for consideration is as to whether in a case of this nature, Section 376B of the Indian Penal Code is attracted or not.

5. **Section 375 of the Indian Penal Code** defines rape to mean:-

"Rape. - *A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-*

*First. - Against her will.*

*Secondly. - Without her consent*

*Thirdly. - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.*

*Fourthly. - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

*Fifthly. - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*

*Sixthly. - With or without her consent, when she is under sixteen years of age."*

6. Section 376 (2) of the Indian Penal Code provides for sentences for different nature of the offences falling in the said category. Section 376(2)(b) provides for sentences against public servant who takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him. Section 376 (2)(b) reads as under:-

"(2) *Whoever -*

(a) \*\*\*

(b) *being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or*

(c) \*\*\*

(d) \*\*\*

(e) \*\*\*

(f) \*\*\*

(g) \*\*\*

*shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine"*

7. The ingredients of the said provision are :

- (i) the accused must be a public servant;
- (ii) he must take advantage of his official position;
- (iii) he must induce or seduce any woman;

- (iv) such woman must be in his custody in such capacity or she is in the custody of public servant subordinate to him; and
- (v) he must have sexual intercourse with her which does not amount to the offence of rape.

8. The Indian Penal Code was amended by Act 43 of 1983 in terms whereof apart from amending Section 376 itself, various sub-sections were inserted, viz., Sections 376A to 376D. All the aforementioned newly inserted provisions were sought to deal with such cases which are not covered by Section 376. They have thus, been inserted to meet a situation which was otherwise not provided for under Section 376. A new offence against the public servant is created under Sections 376(2)(b), 376B and 376C of the Indian Penal Code. Intercourse by a man with his wife during separation and by any member of the management or staff of a hospital with any woman in that hospital would be the offences falling under Sections 376A and 376D of the Code.

9. A distinction must also be made out between an offence of rape as contained in Section 375 of the Indian Penal Code which is punishable under Section 376 and an offence of sexual intercourse with a woman in the situations specified in the aforementioned provisions. The distinction is that whereas under Section 376 (2), there is no consent at all, under Sections 376B, 376C and 376D, there would be consent on the part of the prosecutrix but such consent has been obtained by taking undue advantage of the position as public servant, Superintendent or Member of the Management. Sections 376A to 376D, *stricto sensu* therefore, do not deal with rape as is understood in its ordinary parlance.

10. While construing a penal provision, the **rule of strict interpretation** shall be adhered to.

11. Consent of a girl, therefore, although would not take the offence outside the purview of Section 376(2), but therefor other ingredients thereof must be found to be existing.

12. We will assume that the appellant being a teacher of the government school was a public servant. But all the students of the school, only thereby, were not in the custody of the appellant. The expression "custody" implies guardianship. A custody must be a lawful custody. The same may arise within the provisions of the statute or actual custody conferred by reason of an order of a court of law or otherwise.

13. In **P. Ramanatha Aiyar's Advanced Law Lexicon**, page 1170, "custody" has been defined to mean:

*"Care keeping; charge (as parent or guardian having custody of children and minors); imprisonment; judicial or penal safe keeping (as custody of prisoner); defence from an enemy; preservation (as a fleet stationed for the custody of the narrow seas)."*

14. When these two ingredients are satisfied, the third ingredient, therefore, would be as to whether the public servant has taken advantage of his official position. If a student and

a teacher fall in love with each other, the same would not mean that the teacher has taken undue advantage of his official position. Even then, there must be an inducement or seduction by a public servant so far as the woman in his custody is concerned.

15. Sexual intercourse, therefore, for the purpose of attracting Section 376B of the Indian Penal Code must take place at a place where the woman was in custody. In this case, the prosecutrix categorically admitted that the same did not take place within the precincts of the school but outside the school.

16. We, therefore, are clearly of the opinion that the ingredients of the offence under Sec. 376B of the Indian Penal Code are not satisfied in the instant case.

17. For the reasons aforementioned, the appeal is allowed. Appellant is on bail. He is discharged from the bail bond.



**ISCLR/2007/10/17  
IN THE SUPREME COURT OF INDIA**

**PETITIONER: P. Suresh Kumar**

**Vs.**

**RESPONDENT: R. Shankar**

Appeal (crl.) 1335 of 2005

Date of Judgment: 08/03/2007

Bench: S.B. Sinha & Markandey Katju

Subject: Criminal

Legislation Referred:

- Code of Criminal Procedure, 1973 - Section 29(2), 357(3), 377
- Negotiable Instruments Act, 1881 - Section 138
- Negotiable Instruments (Amendment & Misc. Provisions) Act, 2002

Cases Referred:

- Pankajbhai Nagjibhai Patel v. State of Gujarat [(2001) 2 SCC 595]
- K. Bhaskaran v. Sankaran Vaidhyan Balan [(1999) 7 SCC 510]
- Rachhpal Singh v. State of Punjab (2002) 6 SCC 462
- State of Punjab v. Gurmej Singh [(2002) 6 SCC 663]

- Sube Singh v. State of Haryana [2006 (3) SCC 178]

Counsel:

For appellant: Mr. Kailash Vasudev, senior counsel

For respondent: Mr. V. Prabhakar, counsel

## **JUDGMENT:**

S.B. SINHA, J :

1. The parties hereto were partners. The partnership business ran into rough weather. Appellant intended to initiate some criminal proceedings against the respondent. Allegedly, the bank account was to be operated jointly. Respondent alone as a partner, thus, could not have taken out any money from the bank. However, allegedly, he did so. According to the respondent, a compromise was entered into by and between the parties in a police station on the following terms:

"1) Both the firms accounts right from inception till date shall be finalized and the share of profits determined by an independent auditor, Mr. R. Kasi Viswanathan. His determination shall be final and binding on both the parties.

