

BEFORE THE MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
WORLD TRADE CENTRE, CENTRE NO.1,
13th FLOOR, CUFFE PARADE, MUMBAI 400005
CASE NO. 182 OF 2014

IN THE MATTER OF:

The Tata Power Company Limited

...Petitioner

Versus

BEST Undertaking & Ors.

...Respondents

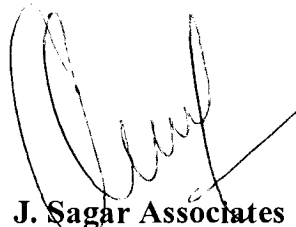
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**The Tata Power Company Limited/
Petitioner**

Through:



**J. Sagar Associates
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Vakils House, 18 Sprott Road
Ballard Estate, Mumbai 400 001, India**

Date: August 19, 2015

Place: Mumbai

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**Additional Submission on behalf of The Tata Power Company Limited with
regard to observations, findings and directions of the Hon'ble Tribunal in
its Judgment dated 28.11.2014 in Appeal No. 246 of 2012 and batch**

1. The Tata Power Company Limited ("**Tata Power**") has filed the present Petition seeking approval of its Network Rollout Plan in accordance with the directions of this Hon'ble Commission in its Order dated 14.08.2014 in Case No. 90 of 2014. By the said Order, this Hon'ble Commission had:-

- (a) Granted a Distribution Licence to Tata Power, being Distribution Licence No. 1 of 2014, for a period of 25 years from 16.08.2014.
- (b) Directed Tata Power to submit its revised Network Rollout Plan in terms of the directions. It was laid down that the Network Rollout Plan approved by this Hon'ble Commission would form part of the Specific Conditions of Licence as specified by it in terms of Section 16 of the Electricity Act, 2003 ("**Electricity Act**").

2. Pursuant to this Hon'ble Commission's Order dated 14.08.2014 in Case No. 90 of 2014, Tata Power had submitted its Revised Network Rollout Plan on 09.10.2014.

3. During the pendency of this Petition, Hon'ble Appellate Tribunal for Electricity ("**Hon'ble Tribunal**") disposed off Appeal No. 246 of 2012 and batch titled as *Tata Power Company Limited Vs. Maharashtra Electricity Regulatory Commission and Ors.* by its Judgment dated 28.11.2014 ("**Judgment dated**

28.11.2014”), returning certain findings, observations and directions. These were cross-appeals filed by Tata Power and Reliance Infrastructure Limited (“**R-Infra**”) challenging this Hon’ble Commission’s Order dated 22.08.2012 in Case No. 151 of 2011. In view of the observations and directions of the Hon’ble Tribunal in its Judgment dated 28.11.2014, Tata Power revised its Network Rollout Plan and submitted the same to this Hon’ble Commission on 12.02.2015, and updated the same by filing it on 06.08.2015 pursuant to order dated 30.07.2012.

4. It is stated that, the captioned Petition was listed for hearing before this Hon’ble Commission on 12.08.2015. During the said hearing, this Hon’ble Commission directed the parties to submit the difference between the terms ‘observations’, ‘finding’, ‘ruling’ and its legal implications, for the assistance of this Hon’ble Commission in interpreting the said Judgment of the Hon’ble Tribunal. Tata Power is filing the present additional submissions in light of the said directions of this Hon’ble Commission.

Re: Ratio v. Obiter

5. To explain Tata Power’s position, it is necessary to highlight the settled principles of law with regard to doctrine of precedent and difference between ‘*ratio-decidendi*’ (reason of decision) and ‘*obiter dicta*’ (general observations/ fleeting references).

6. The doctrine of precedent and stare decisis refers to the position of law declared by a court higher in hierarchy or superior in status which is binding and has to be followed *while deciding the same question of law that comes subsequently before subordinate courts, tribunals or other authorities*. Therefore, in order to understand what constitutes a precedent, it is important to understand that part of a judicial decision which constitutes binding authority, i.e., the ‘*ratio-decidendi*’ of a judicial decision. The Hon’ble Supreme Court in the case of ***Union of India v. Dhanwanti Devi reported as (1996) 6 SCC 44*** (Para 9) has held that:-

- (a) Every decision contains three basic postulates:-
 - (i) Findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts.
 - (ii) Statements of the principles of law applicable to the legal problems disclosed by the facts.

- (iii) Judgment based on the combined effect of the above.
- (b) *A decision is only an authority for what it actually decides. What is of the essence in a decision is its 'ratio-decidenti' and not every observation found therein nor what logically follows from the various observations made in the judgment.* Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its '*ratio-decidenti*' and not every observation found therein.
- (c) It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the '*ratio-decidenti*'.

A copy of Hon'ble Supreme Court's Judgment in the case of *Union of India v. Dhanwanti Devi* reported as (1996) 6 SCC 44, is annexed hereto and marked as **Annexure- P-1**.

7. The position of law relating to '*ratio-decidenti*'¹ are summarized hereunder:-

- (a) '*Ratio-decidenti*' must be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law (statutory or judge made) and a minor premise consisting of the material facts of the case under consideration.
- (b) '*Ratio-decidenti*' of a judgment has to be found out only on reading the entire judgment. It is not advisable to pick up a line / observation from here and there from the judgment. *One additional or different fact can make a world of*

¹ These principles are called out of:

(a) *Quinne v. Leathem*: 1901 AC 495: HL (at pg. 506); (b) *Ambica Quarry Works*: (1987) 1 SCC 613 (Para 18); (c) *Krishena Kumar v. Union of India*: (1990) 4 SCC 207 (Para 19-20); (d) *State of Orissa v. Mohd Ilyas*: (2006) 1 SCC 275 (Para 12); (e) *Som Mittal v. State of Karnataka*: (2008) 3 SCC 574 (Para 9); (f) *Union of India v. Amrit Lal Manchanda*: (2004) 3 SCC 75 (Para 15); (g) *Regional Manager v. Pawan Kumar Dubey*: (1976) 3 SCC 334 (Para 7); (h) *Bharat Petroleum Corporation Ltd. & Anr. Vs. N.R. Vairamani and Anr.*: AIR 2004 SC 4778 (Para 9 and 11); (i) *State of Punjab v. Baldev Singh*: (1999) 6 SCC 172 (Para 3); (j) *Dr. Rajbir Singh Dalal v. Chaudhari Devi Lal University, Sirsa and Anr.*: (2008) 9SCC 284 (Para 34 to 41); and (k) *Arasmeta Captive Power Co. (P) Ltd. v. Lafarge India (P) Ltd.*: (2013) 15 SCC 414 (Para 31 to 41).

difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

- (c) A decision often takes its colour from the question involved in the case in which it was rendered. *The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation.*
- (d) The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. *Statements which are not part of the 'ratio-decidenti' or casual remarks/ observations/ directions without laying down any principle of law and without giving any reason are considered as obiter dicta and do not amount to precedent.* The task for finding the principle is fraught with difficulty as *without an investigation into the facts, it cannot be assumed whether a similar decision / direction must or ought to be made as a measure of social justice.*
- (e) *No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law.*

Copies of the leading Judgments are annexed hereto and marked as **Annexure- P-2 (Colly)**.

8. It is a settled principle of law that an '*obiter dictum*' as distinguished from a '*ratio-decidenti*' is *an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision.* The *obiter dicta does not have a binding precedent*². Copies of the Judgments are annexed hereto and marked as **Annexure- P-3 (Colly)**.

Re: Segregating Ratio & Obiter and findings from observations in APTEL judgement dated 28.11.2014

9. It is submitted that the Cross Appeals filed by Tata Power and R-Infra challenged this Hon'ble Commission's Order dated 22.08.2012 in Case No. 151 of 2011, including certain restrictions on Tata Power regarding:-

- (a) Category of consumers to which Tata Power could supply electricity utilizing R-Infra's network.
- (b) Laying down network by Tata Power to meet its Universal Service Obligation in its entire area of supply.

² Please see:

(a) *State of Haryana v. Ranbir*: (2006) 5 SCC 167 (Para 12-15); and (b) *Ratanlal Nahata v. Nandita Bose*: 1998 SCC OnLine Cal 201: AIR 1999 Cal 29 (5 Judge Bench) (Para 134-144).

10. The directions of this Hon'ble Commission in its Order dated 22.08.2012 in Case No. 151 of 2011, against which Cross-Appeals were preferred by Tata Power and R-Infra are as under:-

"..96. Based on all the analysis of all the above issues, the Commission has come to the conclusion that there is a need to intervene in the manner of changeover and switchover of consumers, as being undertaken by the Parties, and there is a need to calibrate the migration of consumers from one Licensee to another, in order to ensure a level playing field and also to protect the interests of low-end consumers being supplied electricity in the Common Area of supply between Rlnfra-D and TPC-D. Accordingly, the Commission hereby modifies the interim Order in Case No. 50 of 2009, under Section 94(2) of the EA 2003, as under:

- a) ***Prospectively, from the date of this Order, consumer changeover will be allowed from Rlnfra-D to TPC-D only for the residential category of consumers and that too only for the consumers who consume electricity upto 300 units a month.***
- b) *For the purpose of identifying the target segment for consumer changeover, only those residential category consumers whose 'average' monthly consumption over the previous 12 months (as on date of submitting the application and as captured in the last paid monthly bill of Rlnfra-D) is upto and including 300 units per month, shall be eligible to changeover from Rlnfra-D to TPC-D.*
- c) *The above restriction shall not apply to pending applications for changeover (as on date of this (as on date of this Order), irrespective of consumer category and consumption slab, which will be processed as per the earlier protocol approved in the interim Order dated October 15, 2009, and changeover for eligible consumers shall be done in a smooth manner.*
- d) *This restriction of changeover being restricted to residential consumers with average electricity consumption of upto 300 units a month, shall be in force for a period of one year from the date of this Order, and the Commission will review the status of changeover and switchover and new connections added in the identified areas during this period, before deciding on the forward path for the period beyond one year.*
- e) *For all changeover consumers who have changed over before the date of this Order or who have already applied before the date of this Order and are eligible for changeover, the supply will be given by TPC-D using the network of RlnfraD, till such time as TPC-D develops its own distribution network in the area.....*
- i) ***Switchover of consumers from Rlnfra-D to TPC-D network is allowed for existing changeover consumers and all consumers who have already applied and are eligible for changeover, for all consumer categories, from the date of laying distribution network in the Common Licence Area. This has been explained in greater detail in the subsequent paragraphs.***
- j) *All existing and future changeover consumers, who have changed over from Rlnfra-D to TPC-D and all existing direct consumers of TPC-D, can changeover from TPC-D to Rlnfra-D, in accordance with the protocol approved by the Commission in the interim Order dated October 15, 2009 in Case No. 50 of 2009.*
- k) *The above dispensation, to be in force for the next one year from the date of this Order...*

....
98. Accordingly, the Commission hereby issues the following **directions to TPC-D regarding the network roll out plan and capital expenditure to be undertaken over the next one year from the date of this Order:**

- a) *TPC-D will have to focus all its energies and capital expenditure and ensure that by the end of one year from the date of this Order, **TPC-D has rolled out its entire distribution network in the 11 Clusters identified above** (to be redrawn into a Municipal Ward-wise Plan by TPC-D) **in such a manner that it is in a position to provide supply through its own distribution network to existing and prospective consumers located anywhere within these Clusters, within the minimum time period of one month specified under the MERC SOP Regulations.....***
- c) *Further, the Commission has already granted in-principle approval to capital expenditure schemes to be undertaken over the next 2-3 years. In view of the above direction to redraw the Cluster based Plan into a Ward-wise Plan, such that the 11 Clusters identified by the Commission are covered in the first Phase, TPC-D has to re-arrange the Plan such that the schemes covering the 6 Clusters overlapping between TPC-D's proposed Plan and those identified by the Commission (Mira Road, Dahisar, Kurla LBS, Saki, Mindspace, Trombay, Mankhurd Chembur, Vrindavan, Arogyanidhi, Vasantotsav, and Malad BMC Lagoon) are covered, and the balance schemes are designed for the remaining Clusters. ..."*

11. The Hon'ble Tribunal in its Judgment dated 28.11.2014 framed and decided the following issues (please see para 5):-

- (a) Whether Tata Power had indulged in "Cherry Picking" of changeover consumers who were supplied electricity on R-Infra's network?
- (b) Whether Tata Power has laid down network selectively to serve high end subsidizing consumers ignoring low end consumers in the proximity?
- (c) Whether this Hon'ble Commission had power to issue the impugned directions to Tata Power under Section 23 of the Electricity Act?
- (d) Whether this Hon'ble Commission has erred in continuing the interim arrangement for supplying electricity to changeover consumers using R-Infra's network permitted by its order dated 15.10.2009?

12. The findings, observations and/ or directions of the Hon'ble Tribunal are to be read in the context of the facts of the said case (Case No. 151 of 2011) and issues framed by the Hon'ble Tribunal and not otherwise. As is evident from the facts of that case, the issue before the Hon'ble Tribunal was whether:-

- (a) This Hon'ble Commission had authority to impose restrictions upon Tata Power as regards servicing only a particular class of consumer? If so whether this Hon'ble Commission followed the mandatory procedure prescribed under the Electricity Act to do so?
- (b) Tata Power had selectively chosen the consumers it intended to supply power on its network and accordingly laid down the said network?

The findings and directions returned by the Hon'ble Tribunal in its Judgment dated 28.11.2014 regarding each of the issues framed are discussed below.

I Whether Tata Power has indulged in “Cherry Picking” of changeover consumers supplied electricity on R-Infra’s network?

13. Re: Findings of Hon'ble Tribunal

- (a) Complete reading of the application form would show that PAN card and Mobile number are not mandatory *and their inclusion in the application form would not lead to the conclusion that Tata Power was cherry-picking the changeover consumers.* [Para 17, 24 and 80(i) of the Judgment]
- (b) *The consumer has to ultimately decide the distribution licensee from whom it wants to take the supply.* The consumer would normally choose the licensee primarily on the basis of tariff and reliability of supply. *For changeover consumer the reliability of supply is the same irrespective of whether the supply is from R-Infra or Tata Power. Therefore, the tariff alone is the criteria for the consumer to decide the changeover.* [Para 23 of the Judgment]
- (c) *By putting restriction on some categories of consumers to changeover to Tata Power, this Hon'ble Commission has denied choice to certain categories of consumers to avail supply at cheaper tariff to which they are entitled as per the scheme of the Electricity Act and also as per the changeover protocol devised by this Hon'ble Commission.* [Para 24 of the Judgment]
- (d) The movement of consumers from one licensee to other licensee in the same area of supply would be on account of tariff differential between both the Licensees. *The tariff fixed by this Hon'ble Commission is ultimately deciding the trend of movement of consumers and in no way can be termed as ‘cherry picking’ by Tata Power.* [Para 25 & 26 of the Judgment]

14. Re: Directions of the Hon'ble Tribunal

- (a) Tata Power is directed to keep record of the category wise applications received for changeover (0-300 Units residential may be a separate category) applications rejected with reason for rejection (category-wise), category wise changeover allowed and post the same on its website quarterly.

- (b) Tata Power is also directed to give a public notice regarding documents required for changeover application clearly indicating that PAN no. is not mandatory. **[Para 31 and 80(i) of the Judgment]**

15. It is stated that the rest of the discussions are passing observations which has no binding effect.

II Whether Tata Power has laid down network selectively to serve high end subsidizing consumers ignoring low end consumers in the proximity?

16. *Re: Findings of the Hon'ble Tribunal*

- (a) Merely because Tata Power has not switched over the subsidized residential changeover consumers in the vicinity of its network, it does not establish conclusively that Tata Power is selectively laying its network for high end consumers. However, such possibility is also not completely ruled out. **[Para 49, 50 and 80(ii) of the Judgment]**
- (b) In the circumstances of the present case *where a reliable distribution system of R-Infra is already existing AND physical constraints in laying down of network by Tata Power AND very high cost involved in the same*, it is in the overall interest of consumers of Tata Power and R-Infra that the changeover consumers continue to get supply from Tata Power on the R-Infra's network. It will also be convenient and economical for the consumer to changeover back to R-Infra in case R-Infra's tariff becomes more attractive in future. **[Para 56 of the Judgment]**
- (c) Consumer interest is one of the main features of the Electricity Act. It is also to be ensured that no undue commercial advantage is gained by Tata Power by selectively laying down network to cater to only high end consumers. The interest of R-Infra has to be safeguarded to avert any cherry picking by Tata Power for switchover consumers. **[Para 57 of the Judgment]**
- (d) Where Tata Power has already laid down its network and some consumers have switched over from R-Infra to Tata Power, *these consumers can remain with Tata Power. However, they can choose to switch over to R-Infra in future* on R-Infra's existing network as per the *switch over protocol to be decided by this Hon'ble Commission*. **[Para 60 of the Judgment]**
- (e) This Hon'ble Commission shall consider to give approval for laying down of network by Tata Power only in areas where there are distribution constraints

AND *laying down of a parallel network by Tata Power will improve reliability of supply* AND benefit the consumers, only after hearing R-Infra and the consumers. [Para 61 of the Judgment]

- (f) *Tata Power can supply power to the existing consumers of R-Infra* irrespective of category of consumer on the request of the consumers only *through R-Infra's network by paying the necessary wheeling charges as well as the other compensatory charges* including the cross subsidy charges to R-Infra. [Para 61 of the Judgment]

- (g) Directions issued by this Hon'ble Commission in its Order dated 22.08.2011 in Case No. 151 of 2011 are set aside. [Para 80(v) of the Judgment]

17. ***Re: Directions of the Hon'ble Tribunal***

- (a) Tata Power is directed to *provide its network roll-out plan for approval of this Hon'ble Commission*. The Rollout Plan of Tata Power is to be approved by this Hon'ble Commission *only after hearing R-Infra and the consumers*. In the meantime *Tata Power is restrained to lay down its distribution network in the area common to R-Infra till further orders of this Hon'ble Commission on its Rollout Plan* as per the directions given in the said Judgment. However, Tata Power can supply power to the existing consumers of R-Infra irrespective of the category of consumer on the request of the consumers only through R-Infra's network by paying necessary wheeling charges as well as the other compensatory charges including the cross subsidy charges to R-Infra. [Para 58, 59 and 61 of the Judgment]
- (b) Areas *where Tata Power has already made considerable investment in constructing the distribution system in pursuance of the directions of this Hon'ble Commission in Case No. 151 of 2011, it should be allowed to be commissioned and capitalized, to feed the consumers as decided by this Hon'ble Commission*. Tata Power may submit a proposal to this Hon'ble Commission in this regard which this Hon'ble Commission shall consider and decide after hearing the concerned parties including R-Infra. [Para 59 of the Judgment]
- (c) There is no *restriction on Tata Power or R-Infra to lay network for supply to new connections*. [Para 61 of the Judgment]
- (d) R-Infra shall not lay network in any area where only Tata Power's network is existing and use Tata Power's network for changeover of consumers, if any,

till further orders by this Hon'ble Commission, *except for extending supply to new connections*. [Para 61 of the Judgment]

- (e) *Switchover and Changeover protocol* is to be decided by the Commission. This Hon'ble Commission has been directed to devise a suitable protocol in this regard after following due procedure. This may require change in licence condition of the *licensees* which this Hon'ble Commission shall decide after following due procedure as per law. [Para 61 and 80(iii) of the Judgment]

18. It is stated that the rest of the discussions are passing observations which has no binding effect.

III Whether the this Hon'ble Commission had power to issue the impugned directions to Tata Power under Section 23 of the Electricity Act, 2003?

19. *Re: Findings of the Hon'ble Tribunal*

- (a) The conditions/ restrictions imposed by this Hon'ble Commission qua geographical area and category of consumers to which Tata Power is entitled to supply power within its area of supply, amounts to amendment of licence condition of Tata Power. [Para 67 of the Judgment]
- (b) The restrictions imposed by this Hon'ble Commission have denied other consumers from exercising their choice of supplier guaranteed by the Electricity Act. [Para 73 of the Judgment]

IV Whether this Hon'ble Commission has erred in continuing the interim arrangement for supplying electricity to changeover consumers using R-Infra's network permitted by the Commission by order dated 15.10.2009?

20. *Re: Findings of the Hon'ble Tribunal*

- (a) It is perfectly legal for the consumers to changeover from one licensee to another using the network of one of the licensees and, therefore, there is no illegality in continuation of the directions of this Hon'ble Commission in the order dated 15.09.2009 regarding changeover to Tata Power using R-Infra's network. However, R-Infra is entitled to charge from changeover consumers wheeling charges and other compensatory charges including the cross subsidy charges as decided by this Hon'ble Commission from time to time as per law.

Re: Directions of the Hon'ble Tribunal

- (a) The Commission is also directed to lay down a detailed changeover protocol after hearing the concerned parties. [**Para 77 and 80(vi) of the Judgment**]

Re: Submissions on the Judgement dated 28.11.2014 re. R-Infra and Tata Power

21. The Hon'ble Tribunal is a creation of statute and has to function within the four corners of the Electricity Act. The Hon'ble Tribunal cannot amend and/ or modify the provisions of the Electricity Act. The validity and/or vires of the provisions of the Electricity Act can only be tested by courts having powers of judicial review, which is not vested upon the Hon'ble Tribunal by the legislature.

22. It is submitted that while deciding the issues at hand, the observations and/ or findings of the Hon'ble Tribunal were returned in the given facts and circumstances, i.e., congestion of Mumbai and difficulties experienced by Tata Power in physically laying network in Mumbai due to its peculiar topography and growth pattern. The Hon'ble Tribunal did not:-

- (a) Declare the law on Universal Service Obligation in terms of the Electricity Act when there was no occasion for it to consider and decide the said question.
- (b) Decide the factual aspects of reliability or lack of it in R-Infra's network.

23. It is our considered view that the Hon'ble Tribunal has left the decision qua development of the network with multiple licensees in the licensed areas for the consideration of this Hon'ble Commission while approving the Network Rollout Plan of Tata Power and/ or further development/ augmentation of the R-Infra's network. These guidelines have been laid down by the Hon'ble Tribunal given the facts of the case so as to strike a balance between development of an efficient, coordinated and economical distribution system; the choice of the consumer; and the Universal Service Obligation of the distribution licensee to supply in a viable manner. In this regard, the following are noteworthy:-

- (a) The provisions of the Electricity Act. [**Sections 14, 42 and 43 of the Electricity Act**]
- (b) MERC (General Conditions of Distribution Licence) Regulations, 2006. [**Regulation 8.3.1, 8.3.2, 8.3.6, 8.3.10, 8.7.1**]
- (c) Specific Conditions in Distribution Licence No.1 of 2014. [**Condition No. 1 and 2**]
- (d) Judgment of Hon'ble Supreme Court in *MCGM Vs. MERC & Ors*: (2015) 2 SCC 438. [**Para 26-31**].

- (e) Judgment of Hon'ble Supreme Court in *Tata Power Company Limited Vs. Reliance Energy Limited and Ors.*: (2008) 10 SCC 321. [**Paras 99, 100, 103 and 105**]

24. From the perusal of the aforesaid statutory provisions read with the Hon'ble Tribunal's Judgment dated 28.11.2014, the following is noteworthy:-

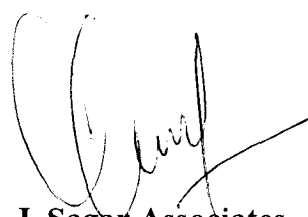
- (a) Protection of consumer interest is paramount in terms of the statutory framework. The consumer has to ultimately decide the distribution licensee from whom he wishes to avail supply. The consumer has the choice to elect both its source of supply (choose the distribution licensee from whom he wishes to avail to supply) as well as the mode of supply (option of open access under Section 42 or avail supply under Section 43 of the Electricity Act). The consumer has a choice whether it wishes to avail supply from a distribution licensee through its own distribution network (Section 43 of the Electricity Act) or from another distribution licensee/ other source from the network of any other distribution licensee (Section 42 of the Electricity Act).
- (b) Distribution licensee is required to develop and maintain an efficient, coordinated and economical distribution system in its area of supply.
- (c) The Hon'ble Tribunal has laid down certain guidelines for the consideration of this Hon'ble Commission while approving Tata Power's Network Rollout Plan. The Hon'ble Tribunal in its Judgment dated 28.11.2014 finds that parallel network should be laid only if:-
 - (i) There is no reliable distribution network of a licensee existing in a particular area; AND
 - (ii) There are no physical constraints in laying down of any new network; AND
 - (iii) It is in consumer interest; AND
 - (iv) It improves reliability of the supply.
- (d) There is no restriction on laying of parallel network, if such network is laid down:-
 - (i) To supply to new consumers/ connection;
 - (ii) To cater to the demand made by an existing consumer; or
 - (iii) In consumer interest.

(e) This Hon'ble Commission cannot restrict supply to a particular class of consumers given the Universal Service Obligation of the distribution licensee.

25. It is submitted that, Tata Power prays that the present submissions be taken on record. Tata Power reserves its right to file additional affidavit(s) to place on record any other information sought by this Hon'ble Commission and/ or required for the consideration of the present matter.

**The Tata Power Company Limited/
Petitioner**

Through:



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Date: August 19, 2015

Place: Mumbai

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BEST Undertaking & Ors.

... Respondents

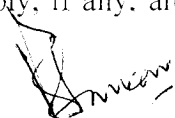
AFFIDAVIT

I, Mr. Bhaskar Sarkar, son of Mr. Arup Kumar Sarkar, aged 49 years, Head Business & Regulations (Mumbai Operation) of The Tata Power Company Limited ("**Petitioner/ Tata Power**"), having my office at Dharavi Receiving Station, Near Shalimar Industrial Estate, Matunga, Mumbai 400 019, Maharashtra, India, do hereby state on solemn affirmation as under:-

1. I state that I am the authorized signatory of Tata Power, the Petitioner, in the present Petition and as such I am fully conversant with the facts and circumstances of the present case and I am duly authorized and competent on behalf of Tata Power to swear and affirm this Affidavit.

2. I state that I have read and understood the accompanying Submissions with regard to observations and findings of the Hon'ble Tribunal in its Judgment dated 28.11.2014 in Appeal No. 246 of 2012 and batch, in the captioned Petition and the same has been drafted under my instructions and after carefully going through the same, I state that the content of the same are true and correct to my knowledge and belief and it is stated that no part of it is false and nothing material has been concealed there from.