2) The above scrutiny and finalization shall be completed before 31.1.1996. Until such time, we shall not raise any dispute against each other.

3) Till such finalization, Mr. Shankar shall handover a cheque (cheque No. 551661 dated

31.1.96) for Rs. 7 lakhs to Mr. Suresh Kumar as security deposit.

4) If the share of profits for Mr. Suresh Kumar is more than 7 lakhs, he shall encash the cheque and shall also receive the balance amount from Shankar forthwith. If the share of profits is less than 7 lacs, Suresh Kumar shall return the said cheque and Shankar shall pay Suresh Kumar a draft for the amount of profits determined. If any profit is due to Shankar, Suresh Kumar shall pay the same to Shankar forthwith."

2. Pursuant thereto or in furtherance thereof, the respondent allegedly handed over a post dated cheque for a sum of Rs. 7,00,000/- to the appellant. As the said cheque was dishonoured on presentation, a complaint petition was filed by the appellant inter alia alleging:

"3. Further the accounts in the Bank are joint accounts and the cheques can be drawn only by both of partners on any account and not by one partner.

4. The Complainant submits that the accused has taken some amounts from the Bank and the bills also encashed by him for his own gain without concern of complainant. Therefore the accused has agreed to pay the profits sharing of a sum of Rs. 12 lacs towards the complainant. But he agreed to pay advance share of profit which he owes to the complainant till appropriate audit and accounting is made, the accused has given a sum of Rs. 7 lacs by cheque No. 551661 dated

31.1.1996 drawn of Syndicate Bank, Kodambakkam Branch as assured. The accused is to settle the entire due towards the complainant before 31.1.1996.

5. The complainant submits that the accused has not informed the complainant anything about the stop payment or requesting not to present the cheque. Therefore, in good faith the complainant has presented the cheque on 31.1.1996 through his Bankers Syndicate Bank, Kodambakkam Branch through his S.B. Account No. 10521. And the complainant has received an intimation from the Bankers that the payment stopped by the drawer and thus the cheque is dishonoured. The complainant has also verified whether the accused has sufficient funds in the Bank account on 31.1.96 but to his shock found that the accused was not having sufficient funds to honour the cheque on 31.1.96. Therefore the complainant has issued a lawyer's notice dt. 3.2.1996 to the accused stating that the dishonouring of the cheque and the accused caused complainant mental agony and demanded the cheque amount to be paid to the complainant within 15 days from the date of receipt of the notice. The accused has received the notice on 6.2.1996 but he has preferred no reply to the notice even after 15 days and he has not paid the cheque amount till date."

3. The learned Trial Judge, however, found the said defence of the respondent to be not acceptable. The learned Magistrate by a judgment and order dated 12.10.1998 imposed a fine of Rs. 7,05,000/- and directed that if the respondent fails to remit, he will undergo three months simple imprisonment. Out of the said amount, he was directed to pay a sum of Rs. 7,00,000/- by way of compensation and the remaining sum of Rs. 5000/- was to be credited to the Government.

4. An appeal thereagainst was filed by the respondent. The learned Additional Sessions Judge partially allowed the said appeal stating:

"22. In the result, this Criminal Appeal is partly allowed thereby the finding of conviction against the accused under **Sec. 138 of Negotiable Instrument Act** is confirmed and the sentence is modified to the effect that the appellant/ accused should pay a fine of Rs. 5,000/- (Rupees five thousand only) under Sec. 138 of Negotiable

Instrument Act and in default to undergo three months simple imprisonment and the order of the learned Magistrate in awarding compensation is set aside. There is no order as to cost. The appellant/ accused will be entitled to get back the amount deposited by him less the fine amount, now imposed, and entitled to get back the bank guarantee and other security deeds filed by him in this case after the time for revision or appeal is over or after the revision or after if any preferred is over."

5. Appellant herein preferred a revision application before the High Court which was marked as R.C. No. 1213 of 2001 whereby and whereunder modification was made by the appellate court in relation to the quantum of fine.

6. Respondent filed a criminal revision against the said order which was marked as Criminal R.C. No. 713 of 2001. The High Court dismissed both the civil revisions confirming the conviction of the respondent under the provisions of the Act as also the order qua the question of the payment of fine.

7. Respondent herein has not approached this Court from the said order. Only Appellant has. By an order dated 6.10.2005, a 3-Judge Bench of this Court while granting leave directed:

"Notice shall issue to the respondent to show cause why the sentence be not enhanced and the sentence of fine be not substituted by order for imprisonment as also an order for payment of compensation under Section 357(3) of the Code of Criminal Procedure read with Section 138 of the Negotiable Instruments Act, returnable after four weeks."

8. It is not in dispute that the Negotiable Instruments Act (for short "the Act") was amended by the Negotiable Instruments (Amendment & Misc. Provisions) Act, 2002 which came into force with effect from 6.02.2003 in terms whereof the accused could also be imprisoned for a term which may extend to one year or with fine which may extend to twice the amount of the cheque or with both. The amended provision, however, is not applicable in the instant case.

9. Mr. Kailash Vasudev, learned senior counsel appearing on behalf of the appellant, would submit that the learned District Judge and the High Court committed a serious error in passing the impugned judgment insofar as they failed to take into consideration that the quantum of punishment should be commensurate with the gravity of the offence and having regard to the amendment in the Act which came into force on 6.02.2003, it is a fit case where the respondent should have been awarded substantial punishment.

10. Mr. V. Prabhakar, learned counsel appearing on behalf of the respondent, on the other hand, would submit that having regard to the fact that this Court had issued notice on enhancement of sentence; in terms of Section 377 of the Code of Criminal Procedure, the respondent would be entitled to contend that no case had been made out for recording a judgment of conviction by the courts below. According to the learned counsel, the defence of the respondent having regard to entering into a compromise by and between the parties hereto was wrongly not accepted by the courts below, as the same should have been considered by the courts below in the light of the averments made by the complainant in the complaint petition wherefrom it would be evident that :

- (i) the share of the profit in the partnership business was still to be ascertained;
- (ii) the cheque was issued in anticipation of the accounts to be audited by a named auditor;
- (iii) Only upon finalization of the accounts by the auditor, the debt or liability of the respondent could have been clearly ascertained so as to make him liable for payment of any amount pursuant thereto or in furtherance thereof.

11. In the instant case, it was urged, as the appellant himself in his complaint petition categorically stated that the actual amount of the liability of the respondent was yet to be

ascertained, the courts concerned must be held to have committed a manifest error in recording a judgment of conviction.

12. It was further submitted that the appellate court and consequently, the High Court also committed a manifest error inasmuch as they failed to take into consideration that the burden of proof on the accused can be discharged by showing only preponderance of probabilities; the standard of proof not being the proof beyond all reasonable doubt. Our attention has further been drawn to the fact that although the learned Trial Judge had directed payment of compensation and fine of Rs. 7,05,000/-, the appellant had not filed any appeal thereagainst and in that view of the matter, the revision petition filed by it was not maintainable.

13. Section 138 of the Act is a special statute. It provides inter alia for imposition of fine which may extend to twice the amount of the cheque.

14. We, as at present advised, need not go into the question as to whether having regard to the provisions contained in **Sub-section (2) of Section 29 of the Code of Criminal Procedure**, the jurisdiction of the Magistrate would be to impose a fine for a sum of Rs. 5,000/- or not in view of the decisions of this Court in **Pankajbhai Nagjibhai Patel v. State of Gujarat [(2001) 2 SCC 595]** and **K. Bhaskaran v. Sankaran Vaidhyan Balan [(1999) 7 SCC 510]**.

15. The question arising in this case, in our opinion, should be considered absolutely from a different angle.

16. Although the power of the court to impose a fine may or may not be limited, it is not in dispute that the power to award compensation is not. The purpose for which such compensation is to be granted to the complainant whether in terms of clause (b) of Sub-section 1 of Section 357 of the Code of Criminal Procedure or Sub-section (3) of Section 357 is not of much significance for our purpose, although there cannot be any doubt whatsoever that consideration for payment of compensation is somewhat different from payment of fine. [See **Rachhpal Singh v. State of Punjab (2002) 6 SCC 462**]

17. In **State of Punjab v. Gurmej Singh [(2002) 6 SCC 663]** it was stated:

*"9. The next contention raised by the learned counsel for the appellant is that the surviving victim, namely, the daughter of Jagjit Singh may be awarded some compensation under Section 357(3) of the Code of Criminal Procedure. In support of his submission he has also referred to a decision of this Court in Rachhpal Singh v. State of Punjab. In the said case this Court allowed compensation under sub-section (3) of Section 357 CrPC to the victims but it would not be applicable in the present case since a sentence of fine has also been imposed. A reading of sub-section (3) of Section 357 would show that the question of award of compensation would arise where the court imposes a sentence of which fine does not form a part. The decision in Rachhpal Singh does not take any contrary view nor hold that compensation may be awarded over and above the sentence of fine. A perusal of sub-section (3) of Section 357 CrPC would make the position clear.*

11. *In the present case, sentence of fine has also been imposed, as indicated in the earlier part of this judgment. Out of the fine, a sum of Rs 1000 each had been ordered to be given to the three injured persons, namely, Dalip Singh, Amarjit Kaur and Gurmeet Kaur. The balance amount is to go to the legal heirs of Jagjit Singh. We had heard the learned counsel for both parties on this aspect. Learned counsel for the appellant submitted that Gurmeet Kaur lost both her parents as well as her brother in the incident and now she is alone and would have become of marriageable age or may have to start some work of her own. She would need some money. In case she cannot be compensated, the amount of fine may be enhanced to some extent. Learned counsel for the respondent has, however, submitted that out of seven acres of land belonging to his father, the same has been divided into three equal shares and some of it is also under mortgage and he has got two daughters and a son and his wife. He has also submitted that whenever the respondent was released on parole he met Gurmeet Kaur and his wife also keeps on going to meet her. Their relations are normal and cordial. If that is so, nothing better can be thought of in the prevailing circumstances. However, we are not considering for awarding any compensation to Gurmeet Kaur under Section 357(3) CrPC but the amount of fine imposed, can in any case be reasonably enhanced."*

18. Purpose of imposition of fine and/ or compensation, however, must be considered having regard to the relevant factors in mind as envisaged under Section 357 of the Code of Criminal Procedure.