3. I state that the annexures along with the accompanying Reply, if any, are true copies of their respective originals.



DEPONENT

VERIFICATION

I, the deponent above named, do hereby verify that the contents of my above Affidavit are true and correct, no part of it is false and nothing material has been concealed therefrom.

Verified at Mumbai on this 19 day of August, 2015.



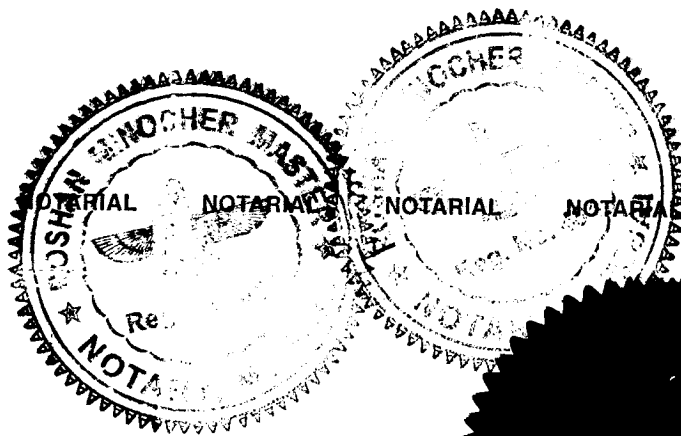
DEPONENT

Be pie me:
R M Master

MS. ROSHAN M. MASTER
NOTARY, GREATER BOMBAY
2403, ORCHID TOWER A
BELLAS ROAD,
MUMBAI - 400 008.

Reg. No. 404

S. no 12335
19.8.2015



NOTARIAL

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Section 309 IPC from the vice of being unconscionably harsh, thereby making it wholly arbitrary and unreasonable. It has been indicated by the Constitution Bench that in an appropriate case, even fine can be imposed for offence under Section 309 IPC and incidents have been cited where law courts in India have awarded nominal punishment and have even given the benefit of Probation of Offenders Act, 1958 to the accused convicted for offence in attempting to commit suicide. a

6. Considering the serious ailments which the respondent was suffering from, it appears to us that it will not be desirable to proceed further with the trial of the said criminal case initiated against the accused for the alleged offence to commit suicide after such a long lapse of time. In the facts of the case, even if he is found guilty after the completion of trial, the respondent deserves to be treated very sympathetically in the matter of awarding punishment for the said offence alleged against him. In the special facts of the case, we do not think that the respondent deserves to be subjected to trial for the aforesaid offence after such a distant time when even if the prosecution case is proved beyond reasonable doubt, the accused deserves a very lenient sentence of nominal fine. In order to do complete justice, in the facts of the case, we direct for quashing the said criminal case against the respondent. b c d

(1996) 6 Supreme Court Cases 44

(BEFORE K. RAMASWAMY, S. SAGHIR AHMAD AND G.B. PATTANAIK, JJ.)

UNION OF INDIA AND OTHERS . . . Appellants;

Versus

DHANWANTI DEVI AND OTHERS . . . Respondents. e

Civil Appeal No. 11359 of 1996†, decided on August 21, 1996

A. Land Acquisition and Requisition — Jammu and Kashmir Requisitioning and Acquisition of Immovable Property Act, 1968 (15 of 1968) — Ss. 7 and 8 — Requisitioning and Acquisition of Immovable Property Act, 1952 — Ss. 7 and 8 — Solatium and interest — Acquisition of property which is subject to prior requisition and is in possession of the Government — Absence of provision in the Act for payment of solatium and interest — Held, omission being deliberate owner is not entitled to solatium and interest — Interest on equitable consideration cannot be allowed if the statute under which the property was acquired expresses a contrary intention — Ratio in *Hari Krishan Khosla case* not in conflict with ratio in *Satinder Singh case* — Nor does the former have the effect of overruling the latter — Land Acquisition Act, 1894, Ss. 23(1-A) & (2), 28 and 34 f g

B. Equity — Right to receive interest in lieu of possession of immovable property taken away by compulsory acquisition is an equitable right — However, when the statute under which the property was acquired expresses a contrary intention no interest can be awarded h

† From the Judgment and Order dated 29-9-1992 of the Jammu and Kashmir High Court in C.I.M.A. No. 72 of 1988

a The act of taking possession of immovable properties generally implies an agreement to pay interest on its consideration for deferred payment. In a court of equity, when the seller parts with possession of immovable property, the purchaser becomes its owner while the seller receives money as consideration in lieu of the property. The seller, therefore, is entitled to claim interest in place of his retaining possession of the property from the date the purchaser takes possession of the property till the date of payment. On this premise, claim for interest is sought against the State when it exercises its power of eminent domain and acquires the property of a citizen for public purpose. This principle was extended in equity to recompensate the owner for deprivation of his possession and enjoyment thereof in accordance with law. It was, therefore, held in equity that the owner is entitled to interest on the principal amount of award from the date of taking possession unless the statute under which the land was acquired expresses its contrary intention. It is on this premise that the right to receive interest takes the place of right to retain possession and its enjoyment. It is equally settled law that equity operates where statute does not occupy the field. Conversely, when the statute occupies the field equity yields place to the statute. (Para 11)

b The question, therefore, is whether the Jammu and Kashmir Act expresses any intention to exclude payment of interest and solatium in respect of the property acquired thereunder? Land Acquisition Act, 1894 provides for payment of interest under Section 34 by the Land Acquisition Officer and by the court under Section 28. Similarly, Section 23(2) provides for payment of solatium, in addition to compensation, in consideration of compulsory acquisition. The Jammu and Kashmir Legislature was aware of the above provisions and principles of determination of the compensation under the Acquisition Act. Yet, the legislature departed from those principles; instead, it set down under the Act its own principles to determine the compensation. The Jammu and Kashmir Act did not expressly provide for payment of interest and solatium as components of compensation under the Act. (Paras 12 and 13)

c The Central Act of 1952 equally does not provide for payment of solatium and interest. The Jammu and Kashmir Act was passed in the year 1968 while the Central Act of 1952 was passed in 1952. It would, therefore, be reasonable to conclude that the State Legislature was cognizant of the express provisions for payment of interest and solatium available in the Land Acquisition Act. The Jammu and Kashmir Act omitted similar provisions for payment of interest and solatium as part or component of compensation, obviously to fall in line with the Central Act of 1952. (Para 14)

d It would be seen that sub-section (2) of Section 23 of the Land Acquisition Act expressly states that solatium is "in addition" to the compensation as consideration for compulsory nature of acquisition. The Jammu and Kashmir Act omitted to pay solatium and interest, in addition to compensation. The omission by the legislature is deliberate. Therefore, the owners are not entitled to solatium and interest under the Jammu and Kashmir Act of 1968. (Para 17)

e *Union of India v. Hari Krishan Khosla*, 1993 Supp (2) SCC 149; *Union of India v. Distt. Judge*, (1994) 4 SCC 737 : JT (1994) 3 SC 629; *Prem Nath Kapur v. National Fertilizers Corpn. of India Ltd.*, (1996) 2 SCC 71, followed

f *Prabhu Dayal v. Union of India*, 1995 Supp (4) SCC 221; *National Insurance Co. Ltd. v. LIC*, 1963 Supp (2) SCR 971 : AIR 1963 SC 1171 : (1963) 33 Comp Cas 513; *Harbans Singh Shanni Devi v. Union of India*, CAs Nos. 470-71 of 1985, decided on 11-02-1985, distinguished

g *Satinder Singh v. Amrao Singh*, (1961) 3 SCR 676 : AIR 1961 SC 908, explained and distinguished

R.B. Lala Narsingh Das v. Secy. of State for India, AIR 1925 PC 91 : 52 IA 133 : 29 CWN 822; *Raghubans Narain Singh v. U.P. Govt.*, (1967) 1 SCR 489 : AIR 1967 SC 465; *Prithvi Raj Taneja v. State of M.P.*, (1977) 1 SCC 684 : (1977) 2 SCR 633; *Joginder Singh v. State of Punjab*, (1985) 1 SCC 231 : (1985) 1 SCR 682; *Birmingham City Corpn. v. West Midland Baptist (Trust) Assn. (Incorporated)*, (1969) 3 All ER 172 : (1969) 3 WLR 389 : 1970 AC 874; *CST v. Pine Chemicals Ltd.*, (1995) 1 SCC 58; *Yanamadala Coop. Labour Contract Society Ltd. v. Asstt. Director of Mines & Geology*, AIR 1984 AP 270; *Pertiyar & Pareekanni Rubbers Ltd. v. State of Kerala*, (1991) 4 SCC 195; *Nagpur Improvement Trust v. Vithal Rao*, (1973) 1 SCC 500; *P.C. Goswami v. Collector of Darrang*, (1982) 1 SCC 439; *State of Kerala v. T.M. Peter*, (1980) 3 SCC 554, referred to

[Ed. . It has been observed in para 10 that in *Hari Krishna Khosla case* it was held that solatium and interest are not a part of compensation and that the finding that solatium and interest are not payable for the lands acquired under the Central Act of 1952 as part of compensation is a binding precedent. Again in para 17 it has been laid down that "It would be seen that sub-section (2) of Section 23 of the Acquisition Act expressly states that solatium is 'in addition' to the compensation as consideration for compulsory nature of acquisition". With respect, the above observation appears to be based on misreading of sub-section (2) of Section 23 of the Land Acquisition Act, 1894. Sub-section (2) states that solatium is "in addition to the market value of the land". Market value is one of components of the compensation.]

C. Land Acquisition and Requisition — Jammu and Kashmir Requisitioning and Acquisition of Immovable Property Act, 1968 (15 of 1968) — Preamble, Ss. 7 and 8 — Absence of provision for payment of solatium and interest — Held, does not render the Act violative of Art. 14 — Act not violative of even Art. 31 as applicable to Jammu and Kashmir — Denial of solatium and interest in respect of property acquired under the Act could not be an unjust enrichment of the State — Concept of unjust enrichment explained — Constitution of India, Arts. 14 and 31 — Unjust enrichment

The public money is credited to the Consolidated Fund of India which is expended in accordance with the Appropriation Bill passed by Parliament or the State Legislature in accordance with the provisions of the Constitution. The amount collected would be expended for the purposes of appropriation and for implementation of the Directive Principles of State policy and the law made by the appropriate legislature or the executive policy in furtherance thereof. Therefore, the non-payment of solatium and interest does not independently get into the coffers of the public exchequer nor does the State enrich itself. The public money is expended only for public purpose. The concept of unjust enrichment by the State is alien to and in derogation of the constitutional scheme and public policy. The general principle is that one should not be permitted to unjustly enrich himself at the expense of others. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belongs to another. Three elements must be established in order to sustain a claim based on unjust enrichment, the benefit conferred upon the defendant by the plaintiff; appreciation of knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. These principles specifically absent in the case of omission by a statute, are made by the competent legislature to award interest or solatium, in addition to compensation. So, it cannot be characterised as unjust enrichment where such action does not involve violation of law or is not opposed to public policy either directly or indirectly when the statute prescribes the principle for payment of compensation and omits as its policy to provide for the payment of interest and solatium as components of compensation. It is the legislative public policy to provide for acquisition of the private property for a public purpose. The

- a State pays compensation for the acquired land in accordance with the principle laid down in the statute. It would, therefore, be illogical to contend that by legislative omission to pay solatium and interest the State enriches itself unjustly at the expense of the private person. (Para 19)

Union of India v. Hari Krishan Khosla, 1993 Supp (2) SCC 149, followed

- b **D. Land Acquisition and Requisition — Jammu and Kashmir Requisitioning and Acquisition of Immovable Property Act, 1968 (15 of 1968) — Ss. 7 and 8 — Acquisition of requisitioned property — Compensation — Principle for determination of — Requisitioning and Acquisition of Immovable Property Act, 1952, Ss. 7 and 8**

- c In determining compensation in respect of the acquired property, which is the subject-matter of prior requisition and was in possession of the Government, the principle for determination of compensation is as per the bilateral agreement between the owner and the Government. Where it was not effectuated and no agreement was reached, the arbitrator is empowered to determine the compensation which the requisitioned property would have fetched in open market, if it had remained in the same condition as it was at the time of its requisition but the prevailing price should be as on the date of acquisition. Had it been sold in the open market to a willing purchaser by a willing vendor, the price offered by a willing purchaser in the open market would be the yardstick. The arbitrator, therefore, is kept in the armchair of a willing purchaser and should consider the circumstances attending the requisitioned property. Had it remained with the owner in the same condition as it was at the time of its requisition and if it were to be sold on the date of acquisition in that condition, the price a willing purchaser would offer would be just and fair compensation under the Act. (Para 13)

- e **E. Constitution of India — Art. 141 — Precedent — What constitutes — Only essence of the decision and its ratio is binding and not every observation found therein — Every decision must be read as applicable to the particular facts proved — A precedent by long recognition matures into rule of stare decisis**

- f It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*. According to the well-settled theory of precedents, every decision contains three basic postulates—(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract *ratio decidendi*, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that

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is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of *stare decisis*. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its *ratio decidendi*. (Para 9)

Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents. (Para 10)

S-M/T/16683/C

Advocates who appeared in this case :

- A.S. Nambiar, Senior Advocate (Wasim Qadri and Ms Sushma Suri, Advocates, with him) for the Appellants;
- D.D. Thakur, Senior Advocate (E.C. Agarwala and Atul Sharma, Advocates, with him) for Respondent I.
- C.S. Vaidyanathan, Senior Advocate (R.P. Singh, Shivram, Suman Kapoor and Ms Meenakshi Arora, Advocates, with him) for the Respondent.

Chronological list of cases cited

on page(s)

1. (1996) 2 SCC 71, *Prem Nath Kapur v. National Fertilizers Corpn. of India Ltd.* 57c-d d
2. (1995) 1 SCC 58, *CST v. Pine Chemicals Ltd.* 51a
3. 1995 Supp (4) SCC 221, *Prabhu Dayal v. Union of India* 51a, 56f-g
4. (1994) 4 SCC 737 : JT (1994) 3 SC 629, *Union of India v. Distt. Judge* 49f-g, 53a-b, 57d-e
5. 1993 Supp (2) SCC 149, *Union of India v. Hari Krishan Khosla* 49g, 51a-b, 51b, 51b-c, 51c, 51e-f, 52f, 53b, 53b-c, 53d, 56a, 56g, 57a-b, 57b, 57b-c, 57c, 57d, 57e-f e
6. (1991) 4 SCC 195, *Periyar & Pareekanni Rubbers Ltd. v. State of Kerala* 51a
7. (1985) 1 SCC 231 : (1985) 1 SCR 682, *Joginder Singh v. State of Punjab* 50g
8. AIR 1984 AP 270, *Yanamadala Coop. Labour Contract Society Ltd. v. Assstt. Director of Mines & Geology* 51a
9. (1982) 1 SCC 439, *P.C. Goswami v. Collector of Darrang* 51a f
10. (1980) 3 SCC 554, *State of Kerala v. T.M. Peter* 51a-b
11. (1977) 1 SCC 684 : (1977) 2 SCR 633, *Prithvi Raj Taneja v. State of M.P.* 50g
12. (1973) 1 SCC 500, *Nagpur Improvement Trust v. Viithal Rao* 51a
13. (1969) 3 All ER 172 : (1969) 3 WLR 389 : 1970 AC 874, *Birmingham City Corpn. v. West Midland Baptist (Trust) Assn. (Incorporated)* 50g-h
14. (1967) 1 SCR 489 : AIR 1967 SC 465, *Raghubans Narain Singh v. U.P. Govt.* 50g g
15. 1963 Supp (2) SCR 971 : AIR 1963 SC 1171 : (1963) 33 Comp Cas 513, *National Insurance Co. Ltd. v. LIC* 56a-b
16. (1961) 3 SCR 676 : AIR 1961 SC 908, *Satinder Singh v. Amrao Singh* 50b, 51a-b, 51b-c, 53b-c, 53c-d, 53d, 55f, 56a, 56e
17. AIR 1925 PC 91 : 52 IA 133 : 29 CWN 822, *R.B. Lala Narsingh Das v. Secy. of State for India* 50g h
18. CAs Nos. 470-71 of 1985, decided on 11-02-1985, *Harbans Singh Shanni Devi v. Union of India* 56g

The Judgment of the Court was delivered by

K. RAMASWAMY, J.— Application for impleadment allowed.

a

2. Leave granted.

3. This appeal by special leave arises from the judgment and order dated 29-9-1992 passed by the High Court of Jammu and Kashmir in CIMA No. 72 of 1988.

b

4. The only question that arises for decision in this appeal is whether the respondents are entitled to solatium and interest under the Jammu and Kashmir Requisitioning and Acquisition of Immovable Property Act, 1968 (15 of 1968) (hereinafter referred to as “the Act”)?

c

5. The facts in a nutshell are that land admeasuring 399 kanals and 4 marlas situated in Villages Rampur, Talwal and Goverdhan Pain was acquired for public purposes, viz., defence, by publication of notification under Section 7 of the Act on 16-10-1986. The Deputy Commissioner, Rajouri in his award dated 3-11-1986 awarded compensation @ Rs 21,000 in respect of lands situated in Villages Rampur and Talwal and Rs 10,000 per kanal in respect of land situated in Village Goverdhan Pain with 10 per cent escalation on account of passage of time. The compensation was accordingly paid but feeling dissatisfied therewith, the claimants-landowners sought reference under Section 8 of the Act to the arbitrator who by his award dated 8-3-1987 enhanced the compensation to Rs 60,000 per kanal in respect of lands in Villages Rampur and Talwal and Rs 40,000 per kanal in respect of land in Village Goverdhan Pain; he also awarded 15 per cent solatium and 4 per cent interest per annum on the enhanced compensation. When the appellants questioned the same by filing an appeal in the High Court, it by impugned judgment and order dated 29-9-1992 confirmed the same and dismissed the appeal holding that no discrimination could be made between the owners whose lands are acquired under the Land Acquisition Act, 1894 and owners whose lands are acquired under the Act and hence the arbitrator was justified in awarding solatium and interest to the landowners-respondents. Hence this appeal by special leave.

e

f

6. The admitted position is that prior to the acquisition the properties were under requisition under Section 3 of the Act. Shri Nambiar, the learned Senior Counsel for the appellant, contended that the Act did not confer power upon the arbitrator or the court to award solatium and interest. The controversy is no longer res integra as a two-Judge Bench of this Court in *Union of India v. Distt. Judge*¹ had held that the claimants are not entitled to solatium and interest under the Act. The ratio in *Union of India v. Hari Krishan Khosla*² was applied wherein the Requisitioning and Acquisition of Immovable Property Act, 1952 (for short, “the Central Act”) similarly did not provide for payment of solatium and interest. Thus, it is contended, a three-Judge Bench of this Court had held that the arbitrator and the court have no power to award solatium and interest on the enhanced compensation under the Act.

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¹ (1994) 4 SCC 737 : JT (1994) 3 SC 629

² 1993 Supp (2) SCC 149

7. On the other hand, argument of Shri Vaidyanathan, the learned Senior Counsel for the second respondent, adopted by Shri Thakur, the learned Senior Counsel for the first respondent, is that the Act is a measure of appropriation of the private property of citizens though for public purpose. When the owner is deprived of his possession and enjoyment of his property payment of solatium and interest for compulsory acquisition is integral to the compulsory acquisition. In equity, the owner is entitled to restitution for dispossession and enjoyment with interest in lieu thereof. This Court had held in *Satinder Singh v. Amrao Singh*³ that from the date of dispossession till the date of receipt of compensation it is an implied agreement to pay interest on the value of the property. The right to receive interest is in place of right to retain possession. Unless the statute specifically and expressly excludes payment of interest and solatium the landholder is entitled to the interest on the amount quantified towards compensation and solatium; denial thereof would amount to unjust enrichment by the State depriving the landholder of his land as well as right to receive compensation for the intervening period. The denial also is arbitrary and most unjust. In the State of Jammu and Kashmir, the right to property is still a fundamental right; hence, deprivation of the property without payment of solatium and interest violates an individual's fundamental right to property and, therefore, it would be arbitrary offending Article 14 of the Constitution. When an acquisition under the Land Acquisition Act, 1894 is resorted to, the claimant-owner is entitled to solatium under Section 23(2), interest under Sections 34 and 28 and additional amount under Section 23(1-A). The denial of payment of solatium and interest, therefore, is discriminatory violating Article 14 of the Constitution. The very concept of market value is a price which is agreed upon by a willing purchaser as consideration for purchase of the property from a willing seller. Compulsory purchase is a hypothetical sale. Based on the above premises, it is contended, a purchaser on taking possession of the property has to pay the entire consideration forthwith but the quantification of compensation under the Act like the Land Acquisition Act, 1894 (for short, "the Acquisition Act") takes place at hierarchical stages. Until quantification is done, the claimant-owner is entitled to interest for the interregnum between the date of taking possession and the date of determination and deposit of the compensation so determined. Applying the above principles, this Court repeatedly has held that payment of solatium and interest is an integral part of the compensation. In support thereof, Shri Vaidyanathan placed reliance on the *ratio decidendi* in *R.B. Lala Narsingh Das v. Secy. of State for India*⁴ (AIR at p. 92), *Raghubans Narain Singh v. U.P. Govt.*⁵ (SCR at p. 497), *Prithvi Raj Taneja v. State of M.P.*⁶ (SCR at p. 635), *Joginder Singh v. State of Punjab*⁷ (SCR at pp. 684-85), *Birmingham City Corpn. v. West Midland Baptist (Trust) Assn.*

3 (1961) 3 SCR 676 : AIR 1961 SC 908

4 AIR 1925 PC 91 : 52 IA 133 : 29 CWN 822

5 (1967) 1 SCR 489 : AIR 1967 SC 465

6 (1977) 1 SCC 684 : (1977) 2 SCR 633

7 (1985) 1 SCC 231 : (1985) 1 SCR 682

UNION OF INDIA v. DHANWANTI DEVI (K. Ramaswamy, J.)

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(Incorporated)⁸, *CST v. Pine Chemicals Ltd.*⁹, *Prabhu Dayal v. Union of India*¹⁰, *Yanamadala Coop. Labour Contract Society Ltd. v. Asstt. Director of Mines & Geology*¹¹, *Periyar & Pareekanni Rubbers Ltd. v. State of Kerala*¹², *Nagpur Improvement Trust v. Vithal Rao*¹³, *P.C. Goswami v. Collector of Darrang*¹⁴, *State of Kerala v. T.M. Peter*¹⁵. He further contended that in *Union of India v. Hari Krishan Khosla*² a three-Judge Bench did not consider the ratio in *Satinder Singh case*³ which is a decision of a coordinate Bench of three Judges. There is no ratio in *Hari Krishan Khosla case*²; it is only a conclusion. A conclusion does not constitute a precedent. If it is considered to be the ratio, it is inconsistent with the ratio in *Satinder Singh case*³. The ratio in *Satinder Singh case*³ does not have the effect of being overruled in *Hari Krishan Khosla case*². It is *per se per incuriam*. If a coordinate Bench disagrees with the view of an earlier coordinate Bench, the only course open to the former is to refer the matter to the larger Bench. Therefore, the decision in *Hari Krishan Khosla case*² requires reconsideration by a Constitution Bench.

8. Having considered and given anxious consideration to the respective contentions, the question arises whether the respondents are entitled to solatium and interest under the Act? It is not necessary to burden the judgment with copious references made by Shri Vaidyanathan. Suffice it to state that the State exercising the power of eminent domain is empowered to acquire, for public purposes, the property of a citizen. The compensation for the acquired property is determined according to the principles laid down in the Act under which the property came to be acquired. It is true that by process of compulsory acquisition, the owner is deprived of his possession and enjoyment and in lieu thereof compensation be awarded as per the principles laid down in the Act. The determination of the compensation is done at hierarchical stages as per law.

9. Before advertng to and considering whether solatium and interest would be payable under the Act, at the outset, we will dispose of the objection raised by Shri Vaidyanathan that *Hari Krishan Khosla case*² is not a binding precedent nor does it operate as *ratio decidendi* to be followed as a precedent and is *per se per incuriam*. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*. According to the well-settled theory of precedents, every decision contains three basic postulates—(i) findings of

g 8 (1969) 3 All ER 172 : (1969) 3 WLR 389 : 1970 AC 874

9 (1995) 1 SCC 58

10 1995 Supp (4) SCC 221

11 AIR 1984 AP 270

12 (1991) 4 SCC 195

h 13 (1973) 1 SCC 500

14 (1982) 1 SCC 439

15 (1980) 3 SCC 554

material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract *ratio decidendi*, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of *stare decisis*. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its *ratio decidendi*.

10. Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents. It would, therefore, be necessary to see whether *Hari Krishan Khosla case*² would form a binding precedent. Therein, admittedly the question that had arisen and was decided by the Bench of three Judges was whether solatium and interest are payable to an owner whose land was acquired under the provisions of the Central Act? On consideration of the facts, the relevant provisions in the Central Act and the previous precedents bearing on the topic, the Court had held that solatium and interest are not a part of compensation. It is a facet of the principle in the statute. The Central Act omitted to provide for payment of solatium and interest since preceding the acquisition the property was under requisition during which period compensation was paid to the owner. The position obtained and enjoyed by the Government during the period of requisition continued after acquisition. The same principle was applied without further elaboration on entitlement to payment of interest of an owner. It is true that

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- a the decisions relied on by Shri Vaidyanathan on the principle of payment of interest as part of compensation in respect of land acquired were brought to the attention of this Court for discussion. What would be its purport would be considered a little later. Suffice it to say for the present that the finding that solatium and interest are not payable for the lands acquired under the Central Act as part of compensation is a binding precedent. Obviously, therefore, this Court followed the ratio therein in *Distt. Judge case*¹. The contention, therefore, that *Hari Krishan Khosla case*² cannot be treated as a binding precedent since therein there is no ratio but a conclusion without discussion, is not tenable and devoid of force. In that view, it is not necessary to discuss in extenso the effect of the decisions cited by Shri Vaidyanathan. Equally, the contention of Shri Vaidyanathan that the ratio in *Hari Krishan Khosla case*² is in conflict with the ratio in *Satinder Singh case*³ which was neither distinguished nor overruled and that the decision of a coordinate Bench cannot have the effect of overruling decision of another coordinate Bench, cannot be given countenance. The effect of the ratio in *Satinder Singh case*³ will be considered a little later; suffice it to state that there is no conflict in the ratio of these two cases if the facts in *Satinder Singh case*³ are closely analysed and the principle laid down therein is understood in its proper perspective. Therefore, *Hari Krishan Khosla case*² cannot be held to be *per incuriam* nor has it the effect of overruling the ratio decidendi of *Satinder Singh case*³.
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11. Taking the question of entitlement to interest as a first question, as vehemently argued by Shri Vaidyanathan, broadly speaking, the act of taking possession of immovable properties generally implies an agreement to pay interest on its consideration for deferred payment. In a court of equity, when the seller parts with possession of immovable property, the purchaser becomes its owner while the seller receives money as consideration in lieu of the property. The seller, therefore, is entitled to claim interest in place of his retaining possession of the property from the date the purchaser takes possession of the property till the date of payment. On this premise, claim for interest is sought against the State when it exercises its power of eminent domain and acquires the property of a citizen for public purpose. This principle was extended in equity to recompensate the owner for deprivation of his possession and enjoyment thereof in accordance with law. It was, therefore, held in equity that the owner is entitled to interest on the principal amount of award from the date of taking possession unless the statute under which the land was acquired expresses its contrary intention. It is on this premise that the right to receive interest takes the place of right to retain possession and its enjoyment. It is equally settled law that equity operates where statute does not occupy the field. Conversely, when the statute occupies the field the equity yields place to the statute.
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12. The question, therefore, is whether the Act expresses any intention to exclude payment of interest and solatium in respect of the property acquired thereunder? It is not in dispute that the property was initially under requisition whereunder possession thereof was taken from the respondents. During the period of requisition the respondents received compensation. The
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quantum thereof was sought to be put in issue but since that question was neither relevant nor in issue in the courts below, we desist from going into that aspect. Under Section 7(1) of the Act, where property is subject to requisition, if the Government is of the opinion that it is necessary to acquire the property for a public purpose, it is empowered to acquire such property by making publication to that effect in the State Gazette. Preceding thereto, a prior notice of show cause should be given to the owner-claimants as to why the property should not be acquired; their objections, if any, should be considered after giving an opportunity and before deciding the same. Such an order in substance is like a declaration under Section 6 of the Acquisition Act after enquiry under Section 5-A. By operation of sub-section (2), the property vests in the Government from the date of publication in the Gazette, absolutely free from all encumbrances and the previous period of requisition of such property comes to an end. Sub-section (3) enumerates the circumstances in which the property cannot be acquired. Section 8 prescribes principles on which compensation shall be determined and given to the owner, in the manner and in accordance with the principles set out therein. Clause (a) thereof gives right to fix compensation by an agreement between the Government and the owner indicating thus:

“Where the compensation can be fixed by agreement, it shall be given in accordance with such agreement.”

Clause (b) gives alternative mode to the Government and provides that in the absence of such an agreement reached between the owner and the Government, “the Government shall appoint as arbitrator, a person, who is a District Judge or Additional District Judge”. Clause (c) provides assistance to the arbitrator in the form of a person to be nominated by the Government who has expert knowledge as to the nature of the property acquired, to assist the arbitrator as assessor in determining compensation. The principle of determination of compensation found in clause (d) is “fair amount of compensation”. Under clause (e), the arbitrator shall, after hearing the disputes, obviously wherein the Government is a party, make an award determining the amount of compensation which appears to him to be ‘just’ and specify the person or persons to whom such compensation shall be paid. In making the award, the arbitrator shall have regard to the circumstances of each case and the provisions of sub-sections (2) and (3) so far as they are applicable. Sub-section (2) deals with payment of compensation for the property requisitioned. Sub-section (3) contemplates compensation payable for the property acquired under Section 7. It envisages that the compensation payable

“shall, in the absence of an agreement, be the price which the requisitioned property would have fetched in open market, if it had remained in the same condition as it was at the time of its requisition and been sold on the date of acquisition”.

13. It would thus be seen that in determining compensation in respect of the acquired property, which is the subject-matter of prior requisition and was in possession of the Government, the principle for determination of

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- compensation is as per the bilateral agreement between the owner and the Government. Where it was not effectuated and no agreement was reached,
- a the arbitrator is empowered to determine the compensation which the requisitioned property would have fetched in open market, if it had remained in the same condition as it was at the time of its requisition but the prevailing price should be as on the date of acquisition. Had it been sold in the open market to a willing purchaser by a willing vendor, the price offered by a willing purchaser in the open market would be the yardstick. The
 - b arbitrator, therefore, is kept in the armchair of a willing purchaser and should consider the circumstances attending the requisitioned property. Had it remained with the owner in the same condition as it was at the time of its requisition and if it were to be sold on the date of acquisition in that condition, the price a willing purchaser would offer would be just and fair compensation under the Act. The Acquisition Act provides for payment of
 - c interest under Section 34 by the Land Acquisition Officer and by the court under Section 28. Similarly, Section 23(2) provides for payment of solatium, in addition to compensation, in consideration of compulsory acquisition. The presumptive evidence furnishes that the Jammu and Kashmir Legislature was aware of the above provisions and principles of determination of the compensation under the Acquisition Act. Yet, the legislature departed from
 - d those principles; instead, it set down under the Act its own principles to determine the compensation. The Act did not expressly provide for payment of interest and solatium as components of compensation under the Act.

- e 14. The question, therefore, emerges whether it is necessary for the State Legislature to expressly specify that interest or solatium shall not be payable for the lands or property acquired under Section 7(1) of the Act. *Sub silentio* is eloquent. It would further be seen that Section 8 of the Central Act equally does not provide for payment of solatium and interest. The Act was passed in the year 1968 while the Central Act was passed in 1952. It would, therefore, be reasonable to conclude that the State Legislature was cognizant of the express provisions for payment of interest and solatium available in the Acquisition Act. The Act omitted similar provisions for payment of
- f interest and solatium as part or component of compensation, obviously to fall in line with the Central Act.

- g 15. In *Satinder Singh case*³ the East Punjab Requisition of Immovable Property (Temporary) Powers Act, 1948 (48 of 1948) did not provide for any principle on which the compensation in respect of the property acquired thereunder was to be determined. Section 5(e) of that Act makes Section 23(1) of the Land Acquisition Act, 1894 specifically applicable for
- h determination of compensation. Contention raised therein was that Sections 23(2), 28 and 34 by necessary implication stood excluded. Considering the said contention, the general principle of law as regards the right to interest on the compensation of immovable property was discussed and it was held that when possession of immovable property is taken from an owner, there is a general implied agreement to pay interest on the value of the property. On this premise, the claim for interest was made against the State. Accordingly, it was held that Sections 28 and 34 providing for payment of interest and

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Section 23(2) for payment of solatium, were not excluded. The ratio, therefore, must be understood in the light of the facts found therein. Thus considered, we find that the ratio in *Hari Krishan Khosla case*² and in *Satinder Singh case*³ are not in mutual conflict nor has the former the effect of overruling the latter. The difficulty arises in understanding the ratio in proper perspective.

16. In *National Insurance Co. Ltd. v. LIC*¹ the business of insurance carried on by the appellant was nationalised under the Life Insurance Corporation Act, 1956 and stood vested in the Life Insurance Corporation of India on and from 1-9-1956, the appointed day. The dispute between the parties related to the compensation payable to the appellant-Corporation on such vesting and one of the issues was whether interest was payable on such compensation. There was no express provision for payment of interest as the life insurance business vested in the Life Insurance Corporation. The Tribunal had held that it had no jurisdiction to award interest since there was no express provision in the Act. It was conceded during the hearing in this Court that the Corporation agreed to pay interest awardable but the dispute was about the rate of interest, the amount on which it is payable and the date from which it should be given. Considering the contentions in that background, this Court had held that the property remained just where it was. The purchaser has the money in his pocket and the seller has the estate vested in him but the character changes in a court of equity; the seller becomes the owner of the money and the purchaser becomes the owner of the estate. On entering possession, the purchaser becomes entitled to the rent but if he has not paid the price, interest in equity is payable by him on the purchase price which belongs to the seller. On this principle, this Court referred with approval the ratio in *Satinder Singh case*³. In this background, it would be seen that there is no dispute as regards the principle of law on the right to receive interest on the value of the property from the date of taking possession by the purchaser from the seller when the purchase price was not paid. The question whether the landholder would be entitled to interest when the Act omitted payment thereof did not arise therein since the Life Insurance Corporation had agreed to pay interest on the value of the life insurance business of the appellant therein which vested in the Life Insurance Corporation. Therefore, the ratio in this case is also of little assistance to the facts in this case. The facts in *Prabhu Dayal v. Union of India*¹⁰ were that the property of the appellants was acquired under the Central Act but the appellants received the compensation under protest. The arbitrator was not appointed for a long period by the Government as enjoined under Section 8 of that Act to determine the market value. In *Harbans Singh Shanni Devi v. Union of India*² which was followed in *Hari Krishan Khosla case*² solatium and interest were awarded to the claimants. The question which arose for decision in these cases was as to the laches on the part of the Union of India in appointing an arbitrator to determine

1 1963 Supp (2) SCR 971 : AIR 1963 SC 1171 : (1963) 33 Comp Cas 513

2 CAs Nos. 470-71 of 1985, decided on 11-02-1985 (See 1995 Supp (4) SCC at p. 223)

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a compensation and whether the owner was disentitled to interest and solatium. This Court applied the principle of equity and directed payment of solatium and interest to recompensate loss of enjoyment of the money payable towards compensation. The ratio, therefore, is of no avail to the appellants.

b 17. All the decisions cited by Mr Vaidyanathan in support of his contention on solatium were considered in *Hari Krishan Khosla case*². His repeated attempts failed to persuade us to have that decision referred to a larger Bench of five Judges. We are unable to persuade ourselves to doubt the correctness of the judgment in *Hari Krishan Khosla case*². All the decisions cited by the counsel were considered in extenso by the Bench in *Hari Krishan Khosla case*². We are, therefore, of the opinion that it is not necessary to re-examine all the decisions once over. We are in respectful agreement with the ratio in *Hari Krishan Khosla case*². It would be seen that c sub-section (2) of Section 23 of the Acquisition Act expressly states that solatium is "in addition" to the compensation as consideration for compulsory nature of acquisition. This distinction was pointed out in a catena of decisions including the one referred by a Bench of three Judges in *Prem Nath Kapur v. National Fertilizers Corpn. of India Ltd.*¹⁸ For parity of reasons, without further discussion it was held that interest also was not d payable. We, therefore, respectfully agree with the ratio in *Hari Krishan Khosla case*² that the Act omitted to pay solatium and interest, in addition to compensation. The omission by the legislature, as stated earlier, is deliberate. In *Distt. Judge case*¹ a Bench of two Judges of this Court had held that the claimant is not entitled to solatium and interest. Accordingly, we hold that the respondents are not entitled to solatium and interest.

e 18. It is then contended by Mr Vaidyanathan that citizens in Jammu and Kashmir have fundamental right to property under the Jammu and Kashmir Constitution. The State Act was not incorporated in Schedule IX of the Constitution. The omission to pay solatium and interest is unconstitutional, arbitrary offending Article 14 of the Constitution. The similar contention raised in *Hari Krishan Khosla case*² was considered and rejected. It was held f that it is not violative of Article 14. We are in respectful agreement with the same. The Act is not violative of even Article 31 of the Constitution as applicable to Jammu and Kashmir.

g 19. The contention that the denial of solatium and interest in respect of the property acquired under the Act would be an unjust enrichment of the State, is devoid of substance. The public money is credited to the Consolidated Fund which is expended in accordance with the Appropriation h Bill passed by Parliament or the State Legislature in accordance with the provisions of the Constitution. The amount collected would be expended for the purposes of appropriation and for implementation of the Directive Principles of State policy and the law made by the appropriate legislature or the executive policy in furtherance thereof. Therefore, the non-payment of solatium and interest does not independently get into the coffers of the

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public exchequer nor does the State enrich itself. The public money is expended only for public purpose. The concept of unjust enrichment by the State is alien to and in derogation of the constitutional scheme and public policy. The general principle is that one should not be permitted to unjustly enrich himself at the expense of others. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belongs to another. Three elements must be established in order to sustain a claim based on unjust enrichment, the benefit conferred upon the defendant by the plaintiff; appreciation of knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. These principles specifically absent in the case of omission by a statute, are made by the competent legislature to award interest or solatium, in addition to compensation. So, it cannot be characterised as unjust enrichment where such action does not involve violation of law or is not opposed to public policy either directly or indirectly when the statute prescribes the principle for payment of compensation and omits as its policy to provide for the payment of interest and solatium as components of compensation. It is the legislative public policy to provide for acquisition of the private property for a public purpose. The State pays compensation for the acquired land in accordance with the principle laid down in the statute. It would, therefore, be illogical to contend that by legislative omission to pay solatium and interest the State enriches itself unjustly at the expense of the private person. The contention, therefore, is unsustainable in law.

20. Accordingly, we hold that the High Court and the arbitrator committed manifest grave error of law in awarding solatium and interest on the compensation determined under Section 8 of the Act.

21. The appeal is accordingly allowed. The award of solatium and interest on the compensation awarded stands set aside. The compensation stands upheld, but, in the circumstances, without costs.

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(BEFORE KULDIP SINGH AND B.L. HANSARIA, JJ.)

F.B. TARAPORAWALA AND OTHERS .. Appellants;

Versus

BAYER INDIA LTD. AND OTHERS .. Respondents.

Civil Appeals No. 7086 of 1994[†] with Nos. 11887-88 and 11886 of 1996,
SLPs (C) Nos. 28, 796 and 1159 of 1995, decided on September 9, 1996

Constitution of India — Arts. 136 and 21 — Ecology — Chemical industries — Relocation of — Constitution of authority under S. 3(3) of Environment (Protection) Act — Chemical factories located in populated areas (in Thane, Mumbai) — Lives of inhabitants living around the factories in jeopardy in view

[†] From the Judgment and Order dated 29-6-1994 of the Bombay High Court in R.P. No. 1485 of 1991 in WP No 4497 of 1990

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QUINN APPELLANT; H. L. (I.)

AND

LEATHEM RESPONDENT. Aug. 5.

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Action, Cause of—Conspiracy—Inducing a Person to break his Contract or not to deal with Another or continue in his Employment—Intent to injure—Interference with Trade—Trade Union—Trade Dispute between Employers and Workmen—Conspiracy and Protection of Property Act, 1875, c. 86, ss. 3, 7.

A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable.

The Conspiracy and Protection of Property Act, 1875, c. 86, s. 3, has nothing to do with civil remedies.

The words "trade dispute between employers and workmen" in s. 3 of that Act do not include a dispute on trade union matters between workmen who are members of a trade union and an employer of non-union workmen who refuses to employ members of a trade union.

Semble, the words are restricted to disputes between an employer and his own workmen.

Temperton v. Russell, [1893] 1 Q. B. 715, is not overruled as to the decision by *Allen v. Flood*, [1898] A. C. 1, but the dicta and reasoning of Lord Esher M.R. cannot be supported.

Allen v. Flood explained and its real effect stated.

The decision of the Irish Court of Appeal, *Leathem v. Craig*, [1899] 2 I. R. 667, affirmed.

THE respondent brought an action in Ireland against five defendants, Craig, Davey, Quinn (the appellant), Dornan and Shaw, alleging causes of action which are summarised in the judgment of Lord Brampton. At the trial before Fitz-Gibbon L.J. and a special jury at Belfast in July, 1896, evidence was given for the plaintiff to the following effect. Craig was president, Quinn treasurer, and Davey secretary of a trade union registered as the Belfast Journeymen Butchers and Assistants' Association. By rule 11 of the association it was the duty of all members to assist their fellow unionists to obtain employment in preference to non-society men.

H. L. (I.) The plaintiff, a flesher at Lisburn for more than twenty
 1901 years, in July, 1895, was employing Dickie and other assistants
 QUINN who were not members of the union. At a meeting of the
 LEATHEN. association at which Craig, Quinn, Dornan and Shaw were
 present, and which the plaintiff attended by Davey's invitation,
 the plaintiff offered to pay all fines, debts and demands against
 his men, and asked to have them admitted to the society. This
 was refused, and a resolution was passed that the plaintiff's
 assistants should be called out. Craig told the plaintiff that
 his meat would be stopped at Munce's if he did not comply
 with their wishes. Munce, a butcher, had been getting about
 30% worth weekly of meat from the plaintiff for twenty years.

The plaintiff in his evidence said: "For the last four years
 Munce has had an agreement with me to take my fine meat at
 so much a pound. He expected me to send it to him every
 week, and there was no week he did not get it. I had no
 written agreement with him. Whenever I killed I sent it,
 but I was not bound—only by word of mouth. It was only
 that if I sent it he would take it." What this meant did not
 clearly appear, but Munce's clerk who was called said, "Munce
 had no contract with the plaintiff: if he wanted his meat he
 could take it or reject it if he chose; it came weekly and
 was never refused. Neither was bound either to take or
 supply it."

In September Davey wrote to the plaintiff that if he con-
 tinued to employ non-union labour the society would be
 obliged to adopt extreme measures. After some negotiations
 with Munce Davey wrote to him that having failed to make a
 satisfactory arrangement with the plaintiff, they had no other
 alternative but to instruct Munce's employees to cease work
 immediately the plaintiff's beef arrived. On September 20
 Munce sent a telegram to the plaintiff, "Unless you arrange
 with society you need not send any beef this week as men
 are ordered to quit work," and Munce ceased to deal with
 the plaintiff. The plaintiff said that in consequence of this
 he was put to great loss, a quantity of fine meat having been
 killed for Munce.

Dickie, who had been ten years in the plaintiff's employ, was

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called and said that he was employed by the week, that he was called out by the society, that he gave the plaintiff no notice when he left, that he left in the middle of the week, and that the plaintiff did not pay him for the broken week. There was no evidence of damage to the plaintiff, pecuniary or otherwise, caused by Dickie's breach of contract.

Evidence was given that "black lists" were issued by the society, containing (inter alia) the names of tradesmen who had dealings with the plaintiff, and one of whom was induced not to deal with him, but there was no evidence connecting Quinn with these lists.

The learned judge's notes of the evidence proceeded thus :—

At the close of the plaintiff's case "O'Shaughnessy, Q.C., asked for a non-suit or direction for the defendants on the grounds: 1st. That to sustain the action a contract made with Leathem must be proved to have been made and broken through the acts of the defendants, and that there was no evidence of such contract or breach. 2nd. That there was no evidence of pecuniary damage to the plaintiff through the acts of the defendants. 3rd. That the ends of the defendants and the means taken by them to promote those ends as appearing in evidence were legitimate, and there was no evidence of actual damage to the plaintiff.

"I declined to withdraw the case from the jury. O'Shaughnessy, Q.C., then stated that he called no evidence for the defendants. Chambers addressed the jury for the plaintiff. O'Shaughnessy, Q.C., replied for the defendants. I charged the jury, leaving them the following questions, to which I append their findings: 1. Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?—Answer: Yes. 2. Did the defendants or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence or any of them not to deal with the plaintiffs or not to continue in his employment, and were such persons so induced not so to do?—Answer: Yes. 3. Did the defendants Davey, Dornan and Shaw, or any of them, publish the 'black list' with intent to

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H. L. (I) injure the plaintiff in his business, and if so did the publication so injure him?—Answer: Yes.

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“The jury found for the plaintiff, with 250*l.* damages, of which 50*l.* was for damages on the cause of action relating to the ‘black lists,’ and 200*l.* was for damages on the other causes of action. I directed the jury that there was no evidence against the defendants Craig and Quinn upon the cause of action relating to the ‘black lists,’ and I directed them to assess the damages (if any) on that cause of action separately. On the above findings, on the application of Serjeant Dodd, I gave judgment for the plaintiff upon the other causes of action against all the defendants, with 200*l.* damages, and against the defendants Davey, Dornan and Shaw upon the cause of action relating to the ‘black lists’ for the further sum of 50*l.* damages.

“At the conclusion of my charge, O’Shaughnessy, Q.C., for the defendants, made the following objections and requisitions:—

“1. That I had given the jury no definition of damage, and he asked me to define damage as ‘actual loss.’

“I told the jury that pecuniary loss, directly caused by the conduct of the defendants, must be proved in order to establish a cause of action, and I advised them to require to be satisfied that such loss to a substantial amount had been proved by the plaintiff. I declined to tell them that if actual and substantial pecuniary loss was proved to have been directly caused to the plaintiff by the wrongful acts of the defendants, they were bound to limit the amount of damages to the precise sum so proved. I told them that if the plaintiff gave the proof of actual and substantial loss necessary to maintain the action, they were at liberty in assessing damages to take all the circumstances of the case, including the conduct of the defendants, reasonably into account.

“2. That I had told the jury that the liability of the defendants depended on a question of law, and that as the defendants could not give their testimony as to their own intentions, observations which I had made upon their non-production amounted to misdirection.

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"I did not tell the jury that the liability of the defendants depended on any question of law. I told them that the questions left to them were questions of fact to be determined on the evidence, but that they included questions as to the intent of the defendants, and, in particular, their intent to injure the plaintiff in his trade as distinguished from the intent of legitimately advancing their own interests. I did not tell the jury that the defendants could be directly asked what their own intention was, but I did tell them that their intention was to be inferred from their acts and conduct as proved, and that in acting upon the evidence given by the plaintiff they were at liberty to have regard to the fact that the defendants, who might have given the best evidence on the subject, had not been produced to explain, qualify or contradict any of the evidence given for the plaintiff as to their overt acts.

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"3. That the cause of action relating to the 'black list' was separate and should be separately left to the jury.

"I acceded to this objection, and directed the jury that there was not sufficient evidence to connect the defendants Craig and Quinn with the publication of the 'black lists.' As against the other three defendants, I told the jury that their acts in relation to the 'black lists.' might be considered upon the issues relating to their intent and conduct generally.

"4. That there was no question to go to the jury because no actual injury had been proved, as there was no evidence that any binding contract with the plaintiff had been broken through the action of the defendants, and there was no evidence of any money loss.

"Having told the jury that the proof of actual pecuniary loss directly caused to the plaintiff by the wrongful acts of the defendants must be established by the plaintiff as the foundation of the action, I declined to withdraw the case from them, having regard especially on the question of breach of a binding contract to the withdrawal of Dickie from the plaintiff's employment, and generally to the evidence as to the pecuniary loss on the sale of meat prepared for Munce, to the loss of his

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custom, and to the threat to withdraw his men if the plaintiff's meat arrived and was received at his shop. I advised the jury not to find for the plaintiff unless satisfied that he had sustained actual money loss in his business to a substantial amount. Upon the meaning of the words 'wrongfully and maliciously' in the questions, I told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests. As to the 'black lists,' I told the jury that their publication would be actionable if done, without justification, for the purpose and with the effect of injuring the plaintiff in his business, by holding him up to unpopularity or disfavour with or by intimidating those who would otherwise have dealt with him. Finally, I told the jury that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, whether employers or employed, by reasonable and legitimate means, were perfectly lawful, and were not actionable so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, I told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade. Whether the acts of the defendants were or were not in that sense actionable was the question which I told the jury they had to try upon the evidence. At

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the conclusion of my charge, at the request of O'Shaughnessy, Q.C., for the defendants, I divided this single question into the written questions which I submitted to the jury as above stated.

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"I approved of the verdict. The amount of damages was larger than I might myself have given, if it were within my province to assess damages. But I cannot say that any excess which there may be in the mere amount of damages is either so great, or having regard to the circumstances of the defendants and of the case, so material as to justify me in expressing disapproval of the verdict upon that ground alone."

The learned judge gave judgment for the plaintiff for 200% on the first and second causes of action against all the defendants, and for the further sum of 50% damages on the third cause of action against the defendants Davey, Dornan, and Shaw only, with costs.

A motion was made "to set aside the verdict and judgment and enter a verdict for the defendants, or, in the alternative, for a new trial on the ground of misdirection of the learned judge in refusing to direct for the defendants; leaving to the jury the case as against all the defendants on the evidence; and in that on the evidence no actionable wrong was shewn; in that he refused to direct for the defendants in the absence of evidence of damage fit to be submitted to a jury; and on the further ground that the learned judge misdirected the jury in that he refused to tell the jury their findings of damages was confined to damages shewn in the evidence, and, in the alternative, for a new trial on the ground that the damages were excessive and out of all proportion to the amount suggested in evidence, and that the learned judge further allowed the jury to take into account on the question of liability and damages a certain paper in the case called the "black list," and upon other grounds." This motion was refused with costs by the Divisional Court (Andrews J., O'Brien J., and Sir P. O'Brien C.J., Pallets C.B. dissenting).

In the Irish Court of Appeal (Lord Ashbourne L.C.; Porter M.R., Walker and Holmes L.JJ.) the decision below was affirmed with costs, the judgment for the plaintiff being

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H. L. (I.) amended by omitting the part as to the recovery of 50l. damages. (1) Quinn alone brought the present appeal.

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May 14, 17, 20; June 11, 13. *W. Martin McGrath* and *Vesey Knox*, for the appellant. To justify the verdict and judgment for the plaintiff it must be shewn that there was a violation of a legal right: some conduct which would have been actionable whatever the motive, and without conspiracy or combination. An act which is not in itself actionable does not become so because the motive is malicious or bad: *Allen v. Flood* (2), nor because it is done in combination by two or more, or by the conspiracy of several, unless the conspiracy be criminal. There is no question of criminality here. These latter propositions are not decided by *Allen v. Flood* (2), for they were left open in the judgments, but they follow from the reasoning in that case and are the natural sequence of previous decisions. The learned judge who tried the case misdirected the jury on all these points: confusing "malice" with a wrongful act; treating an intention to injure as turning an innocent act into a tortious one; and a combination between two or more as having the same effect. None of the acts complained of were in themselves tortious. The most plausible argument for the plaintiff was that it is actionable to induce a man to break a contract; but *Lumley v. Gye* (3) has been doubted, is unsound in principle, and can be overruled here. It may be actionable to induce the commission of a tort, but it is a long step from a tort to a breach of contract, and Lord Coleridge C.J., following Coleridge J. in *Lumley v. Gye* (3), held in *Bowen v. Hall* (4) that an action does not lie for maliciously and injuriously procuring another to break a contract where the relation of master and servant in the strict sense does not exist. In the present case there was no evidence of a contract between the plaintiff and Munce: the plaintiff's own evidence is confused and self-contradictory, and the only rational conclusion is to adopt the evidence of Munce's clerk that there was no contract,

(1) *Leathem v. Craig*, [1899] 2 I. R. 667.