19. We may notice that in [Sube Singh v. State of Haryana \[2006 \(3\) SCC 178\]](#), the law has been stated in the following terms :

*"...The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure."*

20. The basic question, however, which arises for consideration before us is as to whether we, in the peculiar facts and circumstances of this case, can delve deep into the matter so as to find out the culpability of the respondent herein and pass a judgment of acquittal in his favour. We do not think that we should do so. Section 377 of the Code of Criminal Procedure has no application in the instant case. Respondent has not preferred any appeal. Even otherwise the complainant had categorically stated in his complaint petition that although his claim was for a sum of Rs. 12 lakhs which amount the respondent is said to have been withdrawn from the bank in contravention of the terms and conditions of the deed of partnership, he accepted his liability at least to the extent of Rs. 7,00,000/-. It appears from a plain reading of the complaint petition that the respondent had admitted his liability to the extent of Rs. 7,00,000/-. It was found as of fact to be so by the courts below. The said findings do not warrant any interference. The defence raised by the respondent to the effect that the parties had entered into a compromise in the police station and he had to sign a cheque under some threat or coercion had not been accepted by the courts below. There cannot be any doubt whatsoever that had the respondent been

able to show that the cheque had been issued not in discharge of a debt but by way of a security pending determination of his liability by an auditor, the matter would have been different. In such an event, the court could have arrived at a finding that the cheque having been issued on the basis of an anticipated profit which by itself did not create any liability in presenti and the result of the audit might have gone either way, no case under Section 138 of the Act was made out. But, the same is not the case here.

**21.** The question which now arises for consideration is as to whether any case for awarding a substantial sentence has been made out. We do not think so. Grant of compensation, in our opinion, would subserve the purpose.

**22.** Appellant may also file a suit for damages and/ or for other reliefs. We do not know what was found by the auditor upon scrutiny of the books of account of the partnership firm.

**23.** The relationship between the parties is not disputed.

**24.** Respondent has not been charged with any fraudulent action. He had a probable defence. Appellant furthermore had not preferred any appeal against the judgment of the learned Trial Judge for enhancement of the sentence. It may be that quantum of compensation has been altered to that of the fine but in effect and substance the same did not matter.

**25.** In our opinion, therefore, interest of justice would be subserved, if the respondent is hereby directed to pay a compensation of Rs.7,00,000/- in stead and place of a fine of Rs.5,000/-, as has been directed by the High Court. Thus, the appellant would be entitled to get the aforementioned sum of Rs.7,00,000/- by way of compensation.

**26.** This appeal is disposed of accordingly. Respondent should pay the amount of compensation within a period of eight weeks, if not already deposited, failing which steps may be taken for recovery thereof in accordance with law.



**ISCLR/2007/10/18**  
**IN THE SUPREME COURT OF INDIA**

**PETITIONER: Vice Chancellor, M.D. University, Rohtak**  
**Vs.**  
**RESPONDENT: Jahan Singh**

Appeal (civil) 853 of 2006

Date of Judgment: 08/03/2007

Bench: S.B. Sinha & Markandey Katju

Subject:

Legislations Referred:

- Maharishi Dayanand University Act, 1975
- Constitution of India - Article 14

Cases Referred:

- Mahabir Vegetable Oils (P) Ltd. and Another v. State of Haryana and Others [(2006) 3 SCC 620]
- MRF Ltd., Kottayam v. Asstt. Commissioner (Assessment) Sales Tax and Others [(2006) 8 SCC 702]
- State of U.P. and Another v. Jogendra Singh and Another [(1998) 1 SCC 449]
- Kuldeep Singh v. Govt. of NCT of Delhi [(2006) 5 SCC 702]

Counsel:

For appellants: Mr. Nidesh Gupta, counsel

**JUDGMENT:**

S.B. SINHA, J :

1. Respondent herein was appointed as a Reader in Physics in Maharishi Dayanand University, Rohtak (hereinafter referred to as 'the University'). His services were terminated during the period of probation by an order dated 20.06.1979. He questioned the legality of said order of termination in a Civil Writ Petition before the High Court of Punjab and Haryana, but the same was dismissed.

2. It, however, appears that the respondent filed an application for his appointment as a Reader in the University of Zambia. The Zambia University accepted the said offer on the conditions mentioned therein, stating :

*"If you are willing to accept the appointment on the above terms, I shall be grateful if you will sign and date all the enclosed copies of this letter, signing also and*

*dating one copy of the terms and conditions of service sent herewith, and returning to me all the enclosed copies of this letter and one copy of the Terms and Conditions of Service within thirty days of the date of this letter."*

3. Respondent accepted the said offer of appointment on 04.10.1983, stating :

*"I accept appointment on the terms set out in this letter and in the document headed "Terms and Conditions of Service for Academic Staff". I agree to carry out such duties as are assigned to me from time to time by the Vice Chancellor and the Dean of the School of Natural Sciences."*

4. Although, the respondent was not in employment of the University he purported to have filed an application for his reappointment in the post of a reader of the University on 05.10.1983, which was accepted on the same day.