(2) [1898] A. C. 1.

(3) (1853) 2 E. & B. 216.

(4) (1881) 6 Q. B. D. 342.

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the plaintiff not being bound to send the meat, and Munce not being bound to take it. As to the case of the plaintiff's assistant, Dickie, there was no evidence of damage to the plaintiff, and without damage no action will lie. There is no reason for extending the right of action beyond the right to sue the man who broke the contract.

With regard to inducing persons not to make contracts or deal with the plaintiff, or continue in his employment, the law is settled by the *Mogul Case*. (1) No matter whether the effect or the intention be to injure another, it is lawful to do these things in order to secure a monopoly, or benefit oneself, and in the absence of criminality what is lawful in one is not unlawful in several. To promote the interests of a trade union is as legitimate as to struggle for the monopoly of a particular business. There was here no threat of violence, obstruction, intimidation, or nuisance, nothing but the advancement of trade unionism by lawful means. This view was taken by Darling J. in *Huttley v. Simmons* (2), and see the judgment of Holmes J., who dissented, in *Vegelahn v. Guntner*. (3) Concerted action to injure another, if no legal right is infringed, is not forbidden by law: *Cotterell v. Jones*. (4) There was no actual decision in *Gregory v. Duke of Brunswick* (5) that a combination to hiss an actor was illegal.

[LORD HALSBURY L.C. I think there was. See the report in 6 Scott, N. R. 809.]

The point does not seem to have been actually decided. The defendant's plea of justification on the grounds of obscene libels and blackmailing by the plaintiff was disallowed and leave was given to amend: but there was no amendment. The decision was therefore naught. The summing-up is reported 1 C. & K. 31. It is an old fallacy to argue that though one man may legally injure another, the same act in several combined is illegal because several can do more mischief than one. It is not true: some men are a host in their individual

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(1) [1892] A. C. 25.

(3) (1896) 167 Mass. 92.

(2) [1898] 1 Q. B. 181.

(4) (1851) 11 C. B. 713.

(5) (1843-4) 6 M. & G. 205, 953.

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H. L. (I.) selves: are lions; some multitudes are asses: e.g. Napoleon:
 1901 Bismarck: and the nations whom they crushed.

QUINN The Conspiracy and Protection of Property Act, 1875, c. 86,
 v. applies to the present case. These were acts done in combina-
 LEATHEN. tion by several persons in contemplation or furtherance of "a
 — trade dispute" between employers and workmen. The Act
 expressly protects such acts from indictment and by implication
 from civil liability.

None of the acts complained of being wrongful, judgment
 should be entered for the appellant, and failing that, there should
 be a new trial, there being several misdirections, and the jury
 having given damages in respect of acts which are admittedly
 not actionable. The damages also are in any view excessive.

Haldane, K.C., and *Francis Watt*, for the respondent. A
 conspiracy has been defined as a combination (1.) to do an
 illegal act by legal means; (2.) or an illegal act by illegal
 means; or (3.) a legal act by illegal means. The conduct of
 the appellant comes within one or more of these categories.
 But, apart from conspiracy, the appellant's acts were in them-
 selves unlawful. They were acts of molestation—intimidation—
 oppression. These are described by Bowen L.J. in the *Mogul
 Case* (1) as being forbidden, and his language was approved on
 the appeal to this House. They were not acts done by an
 individual workman in pursuit of his own interest; and there
 was no such lawful excuse as in the *Mogul Case* (2) and in
Allen v. Flood. (3) Threats by an individual to boycott, or in
 other words to injure or even ruin, are unlawful apart from
 combination. But there was also a conspiracy to do these
 things. The essential difference—in addition to the element of
 conspiracy—between this case and *Allen v. Flood* (3) is that
 there the act complained of was lawful—here unlawful. An
 actionable conspiracy is constituted where two or more combine
 for an unlawful purpose, even if no overt act is committed.
 This case is precisely similar to *Temperton v. Russell*. (4) That
 case was held by Wright J. (5) not to be applicable to *Allen v.*

(1) (1869) 23 Q. B. D. at p. 614.

(3) [1898] A. C. 1.

(2) [1892] A. C. 25.

(4) [1893] 1 Q. B. 715, 730.

(5) [1898] A. C. 64.

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Flood (1): see also *Mathew J.* (2) That may be, but this case is of the character of nuisance, riot, disturbance, unlawful assembly: *Clifford v. Brandon* (3); *Rex v. Eccles* (4); *Walsby v. Anley* (5); *Lyons v. Wilkins.* (6) The acts done were indictable as a nuisance, and punishable as a misdemeanour. There are many American cases on boycotting, based on English decisions: see *Crump v. Commonwealth* (7): "The power of many for mischief against the one is so great that the State should protect the one." In *Boutwell v. Marr* (8) it was held that a conspiracy to boycott was unlawful, and that a man has no right to divert business custom from another. Coercion or intimidation of employers or customers is prohibited: *Beck v. Railway Teamsters' Protective Union* (9); *Delz v. Winfree.* (10) There was no "trade dispute" here, and s. 3 of the Act of 1875 affords no protection to the appellant. *Lyons v. Wilkins* (6) shews that the operation of the section is limited to cases between an employer and his own workmen. A conspiracy to prevent a man's making his living by working at his trade is unlawful: *Rex v. Eccles* (4): and see the judgment, which collects the cases, of Phillimore J. in *Boots v. Grundy.* (11)

[They also referred to *Benton v. Pratt* (12), *Rice v. Manley* (13), and *Green v. Bulton.* (14)]

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M'Grath, in reply, referred to *Scottish Co-operative Society v. Glasgow Fleshers' Association.* (15)

The House took time for consideration.

Aug. 5. EARL OF HALSBURY L.C. My Lords, in this case the plaintiff has by a properly framed statement of claim complained of the defendants, and proved to the satisfaction of a jury that the defendants have wrongfully and maliciously induced

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| (1) [1898] A. C. 1. | (9) (1898) 74 Amer. St. R. 421. |
| (2) [1898] A. C. at p. 25. | (10) (1891) 26 Amer. St. R. 755. |
| (3) (1810) 2 Camp. 358; 11 R. R. 731. | (11) (1900) 82 L. T. 769; 48 W. R. 638. |
| (4) (1783) 1 Lea. C. C. 274. | (12) (1829) 2 Wend. 385. |
| (5) (1861) 3 E. & E. 516. | (13) (1876) 66 N. Y. (21 Sichel's) 82. |
| (6) [1899] 1 Ch. 255. | (14) (1835) 2 C. M. & R. 707; 41 R. R. 818. |
| (7) (1888) 10 Amer. St. R. 903. | (15) (1898) 35 Sc. L. R. 645. |
| (8) (1899) 76 Amer. St. R. 746. | |

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H. L. (I.) customers and servants to cease to deal with the plaintiff, that
 1901 the defendants did this in pursuance of a conspiracy framed
 QUINN among them, that in pursuance of the same conspiracy they
 v. induced servants of the plaintiff not to continue in the plain-
 LEATHEM. tiff's employment, and that all this was done with malice in
 Earl of Halsbury order to injure the plaintiff, and that it did injure the plaintiff.
 L.C.
 If upon these facts so found the plaintiff could have no remedy
 against those who had thus injured him, it could hardly be said
 that our jurisprudence was that of a civilized community, nor
 indeed do I understand that any one has doubted that, before
 the decision in *Allen v. Flood* (1) in this House, such fact-
 would have established a cause of action against the defendants.
 Now, before discussing the case of *Allen v. Flood* (1) and what
 was decided therein, there are two observations of a general
 character which I wish to make, and one is to repeat what I
 have very often said before, that every judgment must be read
 as applicable to the particular facts proved, or assumed to be
 proved, since the generality of the expressions which may be
 found there are not intended to be expositions of the whole
 law, but governed and qualified by the particular facts of the
 case in which such expressions are to be found. The other is
 that a case is only an authority for what it actually decides. I
 entirely deny that it can be quoted for a proposition that may
 seem to follow logically from it. Such a mode of reasoning
 assumes that the law is necessarily a logical code, whereas
 every lawyer must acknowledge that the law is not always
 logical at all. My Lords, I think the application of these two
 propositions renders the decision of this case perfectly plain,
 notwithstanding the decision of the case of *Allen v. Flood*. (1)

Now, the hypothesis of fact upon which *Allen v. Flood* (1)
 was decided by a majority in this House was that the defendant
 there neither uttered nor carried into effect any threat at all:
 he simply warned the plaintiff's employers of what the men
 themselves, without his persuasion or influence, had deter-
 mined to do, and it was certainly proved that no resolution
 of the trade union had been arrived at at all, and that the trade
 union official had no authority himself to call out the men,

(1) [1898] A. C. 1.

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which in that case was argued to be the threat which coerced the employers to discharge the plaintiff. It was further an element in the decision that there was no case of conspiracy or even combination. What was alleged to be done was only the independent and single action of the defendant, actuated in what he did by the desire to express his own views in favour of his fellow members. It is true that I personally did not believe that was the true view of the facts, but, as I have said, we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision. My Lords, in my view what has been said already is enough to decide this case without going further into the facts of *Allen v. Flood* (1); but I cannot forbear accepting with cordiality the statement of them prepared by two of your Lordships, Lord Brampton and Lord Lindley, with so much care and precision.

Now, in this case it cannot be denied that if the verdict stands there was conspiracy, threats, and threats carried into execution, so that loss of business and interference with the plaintiff's legal rights are abundantly proved, and I do not understand the very learned judge who dissented to have doubted any one of these propositions, but his view was grounded on the belief that *Allen v. Flood* (1) had altered the law in these respects, and made that lawful which would have clearly been actionable before the decision of that case. My Lords, for the reasons I have given I cannot agree with that conclusion. I do not deny that if some of the observations made in that case were to be pushed to their logical conclusion it would be very difficult to resist the Chief Baron's inflexible logic; but, with all the respect which any view of that learned judge is entitled to command and which I unfeignedly entertain, I cannot concur. This case is distinguished in its facts from those which were the essentially important facts in *Allen v. Flood*. (1) Rightly or wrongly, the theory upon which judgment was pronounced in that case is one whereby the present is shewn to be one which the majority of your Lordships would have held to be a case of actionable injury inflicted without any excuse whatever.

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My Lords, there was a subordinate question raised which I must not pass over. It is suggested that FitzGibbon L.J. did not put all the questions which were necessary to raise all the points which the learned counsel desired to argue. Now, I think the charge of the Lord Justice was absolutely accurate, and when, in deference to the wishes of the learned counsel for the defendant himself, he consented to put such questions as were then desired, it would be intolerable that it should afterwards be made the subject of complaint that he did not at the same time put other questions which he was not asked to put at all.

My Lords, for these reasons I am of opinion that there is no difficulty whatever in this case, and I move that this appeal be dismissed with costs.

LORD MACNAGHTEN. (1) My Lords, notwithstanding the strong language of the late O'Brien J. and the arguments of the Lord Chief Baron, I cannot help thinking that the case of *Allen v. Flood* (2) has very little to do with the question now under consideration. In my opinion, *Allen v. Flood* (2) laid down no new law. It simply brushed aside certain dicta which in the opinion of the majority of this House were contrary to principle and unsupported by authority. Those dicta are first to be found in the judgment delivered by Lord Esher on behalf of himself and Lord Selborne in *Bowen v. Hall*. (3) They were repeated by Lord Esher and Lopes L.J. in *Temperton v. Russell* (4); but they were not, I think, necessary for the decision in either case. They did form the ground of decision in *Allen v. Flood* (2) in its earlier stages. But in the end the law was restored to the condition in which it was before Lord Esher's views in *Bowen v. Hall* (3) and *Temperton v. Russell* (4) were accepted by the Court of Appeal. The head-note to *Allen v. Flood* (2) might well have run in words used by Parke B. in giving the judgment of an exceptionally strong Court, nearly half a century ago (*Stevenson v. Newnham* (5))—"an act which does

(1) Read by Lord Brampton in (3) 6 Q. B. D. 333.
Lord Macnaghten's absence. (4) [1893] 1 Q. B. 715.
(2) [1898] A. C. 1. (5) (1853) 13 C. B. 297.

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not amount to a legal injury cannot be actionable because it is done with a bad intent." That, in my opinion, is the sum and substance of *Allen v. Flood* (1) if you eliminate all matters of merely passing interest—the charge of the learned judge, the findings of the jury (unintelligible, I think, without a careful examination of the evidence), and the discussion of the evidence itself in the two different aspects in which it was presented—once for the consideration of this House, and again for the consideration of the learned judges by whom the House was assisted.

The case really brought under review on this appeal is *Temperton v. Russell*. (2) I cannot distinguish that case from the present. The facts are in substance identical: the grounds of decision must be the same. Now, the decision in *Temperton v. Russell* (2) was not overruled in *Allen v. Flood* (1), nor is the authority of *Temperton v. Russell* (2), in my opinion, shaken in the least by the decision in *Allen v. Flood*. (1) Disembarrassed of the expressions which Lord Esher unfortunately used, the judgment in *Temperton v. Russell* (2) seems to me to stand on surer ground. So far from being impugned in *Allen v. Flood* (1) it had, I think, the approval of Lord Watson, whose opinion seems to me to represent the views of the majority better far than any other single judgment delivered in the case. Lord Watson says (3) that he did not think it necessary to notice at length *Temperton v. Russell* (2), because it was to his mind "very doubtful whether in that case there was any question before the Court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful." Then he goes on to say: "The only findings of the jury which the Court had to consider were—(1.) that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2.) that the defendants had maliciously conspired to induce and had thereby induced certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have

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(2) [1893] 1 Q. B. 715.

(3) [1898] A. C. 108.

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been induced, the first of these findings raised the same question which had been disposed of in *Lumley v. Gye*. (1) According to the second finding the persons induced merely refused to make contracts, which was not a legal wrong on their part, but the defendants who induced were found to have accomplished their object to the injury of the plaintiffs by means of unlawful conspiracy—a clear ground of liability according to *Lumley v. Gye* (1) if, as the Court held, there was evidence to prove it.” It must be admitted, I think, that the second reference to *Lumley v. Gye* (1) in the passage I have just quoted is a slip—a rare occurrence in a judgment of Lord Watson’s. But I do not think that the slip (if it be a slip) impairs the effect of what Lord Watson said. Obviously Lord Watson was convinced in his own mind that a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong.

Precisely the same questions arise in this case as arose in *Temperton v. Russell*. (2) The answers, I think, must depend on precisely the same considerations. Was *Lumley v. Gye* (1) rightly decided? I think it was. *Lumley v. Gye* (1) was much considered in *Allen v. Flood*. (3) But as it was not directly in question, some of your Lordships thought it better to suspend their judgment. In this case the question arises directly, and it is necessary to express an opinion on the point. Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

The only other question is this: Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it

(1) 2 E. & B. 216.

(2) [1893] 1 Q. B. 715.

(3) [1898] A. C. 1.

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is founded in good sense. *Gregory v. Duke of Brunswick* (1) is one authority, and there are others. There are valuable observations on the subject in Erle J.'s charge to the jury in *Duffield's Case* (2) and *Rowland's Case*. (3) Those were cases of trade union outrages; but the observations to which I refer are not confined to cases depending on exploded doctrines in regard to restraint of trade. There are also weighty observations to be found in the charge delivered by Lord FitzGerald, then FitzGerald J., in *Reg. v. Parnell and Others*. (4) That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of Bowen L.J. and Lords Bramwell and Hannen in the *Mogul Case*. (5) A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing (as Lord FitzGerald observes) when one man has to defend himself against many combined to do him wrong.

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I have only to add that I agree generally with the judgments delivered in the Courts below, and particularly with the judgment of Andrews J. in the Queen's Bench, and the judgment of Holmes L.J. in the Court of Appeal. I do not think that the acts done by the defendants were done "in contemplation or furtherance of a trade dispute between employers and workmen." So far as I can see, there was no trade dispute at all. Leathem had no difference with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay their fines and entrance moneys. What he objected to was a cruel punishment proposed to be inflicted on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their

(1) 6 M. & G. 205, 953.

(3) (1851) 5 Cox C. C. 436.

(2) (1851) 5 Cox C. C. 404.

(4) (1881) 14 Cox C. C. 508.

(5) 23 Q. B. D. 598; [1892] A. C. 25.

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H. L. (I.) vengeance on Leatham's servants who were not members of the union.

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I also think that the provision in the Conspiracy and Protection of Property Act, 1875, which says that in certain cases an agreement or combination is not to be "indictable as a conspiracy," has nothing to do with civil remedies.

LORD SHAND. (1) My Lords, after the able and full opinions of the learned judges of the Court of Appeal in Ireland holding that the verdict and judgment for the plaintiff ought to stand, the grounds of my opinion that the judgment ought to be affirmed and the appeal dismissed may be shortly stated. I refrain from any detailed reference to the numerous cases cited in the argument. These have been considered and discussed by the judges of the Court of Appeal, and I concur in the reasoning of the majority of their Lordships, and they have been already dealt with in my judgment in the case of *Allen v. Flood*. (2)

In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that combination for no such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful; and, having considered the arguments in this case, my opinion has only been confirmed.

The learned judge before whom the case was tried, with reference to the words "wrongfully and maliciously" in the first question, told the jury that the questions to be answered by them were matters of fact only to be determined on the evidence, and in particular involved the question whether the intention of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests. The verdict affirms that this was the fact, for after the direction of the learned judge no other interpretation can be given to the finding that the acts

(1) Read by Lord Davey in Lord Shand's absence.

(2) [1898] A. C. 1.

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complained of were done by the defendants "wrongfully and maliciously."

This being clearly so, the question now raised is really whether, in consequence of the decision of this House in the case of *Allen v. Flood* (1), and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another, and not to advance the parties' own trade interests, and injury has resulted, no action will lie, or, to put the question in a popular form, whether the decision in *Allen v. Flood* (1) has made boycotting lawful.

Apart from the decision in that case, the judgment of the learned judges in Ireland would have been unanimous in affirming the principle to which FitzGibbon L.J. gave effect. The general law cannot, I think, be more happily stated than in the passage from the judgment of Lord Bowen in the *Mogul Case* (2), which was quoted by the Lord Chancellor with an expression of his strong approval in the case of *Allen v. Flood*. (3) [His Lordship read the passage.] The Lord Chancellor also spoke with approval, as I should certainly do, of the views to a similar effect stated by Sir William Erle in his work on Trade Unions.

It may be true that in certain cases the object of inflicting injury, and success in that object, requires combination or conspiracy with others in order to be effectual. That was not so in all of the cases enumerated by Lord Bowen; but no question on that point arises in the circumstances of this particular case, for according to the evidence and the verdict of the jury the defendants by combined action wrongfully and maliciously induced a number of persons to refrain from dealing with the plaintiff. That is sufficient for the decision of the case, although, in my opinion, it is further proved that they succeeded in inducing a servant and a customer of the plaintiff to break existing contracts with him. On the whole, it seems to me clear that the defendants were guilty of unlawful acts, unless the judgment in the case of *Allen v. Flood* (1)

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(1) [1898] A. C. 1.

(2) 23 Q. B. D. 614.

(3) [1898] A. C. at p. 74.

H. L. (1) has introduced a change which has rendered such acts lawful.

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As to the vital distinction between *Allen v. Flood* (1) and the present case, it may be stated in a single sentence. In *Allen v. Flood* (1) the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests." It is unnecessary to quote from the judgments of the majority of the learned judges in *Allen v. Flood* (1) to shew their opinions on the importance of this essential point. Lord Herschell, for example, said (2): "The object which the defendant and those whom he represented had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end." And the other noble and learned Lords in the majority expressed themselves to a similar effect. For myself, what I said was this (3): "If anything is clear on the evidence, it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did; that this was his motive of action, and not a desire, to use the words of the learned judge, 'to do mischief to the plaintiffs in their lawful calling.' The case was one of competition in labour, which, in my opinion, is in all essentials analogous to competition in trade, and to which the same principles must apply."

The ground of judgment of the majority of the House, however varied in expression by their Lordships, was, as it appears to me, that Allen in what he said and did was only exercising the right of himself and his fellow workmen as competitors in the labour market, and the effect of injury thus caused to others from such competition, which was legitimate, was not a legal wrong.

(1) [1898] A. C. 1.

(2) [1898] A. C. at p. 132.

(3) [1898] A. C. at p. 163.

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It is only necessary to add that the defendants here have no such defence as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen v. Flood* (1), as a case of legitimate competition in the labour market, is essentially different, and gives no ground for the defendant's argument.

I concur with your Lordships in holding that there is not sufficient ground for disturbing the verdict on the question of damages, and in holding that the special provision of the 3rd section of the Conspiracy Act of 1875 has no application to the circumstances of this case.

LORD BRAMPTON. My Lords, this case now awaiting your Lordships' final judgment is one which, looked at simply as affecting the parties to it, is of no serious pecuniary concern; but it involves, nevertheless, questions of widespread importance to every trader and to every employer and servant engaged in trade.

It is an action originally brought in the High Court in Ireland by Henry Leatham, the respondent, as plaintiff, against Joseph Quinn (the sole appellant) and four other persons, named respectively John Craig (now dead), John Davey, Henry Dornan, and Robert Shaw, as defendants, to recover damages for a wrongful interference with the plaintiff's business of a butcher at Lisburn, a few miles from Belfast. For upwards of twenty years before July, 1895, Leatham had carried on business in Lisburn, having as one of his constant customers Andrew Munce (now also dead), who kept a butcher's shop at Belfast, to whom he supplied weekly twenty or thirty pounds' worth of the best meat; and he had in his employ as assistants several men at weekly wages.

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In February, 1893, a trade union society was registered under the Trade Union Acts, 1871 and 1876, by the name of "The Belfast Journeymen Butchers and Assistants' Association." Of this society Craig was president, Quinn treasurer, and Davey secretary; they were original members; the other defendants, Dornan and Shaw, joined subsequently as mere ordinary members. Leathem was not a member, nor were any of his assistants. The members of the society amongst themselves soon adopted an unregistered rule that they would not work with non-union men, nor would they cut up meat that came from a place where non-union hands were employed; but there was no evidence that, prior to July, 1895, this had been productive of any conflict between Leathem's men and the union.

Early in that month, however, Leathem, on the invitation of Davey, attended a meeting of the society held at Lisburn. All the defendants were there. The occurrences at this meeting shewed the existence of an angry feeling, and an overbearing determination on the part of the defendants to compel Leathem to employ none but union men, which culminated in the lawless conduct the subject of this action.

Leathem had at that time among his assistants a man named Robert Dickie, a family man, with young children dependent upon him; this man had been in his employ for ten years. He was desirous of keeping him and all the others employed by him in his service, but still of doing anything in reason to conciliate the society. But I had better let him tell his account of this meeting in his own words, as he told it to the jury. "I said that I came on behalf of my men, and was ready to pay all fines, debts, and demands against them; and I asked to have them admitted to the society. The defendant Shaw got up and objected to their being allowed to work on, and to their admission, and said that my men should be put out of my employment, and could not be admitted, and should walk the streets for twelve months. I said it was a hard case to make a man walk the streets with nine small children, and I would not submit to it. Shaw moved a resolution that my assistants should be called out; a man named Morgan seconded

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the resolution, and it was carried. Craig was in the chair; I was sitting beside him. He said there were some others there that would suit me as well. He picked some out and said they could work for me. I said they were not suitable for my business, and I would keep the men I had. They said I had to take them. I said I would not put out my men. Craig then spoke, and told me my meat would be stopped in Andrew Munce's if I would not comply with their wishes."

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The chairman spoke truly; for on September 6 the secretary of the society wrote to Leathem, asking "whether he had made up his mind to continue to employ non-union labour," adding, "If you continue as at present, our society will be obliged to adopt extreme measures in your case." He wrote also to Mr. Munce on September 13, stating that a deputation had been appointed to wait upon him to come to a decision in regard to his purchase of meat from Leathem & Sons, as they were anxious to have a settlement at once. To this letter Mr. Munce sent, on September 14, a very sensible reply: "It is quite out of my province to interfere with the liberty of any man. But why refer to me in the matter? I do not think it fair for you to come at me, seeing it appears to be the Messrs. Leathem that you wish to interfere with." A deputation, which included Craig, Quinn, Shaw, and Dornan, had an interview with a son of Mr. A. Munce, and on September 17 he wrote to the secretary the reply of his father, "that he could not interfere to bring pressure to bear on Mr. Leathem to employ none but society men by refusing to purchase meat from him, as that would be outside his province and interfering with the liberty of another man." The 18th of September brought a definite announcement from the secretary to Mr. Munce that, having failed to make a satisfactory arrangement with Mr. Leathem, they had no other alternative but to instruct his (Munce's) employees "to cease work immediately Leathem's beef arrives." Thereupon Mr. Munce was constrained to send to Leathem on September 20 a telegram: "Unless you arrange with society you need not send any beef this week, as men are ordered to quit work." On and

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H. L. (I.) from that day Munce took no more meat from Leathem, to his substantial loss.

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Another mode adopted by several of the defendants with a view to prevent persons dealing with Leathem was the publication throughout the district of Lisburn of "black lists" containing and holding up to odium, not only his name, but the names of persons who dealt with him, as a warning to those persons that if they wished their names to be removed from the lists they must have no more dealings with him or any other non-society shops. Amongst others, a man named McBride, a customer of Leathem, was operated on by this mode, and ceased to deal with him; attempts were also made by means of such lists to influence two other men named Davis and Hastings. With the object of further inconveniencing Leathem in his trade, two of his weekly servants, Rice and McDonnell, who had been non-union men, were somehow or other induced to join the society and to quit their service with Leathem. It is true they gave due notice of their intention to do so, and as regards them, therefore, no separate cause of action could be maintained. But it is significant that after they had left their service they were paid by the society during the time they were out of work weekly sums of money as compensation for the wages they would have earned with Leathem. As regards the assistant, Robert Dickie, he left his service without any notice in the middle of a week, and so wrongfully broke his contract with his employers, and there was an abundance of evidence that he was induced to do that wrongful act through the unjustifiable influence of the defendants, for Dickie's evidence at the trial was that he was brought out of Leathem's shop by Rice to a meeting of the society in a room over the defendant Dornan's shop; that Shaw (another defendant) was there; that they wanted him to leave Leathem because the rest were out, and promised to pay him what he had from Leathem; that he left, and was paid by Rice for the society and was then in Dornan's service.