5. The very fact that the respondent was appointed on the same day, as on the date of filing of application, evidently no selection process was undergone therefor. He joined the services of the University on 05.10.1983. He applied for grant of extra-ordinary leave without pay for a period of two years, in view of his assignment with the Zambia University and the Executive Council of the University by a resolution dated 21.11.1983 acceded to the said request. On expiry of the said period of two years, he joined the University again in August 1985. He thereafter prayed for grant of increments in the pay scale during the period he was on extra-ordinary leave. The University referred the matter to the University Grants Commission, which in terms of its letter dated 10.12.1987 opined that the matter was within the domain of the State Government, stating :

*"I am directed to refer to your letter No.ET-2/87/13370 dated 21.9.87 on the above subject and to say that being an administration matter of the University. I am to request you to approach the State Government/Department of Education in this regard."*

7. The Executive Council, however, amended the resolution on 28.11.1990.

8. The State Government, however, when approached refused to grant its approval in terms of its letter dated 04.02.1992, stating :

*"Reference your letter No.ET-2/91/28102 dated 24.10.1991 on the above cited subject."*

*The Govt. have observed the decision taken by the Executive Council of M.D. University, Rohtak under its Reso. No.13 dated 28.11.1990, thereby proposing to grant the benefit of Extra Ordinary Leave (maximum three years) towards annual increments. The Govt. have found that this provision is contrary to the Govt. rules. There is no provision either in Govt. rules or in other Universities in the State for granting this benefit to the Govt./University employees. This proposal shall create anomaly amongst the Govt. employees and other University employees vis-`-vis M.D. University employees. In view of these facts, the University is requested to take immediate action in canceling*

*these facts, the University is requested to take immediate action in canceling the decision taken by the Executive Council under Resolution No.13 dated 28.11.1990."*

9. Yet again the respondent prayed for condonation of break in his service with all resultant benefits, but yet again the State Government conveyed its objection thereto.

10. However, despite the same, it appears, the Registrar of the University by a letter dated 06.02.1995 conveyed to the respondent that the Vice-Chancellor had been pleased to count his extra-ordinary leave period when he had worked with the University of Zambia from 30.11.1983 to 14.08.1985 towards annual increment. It is, however, stated that the said resolution of the Executive Council and/or the said letter was not acted upon, inter alia, on the premise that being not in tune with the extant regulations. The matter was referred to the State Government and by reason of a letter dated 26.05.1997 it conveyed its objections thereto.

11. Respondent was apprised of the decision of the University that his request for increments during the period of extra-ordinary leave had not been acceded to by the /University by a letter dated 15.04.1998. A writ petition came to be filed by the respondent, which was dismissed by a learned Single Judge of the High Court by an order dated 09.10.2001. However, on an intra-court appeal filed by the respondent, a Division Bench of the said High Court allowed the same by a judgment and order dated 29.11.2004.

12. Appellant is, thus, before us.

13. Mr. Nidesh Gupta, the learned counsel appearing on behalf of the appellant, would submit that in term of the extant rules, the respondent was not entitled to annual increments during the period of leave.

14. Respondent who appeared in person, on the other hand, would submit that the Executive Council having amended the relevant regulations with retrospective effect, he would be deemed to have been continuing in service since 1977 and in that view of the matter, no illegality has been committed by the High Court in directing grant of increments in his favour during the period he was serving the Zambia University.

15. It was furthermore submitted that in a similar matter involving one Satpal Taneja, the University had granted such increments. Respondent would contend that merely a sum of Rs. 388/- was paid to him by the University and the rest of the amount is yet to be paid, whereas in the case of the said Satpal Taneja, the entire amount had been paid.

16. The fact that the services of the respondent were terminated during his period of probation is not in dispute. He, therefore, on or about 27.09.1983 was not in the services of the University. He furthermore, as noticed hereinbefore, neither applied for his appointment with the University of Zambia himself or not through the University, nor was it legally permissible as he was not in service at the relevant point of time. It is also not in dispute that before the respondent was reappointed by the University on

humanitarian ground or any other ground as a Reader therein, a contract of service subject to fulfillment of certain terms and conditions between the respondent and the University of Zambia came into being only thereafter. The appointment of the respondent would be treated to be a fresh appointment and not a continuing one. His services having been terminated during the period of probation, even no re-appointment was permissible in law. In the aforementioned factual backdrop, the legal questions raised before us are required to be considered. The University is a creature of statute. It was created under the **Maharishi Dayanand University Act, 1975** (for short, 'the Act'). The said Act provides for the regulations making power. The University framed leave regulation. **Regulation 26(i)(c)** deals with extra-ordinary leave, which reads as under :

*"(i) An employee (whether permanent or temporary) may be granted extra ordinary leave by the competent authority.*

*a) when no other leave is admissible; or*

*b) when other leave is admissible, the employee applies in writing for the extra ordinary leave for any special reason.*