The case came on for trial at the Belfast Assizes in July, 1896, before FitzGibbon L.J. and a special jury. The pleadings charged in the first four counts, as separate causes of

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action, (1.) the procuring Munce to break contracts he had made with Leathem; (2.) the publication by the defendants of "black lists"; (3.) the intimidation of Munce and other persons to break their contracts; and (4.) the coercion of Dickie and other servants to leave the service of the plaintiff. Each of these counts alleged that the acts complained of were done "wrongfully and maliciously, and with intent to injure the plaintiff, and to have occasioned him actual loss, injury, and damage." The fifth and last count charged, also as a separate cause of action, that the defendants unlawfully and maliciously conspired together, and with others, to do the various acts complained of in the previous counts, with intent to injure the plaintiff and his trade and business, and that by reason of the conspiracy he was injured and damaged in his trade. Damages and an injunction were claimed.

The evidence adduced I have already set forth substantially. At the conclusion of it Mr. O'Shaughnessy, Q.C., for the defendants, submitted that they were entitled to a nonsuit upon the grounds that there was no evidence of a contract between Munce and Leathem, nor of any pecuniary damage to the plaintiff by reason of the acts of the defendants, and that the acts of the defendants were legitimate. The learned Lord Justice refused to nonsuit, and I think he rightly refused. For there was clearly evidence for the consideration of the jury upon one or more of (I think upon all) the causes of action. I need not discuss that point further, for it was practically disposed of during the argument before this House.

No evidence was called for the defendants. I regret that no shorthand note of the summing-up of the Lord Justice was furnished to your Lordships. We have, however, a copy of the learned judge's own notes and memoranda. From a careful perusal of these I am satisfied that every indulgence that could have been reasonably given to the learned counsel in presenting his case to the jury was allowed him, and I am satisfied that he must be taken to have acquiesced in the form in which the questions submitted for the consideration of the jury were left to them, even though it might otherwise have been open to criticism.

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After commenting upon the evidence relied upon by the plaintiff as proof of actionable misconduct, he told the jury that they had to consider whether the interests and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him as distinguished from acts legitimately done to secure or advance their own interests; that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, by reasonable and legitimate means were perfectly lawful, and were not actionable so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, he told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants, to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade. And having so told the jury, he proposed to put to them as the question they had to try upon the evidence, Whether the acts of the defendants were or were not in that sense actionable?

I have thought it right, as near as possible, to follow the language of the Lord Justice, for that charge was delivered before *Allen v. Flood* (1) was decided in this House. In substance I think it was correct, having regard to the case before him. In some respects it seems to me that it was a little too favourable to the defendants, but even had it been otherwise it was uttered in the presence of the defendants' counsel, who desired and was allowed then and there to make such objections as he thought fit to it. He made four only: first, that

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the judge had given no definition of damage; second, that he had told the jury that the liability of the defendants depended on a question of law. These two questions were to my mind conclusively answered in the summing-up: see p. 33 of Appendix.

A third objection was that the question relating to the black list should be separately left to the jury. It was then so left, and as to that the judge directed them that there was not sufficient evidence to connect Quinn and Craig with the black lists. By this I take it he meant not as an independent cause of action, there being, in fact, no evidence of Quinn's personal participation in the publication of those lists. But that left him still affected by them as overt acts of the conspiracy, for each of which every one of the conspirators is liable, and the evidence touching the black lists was beyond all question admissible under the conspiracy count.

The fourth objection was that there was no evidence of any binding contract having been broken through the action of the defendants; but the judge then again declined to withdraw that question of contract from the jury, and I think he was right in so refusing at that stage of the trial; and at a later stage, after the whole matter had been disposed of under the conspiracy count, he rightly refrained from putting the question at all, because it had become unnecessary. At the request of the learned counsel, however, he divided the single general question he at first proposed into the three separate questions—(1.) Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff? (2.) Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not to do so? (3.) Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and, if so, did the publication so injure him? The jury answered each of these questions in the affirmative, and assessed the damages

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H. L. (I.) against all the defendants at 200*l.*; and with regard to the third
1901 question, they found against the defendants Dornan, Davey,
QUINN and Shaw, with an additional 50*l.* as damages against them
v. only. Judgment was given in accordance with that verdict.
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If, my Lords, before that judgment was given the counsel for either party had felt it of importance that the specific issues raised upon each count should be determined by the jury, the learned judge would, no doubt, have applied himself to attain that object; but when, as it oftentimes happens in the course of a trial, it is obvious to everybody concerned in it that the case may conveniently be determined by the answer of the jury to one general comprehensive question involving the whole of the material matters at issue, and all parties either expressly or tacitly acquiesce in that view, and such question is accordingly put to and answered by the jury, neither party can afterwards hark back to the original issues raised by the pleader on the record long before it was possible for him to know how the case can best be dealt with when the evidence is all disclosed. Here the real substantial question was whether there had existed between all or any two or more of the defendants an unlawful conspiracy to injure the plaintiff in his trade, and, if so, whether the plaintiff had been specially injured thereby, all the wrongful acts charged in the previous counts being treated as overt acts of such conspiracy. To support that conspiracy count it was not essential that every overt act alleged should be proved, but only a sufficient number of them to support the count. The issues on that count having been found by the jury, and damages assessed in favour of the plaintiff, the separate issues became immaterial, since they had already been treated as incorporated for all purposes of the action in it. I note, in confirmation of this, that the Lord Justice pointedly told the jury that proof of a conspiracy was essential to the support of the action.

In substance, this finding of the jury amounted to a general verdict against all the defendants, except on the issue relating to the black lists, with 200*l.* damages, and as to that issue against Davey, Dornan, and Shaw only, with separate and further damages, 50*l.*

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Rightly understood, I think the judgment in *Allen v. Flood* (1) is harmless to the present case. But I need hardly say that, in order properly to understand and appreciate it, it is essential to ascertain what were the material facts assumed to exist by their Lordships who assented to that judgment, and what were the principles of law applied by them to those facts. This necessity will be more apparent when it is realized that unanimity of opinion as to the facts certainly did not prevail, that the judges who were called upon to render their assistance to the House were requested to answer this one simple question only, namely, "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" This evidence was only to be found in the Appendix handed to each of the judges as containing the evidence referred to, and to that evidence the judges naturally applied themselves, and upon it their opinions were formed. That evidence of the plaintiffs' witnesses most certainly did not altogether coincide with some very material facts assumed by their Lordships; this will account for variance in the views expressed as to the legal rights and alleged wrongful acts of the parties. It would be an endless task to endeavour to reconcile all these differences of fact and opinion; I will not, therefore, make the attempt.

Some of this confusion arose no doubt from the course taken, rightly or wrongly, at the trial, when all questions of conspiracy, intimidation, coercion, or breach of contract were withdrawn from the jury, the only matters of fact found by them being that Allen maliciously induced the Glengall Company to discharge Flood and Taylor from their employment, and not to engage them again, and that each plaintiff had suffered 20% damages.

I collect from the case, as reported, that it was assumed by their Lordships that the Glengall Company were under no contractual obligation to retain the plaintiffs Flood and Taylor in their service for any duration of time, but might dismiss them from their employment at any moment it was their will so to do, and that the boiler-makers were working under the

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H. L. (1.) same conditions; that Allen in making the communication
1901 which induced the Glengall Company to dismiss the plaintiffs
QUINN was doing only that which he had a legal right to do, and they
v. held, therefore, that the plaintiffs had no legal cause of action
LEATHEN. against either the Glengall Company or the defendant, and
Lord Brampton. that the mere fact as found by the jury that the defendant was
acted by a malicious motive could not convert a rightful
into a wrongful act.

This latter proposition, that the exercise of an absolutely legal right cannot be treated as wrongful and actionable merely because a malicious intention prompted such exercise, was established as clear law by this House in *Bradford Corporation v. Pickles* (1), and it is now too late to dispute it, even if one were disposed to do so, which I am not. It must not, however, be supposed that a malicious intention can in no case be material to the maintenance of an action. It is commonly used to defeat the defence of privilege to do or to say that which without privilege would be wrongful and actionable.

Take the familiar instance of an action for malicious prosecution. It is not a wrongful act for any person who honestly believes that he has reasonable and probable cause, though he has it not in fact, to put the criminal law in motion against another; but if to the absence of such reasonable and probable cause a malicious motive operating upon the mind of such prosecutor is added, that which would have been a rightful (in the sense of a justifiable) act if done without malice becomes with malice wrongful and actionable. What would constitute such malice it is not material for the purposes of this case to define. Of course, if when he instituted criminal proceedings the prosecutor knew he had no reasonable ground for the steps he was taking, the definition of malice given by Bayley J. in *Bromage v. Prosser* (2) would distinctly apply, and no further proof of malice would be required; but if he really believed he had such reasonable cause, although in fact he had it not, and was actuated not by such belief alone, but also by personal spite or a desire to bring about the imprisonment of or other harm to the accused, or to accomplish some other sinister object

(1) [1895] A. C. 587.

(2) 4 B. & C. 247; 28 R. R. 241.

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of his own, that personal enmity or sinister motive would be quite sufficient to establish the malice required by law to complete a cause of action—that is, if such malice was found as a fact by the jury.

In this case the alleged cause of action is very different from that in *Allen v. Flood*. (1) It is not dependent upon coercion to break any particular contract or contracts, though such causes of action are introduced into the claim; but the real and substantial cause of action is an unlawful conspiracy to molest the plaintiff, a trader in carrying on his business, and by so doing to invade his undoubted right, thus described by Alderson B. in delivering the judgment of the Exchequer Chamber in *Hilton v. Eckersley* (2): “*Prima facie* it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion.”

To this I would add the emphatic expression of the Lord Chancellor, Lord Halsbury, in the *Mogul Case* (3): “All are free to trade upon what terms they will”; and of Lord Bramwell, who in *Reg. v. Drwitt* (4), in a passage quoted by Lord Halsbury in the same case (5), said: “The liberty of a man’s mind and will to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law’s protection as was that of his body.” Again, Sir W. Erle thus expresses himself: “Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others.” (6) I am not aware that the rights thus stated have

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| (1) [1898] A. C. 1. | (4) 10 Cox C. C. 600. |
| (2) 6 E. & B. 74. | (5) [1892] A. C. at p. 73. |
| (3) [1892] A. C. 38. | (6) Erle on Trade Unions, p. 12. |
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H. L. (I.) ever been seriously questioned. I rest my judgment upon
 1901 the principle expressed in these few sentences. I seek for no
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The remedy for the invasion of a legal right is thus stated by Lord Watson in his judgment in *Allen v. Flood* (1): "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed."

I cannot suppose any intelligent person reading the evidence adduced on the trial of this case failing to come to the conclusion that the acts complained of amounted to a serious and wrongful invasion of the plaintiff's trade rights, and I am at a loss to comprehend upon what ground it is that the defendants seek to justify or excuse their action towards him.

As members of a trade union society they have no more legal right to commit what would otherwise be unlawful wrongs than if the association to which they are attached had never come into existence. They have no more right to coerce others pursuing the same calling as themselves to join their society, or to adopt their views or rules, than those who differ from them and belong to other trade associations would have a right to coerce them. The Legislature in conferring upon trades unions such privileges as are contained in the Trade Union Acts, 1871 and 1876, does not empower them to do more than make rules for the regulation of their own conduct and to provide for their own mutual assistance, and leaves each member as free to cease to belong to it and to repudiate every obligation for future observance of its rules as though he had never joined it; and most certainly it has not conferred upon any association or any member of it a licence to obstruct or interfere with the freedom of any other person in carrying on his business or bestowing his labour in the way he thinks fit, provided only that it is lawful: see *Erle J. in Reg. v. Rowlands* (2); and although a combination of members of a trade union for certain purposes is no longer unlawful and criminal as a conspiracy merely because the objects of that combination are in restraint of trade, no

(1) [1898] A. C. at p. 92.

(2) (1851) 2 Den. C. C. 364.

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protection is given to any combination or conspiracy which before the passing of the Act of 1871 would have been criminal for other reasons.

Not a word is to be found in the Trade Union Acts or in the Conspiracy Act of 1875 sanctioning such conduct as that complained of. Indeed, one cannot read the 7th section of the latter Act imposing penalties for undue coercion and intimidation without seeing that it had no intention to tolerate such proceedings as in this case are complained of, but rather to protect those upon whom coercive measures might be practised. I may also note that the 3rd section of that Act does not apply to civil proceedings by action.

It would not be useful to examine again all the numerous cases upon the citation and discussion of which much time has been expended, for not one of them would really assist the appellant in defence of his or his co-conspirators' conduct.

The *Mogul Case* (1) contains no doubt a mass of valuable, interesting, and useful law as to the length to which competing traders may go in pushing and endeavouring to promote their respective interests, and yet keep within bounds that are legal, though the stronger and more wealthy of them may sometimes press hardly upon the weaker whose capital is limited. One trader may by his mode of carrying on his trade hold out attractions and allurements which may enlist so many of his rival's customers as will well-nigh, perhaps wholly, destroy his trade.

But not a word will be found in that case justifying an active interference with the right of every trader to carry on his business in his own manner, so long as he does not interfere with a similar legal right which is vested in his neighbour and observes the correlative duty pointed out by Sir W. Erle.

My noble friend, the Lord Chancellor, accurately summed up the position of things in the *Mogul Case* (1) in these words: "What legal right was interfered with? What coercion of the mind, will, or person is effected? All are free to trade on what terms they will, and nothing has been done except in

(1) [1892] A. C. 25.

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appellant's interests."

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But I will not linger upon a consideration of what may be done in competition, for competition is not even suggested as a justification of the acts now complained of—acts of wanton aggression the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade.

It cannot be—it was not even suggested—that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules, according to the statutory requirement, or in support of any lawful right of the association or any member of it, or to obtain or maintain fair hours of labour or fair wages, or to promote a good understanding between employers and employed and workman and workman, or for the settlement of any dispute, for none had existence. It would, indeed, be a strange mode of promoting such good understanding to coerce a tradesman's customers to leave him because he would not, at the bidding of the association, dismiss workmen who desired to continue in his service and whom he wished to retain to make way for others he did not want.

I will deal now with the conspiracy part of the claim, respecting which much confusion and uncertainty seems somehow to have arisen, which I find it difficult to understand. I have no intention, however, to embark upon a history of the law relating to the subject, or to the old and obsolete writ of conspiracy. It would be useless for our present purpose.

I will endeavour briefly to state how I view the matter practically, so far as it concerns this case.

A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy,

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are, in my opinion, the same, though to sustain an action special damage must be proved. This is the substance of the decision in *Barber v. Lesiter*. (1) I quote as a very instructive definition of a conspiracy the words of a great lawyer, Willes J., in *Mulcahy v. Reg.* (2), in delivering the unanimous opinion of himself, Blackburn J., Bramwell B., Keating J., and Pigott B., which was adopted by this House: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means The number and the compact give weight and cause danger."

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It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present.

In 1870 Cockburn C.J., in delivering the unanimous judgment of Channell B., Cleasby B., Keating and Brett JJ. in *Reg. v. Warburton* (3), said: "It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done should be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i.e., amount to a civil wrong."

It has often been debated whether, assuming the existence of a conspiracy to do a wrongful and harmful act towards another and to carry it out by a number of overt acts, no one of which taken singly and alone would, if done by one individual acting alone and apart from any conspiracy, constitute a cause of action, such acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy, and if by those acts substantial damage was caused to the person against whom the conspiracy was directed: my own opinion is that they would.

(1) 7 C. B. (N.S.) 175.

(2) (1868) L. R. 3 H. L. at p. 317.

(3) L. R. 1 C. C. 276.

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H. L. (1.) In dealing with the question it must be borne in mind that
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The overt acts which follow a conspiracy form of themselves no part of the conspiracy: they are only things done to carry out the illicit agreement already formed, and if they are sufficient to accomplish the wrongful object of it, it is immaterial whether singly those acts would have been innocent or wrongful, for they have in their combination brought about the intended mischief, and it is the wilful doing of that mischief, coupled with the resulting damage, which constitutes the cause of action, not of necessity the means by which it was accomplished.

Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison. Many illustrations of these views might be suggested, but I need them not if I have made myself understood.

The cases bearing upon the subject are not very numerous: the whole subject was fully discussed in the *Mogul Case* (1) in each of its stages—to it I simply refer. *Rex v. Journeymen Tailors of Cambridge* (2) was an indictment for a common law conspiracy by workmen to raise wages. On objection taken to the indictment it was upheld for the reason given that the conspiracy was illegal, although the matter about which they conspired might have been lawful for them or any to do if they had not conspired to do it; and *Rex v. Eccles* (3), before Lord Mansfield, was an indictment for a conspiracy by indirect means to deprive and hinder one Booth from using and

(1) [1892] A. C. 25.

(2) (8 Geo. 1) 8 Mod. 11.

(3) 1 Lea. C. C. 274.

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exercising his trade of a tailor, and in pursuance of that conspiracy hindering and preventing him from following his said trade to his great damage. It was held unnecessary to set out the means by which the intended mischief was effected, "for the offence does not consist in doing those acts, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offence." See also per Grose J. in *R. v. Mawbey*. (1)

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If I rightly understand the judgment of Darling J. in *Huttley v. Simmons* (2), he treated *Allen v. Flood* (3) as a binding authority compelling him to hold that the object of the conspiracy as proved was not unlawful; in that view he rightly decided that the count for conspiracy could not be maintained. If he had held that, although the object of the conspiracy was unlawful, yet if the overt acts were not so, because they would not have been unlawful if done by one individual without any conspiracy, and had decided on that ground, I should have differed.

I am conscious that I have occupied more of your Lordships' time than I had intended, but the case is of real importance, and I feel that such unlawful conduct as has been pursued towards Mr. Leathem demanded serious attention. I think the law is with him, and that the damages awarded by the jury are under the circumstances very moderate. It is at all times a painful thing for any individual to be the object of the hatred, spite, and ill-will of any one who seeks to do him harm. But that is as nothing compared to the danger and alarm created by a conspiracy formed by a number of unscrupulous enemies acting under an illegal compact, together and separately, as often as opportunity occurs regardless of law, and actuated by malevolence, to injure him and all who stand by him. Such a conspiracy is a powerful and dangerous engine, which in this case has, I think, been employed by the defendants for the perpetration of organized and ruinous oppression.

(1) (1796) 6 T. R. 619; 3 R. R. 282.

(2) [1898] 1 Q. B. 181.

(3) [1898] A. C. 1.

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H. L. (1.) I think the judgment in the Court below ought to be affirmed and this appeal dismissed with costs.

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LORD ROBERTSON. (1) My Lords, in my opinion the judgment appealed against was right for the reasons given by Holmes L.J.

LORD LINDLEY. (2) My Lords, the case of *Allen v. Flood* (3) has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case. It was an action by two workmen of an iron company against three members of a trade union, namely, Allen and two others, for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs. (4) The action was tried before Kennedy J., who ruled that there was no evidence to go to the jury of conspiracy, intimidation, coercion, or breach of contract. The result of the trial was that the plaintiffs obtained a verdict and judgment against Allen alone. He appealed, and the only question which this House had to determine was whether what he had done entitled the plaintiffs to maintain their action against him. What the jury found that he had done was, that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal as to Allen's authority to call out the members of the union, and also as to the means used by Allen to induce the employers of the plaintiffs to discharge them; but, in the opinion of the noble Lords who formed the majority of your Lordships' House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs. (5) There

(1) Read by Lord Davey in Lord Robertson's absence. A. C. 3.

(2) Read by Lord Davey in Lord Lindley's absence.

(3) [1898] A. C. 1.

(4) [1895] 2 Q. B. 22, 23; [1898]

(5) [1898] A. C. p. 19, Lord Watson; p. 115 Lord Herschell; pp. 147-150 Lord Macnaghten; pp. 161, 165 Lord Shand; p. 175 Lord Davey; p. 178 Lord James.

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being no question of conspiracy, intimidation, coercion, or breach of contract for consideration by the House, and the majority of their Lordships having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie; that he had infringed no right of the plaintiffs; that he had done nothing which he had no legal right to do, and that the fact that he had acted maliciously and with intent to injure the plaintiffs did not, without more, entitle the plaintiffs to maintain the action.

My Lords, this decision, as I understand it, establishes two propositions: one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first.

The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new or laid down for the first time in *Allen v. Flood* (1); it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition care, however, must be taken to bear in mind, first, that in *Allen v. Flood* (1) criminal responsibility had not to be considered. It would revolutionise criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful," i.e., to acts involving no breach of duty, or, in other words, no wrong to any one. I shall refer to this matter later on.

The second proposition is that what Allen did infringed no right of the plaintiffs, even although he acted maliciously and with a view to injure them. I have already stated what he did, and all that he did, in the opinion of the majority of the noble Lords. If their view of the facts was correct, their

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conclusion that Allen infringed no right of the plaintiffs is perfectly intelligible, and indeed unavoidable. Truly, to inform a person that others will annoy or injure him unless he acts in a particular way cannot of itself be actionable, whatever the motive or intention of the informant may have been.

My Lords, the questions whether Allen had more power over the men than some of their Lordships thought, and whether Allen did more than they thought, are mere questions of fact. Neither of these questions is a question of law, and no Court or jury is bound as a matter of law to draw from the facts before it inferences of fact similar to those drawn by noble Lords from the evidence relating to Allen in the case before them.

I will pass now to the facts of this case, and consider (1.) what the plaintiff's rights were; (2.) what the defendants' conduct was; (3.) whether that conduct infringed the plaintiff's rights. For the sake of clearness it will be convenient to consider these questions in the first place apart from the statute which legalises strikes, and in the next place with reference to that statute.

1. As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously

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practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by the late Bowen L.J. in his admirable judgment in the *Mogul Steamship Company's Case* (1), may be referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen v. Flood* (2) to be opposed to it.

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If the above reasoning is correct, *Lumley v. Gye* (3) was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton v. Russell* (4) ought to have been decided and may be upheld on this principle. That case was much criticised in *Allen v. Flood* (2), and not without reason; for, according to the judgment of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out in *Allen v. Flood* (2). But in *Temperton v. Russell* (4) there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

2. I pass on to consider what the defendants did. The appellant and two of the other defendants were the officers of a trade union, and the jury have found that the defendants wrongfully

(1) 23 Q. B. D. 613, 614.

(2) [1898] A. C. 1.

(3) 2 E. & B. 216.

(4) [1893] 1 Q. B. 715.

II. L. (I.) and maliciously induced the customers of the plaintiff to refuse to deal with him, and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union; but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in *Allen v. Flood*. (1) In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers, nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse the conduct of the defendants. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case.

3. The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they

(1) [1898] A. C. 1.

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were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged, and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff—not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your Lordships have to deal with a case, not of *damnum absque injuria*, but of *damnum cum injuria*.

Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in the *Mogul Steamship Co. v. MacGregor* (1) and *Allen v. Flood* (2), and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to *Allen v. Flood* (2) in favour of the appellant. His sheet-anchor is *Allen v. Flood* (2), which is far from covering this case, and which can only be made to cover it by greatly extending its operation.

It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in *Allen v. Flood* (2) Lord Herschell (3) expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had

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(1) [1892] A. C. 25.

(2) [1898] A. C. 1.

(3) [1898] A. C. at pp. 128, 138.

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H. L. (I.) determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike, by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen v. Flood* (1) there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is *prima facie* unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country.

(1) [1898] A. C. 1.

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Amongst the American cases I would refer especially to *Vegeahn v. Guntner* (1), where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the case of the *Mogul Steamship Co.* (2) that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. *Allen v. Flood* (3) emphasises the same doctrine. The principle was strikingly illustrated in the *Scottish Co-operative Society v. Glasgow Fleshers' Association* (4), which was referred to in the course of the argument. In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs shewed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed—no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavoured to shew.

Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same

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(1) 167 Mass. 92.

(2) [1892] A. C. 25; 23 Q. B. D. 598.

(3) [1898] A. C. 1.

(4) 35 Sc. L. R. 645.

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for all persons, whatever their callings : it applies to masters as well as to men ; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock-out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is *prima facie*, at all events, a wrong inflicted on the persons coerced ; and in considering whether coercion has been applied or not, numbers cannot be disregarded.

My Lords, the appellant relied on several authorities besides those already referred to, which I will shortly notice. No coercion of the plaintiff's employer, customers, servants, or friends had to be considered in *Kearney v. Lloyd*. (1) This is fully shewn in the various judgments now under review.

In *Huttley v. Simmons* (2) the plaintiff was a cab-driver in the employ of a cab-owner. The defendants were four members of a trade union who were alleged to have maliciously induced the cab-owner not to employ the plaintiff, and not to let him have a cab to drive. The report does not state the means employed to induce the cab-owner to refuse to have any dealings with the plaintiff. The learned judge who tried the case held that as to three of the defendants the plaintiff had no case, and that as to the fourth, against whom the jury found a verdict, no action would lie because he had done nothing in itself wrong, apart from motive, and that the fact that he acted in concert with others made no difference. It is difficult to draw any satisfactory conclusion from this case, as the most material facts are not stated.

I conclude this part of the case by saying that, in my opinion, the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendants turns on principles of common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service, and coercion to break contracts of other kinds, and coercion not to enter into contracts.

(1) 26 L. R. Ir. 268.

(2) [1898] 1 Q. B. 181.

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I pass now to consider the effect of the statute 38 & 39 Vict. c. 86. This Act clearly recognises the legality of strikes and lock-outs up to a certain point. It is plainly legal now for workmen to combine not to work except on their own terms. On the other hand, it is clearly illegal for them or any one else to use force or threats of violence to prevent other people from working on any terms which they think proper. But there are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like. There are annoyances of all sorts and degrees: picketing is a distinct annoyance, and if damage results is an actionable nuisance at common law, but if confined merely to obtaining or communicating information it is rendered lawful by the Act (s. 7). Is a combination to annoy a person's customers, so as to compel them to leave him unless he obeys the combination, permitted by the Act or not? It is not forbidden by s. 7; is it permitted by s. 3? I cannot think that it is. The Court of Appeal (of which I was a member) so decided in *Lyons v. Wilkins* (1), in the case of Schoenthal, which arose there, and is referred to in the judgment of Walker L.J. at p. 99 of the printed judgments in this case. This particular point had not to be reconsidered when *Lyons v. Wilkins* (1) came before the Court of Appeal after the decision in *Allen v. Flood*. (2) But Byrne J. modified the injunction granted on the first occasion (3) by confining it to watching and besetting. He might safely have gone further and have restrained the use of other unlawful means; but the strike was then over, and his modification was not objected to, and cannot be regarded as an authority in favour of the appellant's contention.