*ii) Extra ordinary leave shall be without pay and allowances. However, House Rent Allowance will be admissible for a period not exceeding first four months at the rate at which an employee was drawing before proceeding on such leave provided he has not been in employment elsewhere during that period. The leave shall not ordinarily exceed one year at a time.*

*Extraordinary leave shall not count for increment, except in the following cases :-*

*a) The sanctioning authority is satisfied that such leave was taken by an employee on account of illness or for any other cause beyond his control provided that employee has no other kind of leave to his credit;*

*b) Leave is granted for the purpose of higher studies and research; and*

*c) Leave is granted to accept an invitation to a teaching post or fellowship or research-cum-teaching post or academic work of importance. Provided that the maximum total period for which such leave is granted shall not ordinarily exceed three years and in exceptional cases such leave may be extended so that the total period of leave, during the whole tenure of service of an employee does not exceed five years."*

17. **Clauses (a) and (b) of Regulation 26 (ii)(c)** are not attracted herein. Clause (c), according to the respondent, is attracted in the instant case.

18. However, before proceeding to consider the matter further, we may notice that the said regulation was purported to have been amended with retrospective effect on the following terms :

"Considered the following amendment in Clause 26) of 'Leave Regulations' appearing at pages 159-60 of M.D. University Calendar Volume-III :-

PROPOSED Leave is granted to accept an invitation to a teaching post or fellowship or research-cum-teaching post or an assignment for administrative or technical or academic work of importance. Provided that the maximum total period for which such leave is granted shall not ordinarily exceed three years and in exceptional cases such leave may be extended so that the total period of leave, during the whole tenure of service of an employee does not exceed five years. Provided further that the benefit of increment for a period upto three years of extra-ordinary leave may be allowed for accepting such assignments and for the purpose of higher studies and research anywhere in India or abroad.

The word 'Invitation' of the above rule may include both a direct offer sent by the host institution and any offer received in response to an application, bio-data sent by the employee through the University to any institution in India or abroad."

RESOLVED that the above amendment be approved.

FURTHER RESOLVED that the amended provision would take retrospective effect and would be applicable to both teaching and non-teaching employees who undertake administrative/ teaching assignment anywhere in India or abroad."

19. The Act does not confer any power on the Executive Council to make a regulation with retrospective effect. The purported regulations, thus, could not have been given retrospective effect or retro-active operation as it is now well-settled that in absence of any provision contained in the legislative Act, a delegatee cannot make a delegated legislation with retrospective effect.

20. In **Mahabir Vegetable Oils (P) Ltd. and Another v. State of Haryana and Others [(2006) 3 SCC 620]** this Court stated;

*"41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof.*

*42. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. (See West v. Gwynne)*

*43. A retrospective effect to an amendment by way of a delegated legislation could be given, thus, only after coming into force of sub-section (2-A) of Section 64 of the Act and not prior thereto."*

21. See also **MRF Ltd., Kottayam v. Asstt. Commissioner (Assessment) Sales Tax and Others [(2006) 8 SCC 702]**

22. In any event, the said purported resolution appears to be vague, inasmuch as it does not lay down as to from which date, the said amended regulation would come into effect.

23. No retrospective operation could also be given having regard to the fact that thereby the rights of other employees of the University could not have been taken away. It is not in dispute that other teachers of the University have been given promotion. Respondent would be entitled to be promoted only in the event his break in his service is condoned and the increments as prayed for by him for the period during which he was working with the Zambia University may be granted and not otherwise.

24. Furthermore, the State has declined to grant such benefits to the respondent. It was on that premise the purported offer made by the University was recalled. The same, therefore, cannot be said to be arbitrary in nature.

25. In terms of the original Regulation 26(ii)(c), leave was to be granted on an invitation to a teaching post. No such invitation was made to the respondent. He applied for his appointment with the Zambia University himself. Even assuming that the amendments made in the regulation is valid, the extended meaning of 'invitation' would also have no application in the fact of the present case. By reason of the said amendment, invitation may include both the direct offer or any offer received in response to an application, but indisputably such an application or bio-data must be sent by the employee through the University to an institution in India or abroad. As the respondent was not in the service of the University before he had made such an application, a' fortiori the question of the respondent's application being sent by the employee through the University did not and could not arise.

26. Our attention has been drawn to a decision of this Court in **State of U.P. and Another v. Jogendra Singh and Another [(1998) 1 SCC 449]**, which deals with payment of retiral benefits. The said decision has, however, been relied upon for the proposition that all laws are prospective unless made retrospective either expressly or by necessary implication.

27. We have noticed hereinbefore that the retrospective operation purported to have been given by the Executive Council is ultra vires the Act.

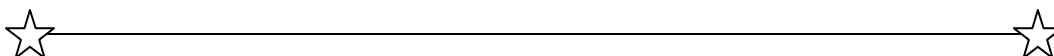
28. So far as the case of Satpal Taneja is concerned, the same stands on a different footing. We do not intend to dilate on the said question in details as the learned Single Judge in his judgment pointed out the case of the respondent viz.-e-viz. Mr. Taneja at some length. We agree therewith.

29. Even assuming the respondent and the said Shri Taneja were similarly situated, we may observe that **Article 14 of the Constitution of India** carries with it a positive concept. Article 14 of the Constitution cannot be invoked, for perpetuating illegality. {See **Kuldeep Singh v. Govt. of NCT of Delhi [(2006) 5 SCC 702 ]**}

30. We, therefore, are of the opinion that the Division Bench of the High Court was not correct in interfering with the judgment of the learned Single Judge as the case of the respondent is not even covered by the said regulations.