It must be conceded that if what the defendants here did had been done by one person it would not have been punishable as a crime. I cannot myself see that there was in this case any trade dispute between employers and workmen within the meaning of s. 3. I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them

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(1) [1896] 1 Ch. 811.

(2) See [1899] 1 Ch. 255.

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(3) See [1899] 1 Ch. at pp. 258, 259.

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But assuming that there was a trade dispute within the meaning of s. 3, and that an indictment for conspiracy could not be sustained in a case like this, the difference between an indictment for a conspiracy and an action for damages occasioned by a conspiracy is very marked and is well known. An illegal agreement, whether carried out or not, is the essential element in a criminal case; the damage done by several persons acting in concert, and not the criminal conspiracy, is the important element in the action for damages. (1) In my opinion, it is quite clear that s. 3 has no application to civil actions: it is confined entirely to criminal proceedings. Nor can I agree with those who say that the civil liability depends on the criminality, and that if such conduct as is complained of has ceased to be criminal it has therefore ceased to be actionable. On this point I will content myself by saying that I agree with Andrews J. and those who concurred with him. It does not follow, and it is not true, that annoyances which are not indictable are not actionable. The law relating to nuisances, to say nothing of the law relating to combinations, shews that many annoyances are actionable which are not indictable, and the principles of justice on which this is held to be so appear to me to apply to such cases as these.

My Lords, I will detain your Lordships no longer. *Allen v. Flood* (2) is in many respects a very valuable decision, but it may be easily misunderstood and carried too far.

Your Lordships are asked to extend it and to destroy that individual liberty which our laws so anxiously guard. The appellant seeks by means of *Allen v. Flood* (2), and by logical reasoning based upon some passages in the judgments given by the noble Lords who decided it, to drive your Lordships to hold that boycotting by trades unions in one of its most objectionable forms is lawful, and gives no cause of action to its victims although they may be pecuniarily ruined thereby.

My Lords, so to hold would, in my opinion, be contrary to

(1) See 1 Wm. Saund. 229 b, 230, and *Barber v. Lesiter*, 7 C. B. (N.S.) 175.

(2) [1898] A. C. 1.

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well-settled principles of English law, and would be to do what H. L. (I.)
is not yet authorized by any statute or legal decision.

In my opinion this appeal ought to be dismissed with costs. 1901
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Order appealed from affirmed and appeal LEATHEN.
dismissed with costs.

Lords' Journals, August 5, 1901.

Solicitors: *Eyre, Dowling & Co., for Joseph Donnelly,*
Belfast; Francis H. White, for G. B. Wilkins, Lisburn.

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fairly. See in this connection the observations in *State of Karnataka v. M/s Hansa Corpn.*⁷ and *K. P. Varghese v. ITO*⁸. See also the observations of this Court in *Kasturi Lal Lakshmi Reddy v. State of J & K*.⁹

16. In fact the respondent did not have a house in his possession. He did purchase one before, but as it was not vacant, he sold away before the institution of the suit. There was no restriction by the Act on sale and alienation of property. At the relevant time the respondent fulfilled all the requirements to maintain an action for eviction. Shri Raja Ram Agarwala, counsel for the respondent, submitted before us that we should take a creative, reasonable and rational approach in interpreting the statute. We should not, he submitted, put such an interpretation as would prevent sale or mortgage of the property by the owner and in this case he was justified in saying that the landlord respondent did not have vacant possession. As the facts of this case warrant and in fact the respondent had sold away the property 1 1/2 years before his suit for his need was instituted, it cannot be said unless there was definite evidence that it was done with the intention to defeat the appellant's claim so as to be read that the landlord occupied another residential house at the relevant time i.e. at the time of institution of the suit. The appellate authority accepted the respondent's need and found him within the purview of the Act. The High Court did not interfere in revision, nor shall we under Article 136 of the Constitution.

17. The appeal, therefore, fails and is accordingly dismissed. Interim orders are vacated. In the facts and circumstances of the case, however, the parties will pay and bear their own costs.

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(BEFORE SABYASACHI MUKHARJI AND K.N. SINGH, JJ.)

Civil Appeal No. 4250 of 1986 [arising out of SLP (Civil)
No. 12041 of 1985]

AMBICA QUARRY WORKS .. Appellant ;

Versus

STATE OF GUJARAT AND OTHERS .. Respondents.

And

Civil Appeal No. 4251 of 1986 [arising out of SLP (Civil)
No. 12090 of 1985]

AMBALAL MANIBHAI PATEL AND OTHERS .. Appellants ;

Versus

STATE OF GUJARAT AND OTHERS .. Respondents.

7. (1980) 4 SCC 697, 704-706.

8. (1981) 4 SCC 173, 179-180, paras 5 & 6 : 1981 SCC (Tax) 293

9. (1980) 3 SCR 1338, 1357 : (1980) 4 SCC 1, 13, paras 14 : AIR 1980 SC 1992

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(1987) 1 SCC

Civil Appeals Nos. 4250 [arising out of SLP (Civil) No. 12041 of 1985]
and 4251 of 1986 [arising out of SLP (Civil) No. 12090 of 1985†],
decided on December 11, 1986

Mines and Minerals — Gujarat Minor Mineral Rules, 1966 — Rule 18 — Renewal of lease — Not mandatory — Where lease granted prior to coming into operation of Forest (Conservation) Act, 1980 but application for renewal of the lease made after commencement of the Act, held, refusal to grant renewal on ground of prohibition under Section 2 of the Act in absence of Central Government's approval thereunder valid

Forest (Conservation) Act, 1980 — Section 2 — After coming into force of the Act, renewal of pre-existing mining leases in forest areas can be granted only if requirements of Section 2 are satisfied

Interpretation of Statutes — Mandatory or directory — 'May' when cannot be construed as 'shall'

Held :

The words "lease . . . may be renewed" in Rule 18(b)(i) of the Gujarat Minor Mineral Rules cannot be construed as "lease . . . shall be renewed". Often when a public authority is vested with power, the expression 'may' has been construed as 'shall' because power, if the conditions for the exercise are fulfilled, is coupled with duty. But while under Rule 18 there was power to grant renewal and in the present cases there were clauses permitting renewals, it might have cast a duty to grant such renewal in the facts and circumstances of the cases specifically in view of the investments made by the lessees in the areas covered by the quarrying leases, but renewals cannot be claimed as a matter of right in these cases. (Paras 13 and 14)

Julius v. Lord Bishop of Oxford, (1880) 5 AC 214 and *Craies On Statute Law*, 7th edn., page 229, referred to

The Gujarat Minor Mineral Rules dealt with a situation prior to the coming into operation of the Forest (Conservation) Act, 1980. The primary purpose of the Act, which must subserve the interpretation in order to implement the Act, is to prevent further deforestation and ecological imbalances. Therefore, the concept that power coupled with the duty enjoined upon the respondents to renew the lease stands eroded by the mandate of the legislation as manifest in 1980 Act in the facts and circumstances of these cases. The primary duty was to the community and that duty took precedence over the obligation to the individuals in the present cases. The appellants were asking for a renewal of the quarry leases. It will lead to further deforestation or at least it will not help reclaiming back the areas where deforestations have taken place. The Central Government has not granted approval. If the State Government is of the opinion that it is not a case where it should seek approval of the Central Government, it cannot apparently seek such approval in a matter in respect of which it had come to the conclusion that no renewal should be granted. (Paras 15 and 19)

State of Rajasthan v. Hari Shankar Rajendra Pal, (1965) 3 SCR 402 : AIR 1966 SC 296 and *State of Bihar v. Banshi Ram Modi*, (1985) 3 SCC 643, distinguished

Interpretation of Statutes — All interpretations must subserve and help implementation of the intention of the Act (Para 20)

†From the Judgment and Order dated August 9, 1985 of the Gujarat High Court in Spl. Civil Appln. No. 2471 of 1985 and 6218 of 1983

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Constitution of India — Article 141 — Precedent — The ratio of a decision should be understood in the fact situation of the particular case — It is an authority for what it actually decides, and not what logically follows from it (Para 18)

Quinn v. Leatham, (1901) AC 495, *relied on*

R-M/7647/C

Advocates who appeared in this case :

Gobind Das and S.H. Sheth, Senior Advocates (*Mrs H. Wahi and M.V. Goswami*, Advocates, with them), for the Appellants;

P S. Poti and T U. Mehta, Senior Advocates (*M.N. Shroff*, Advocate, with them), for the Respondents.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J.—We grant leave in these two special leave applications and dispose of these appeals arising out of the decisions of the High Court of Gujarat by the judgment herein.

2. The two appeals centre round the question of how to strike balance between the need of exploitation of the mineral resources lying hidden in the forests and the preservation of the ecological balance and to arrest the growing environmental deterioration and involve common questions of law. In the appeal arising out of Special Leave Petition Number 12041 of 1985 the appellant firm had been granted a quarry lease for the minor mineral black trap at S. No. 73 of Village Morai of Taluka-Pardi, in the District of Valsad in the State of Gujarat. The lease was granted on or about November 8, 1971 for a period of ten years. The area comprised 13 acres of land for quarrying purpose. Three persons were granted 2 1/2 acres of land each and the remaining 5 1/2 acres of land were placed at the disposal of Industries, Mines and Power Department for the purpose of granting quarry lease from the same. The case of the appellant was that the said lands were dereserved from the forest area from 1971.

3. On or about August 3, 1981 when the appellant's term of lease was about to expire, the appellant applied for renewal of lease as per Rule 18 of Gujarat Minor Mineral Rules, 1966 (hereinafter called the said Rules). The application of the appellant for renewal of lease was rejected by the Assistant Collector, Valsad, on the ground that the land fell under the "Reserved Forest" area and hence the Forest (Conservation) Act, 1980 (hereinafter called '1980 Act') applied to the forests. The forest department of the State of Gujarat refused to give 'no objection' certificate. The contention of the appellant was that by the order dated November 29, 1971, the forest department had dereserved the said land from the reserved area and had allotted the land for the quarrying purpose to the appellant. The contention of the appellant was as the land was under the control of the Industries, Mines & Power department, the 1980 Act did not apply to the same. An appeal was preferred by the appellant which was dismissed by the Director, Industries, Mines and Power department, Government of Gujarat on or about March 4, 1985.

4. It is asserted by the appellant that on or about January 29, 1983, the government had issued two circulars instructing the Director of Geology and Mining and other authorities not to issue the leases in the fresh area issued by the State Government. The appellant thereafter filed a writ petition in the High Court of Gujarat. The High Court of Gujarat dismissed the petition. The appellant has come up in appeal before this Court from the said decision. The appeal arises out of S. L. P. No. 12041 of 1985, hereinafter mentioned as first appeal.

5. The case of the appellants in the second appeal is that on diverse dates quarry leases had been granted to the said appellants. There were ten of them. Eight of the appellants got their first renewal of their quarry leases in 1976-77. Appellant 9 applied for first renewal in August 1979. Appellant 6 applied for first renewal on July 20, 1982. In 1982, some of the appellants except appellants 6 to 9 applied for second renewal to the Collector. On December 1982, second renewals were refused by the Collector. Revision filed by the appellants against the order of the Collector was rejected by the Director, Geology and Mining in 1983 and in December 1983, writ petition often described as special civil application was filed before the High Court, challenging the refusal to renew. The High Court rejected the said writ petition. The second appeal herein arises out of the said decision in August 1985 of the High Court of Gujarat.

6. Both these appeals involve the question, whether after coming into operation of 1980 Act, the appellants were entitled to renewal either first or second of their quarry leases? In this connection it is necessary to refer to the 1980 Act. This was an Act passed by the Parliament to provide for the conservation of forest and for matters connected therewith or ancillary thereto. The Statement of Objects of the said Act is relevant. It is stated that deforestation caused ecological imbalances and led to environmental deterioration. It recognised that deforestation had been taking place on a large scale in the country and it had thereby caused widespread concern. With a view to checking further deforestation, an Ordinance had been promulgated on October 25, 1980. The Ordinance made the prior approval of the Central Government necessary for dereservation of reserved forests and for the use of forest land for non-forest purposes. The Ordinance had also provided for the constitution of an advisory committee to advise the Central Government with regard to grant of such approval. The 1980 Act replaced the said Ordinance. The Act extends to the whole of India except the State of Jammu & Kashmir, and came into force on October 25, 1980. Section 2 of the said Act is only relevant for our present purpose. It provides as follows :

2. *Restriction on the dereservation of forests or use of forest land for non-forest purpose.*—Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing—

(i) that any reserved forest (within the meaning of the expression

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“reserved forest” in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved ;

(ii) that any forest land or any portion thereof may be used for any non-forest purpose.

Explanation.—For the purposes of this section “non-forest purposes” means breaking up or clearing of any forest land or portion thereto for any purpose other than re-afforestation.

7. The said section makes it obligatory for the State Government to obtain the permission of the Central Government for (1) dereservation of reserved forest and (2) for use of forest land for non-forest purposes. It is apparent, therefore, that the two dual situations were intended to be prevented by the legislation in question, namely dereservation of reserved forest, and use of forest land for non-forest purposes.

8. In the instant appeals leases for quarrying purposes had been granted prior to the coming into operation of the Act in question. Shri Gobind Das, learned counsel for the appellant in the first appeal and Shri Sheth learned counsel for the appellants in the second appeal contended that there was no question of extending for non-forest purposes forest lands. There were existing quarry leases ; in one case first renewal was sought and in some other cases second or third renewals were being sought. Therefore these were at the relevant time dereserved forests. Neither of the two contingencies sought to be prevented was there. The conditions precedent for the operation of the Act were not there in the facts of these appeals, it was urged.

9. Our attention was drawn to Rule 18 of Gujarat Minor Mineral Rules, 1966 which were framed under the Act 67 of 1957 by the Government of Gujarat. The rules provide for the period of the lease, renewals and availability of areas already granted and sub-clause (b)(i) of the said Rule 18 of the said Rules provides as follows :

(b)(i) The lease for all minerals specified in sub-clause (i) of clause (a) may be renewed by the competent officer for one or more periods and the period of renewal at one time shall not exceed ten years and the total period for which the lease may be renewed shall not exceed twenty years in the aggregate.

10. Shri Sheth drew our attention to Rule 3 of Part VIII (page 62) of the Manual which deals with the procedure of granting renewals under the rules.

11. On the other hand Shri Mehta, counsel for the respondents in the first appeal and Shri Poti, counsel for the respondents in the second appeal contended before us that after coming into operation of 1980 Act there was no question of renewal of the leases because this Act had prevented renewal of the lease without the approval of the Central Government.

12. Shri Gobind Das, however, placed strong reliance on *State of Rajasthan v. Hari Shankar Rajendra Pal*¹. That was a decision dealing with

1. (1965) 3 SCR 402 · AIR 1966 SC 296

Rajasthan Mines and Minerals Concession Rules, 1958. This Court in that case was concerned with Rule 30 under Chapter IV under the said Rajasthan Rules. This Court observed that the word 'may' in the proviso in Rule 30 in regard to the extension of the period by government should be construed as 'shall' so as to make it incumbent on government to extend the period of the lease if the lessee desired extension. The Rajasthan Rules provided, *inter alia*, as follows :

Period of lease.—A mining lease may be granted for a period of 5 years unless the applicant himself desires a shorter period ;

Provided that the period may be extended by the government for another period not exceeding 5 years with option to the lessee for renewal for another equivalent period, in case the lessee guarantees investments in machinery, equipments and the like, at least to the tune of 20 times the value of annual dead rent within 3 years from the grant of such extension. The value of the machinery, equipment and the like shall be determined by the government. Where the lease is so renewed, the dead rent and the surface rent shall be fixed by the government within the limits given in the Second Schedule to these rules, and shall in no case exceed twice the original dead rent and surface rent respectively, and the royalty shall be charged at the rates in force at the time of renewal.

13. It was submitted by Shri Gobind Das that the said rule was in *pari materia* with sub-rule (b) of Rule 18 of Gujarat Minor Mineral Rules, 1966. Often when a public authority is vested with power, the expression 'may' has been construed as 'shall' because power if the conditions for the exercise are fulfilled is coupled with duty. As observed in *Craies On Statute Law*, 7th edn., page 229, the expression "may" and "shall" have often been subject of constant and conflicting interpretation. "May" is a permissive or enabling expression but there are cases in which for various reasons as soon as the person who is within the statute is entrusted with the power, it becomes his duty to exercise it. As early as 1880 the Privy Council in *Julius v. Lord Bishop of Oxford*² explained the position. Earl Cairns, Lord Chancellor speaking for the judicial committee observed dealing with the expression "it shall be lawful" that these words confer a faculty or power and they do not of themselves do more than confer a faculty or power. But the Lord Chancellor explained there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty must depend upon the facts and circumstances of each case and must be so decided by the courts in each case. Lord Blackburn observed in the said decision that enabling words were always compulsory where the words were to effectuate a legal right.

2. (1880) 5 AC 214

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14. Here the case of the appellants is that they have invested large sums of money in mining operations. Therefore, it was the duty of the authorities that the power of granting permission should have been so exercised that the appellants had the full benefits of their investments. It was emphasized that none of the appellants had committed any breach of the terms of grant nor were there any other factors disentitling them to such renewal. While there was power to grant renewal and in these cases there were clauses permitting renewals, it might have cast a duty to grant such renewal in the facts and circumstances of the cases specially in view of the investments made by the appellants in the areas covered by the quarrying leases, but renewals cannot be claimed as a matter of right for the following reasons.

15. The rules dealt with a situation prior to the coming into operation of 1980 Act. '1980 Act' was an Act in recognition of the awareness that deforestation and ecological imbalances as a result of deforestation have become social menaces and further deforestation and ecological imbalances should be prevented. That was the primary purpose *writ large* in the Act of 1980. Therefore the concept that power coupled with the duty enjoined upon the respondents to renew the lease stands eroded by the mandate of the legislation as manifest in 1980 Act in the facts and circumstances of these cases. The primary duty was to the community and that duty took precedence, in our opinion, in these cases. The obligation to the society must predominate over the obligation to the individuals.

16. For the same reason we are unable to accept the view that the ratio of the decision of this Court in the case of *State of Rajasthan v. Hari Shankar Rajendra Pal*¹ could be invoked in the facts and circumstances of these cases to demand renewal. Furthermore it appears to us from the affidavits in opposition filed on behalf of the respondents that there were good grounds for not granting the renewal of the lease. The orders of the appropriate authorities in both these cases deal with the situation.

17. Both Shri Gobind Das as well as Shri Sheth, however, relied very heavily on the decision of this Court in *State of Bihar v. Banshi Ram Modi*². As the said decision dealt with Section 2 of the 1980 Act, it is necessary to refer to the facts of that case. There a mining lease for winning mica was granted by the State Government in respect of an area of 80 acres of land which formed part of reserved forest before coming into force of 1980 Act. However, the forest land had been dug up and mining operations were being carried on only in an area of 5 acres out of the total lease area of 80 acres. While carrying on mining operations, the respondent came across two associate minerals feldspar and quartz in the area. The respondent in that case, therefore, made an application to the State Government for execution of a Deed of Incorporation to include the said minerals also in the lease. Though the 1980 Act had come into force, the State Government executed the Deed of Incorporation

3. (1985) 3 SCC 643

incorporating these items without obtaining prior sanction of the Central Government under Section 2 of 1980 Act. Since the respondent in that case made a statement before the court that he would carry on the mining operations only on 5 acres of land which had already been utilised for non-forest purposes even before the Act came into force, the question for determination was whether prior approval of the Central Government under Section 2 of 1980 Act in the facts of that case was necessary for the State Government for granting permission to win associate minerals also within the same area of 5 acres of land? This Court answered the question in the negative and affirmed the judgment of the High Court. This Court observed at pages 647 and 648 of the report as follows : (SCC pp. 647-48, para 10)

The relevant parts of Section 2 of the Act which have to be construed for purposes of this case are clause (ii) of and the Explanation to that section. Clause (ii) of Section 2 of the Act provides that notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing that any forest land or any portion thereof may be used for any non-forest purpose. Explanation to Section 2 of the Act defines "non-forest purpose" as breaking up or clearing of any forest land or portion thereof for any purpose other than reafforestation. Reading them together, these two parts of the section mean that after the commencement of the Act no fresh breaking up of the forest land or no fresh clearing of the forest on any such land can be permitted by any State Government or any authority without the prior approval of the Central Government. But if such permission has been accorded before the coming into force of the Act and the forest land is broken up or cleared then obviously the section cannot apply. In the instant case it is not disputed that in an area of five acres out of eighty acres covered by the mining lease the forest land had been dug up and mining operations were being carried on even prior to the coming into force of the Act. If the State Government permits the lessee by the amendment of the lease deed to win and remove felspar and quartz also in addition to mica it cannot be said that the State Government has violated Section 2 of the Act because thereby no permission for fresh breaking up of forest land is being given. The result of taking the contrary view will be that while the digging for purposes of winning mica can go on, the lessee would be deprived of collecting felspar or quartz which he may come across while he is carrying on mining operations for winning mica. That would lead to an unreasonable result which would not in any way subserve the object of the Act. We are, therefore, of the view that while before granting permission to start mining operations on a virgin area Section 2 of the Act has to be complied with it is not necessary to seek the prior approval of the Central Government for purposes of carrying out mining operations in a forest area which is broken up or cleared before the commencement of the Act. The learned counsel for respondent 1 has also given an undertaking that respondent 1 would confine his mining operations only to the extent of five acres of land on which mining operations have already been carried out and will not fell or remove any standing trees thereon without the prior permission in writing from the Central Government. Taking into consideration all the relevant matters, we are of the view that respondent 1 is entitled to carry on mining operations in the said five acres of land for purposes of removing felspar and quartz subject to the above conditions.

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18. The aforesaid observations have been set out in detail in order to understand the true ratio of the said decision in the background of the facts of that case. It is true that this Court held that if the permission had been granted before the coming into operation of the 1980 Act and the forest land has been broken up or cleared, clause (ii) of Section 2 of 1980 Act would not apply in such a case. But that decision was rendered in the background of the facts of that case. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. (*See Lord Halsbury in Quinn v. Leathem*)⁴. But in view of the mandate of Article 141 that the ratio of the decision of this Court is a law of the land, Shri Gobind Das submitted that the ratio of a decision must be found out from finding out if the converse was not correct. But this Court, however, was cautious in expressing the reasons for the said decision in *State of Bihar v. Banshi Ram Modi*³. This Court observed in that decision that the result of taking the contrary view would be (SCC p. 648, para 10) that while the digging for purposes of winning mica can go on, the lessee would be deprived of collecting felspar or quartz which he may come across while he is carrying on mining operations for winning mica. That would lead to an unreasonable result which would not in any way subserve the object of the Act. There was an existing lease where mining operation was being carried on and what was due by incorporation of a new term was that while mining operations were being carried on some other minerals were available, he was giving right to collect those. The new lease only permitted utilisation or collection of the said other minerals.

19. In the instant appeals the situation is entirely different. The appellants are asking for a renewal of the quarry leases. It will lead to further deforestation or at least it will not help reclaiming back the areas where deforestations have taken place. In that view of the matter, in the facts and circumstances of the case, in our opinion, the ratio of the said decision cannot be made applicable to support the appellants' demands in these cases because the facts are entirely different here. The primary purpose of the Act which must subserve the interpretation in order to implement the Act is to prevent further deforestation. The Central Government has not granted approval. If the State Government is of the opinion that it is not a case where the State Government should seek approval of the Central Government, the State Government cannot apparently seek such approval in a matter in respect of which, in our opinion, it has come to the conclusion that no renewal should be granted.

20. In that view of the matter and the scheme of the Act, in our opinion, the respondents were right and the appellants were wrong. All interpretations must subserve and help implementation of the intention of the Act. This interpretation, in our opinion, will subserve the predominant purpose of the Act.

21. In that view of the matter, we are unable to sustain the submissions

4. (1901) AC 495

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urged in support of these appeals. The appeals therefore fail and are accordingly dismissed. In view of the facts and circumstances of these appeals, however, we direct the parties to pay and bear their own costs.

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(BEFORE M.P. THAKKAR AND B. C. RAY, JJ.)

SHAM LAL (DEAD) BY LRS.

Appellant ;

Versus

ATME NAND JAIN SABHA (REGD.), DAL BAZAR

Respondent.

Civil Appeal No. 918 of 1973†, decided on December 10, 1986

Rent Control and Eviction — Rent — Payment or tender of rent arrears on the 'first hearing' of the application or suit for eviction — Meaning of 'first hearing' in context — East Punjab Urban Rent Restriction Act, 1949, Section 13(2)(i) — U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, Section 20(4)

Held :

The East Punjab Rent Act was enacted with the object of affording protection to the tenant against arbitrary increase of rent of certain premises within the limits of urban areas as well as from eviction of the tenants from the rented premises. In this context, it is imperative that the words "the first hearing of the application" in Section 13(2)(i) of the E.P. Rent Act (which is in pari materia with the U. P. Rent Act) have to be interpreted in a manner which promote the object of this beneficial legislation. So read it is clear that these words do not mean the day fixed for return of the summons or the returnable day which is the day for appearance but the day when the court applies its mind to the case, as on the day for appearance of the defendant the court does not take up the hearing or apply its mind to the hearing of the application. It is only after written statement is filed, the issues are framed and hearing commences. (Paras 8 and 13)

Ved Prakash Wadhwa v. Vishwa Mohan, (1981) 3 SCC 667, followed

Mangat Rai v. Ved Prakash, (1969) 1 Rent Control Reporter 96 ; *Shah Ambalal Chhotalal v. Shah Babaldas Dayabhai*, AIR 1964 Guj 9 : (1962) 3 Guj LR 625 and *Khanderao Malkarjun Dhotre v. Anandrao Laxmanrao Mashalkar*, AIR 1959 Bom 471 : 60 Bom LR 1039 : ILR 1958 Bom 1325, approved

Appeal allowed

R-M/7643/C

*Advocates who appeared in this case :**S. A. Mehta, M. K. Dua and Aman Vachhar*, Advocates, for the Appellant;*S. N. Kacker*, Senior Advocate (*B. P. Maheshwari*, Advocate, with him), for the Respondent.

The Judgment of the Court was delivered by

B.C. RAY, J.—This appeal by special leave is directed against the judgment and order passed on February 27, 1973 in Civil Revision No. 895 of 1972 by the High Court of Punjab and Haryana whereby the revision case was allowed reversing the judgment and order of the appellate authority and allowing the

†From the Judgment and Order dated February 27, 1973 of the Punjab and Haryana High Court in Civil Revision No. 895 of 1972

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	(BEFORE Sabyasachi Mukharji, C.J. AND B.C. Ray, M.H. Kania, K.N. Sankaria AND S.C. Agrawal, JJ.)	
a	Special Leave Petition (Civil) No. 8461 of 1986	
	KRISHENA KUMAR .. Petitioner;	
	<i>Versus</i>	
	UNION OF INDIA AND OTHERS .. Respondents.	
b	<i>And</i>	
	Civil Writ Petition No. 1285 of 1986	
	BALBIR SINGH .. Petitioner;	
	<i>Versus</i>	
c	UNION OF INDIA .. Respondent.	
	<i>And</i>	
	Civil Writ Petition No. 1575 of 1986	
	DESH RAJ KOHLI AND OTHERS .. Petitioners;	
d	<i>Versus</i>	
	UNION OF INDIA .. Respondent.	
	<i>And</i>	
	Civil Writ Petition No. 352 of 1989	
e	R.N. Mubayi, President, All India Retired Railwaymen (P.F. Terms) Association .. Petitioner;	
	<i>Versus</i>	
	UNION OF INDIA .. Respondent.	
	<i>And</i>	
f	Civil Writ Petition No. 361 of 1989	
	BRIJ MOHAN KAUL AND OTHERS .. Petitioners;	
	<i>Versus</i>	
	UNION OF INDIA AND ANOTHER .. Respondents.	
g	<i>And</i>	
	Civil Writ Petition No. 1165 of 1989	
	K. Ravi Verma AND OTHERS .. Petitioners;	
	<i>Versus</i>	
h	UNION OF INDIA AND OTHERS .. Respondents.	
	Special Leave Petition (Civil) No. 8461 of 1986 and Writ Petition (Civil) Nos. 1285 and 1575 of 1986 and 352, 361 and 1165 of 1989, decided on July 13, 1990	
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Service Law — Pension — Railway service — P.F. Scheme and pension scheme — Exercise of option — Cut off date for — Arbitrariness and discrimination — Pension scheme successively liberalised while PF scheme remaining stagnant — Ample opportunity given to the PF holders to exercise option for changing over to the pension scheme — PF retirees who failed to exercise the option within time, held, not entitled to be included in the pension scheme on ground of parity — PF retirees and pension retirees constitute different class — Constitution of India, Articles 14 and 16

Jurisprudence — Moral obligation not binding while legal obligation binding — State's obligation towards its employees — Service Law

Constitutional law — Separation of powers — Pension to government employees — In matters entailing financial implications Supreme Court would be loath to pass any order or directions

The petitioners are retired Railway employees who were covered by or had opted for the Railway Contributory Provident Fund Scheme. According to the petitioners before 1957 the only scheme for retirement benefits in the Railways was the Provident Fund Scheme. This scheme was replaced in the year 1957 by the Pension Scheme. The employees who entered Railway service on or after April 1, 1957 were automatically covered by the Pension Scheme instead of the Provident Fund Scheme. The employees who were already in service on April 1, 1957 were given an option either to retain the Provident Fund benefits or to switch over to the pensionary benefits on condition that the matching Railway contribution already made to their Provident Fund accounts would revert to the Railways on exercise of the option. Twelve notifications giving such options were issued. In case of each option the cut-off date was anterior to the respective dates of announcement, and as a result, employees who retired after the cut-off date (specified date) and before the notification date were also made eligible for exercising the option despite the fact that they already retired in the meantime. It was stated that while two alternative benefits of provident fund and pension were more or less equal at the time when the petitioners were to make their choice, the pensions had thereafter been liberalised manifold to the benefit of the pension retirees, whereas no similar benefits had been extended to those who retired opting for Provident Fund; and that had the petitioners, all of whom are PF retirees, known that pensionary benefits might subsequently be so increased, they would no doubt have opted for pension instead of Provident Fund. As regards the cut-off date it was mainly submitted that the Railways issued the notifications giving option to certain PF retirees after the respective cut-off dates to opt for the Pension Scheme even after their retirement, but the same options were not given to other similarly situated PF retirees beyond the respective cut-off dates. This, it was submitted, was clearly discriminatory and violative of Article 14. Dismissing the writ petitions and SLP the Supreme Court

Held :

Those who did not opt for the pension scheme had ample opportunity to choose between the two viz. the PF scheme or the pension scheme. Each option was given for stated reason related to the options. On each occasion time was given not only to the persons in service on the date of the Railway Board's let-

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- a ter but also to persons who were in service till the stated anterior date but had retired in the meantime. The period of validity of option was extended in all the options except a few. Therefore, the cut-off dates were not arbitrarily chosen but had nexus with the purpose for which the option was given.

(Paras 7 and 14)

- b The notification limiting the requirement that instead of all the CPF beneficiaries only those who were in service on a specified date and were still in service on the date of issue of the notification would be deemed to have come over to the pension scheme, cannot be struck down by applying the ratio of *Nakara case*.

- c Morally it may be that the State's obligation towards pension retirees is the same as that towards PF retirees. But that was not the ratio decidendi of *Nakara*. Legislation has not said so. To say so legally would amount to legislation by enlarging the circumference of the obligation and converting a moral obligation into a legal obligation. (Para 31)

Bentham, *Theory of Legislation*, Chapter XII, p. 60, referred to

- d In *Nakara* the Court treated the pension retirees only as a homogeneous class. It was never held that both the pension retirees and the PF retirees formed a homogeneous class and that any further classification among them would be violative of Article 14. On the other hand the court clearly observed that it was not dealing with the problem of a "fund". The Railway Contributory Provident Fund is by definition a fund. Besides on the retirement of an employee government's legal obligation under the Provident Fund account ends while under the Pension Scheme it begins. The rules governing the Provident Fund and its contribution are entirely different from the rules governing pension. It would not, therefore, be reasonable to argue that what is applicable to the pension retirees must also equally be applicable to PF retirees. This being the legal position the rights of each individual PF retiree finally crystallized on his retirement whereafter no continuing obligation remained while, on the other hand, as regard Pension retirees, the obligation continued till their death. The continuing obligation of the State in respect of pension retirees is adversely affected by fall in rupee value and rising prices which, considering the corpus already received by the PF retirees they would not be so adversely affected ipso facto. It cannot, therefore, be said that it was the ratio decidendi in *Nakara* that the State's obligation must be the same as that towards the pension retirees. An imaginary definition of obligation to include all the government retirees in a class was not decided and could not form the basis for any classification for the purpose of this case. *Nakara* cannot, therefore, be an authority for this case.

(Paras 30 and 32)

- h *D.S. Nakara v. Union of India*, (1983) 1 SCC 305: 1983 SCC (L&S) 145: (1983) 2 SCR 165; explained and distinguished

That the Pension Scheme and the PF Scheme are *structurally different* is also in view of the Central Pay Commissions and hence ex gratia benefits have been recommended, which may be suitably increased. (Para 38)

- i *Union of India v. Bidhubhushan Malik*, (1984) 3 SCC 95: 1984 SCC (L&S) 354, referred to

Therefore, the option given to the PF employees to switch over to the pension scheme with effect from a specified cut-off date is bad as violative of Arti-

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cle 14 for the same reasons for which in *Nakara* the notification were read down. The fact that the specified date has been fixed in relation to the reason for giving the option and only the employees who retired after the specified date and before and after the date of notification were made eligible has been substantiated by what has been stated by the successive Pay Commissions. It would also appear that corresponding concomitant benefits were also granted to the Provident Fund holders. There was, therefore, no discrimination and the question of striking down or reading down the concerning clause of the option does not arise. (Para 34)

The submission that at least an option should be given to the respondents either to withdraw the benefit of switching over to pension from everyone or to give it to the petitioners as well, so that the discrimination must go cannot be accepted. As the PF retirees and pension retirees did not belong to a class, there is no discrimination. (Paras 44 and 45)

On the question of financial implication and expenditure includible in the Annual Financial Statement, the Supreme Court has to be loath to pass any order or give any direction, because of the division of functions between the three co-equal organs of the government under the Constitution.

(Paras 42, 43 and 45)

On the question of feasibility of converting all living PF retirees to Pension retirees, it is not necessary to express any opinion. (Para 46)

Constitution of India — Article 141 — Ratio decidendi — How to ascertain — If it is not ascertainable clearly court need not endeavour to spell it out

The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. (Para 20)

Halsbury's Law of England, 4th edn., Vol. 26, para 573, referred to

Constitution of India — Article 141 — Stare decisis — Meaning of — Doctrine of precedent — Binding nature of precedent — Reasons given in support of the decision containing propositions wider than the case itself not binding — Jurisprudence

Stare decisis et non queta movere. To adhere to precedent and not to unsettle things which are settled. But it applies to litigated facts and necessarily decided questions. Apart from Article 141, the policy of courts is to stand by precedent and not to disturb settled point. when court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority,

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a or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy unless there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. It should be invariably applied and should not ordinarily be departed from where decision is of long standing and rights have been acquired under it, unless considerations of public policy demand it. (Para 33)

b The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. The enunciation of the reason or principle upon which a question before a court has been decided is alone binding as precedent. It does not mean that the Supreme Court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required". (Para 19)

c *Caledonian Railway Co. v. Walker's Trustees*, (1882) 7 App Cas 259: 46 LT 826 (HL); *Quinn v. Leatham*, 1901 AC 495: 17 TLR 749 (HL), *relied on*

R-M/10108/CLA

The Judgment of the Court was delivered by

K.N. SAIKIA, J.— This analogous cluster of five writ petitions and
d one special leave petition involves a common question of law. The petitioner in Writ Petition No. 352 of 1989 is the President of the All India Retired Railwaymen (P.F. Terms) Association and the petition has been filed in a representative capacity on behalf of all the members of the Association who retired with Provident Fund benefits. Writ Petition
e No. 361 of 1989 has been filed by three individual retired Railway employees who also retired with Provident Fund benefits. The petitioner in Writ Petition No. 1285 of 1986 retired as Block Inspector of Northern Railway on January 7, 1968, a non-pensionable post. All the petitioners except petitioner 5 in W.P. No. 1575 of 1986 retired from Railway service high posts. Petitioner 1 retired as Additional Member, Railway
f Board on November 5, 1960 with Provident Fund benefits. Petitioner 2 was Member, Railway Board and similarly retired on March 1, 1988 opting for Provident Fund Scheme as at that time the maximum monthly pension was Rs 675 only. Petitioner 3 similarly retired as General
g Manager on December 5, 1960. Petitioner 4 retired as Member (Staff) Railway Board and Ex-officio Secretary to the Government of India on June 30, 1977 opting for the Provident Fund Scheme. Petitioner 5 also retired on June 19, 1972 opting for the Provident Fund Scheme. Petitioner 6 retired on August 28, 1962 as Director Health, Railway
h Board opting for Provident Fund Scheme. Petitioner 7 similarly retired on February 17, 1968 as Director, Railway Board. Petitioner 8 retired as General Manager, Indian Railways on October 15, 1966 with the Contributory Provident Fund Scheme. The petitioners in Writ Petition No. 1165 of 1989 are also similarly retired persons. The petitioner in Special
i Leave Petition (Civil) No. 8461 of 1986 retired as Assistant Auditor, with

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Provident Fund benefits. His claim to switch over to pension after retirement was rejected. The petitioners are thus retired Railway employees who were covered by or had opted for the Railway Contributory Provident Fund Scheme. It is the petitioners' case that before 1957 the only scheme for retirement benefits in the Railways was the Provident Fund Scheme wherein each employee had to contribute till retirement a portion of his annual income towards the Provident Fund and the Railways as the employer would make a matching contribution thereto. This Provident Fund Scheme was replaced in the year 1957 by the Pension Scheme whereunder the Railways would give posterior to his retirement certain monthly pension to each retired employee instead of making prior contribution to his Provident Fund. It is stated that the employees who entered Railway service on or after April 1, 1957 were automatically covered by the Pension Scheme instead of the Provident Fund Scheme. Insofar as the employees who were already in service on April 1, 1957, they were given an option either to retain the Provident Fund benefits or to switch over to the pensionary benefits on condition that the matching Railway contribution already made to their Provident Fund accounts would revert to the Railways on exercise of the option.

2. It is the petitioners' case that till April 1, 1957 or even some time thereafter, the pensionary benefits and the alternative Contributory Provident Fund benefits were considered to be more or less equally beneficial, wherefore, employees opted for either of them. That the benefits of the two were evenly balanced was evidenced by the Railway Board circular dated September 17, 1960 which gave an option to the employees covered by the Provident Fund Scheme to switch over to pension scheme and vice versa.

3. Mr Shanti Bhushan, the learned counsel for the petitioners in Writ Petition Nos. 352 and 361 of 1989, submits that between 1957 and 1987 the pensionary benefits of Railway employees were enhanced on several occasions by different ways such as altering the formula for computing the pension, by including dearness allowance in the pay for computing pension, by removal of the ceiling on pension, and by introducing or liberalising the Family Pension Scheme etc. The Railways, it is urged, had expressed no intention of extending the benefits of this liberalised pension to those employees who had already retired. At the time when the option was given to choose between pension and Provident Fund, the employees had no idea that in future improvements would be made to either of them. However, it is stated, this Court in *D.S. Nakara v. Union of India*¹ held that the benefit of any liberalisation in computation of pension would also have to be extended to those employees who had already retired as they were similarly situated with those who were yet to

¹ (1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165

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- retire. It is submitted, that even though *Nakara case*¹ related to Central Government employees, the Railways also implemented the judgment and extended the liberalised pension benefits even to those employees who had retired long before the liberalisations concerned were introduced. The decision to implement *Nakara judgment*¹ to Railway employees is admittedly contained in G.O. No. F1 (3)-EV/83 dated October 22, 1983. This has, according to the learned counsel, given rise to the “strange situation” namely, that while two alternative benefits of provident fund and pension were more or less equal at the time when the petitioners were to make their choice, the pensions have thereafter been liberalised manifold to the benefit of the pension retirees, whereas no similar benefits have been extended to those who retired opting for Provident Fund, hereinafter called ‘the PF retirees’. It is asserted that due to successive liberalisations of pensions, the pension retirees derived manifold benefits while the PF retirees’ benefits remained stagnant. It is submitted that had the petitioners, all of whom are PF retirees, known that pensionary benefits might subsequently be so increased, they would no doubt have opted for pension instead of Provident Fund. The following twelve notifications giving such options are referred to:

	<i>Date of Notification</i>	<i>Cut-off date chosen</i>
	1. September 17, 1960	July 1, 1959
e	2. October 26, 1962	September 1, 1962
	3. March 3, 1966	December 31, 1965
	4. September 13, 1968	May 1, 1968
	5. July 23, 1974	January 1, 1973
	6. August 23, 1979	March 31, 1979
f	7. September 1, 1980	February 23, 1980
	8. October 4, 1982	August 31, 1982
	9. November 9, 1982	January 31, 1982
	10. May 13, 1983	January 31, 1982
	11. June 18, 1985	March 31, 1985
g	12. May 8, 1987	January 1, 1986

4. It may be noted that in case of each option the cut-off date was anterior to the respective dates of announcement, and as a result, employees who retired after the cut-off date (specified date) and before the notification date were also made eligible for exercising the option despite the fact that they already retired in the meantime. From the above, the ‘main legal point’ that arises, submits Mr Shanti Bhushan, is that the Railways issued the above notifications giving option to certain PF retirees after the respective cut-off dates to opt for the Pension Scheme even after their retirement, but the same options were not given to other similarly situated PF retirees beyond the respective cut-off

dates. This, it is submitted, is clearly discriminatory and violative of Article 14 of the Constitution and deserves to be struck down.

5. It is contended by the petitioners that each of the above notifications including the last one, dated May 8, 1987 had given a fresh option to some of the PF retirees while denying that option to other PF retirees who were identically placed but were separated from the rest by the arbitrary cut-off date. Each of the notifications specified a date and provided that the PF retirees who retired on or after that date would have fresh option of switching over to the pensionary benefits even though they had already retired, and also had already drawn the entire Provident Fund benefits due to them. It is also contended that the specified dates in these notifications having formed the basis of the discrimination between similarly placed PF retirees those were arbitrary and unrelated to the objects sought to be achieved by giving of the option and were clearly violative of Article 14 and also of the principle laid down in *Nakara case*¹, which according to counsel, is that pension retirees could not be divided by such arbitrary cut-off dates for the purpose of giving benefits to some and not to other similarly situated employees; and that by analogy the rule is equally applicable to the Provident Fund retirees as a class.

6. Mr Kapil Sibal, the learned Additional Solicitor General refuting the argument submits that each of the options was meant to give the PF retirees after the specified dates option to switch over to Pension Scheme and that each specified date had nexus with the reason for granting the particular option. He relies on the following statements to substantiate his submission.

Statement Showing Pension Options Given to Railway Employees

Sl. No.	Option	Granted under Railway Board's letter No. and date	Option validity period	Reasons for granting option
1	2	3	4	5
1.	I Option	F(E) 50/RTI/6 dt. November 16, 1957	April 1, 1957 to March 31, 1958 (For those in service on April 1, 1957)	Introduction of pension system on Railways
2.	<i>Extensions</i>	F(P) 58.PN-1/6 dt. March 7, 1958 F(P) 58 PN-1/6 dt. June 19, 1958 F(P) 58.PN-1/6 December 24, 1958 F(P) 58.PN-	Extended up to June 30, 1958 Extended up to December 31, 1958 Extended up to March 31, 1959 Extended	

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			I/6 dt. March 28, 1959	up to September 30, 1959	
a	2.	II Option	PC-60/RB-2/2 dt. September 17, 1960	July 1, 1959 to December 15, 1960 (For those in service on July 1, 1959)	Revision of pay structure (2nd Pay Commission recommendation)
b		<i>Extensions</i>	PC-60/RB-2/2 dt. April 7, 1961 PC-60/RB-2/2 dt. November 2, 1961	Extended up to June 30, 1961 Extended up to December 31, 1961	
c	3.	III Option	F(P) 62.PN-I/2 dt. October 26, 1962	September 1, 1962 to March 31, 1963 (For those in service on September 1, 1962)	Consequent upon decision to count officiating pay for pensionary benefits
d	4.	IV Option	F(P) 63.PN-I/40 dt. January 17, 1964	January 1, 1964 to July 16, 1964	Introduction of Family Pension Scheme
		<i>Extension</i>	F(P) 63.PN-I/47 dt. July 4, 1964	Extended up to September 30, 1964	
e	5.	V Option	F(P) 65.PN-I/41 dt. March 3, 1966	December 31, 1965 to June 30, 1966 (For those in service on December 31, 1965)	In pursuance of the decision to liberalise the Family Pension Scheme by extending it to employees who die while in service
f					
g	6.	VI Option	F(E)III. 68.PN-I/2 dt. September 13, 1968	May 1, 1968 to December 31, 1968 (For those in service on May 1, 1968)	In pursuance of decision to change the definition of "Pay" w.e.f. May 1, 1968 for the purpose of pensionary benefits
h		<i>Extensions</i>	F(E)III. 68. PN-I/2 dt. January 31, 1969	Extended up to March 31, 1969	
i					

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7	VII Option	F(E)III.71.PN-1/3 dt. July 15, 1972	July 15, 1972 to October 21, 1972 (For those in service on July 15, 1972)	As a result of demands from organised labour
8.	VIII Option	PC III.73.PN/3 dt. July 23, 1974	January 1, 1973 to January 22, 1975 (for those in service on January 1, 1973)	Consequent to acceptance of 3rd Pay Commission's recommendations
	Extensions	PC III.73.PN/3 dt. January 18, 1975 and June 25, 1975	Extended up to June 30, 1976 and December 31, 1975	Extended because pay schedule for various categories were being finalised
		PC.III.73 PN/3 Pt.I dt. December 16, 1975	Extended up to June 30, 1976	
		PC.III.73.PN/3 Pt.I dt. June 30, 1976	Extended up to December 31, 1976	
		PC.III.73 PN/3 Pt.I dt. January 3, 1977	Extended up to June 30, 1977	
		PC.III. 73PN/3 Pt.I dt. July 12, 1977	Extended up to December 31, 1977	
		PC.III 73PN/3 Pt. I dt. April 17, 1978	Extended up to June 30, 1978	
		PC. III.73.PN/3 Pt.I dt. May 20, 1978	Options exercised up to December 31, 1978 be considered as valid (Staff who were in service as on January 1, 1973 and retired/died/quitted service during the period from January 1, 1973 to December 31, 1978)	

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			PC-III.78PN/Pt.I dt. December 27, 1978		
a	9.	XI Option	F(E)III.79.PN-1/4 dt. August 23, 1979	March 31, 1979 to February 22, 1980 (For those in service on April 1, 1979)	On account of liberalisation of pension formula and introduction of slab system
b		Extensions	F(E)III.79.PN-1/4 dt. September 1, 1980	Extended up to February 22, 1981	
	10.	X Option	F(E)III 82.PN1/7 dt. October 4, 1982	August 31, 1982 to February 28, 1983 (For those in service on August 31, 1982)	On account of part of DA treated as pay
c		Extension	F(E)III82.PN 1/7 dt. May 13, 1983	Extended up to August 31, 1983	
d				Percentage made applicable from January 31, 1982 under let- ter No. F(E)III 82 PN1/7 dt. November 9, 1982	
e	11.	XI Option	F(E)III85.PN1/5 dt. June 18, 1985	March 31, 1985 to December 17, 1985 (For those in service on March 31, 1985)	Consequent upon DA/ADA up to average price index at point 568 treated as pay for retirement benefits
f					
g	12.	XII Option	PC-IV/87/19/881 dt. May 8, 1987	January 1, 1986 to September 30, 1987 (For those in service on January 1, 1986)	All CPF benefi- ciaries who were in service on January 1, 1986 and who are still in service will be deemed to have come over to Pension Scheme unless they
h					
i					

specifically opt
 out of Pension
 Scheme and
 desire to retain
 the CPF scheme *a*

Introduction of Pension Scheme on Railways and Subsequent Pension Option

(i) Introduction of Pension Scheme

Pension Scheme was introduced on the Railways on November 16, 1957 and was applicable to the following: *b*

- (a) To all Railway servants who enter service on and after November 16, 1957 and
- (b) To all non-pensionable Railway servants who were in service on April 1, 1957 or join Railway Service between April 1, 1957 and November 16, 1957 and opt for the Pension Scheme. *c*

The scheme was made applicable from April 1, 1957 because the financial year commences from April each year. This option was extended four times from time to time and was valid up to March 28, 1959. The extensions were given because there were representations for its extension so that the staff could get time to weigh the merits of the Schemes before they take decisions. *d*

(ii) Pension option dated September 17, 1960

Orders were issued on August 2, 1960 notifying Railway Services (Authorised Pay) Rules, 1960. Under this notification new pay scales were introduced for Railway servants. These new pay scales were effective from July 1, 1959. *e*

Fresh option was granted on September 17, 1960 to Railway employees who were in service on July 1, 1959 to come over to the pension scheme. The last date for exercising the option was December 15, 1960. This was extended up to December 31, 1960 to enable the concerned employees to come to a considered decision whether to retain the PF or opt for the pension scheme. *f*

(iii) Pension Option dated October 26, 1962 *g*

A decision was taken on October 26, 1962 to count the officiating pay for the purpose of retirement benefits in case of those who were in service on September 1, 1962. Accordingly, a fresh option was given to staff to come over to pension scheme on October 26, 1962. This option remained open till March 31, 1963. *h*

(iv) Pension Option dated January 17, 1964

As a result of introduction of Family Pension Scheme 1964, which came into force on January 1, 1964 orders were issued on January 17, 1964 to the effect that all Railway employees who were *i*

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in service could opt for pension scheme within a period of 6 months. This option was extended up to September 16, 1964.

a (v) *Pension Option dated March 3, 1966*

Family Pension Scheme was further liberalised for employees who die while in service. In view of this improvement in Pension Scheme, pension option under Railway Board's orders dated March 3, 1966 was given to employees who were in service on December 31, 1965. Since the liberalisation in Family Pension Scheme came into effect from January 1, 1966, the option was open for employees who were in service on December 31, 1965 and was open up to June 30, 1966.

c (vi) *Pension Option dated September 13, 1968*

The definition of 'Pay' for pensionary benefits was changed from May 1, 1968, through Board's orders dated September 13, 1968. In view of this, a further option was given on September 13, 1968 to Railway employees who were in service on and after May 1, 1968 to opt for the Pension Scheme. This option was open up to December 31, 1968. This was further extended up to March 31, 1969.

d (vii) *Pension Option dated July 15, 1972*

On representation from the recognised labour federations that many employees had not clearly understood the liberalisation introduced in the pension scheme, a fresh option was allowed on July 15, 1972 to all serving employees. This was open till October 21, 1972.

e (viii) *Pension Option dated July 23, 1974*

This option was based on similar orders issued by Ministry of Finance. The rationale behind this option was that the recommendations of the 3rd Pay Commission became effective from January 1, 1973 but pay structure of all employees who were in service on January 1, 1973 got altered through orders issued piecemeal from time to time. There were liberalisations in the pension scheme also in the form of increase in the amount of gratuity as also introduction of the concept of Dearness Relief made available to the pensioners. This option was made available to all employees who were in service on January 1, 1973. Employees who had retired earlier did not get affected in any way by the recommendations of the 3rd Pay Commission and were accordingly not given this option to come over to Pension Scheme. This option was available up to January 22, 1975, a period of 6 months.