31. For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly and that of the learned Single Judge is restored. The appeal is allowed.

32. However, if any amount has been paid to the respondent by the University, the same may not be recovered from him.



**ISCLR/2007/10/19**  
**IN THE SUPREME COURT OF INDIA**

**Petitioner: Bandu**

**Vs.**

**Respondent: State of Maharashtra**

Appeal (crl.) 502 of 2006

Date of Judgment: 09/03/2007

Bench: S. B. Sinha & Markandey Katju

Subject: Criminal

Referred Legislation:

- Indian Penal Code 1860 – Section 302, 498A

**JUDGMENT:**

MARKANDEY KATJU, J.

1. This appeal has been filed against the impugned judgment & order of the High Court of Bombay in Criminal Appeal No. 115 of 1996.

2. Heard learned counsel for the parties and perused the record.

3. In this case the appellant Bandu had been found guilty under Section 498-A of the India Penal Code and was sentenced to rigorous imprisonment for 2 years and a fine of Rs. 500/- by the trial court. However, on appeal by the State Government as well as Bandu, the High Court while setting aside the conviction of the appellant under **Section 498A, held him guilty under Section 302 IPC** and convicted him to life imprisonment and a fine of Rs. 500/-.

4. According to the prosecution case PW6 Shanta Kotangale was married to accused Bandu on 10.5.1985. After happy cohabitation for initial 12 months, the parties started having differences. Accused Bandu used to say that he did not like Shanta and that she should go back to her parent's place. She conceived, but continued to face ill-treatment. Eventually, her brother took her to the parental house. She filed a petition for maintenance before the learned Judicial Magistrate First Class Hinganghat, in which a compromise was reached on 2.10.1990, and the parties resumed cohabitation. Thereafter she gave a birth to a daughter, named Nita, at her parent's place. Accused Bandu brought back his wife and daughter to his matrimonial home. For a few days everything was all right, but thereafter the accused started saying that Nita was not his daughter and, therefore, he prevented Shanta from feeding Nita. On 1.1.1991 at about 3 A.M., when Shanta and accused Bandu were sleeping with their daughter, the accused killed daughter Nita by pressing her neck and threw Nita from the cot. Shanta started crying which attracted quite a crowd and Pulgaon Police Station was informed about the incident. The police came to the spot, took the dead body of 1-1/2 year old Nita and sent it for post mortem examination. After the inquest, the police performed panchanama on the spot, examined the witnesses and registered the offence. The accused was arrested on completion of the investigation and charge-sheet was sent to the learned Judicial Magistrate First Class, Pulgaon. The learned Magistrate committed the case to the Court of Sessions at Wardha.

5. On perusal of the facts, it appears that wife Shanta has deposed that the appellant killed his daughter Nita, who was only 1-1/2 years old, by strangling her. It has come in evidence that the appellant suspected the fidelity of his wife Shanta and thought that Nita was not his child at all. There had been differences between the husband and wife as a result of which she was made to leave her husband's house, but Shanta returned to the appellant after giving birth to her daughter Nita. The accused-appellant did not allow her to feed her daughter Nita and ultimately on 1.1.1991 **killed her by strangling** her. We see no reason to disbelieve Shanta.

6. We have seen the post mortem report. There are injuries on the neck, cheek and eyes of the child Nita and the doctor has given her evidence that the probable cause of death might be **due to asphyxia due to suffocation**. We see no reason to disbelieve the prosecution case as it is consistent with the medical evidence.

7. We have carefully gone through the evidence of Shanta. She is an eye witness to the incident and thus there is **direct evidence** in this case. She has stated that her husband was not allowing her to give milk and feed to her child, Nita and her husband killed the child by pressing her neck. Her evidence is credible and also stood corroborated by the post mortem report and other evidence on record.

8. Thus, we see no reason to interfere with the impugned judgment of the High Court. The appeal is accordingly dismissed.



**ISCLR/2007/10/20  
IN THE SUPREME COURT OF INDIA**

**PETITIONER: U.P. State Road Transport Corporation**

**Vs.**

**RESPONDENT: U.P. Rajya Sadak Parivahan Karamchari Union (Respondent)**

Appeal (civil) 1235 of 2007

[Arising out of Special Leave Petition (Civil) No. 3735 of 2006]

[with CA 1238/2007 @ SLP(Civil) Nos. 10406/2006

CA 1236/2007 @ SLP(Civil) Nos. 10407/2006

CA 1237/2007 @ SLP(Civil) Nos. 10408/2006

Date of Judgment: 09/03/2007

Bench: S. B. Sinha & Markandey Katju

Subject: Labour

Legislation Referred:

- Road Transport Corporation Act, 1950
- U.P. Industrial Disputes Act, 1947 - Section 4-K, 11-C
- Industrial Employment (Standing Orders) Act, 1946 - Section 13A
- Industrial Disputes Act, 1947 – Section 10

Subsidiary Legislation:

- U.P.S.R.T.C Employees (Other than Officers) Service Regulations, 1981 - Rule 2

## JUDGMENT:

MARKANDEY KATJU, J.

1. Leave granted.
2. These appeals have been directed against the impugned judgment and order dated 6.9.2005 of the Uttarakhand High Court in Writ Petition No. 774 of 2002.
3. The appellant - U.P. Road Transport Corporation (hereinafter referred to as the 'Corporation'), has been constituted under the **Road Transport Corporation Act, 1950**. The respondent which is a Trade Union of the appellant-Corporation, filed an Application before the Labour Court, Dehradun under **Section 11-C of the U.P. Industrial Disputes Act, 1947** read with **Section 13A of the Industrial Employment (Standing Orders) Act, 1946**, praying for a declaration that the 15 persons who were appointed on contract basis as 'drivers' and 'conductors' as shown in the annexed chart, be declared as regular and substantive workmen of the Corporation. It was also prayed in the said Application that the concerned workmen be given all the benefits and facilities of regular employees.

The aforesaid Application was allowed by the Labour Court, Dehradun by its order dated 19.9.2001. The Labour Court directed that the concerned workmen be given the minimum wages admissible to the regular employees in the pay scales of 'drivers' and 'conductors'. The Labour Court also held that the said workmen are employees of the Corporation.

4. It is not disputed that the concerned workmen were appointed on contract basis. Before the Labour Court, the Corporation had contended that **Rule 2 of U.P.S.R.T.C Employees (Other than Officers) Service Regulations, 1981** (hereinafter referred to as the 'Regulations') clearly mentions that these regulations shall not apply to employees working on contract basis. The persons working on contract basis filed Writ Petition No. 41349/1999 Kanchi Lal and others vs. U.P.S.R.T.C before the Allahabad High Court for grant of same benefits as the regular employees of the Corporation, but the said writ petition had been dismissed. However, the objection of the Corporation was rejected by the Labour Court. It filed a writ petition thereafter before the High Court which was dismissed by the impugned judgment.
5. It was contended in the writ petition by the appellant that the concerned workmen had not been selected in terms of the process of selection required for appointment of regular employees and hence they cannot be directed to be given minimum pay scales of regular employees. It was also contended that the Labour Court acted beyond its jurisdiction by passing the impugned order dated 19.9.2001 since Section 11-A only permits interpretation and application of a standing order and not any particular relief which can only be given under the Industrial Disputes Act, 1947.

6. It may be noted that the scope of Section 11-C is much narrower than the scope of a regular reference under **Section 10 of the Industrial Disputes Act** or **Section 4-K of the U.P. Industrial Disputes Act**.

7. Section 11-C of the U.P. Industrial Disputes Act states:

*"11-C. Interpretation, etc. of standing orders - If any question as to the application or interpretation of a standing order certified under the Industrial Employment (Standing Orders) Act, 1946, any employer or workman may refer the question to any one of the Labour Courts specified for the disposal of such proceeding by the State Government by notification in the Official Gazette, and the Labour Court to which the question is so referred shall, after giving the parties an opportunity of being heard, decide the question and such decision shall be final and binding on the parties"*

8. Similarly Section 13-A of the Industrial Employment (Standing Orders) Act 1946 states:

*"13-A. Interpretation etc. of standing orders - If any question arises as to the application or interpretation of a standing order certified under this Act, any employer or workman or a trade union or other representative body of the workmen may refer the question to any one of the Labour Courts constituted under the Industrial Disputes Act, 1947, and specified for the disposal of such proceedings by the appropriate Government by notification in the Official Gazette, and the Labour Court to which the question is so referred shall, after giving the parties an opportunity of being heard, decide the question and such decision shall be final and binding on the parties".*

9. In our opinion, the power of the Labour Court under Section 11-C of the UP Industrial Disputes Act or under Section 13-A of the Industrial Employment (Standing Orders) Act 1946 is much narrower than the power of the Labour Court on a reference under Section 10 of the Industrial Disputes Act which corresponds to Section 4-K of the U.P. Industrial Disputes Act.

10. In our opinion, the Labour Court could not have granted the relief it granted by the order dated 19.9.2001, as that could only have been granted on a regular reference under Section 4-K of the U.P. Industrial Disputes Act or under Section 10 of the Industrial Disputes Act.

11. A perusal of the order of the Labour Court dated 19.9.2001 shows that it has not referred to any standing order of the appellant. On the other hand, paragraph 3 of the said order refers to Rule 2 of the 1981 Regulations which clearly provides that the Regulations do not apply to employees engaged on contract basis. In our opinion, the Labour Court

cannot amend the Regulations while hearing an application under Section 11-C of the Industrial Disputes Act.

As already stated above, the scope of Section 11-C is limited to decide a question arising out of an application or interpretation of a standing order and the Labour Court cannot go beyond the scope of Section 11-C of the U.P. Industrial Disputes Act.

**12.** For the reasons given above, the appeals are allowed. The impugned judgment of the High Court as well as the order of the Labour Court dated 19.9.2001 are set aside. However, it is open to the concerned workmen to raise their grievances before the concerned authority under Section 4-K of the U.P. Industrial Disputes Act or under Section 10 of Industrial Disputes Act, as the case may be, and if the State Government refers such a dispute to the Labour Court or Tribunal, we hope that the same will be decided expeditiously. No costs.