The option given vide letter of July 23, 1974 was extended from time to time till December 31, 1978. The reason why this extension had to be allowed was that the revised pay scales recommended by the Pay Commission for many of the categories could not be finalised and notified. Till such time, the revised pay scale admissible

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to each category was made known, it was impossible for the concerned staff to assess the benefit admissible for opting for the revised scale as also for the pension option. The pension option had therefore to be extended from time to time in this manner. a

The letters authorising extension of the date of option were not very clearly worded with the result that the pension option during the periods of extension was granted even to those who had retired before such extension became admissible but who were in service on January 1, 1973. The clarification was accordingly issued to all the Railways stating that the subsequent orders extending the date of option were applicable to serving employees only, but the cases already decided otherwise may be treated as closed and need not be opened again. b c

It was subsequently represented by the organised labour that the options actually exercised up to December 31, 1978 should be treated valid even though such cases may not have been decided by that date. This was agreed to and orders issued accordingly.

(ix) Pension Option dated August 23, 1979 d

A liberalised formula and slab system for calculation of pension effective from March 31, 1979 was notified by Railway Board on June 1, 1979. Accordingly, orders were issued on August 23, 1979 allowing pension option to those Railway employees who were in service on March 31, 1979. This option was initially open till February 22, 1980 but was extended subsequently to enable wider participation up to February 22, 1981. e

(x) Pension Option dated October 4, 1982

Orders were issued by Board on April 30, 1982 ordering that a portion of Dearness Allowance will be treated as pay for retirement benefits w.e.f. January 31, 1982. Accordingly a fresh option was allowed on October 4, 1982 which could be exercised by Railway employees who were in service on January 31, 1982. This option was available up to August 31, 1983. f g

(xi) Pension Option dated June 18, 1985

Orders were issued by Railway Board on May 17, 1985 merging Dearness Allowance to the price index up to 568 with pay for the purpose of retirement benefits and raising the ceiling of DCRG from 36,000 to 50,000 w.e.f. March 31, 1985. Accordingly, another option was granted to the Railway employees who were in service on March 31, 1985. This option was available for a period of 6 months i.e. up to December 17, 1985. h

(xii) Pension Option dated May 8, 1987

Consequent upon acceptance of the recommendations of the 4th Pay Commission the revised pay scales were notified on Septem- i

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a ber 19, 1986 and March 14, 1987, effective from January 1, 1986. Accordingly another pension option was given to the Railway employees who were in service on January 1, 1986 vide orders of May 8, 1987. Under these orders those who did not specifically opt out of pension scheme by December 17, 1987 would be automatically deemed to have opted for the pension scheme.

b 7. We may now examine these options. The Railway Board's letter No. F(E) 50-RTI/6 dated November 16, 1957 introduced the pension scheme for railway servants. It said that the President had been pleased to decide that the pension rules, as liberalised vide Railway Board's Memo No. E-48 OPC-208 dated July 8, 1950 as amended or clarified from time to time should apply "(a) to all Railway servants who entered
c service on or after issue of that letter and (b) to all non-pensionable railway servants who were in service on April 1, 1957 or have joined railway service between that date and the date of issue of the order". The Railway servants referred to in para (b) were required to exercise an unconditional and unambiguous option on the prescribed form on or
d before March 31, 1958 electing for the pensionary benefits or retaining their existing retirement benefits under the State Railway Provident Fund Rules. It further said that any such employee from whom an option form prescribed for the employee's option was not received within the above time limit or whose option was incomplete or conditional or
e ambiguous shall be deemed to have opted for the pensionary benefits and if any such employee had died by that date or on or after April 1, 1957 without exercising option for the pensionary scheme, his dues would be paid on the provident fund system. The period of validity of this option was first extended up to June 30, 1958, December 31, 1958,
f March 31, 1959 and lastly up to September 30, 1959. There could, therefore, be no doubt that those who did not opt for the pension scheme had ample opportunity to choose between the two.

g 8. The second option was given by the Board's letter No. PC-60/RB/2/2 dated September 17, 1960 to elect the retirement benefits under the Provident Fund Rules or the Pension Rules. All Railway servants who were in non-pensionable service on November 15, 1957 prior to the introduction of the pension scheme on the Railways and who were still in service including (IPR) on July 1, 1959 were granted this option to have their retirement benefits regulated by the State Railway Provident
h Fund Rules or the Railway Pension Rules. Every eligible railway servant was given the option to change over from PF benefits to pensionary benefits or vice versa. It clearly said that Railway servants who did not exercise the option would continue to be eligible for the PF benefits or
i pensionary benefits as the case might be for which he was already eligible.

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9. The option was subject to the special conditions stated therein. Where the Railway servants opted for pensionary benefits, the part of the government contribution together with interest thereon and/or special contribution to the Railway servants' PF account had already been paid, the excess of the amount over the gratuity due under the Pension Rules should be refunded to the government. It clearly said that : "the option once exercised shall, however, be final and irrevocable irrespective of the decision taken on that issue". If a Railway servant opted for PF benefits and if the payment of pensionary benefits had already commenced, further payment would be stopped and his PF account would be reconstructed as if he had never opted for pensionary benefits. The period of validity of option was extended up to June 30, 1961, and then up to December 31, 1961. This letter clearly indicated the reason for giving this option as "under the revised pay structure introduced from July 1, 1959, the bulk or whole of the DA previously payable have been absorbed into pay and a number of changes are also being made in the rules regarding retirement benefits".

10. In pursuance of the 3rd Pay Commission Report, government decided to give opportunity to opt for liberalised Railway Pension Rules including benefits of Family Pension Scheme, 1964, to Railway employees, who had retained the contributory PF Rules and who were in service on March 31, 1979 and retired on or after that date provided they gave in writing their option within six months. Employees who has retired under the said State Railway PF (Contributory) Rules, their option would be valid if they refunded the entire government contribution and the excess, if any, of special contribution to PF received by them over DCRG due to them under Pension Rules. In case of deceased employees request could be made for option by valid nominee and in the absence of him by legal guardian. Thereafter a number of representations were made and the government extended the time for giving option for adopting Pension Scheme in place of contributory PF Scheme.

11. As a result of treatment of a portion of ADA as pay for purpose of retirement benefits and consequently enhancement in pensionary benefits, the date for giving option was further extended by February 28, 1983 only for those employees who were in service on August 31, 1982 and who quitted/retired on or after that date. The date of option was further extended from time to time.

12. Keeping in view the treatment of entire DA up to the price index line of 568 as pay for retirement benefits with effect from March 31, 1985, removal of ceiling limit of Rs 1500 on pension and raising of ceiling of DCRG from Rs 36,000 to Rs 50,000 the date of option for employees who were in service on March 31, 1985 and onwards and still

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a governed by SRPF (Contributory) Rules, was further extended up to December 17, 1985 provided the amount of death-cum-retirement gratuity and the excess, if any, of special contribution over the DCRG, was refunded.

13. The 12th option was as under :

b "Government of India/Bharat Sarkar Ministry of Railways/Rail Mantralaya (Railway Board)
Machine No. PC-IV/87/13/881
No.PC-IV/87/Imp. PW I
The General Managers, RBE/S.No 116/87
All Indian Railways, New Delhi, dated May 8, 1987
c Production Units etc.
as per mailing list.

d *Subject* : Change over of Railway employees from the SRPF (Contributory Scheme) to Pension Scheme-Implementation of the recommendation of the 4th Central Pay Commission-regarding.

e The Railway employees who are covered by the SRPF (Contributory Scheme) CPF Scheme have been given repeated options in the past to come over to the Pension Scheme. However, some Railway employees still continue under the CPF Scheme. The 4th Central Pay Commission has now recommended that all CPF beneficiaries in service on January 1, 1986, should be deemed to have come over to the Pension Scheme on that date, unless they specifically opt out to continue under the GPF Scheme.

f 2. After careful consideration the President is pleased to decide that the said recommendation shall be accepted and implemented in the manner hereinafter indicated.

3.1. All CPF beneficiaries, who were in service on January 1, 1986 and who are still in service on the date of issue of these orders, will be deemed to have come over to the Pension Scheme.

g 3.2. The employees of the category mentioned above will, however, have an option to continue under the CPF Scheme, if they so desire. The option will have to be exercised and conveyed to the concerned Head of Office by September 30, 1987, in the form enclosed, if the employees wish to continue under the GPF Scheme.
h If no option is received by the Head of Office by the above date the employees will be deemed to have come over to the Pension Scheme.

i 3.3. The CPF beneficiaries, who were in service on January 1, 1986, but have since retired and in whose cases retirement benefits have also been paid under the CPF Scheme, will have an option to have their retirement benefits calculated under the Pension Scheme

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provided they refund to the government the government contribution to the Contributory Provident Fund and the interest thereon, drawn by them at the time of settlement of the CPF Account. Such option shall be exercised latest by September 30, 1987. a

3.4. CPF beneficiaries, who were in service on January 1, 1986 but have since retired, and in whose cases the CPF Account has not already been paid, will be allowed retirement benefits as if they were borne on pensionable establishments, unless they specifically opt, by September 30, 1987, to have their retirement benefits settled under the CPF Scheme. b

3.5. Cases of CPF beneficiaries, who were in service on January 1, 1986, but have since died, either before retirement or after retirement, will be settled in accordance with para 3.3 or 3.4 above, as the case may be. Options in such cases will be exercised, latest by September 30, 1987, by the widow/widower and, in the absence of widow/widower, by the eldest surviving member of the family, who would have otherwise been eligible to family pension under the Family Pension Scheme, if such Scheme were applicable. c

3.6. The option, once exercised, shall be final. d

3.7.

4.1.

4.2. In the case of employees referred to above, who come over or are deemed to have come over to the Pension Scheme, the government's contribution to the CPF together with the interest thereon, credited to the CPF account of the employee, will be resumed by the government. Special contribution to Provident Fund if already paid in these cases, will be adjusted against the death/retirement gratuity, payable under these orders. The employee's contribution, together with the interest thereon at his credit in the CPF account, will be transferred to the CRPF (Non-Contributory) Account, to be allotted to him, on his coming over to the Pension Scheme. e

4.3.

5. A proposal to grant ex-gratia payment to the CPF beneficiaries, who retired prior to January 1, 1986 and to the families of CPF beneficiaries who died prior to January 1, 1986, on the basis of the recommendations of the 4th Central Pay Commission, is separately under consideration of the government. The said ex-gratia payment, if and when sanctioned, will not be admissible to the employees or their families who opt to continue under the CPF Scheme from January 1, 1986 onward. f

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(G. Chatterjee)
Executive Director, Pay Commission
Railway Board." g

14. The learned Additional Solicitor General states that each option was given for stated reasons related to the options. On each occasion
- a time was given not only to the persons in service on the date of the Railway Board's letter but also to persons who were in service till the stated anterior date but had retired in the meantime. The period of validity of option was extended in all the options except Nos. 3rd, 4th, 5th and 7th. We find the statements to have been substantiated by facts. The cut-off
- b dates were not arbitrarily chosen but had nexus with the purpose for which the option was given.

15. Mr Shanti Bhushan however submits that applying the law laid down in *Nakara case*¹ this Court should simply strike down or read down paragraph 3.1 of the above 12th option dated May 8, 1987. That
- c paragraph said that all CPF beneficiaries who were in service on January 1, 1986 and who were still in service on the date of issue of the order would be deemed to have come over to the pension scheme. It is submitted that once this limiting requirement is removed all the CPF beneficiaries shall be eligible and will be deemed to have come over to the pension scheme.
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16. As the basis or justification for striking or reading down paragraph 3.1 on *Nakara*¹ ratio, it is urged that all the Railway employees numbering about 22 lakhs comprising 16,22,000 in service and about 6
- e lakhs pensioners constitute one family and must be treated as one class as the government's obligation to look after the retired Railway employees both under the pension scheme and the provident fund scheme being the same, they could not be treated differently. Any differential treatment will be discriminatory and violative of Article 14 of the Constitution of India. In *Nakara case*¹ the date arbitrarily chosen was struck down and as a result the revised formula for computing pension was made applicable to all the retired pensioners. The same principle, it is urged, has to be extended to the Provident Fund retirees also otherwise there would be discrimination. It is stated that though at the time of choosing
- g between Provident Fund and Pension Scheme both the alternatives appeared to be more or less equal and the retired provident funders took their lump sum yet subsequently stage by stage the pensioners' benefits were increased in such ways and to such extent that it became more and more discriminatory against the provident funders old and new. It was
- h because of this discrimination that successive options were given by the Railway Board for the provident funders to become pensioners. Hence the submission that this limitation must go, and all the provident funders must be deemed to have become pensioners subject to the condition that the government contribution received by them along with interest thereon is refunded or adjusted. Obviously this gives no importance to the
- i condition in the notifications that option once exercised shall be final

and binding and to the fact that in each option a cut-off date was there related to the purpose of giving that option.

17. Admittedly, the entire case of the petitioners is sought to be based on the decision in *Nakara case*¹. Mr Kapil Sibal submits that the petitioners' basic assumption is erroneous inasmuch as *Nakara case*¹ did not hold that whenever there was a liberalisation of pension all other pension retirees and PF retirees must be given option and that the older system of pension or Provident Fund was always insufficient. According to counsel the only question decided in *Nakara*¹ can be gathered from the following paragraph of the report at page 172 : (SCC p. 311, para 2)

"Do pensioners entitled to receive superannuation or retiring pension under Central Civil Services (Pension) Rules, 1972 ('1972 Rules', for short) form a class as a whole? Is the date of retirement a relevant consideration for eligibility when a revised formula for computation of pension is ushered in and made effective from a specified date? Would differential treatment to pensioners related to the date of retirement qua the revised formula for computation of pension attract Article 14 of the Constitution and the element of discrimination liable to be declared unconstitutional as being violative of Article 14?"

18. The basic question of law that has to be decided, therefore, is what was the ratio decidendi in *Nakara case*¹ and how far that would be applicable to the case of the PF retirees.

19. The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required". This was what Lord Selborne said in *Caledonian Railway Co. v. Walker's Trustees*² and Lord Halsbury in *Quinn v. Leatham*³. Sir Frederick Pollock has also said : "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision."

20. In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of

² (1882) 7 App Cas 259 : 46 LT 826 (HL)

³ 1901 AC 495, 502 : 17 TLR 749 (HL)

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a law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol. 26, para 573)

b “The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal’s duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi.”

c 21. The question then is, has the court said in *Nakara*¹ that what was applicable to pensioners vis-a-vis liberalisation of pension was to be equally applicable to PF retirees? In *Nakara case*¹ petitioners 1 and 2 were retired pensioners of the Central Government, the first being a civil servant and the second being a member of the service personnel of the Armed Forces. The third petitioner was a society registered under the Societies Registration Act, 1860, formed to ventilate the legitimate public problems and was espousing the cause of the pensioners all over the country. The first petitioner retired in 1972 and on computation, his pension worked out at Rs 675 per month and with dearness allowance he was drawing monthly pension of Rs 935. The second petitioner retired at or about that time and at the relevant time was in receipt of a pension plus dearness relief of Rs 981.

f 22. The Union of India had been revising and liberalising the pension rules from time to time. The Central Government servants on retirement from service were entitled to receive pension under the Central Civil Services (Pension) Rules, 1972. Successive Central Pay Commissions recommended enhancement of pension in different ways. The 1st Central Pay Commission (1946-47) recommended raising of the retirement age to 58 years and the scale of pension to 1/80 of the emoluments of each year of service subject to a limit 35/80 with a ceiling of Rs 8000 per year for 35 years of service. The 2nd Central Pay Commission (1957-58) did not recommend any increase in the non-contributory retirement benefits. The Administrative Reforms Commissioner (ARC) 1956 took note of the fact that the cost of living had shot up and correspondingly the possibility of savings had gone down and accordingly recommended that the quantum of pension may be raised to 3/6 of the emoluments of the last three years of service from existing 3/8 and the ceiling to be raised from Rs 675 per month to Rs 1000 per month. Before the govern-

ment acted upon it, the 3rd Central Pay Commission did not examine the question of relief to pensioners because of its terms and recommended no change in the pension formula except that the existing ceiling to be raised from Rs 675 to Rs 1000 per month and the maximum gratuity should be raised from Rs 24,000 to Rs 30,000. a

23. On May 25, 1979, Government of India, Ministry of Finance, issued Office Memorandum No. F-19(3)-EV-79 whereby the formula for computation of pension was liberalised but made it applicable to government servants who were in service on March 31, 1979 and retired from service on or after that date. The formula introduced a slab system for computation of pension which was applicable to employees governed by the 1972 Rules retiring on or after the specified date. The pension for the service personnel which would include Army, Navy and Air Force staff was governed by the relevant regulations. By the Memorandum of the Ministry of Defence bearing No. B/40725/AG/PS4-C/1816/AD (Pension)/Services dated September 28, 1979, the liberalised pension formula introduced for the government servants governed by the 1972 Rules was extended to the armed forces personnel subject to the limitations set out in the memorandum with a condition that the new rules of pension would be effective from April 1, 1979 and may be applicable to all service officers who become/became non-effective on or after that date. This liberalised pension formula was to be applicable prospectively to those who retired on or after March 31, 1979 in case of government servants governed by 1972 rules and in respect of defence personnel those who became/became non-effective on or after April 1, 1979. Consequently those who retired prior to the specified date would not be entitled to the benefits of the liberalised pension formula. b
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24. On the above facts the petitioners therein contended that this Court would consider the *raison d'être* for payment of pension, namely, whether it was paid for past satisfactory service rendered, and to avoid destitution in old age as well as a social welfare or socio-economic justice measure, the differential treatment for those who retired prior to a certain date and those retiring subsequently, the choice of the date being wholly arbitrary would amount to discrimination and violative of Article 14; and whether the classification based on fortuitous circumstance of retirement before or subsequent to a date, fixing of which was not shown to be related to any rational principle, would be equally violative of Article 14. It was contended that pensioners of the Central Government formed a class for the purpose of pensionary benefits and there could not be mini-classification within the class designated as pensioners. f
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25. The court considered the nature and purposes of pension in the context of a welfare State and found that though unquestionably pension i

- was linked to length of service and the last pay drawn which did not imply the pay on the last day of retirement but average emoluments of 36 months service which under the liberalised scheme was reduced to average emoluments of 10 months preceding the date which was expected to be higher than that of the higher average emoluments of 36 months, coupled with the slab system for computation amounted to liberalisation of pension in different ways. If the pensioners who retired prior to the specified date had to earn pension on the average emoluments of 36 months' salary just preceding the date of retirement, naturally the average would be lower and they would be doubly hit because the slab system newly introduced was not available to them while the ceiling was at a lower level and thus they would suffer "triple jeopardy, viz., lower average emoluments, absence of slab system and lower ceiling." This Court, therefore, wanted to know what was the purpose in prescribing the specified date vertically dividing the pensioners between those who retired prior to the specified date and those who retired subsequent to that date and why was the pension scheme liberalised. Receiving no satisfactory reply the court observed : (SCC pp. 328-29, para 39)

- "Both the impugned memoranda do not spell out the *raison d'être* for liberalising the pension formula. In the affidavit in opposition by Shri S.N. Mathur, it has been stated that the liberalisation of pension of retiring government servants was decided by the government in view of the persistent demand of the Central Government employees represented in the scheme of Joint Consultative Machinery. This would clearly imply that the pre-liberalised pension scheme did not provide adequate protection in old age and that a further liberalisation was necessary as a measure of economic security. When government favourably responded to the demand it thereby ipso facto conceded that there was a larger available national cake part of which could be utilised for providing higher security to erstwhile government servants who would retire. The government also took note of the fact that continuous upward movement of the cost of living index as a sequel of inflationary inputs and diminishing purchasing power of rupee necessitated upward revision of pension. If this be the underlying intendment of liberalisation of pension scheme, can anyone be bold enough to assert that it was good enough only for those who would retire subsequent to the specified date but those who had already retired did not suffer the pangs of rising prices and falling purchasing power of the rupee?"

26. The Court then proceeded to examine whether there was any rationale behind the eligibility qualification and finding no rationale concluded : (SCC p. 331, para 42)

- "Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational prin-

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ciple is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory.”

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27. The court accordingly concluded that the division was thus arbitrary and unprincipled and therefore the classification did not stand the test of Article 14. It was also arbitrary as the court did not find a single acceptable or persuasive reason for this division and this arbitrary action violated the guarantee of Article 14. The court observed that the pension scheme including the liberalised scheme to the government employees was non-contributory in character. The payment of pension was a statutory liability undertaken by the government and whatever became due and payable was budgeted for. The court specifically observed : (SCC p. 332, para 45)

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“One could have appreciated this line of reasoning where there is a contributory scheme and a pension fund from which alone pension is disbursed. That being not the case, there is no question of pensioners dividing the pension fund which, if more persons are admitted to the scheme, would pro rata affect the share. Therefore, there is no question of dividing the pension fund. Pension is a liability incurred and has to be provided for in the budget.”

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28. The court further observed : (SCC p. 340, para 58)

“If from the impugned memoranda the event of being in service and retiring subsequent to specified date is severed, all pensioners would be governed by the liberalised pension scheme. The pension will have to be recomputed in accordance with the provisions of the liberalised pension scheme as salaries were required to be recomputed in accordance with the recommendation of the 3rd Pay Commission but becoming operative from the specified date. It does therefore appear that the reading down of impugned memoranda by severing the objectionable portion would not render the liberalised pension scheme vague, unenforceable or unworkable.”

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29. The court in *Nakara*¹ was not satisfied with the explanation that the legislation had defined the class with clarity and precision and it would not be the function of this Court to enlarge the class. The court held in paragraph 65 of the report : (SCC pp. 344-45, para 65)

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“With the expanding horizons of socio-economic justice, the Socialist Republic and Welfare State which we endeavour to set up and largely influenced by the fact that the old men who retired when emoluments were comparatively low and are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, we are satisfied that by introducing an arbitrary eligibility criterion : ‘being in service and retiring subsequent to the specified date’ for being eligible for the liberalised pension scheme and thereby dividing a homogeneous class, the clas-

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a sification being not based on any discernible rational principle and
 having been found wholly unrelated to the objects sought to be
 achieved by grant of liberalised pension and the eligibility criteria
 devised being thoroughly arbitrary, we are of the view that the
 eligibility for liberalised pension scheme of 'being in service on the
 specified date and retiring subsequent to that date' in impugned
 memoranda, Exs. P-1 and P-2, violates Article 14 and is unconstitu-
 b tional and is struck down. Both the memoranda shall be enforced
 and implemented as read down as under : In other words, Ex. P-1,
 the words : 'that in respect of the government servants who were in
 service on March 31, 1979 and retiring from service on or after that
 date'; and in Ex. P-2, the words : 'the new rates of pension are effec-
 c tive from April 1, 1979 and will be applicable to all service officers
 who became/become non-effective on or after that date' are unconsti-
 tutional and are struck down with this specification that the date
 mentioned therein will be relevant as being one from which the
 liberalised pension scheme becomes operative to all pensioners gov-
 d erned by 1972 Rules irrespective of the date of retirement. Omitting
 the unconstitutional part it is declared that all pensioners governed
 by the 1972 Rules and Army Pension Regulations shall be entitled
 to pension as computed under the liberalised pension scheme from
 the specified date, irrespective of the date of retirement. Arrears of
 pension prior to the specified date as per fresh computation is not
 e admissible."

30. Thus the court treated the pension retirees only as a
 homogeneous class. The PF retirees were not in mind. The court also
 clearly observed that while so reading down it was not dealing with any
 fund and there was no question of the same cake being divided amongst
 f larger number of the pensioners than would have been under the
 notification with respect to the specified date. All the pensioners gov-
 erned by the 1972 Rules were treated as a class because payment of pen-
 sion was a continuing obligation on the part of the State till the death of
 each of the pensioners and, unlike the case of Contributory Provident
 g Fund, there was no question of a fund in liberalising pension.

31. The argument of Mr Shanti Bhushan is that the State's obliga-
 tion towards pension retirees is the same as that towards PF retirees.
 That may be morally so. But that was not the ratio decidendi of *Nakara*.¹
 Legislation has not said so. To say so legally would amount to legislation
 h by enlarging the circumference of the obligation and converting a moral
 obligation into a legal obligation. It reminds us of the distinction between
 law and morality and limits which separate morals from legislation.
 Bentham in his *Theory of Legislation*, Chapter XII, page 60 said :

i "Morality in general is the art of directing the actions of men in
 such a way as to produce the greatest possible sum of good. Legisla-

tion ought to have precisely the same object. But although these two arts, or rather sciences, have the same end, they differ greatly in extent. All actions, whether public or private, fall under the jurisdiction of morals. It is a guide which leads the individual, as it were, by the hand through all the details of his life, all his relations with his fellows. Legislation cannot do this; and, if it could, it ought not to exercise a continual interference and dictation over the conduct of men. Morality commands each individual to do all that is advantageous to the community, his own personal advantage included. But there are many acts useful to the community which legislation ought not to command. There are also many injurious actions which it ought not to forbid, although morality does so. In a word legislation has the same centre with morals, but it has not the same circumference.”

32. In *Nakara*¹ it was never held that both the pension retirees and the PF retirees formed a homogeneous class and that any further classification among them would be violative of Article 14. On the other hand the court clearly observed that it was not dealing with the problem of a “fund”. The Railway Contributory Provident Fund is by definition a fund. Besides, the government’s obligation towards an employee under CPF Scheme to give the matching contribution begins as soon as his account is opened and ends with his retirement when his rights qua the government in respect of the Provident Fund is finally crystallized and thereafter no statutory obligation continues. Whether there still remained a moral obligation is a different matter. On the other hand under the Pension Scheme the government’s obligation does not begin until the employee retires when only it begins and it continues till the death of the employee. Thus, on the retirement of an employee government’s legal obligation under the Provident Fund account ends while under the Pension Scheme it begins. The rules governing the Provident Fund and its contribution are entirely different from the rules governing pension. It would not, therefore, be reasonable to argue that what is applicable to the pension retirees must also equally be applicable to PF retirees. This being the legal position the rights of each individual PF retiree finally crystallized on his retirement whereafter no continuing obligation remained while, on the other hand, as regard Pension retirees, the obligation continued till their death. The continuing obligation of the State in respect of pension retirees is adversely affected by fall in rupee value and rising prices which, considering the corpus already received by the PF retirees they would not be so adversely affected ipso facto. It cannot, therefore, be said that it was the ratio decidendi in *Nakara*¹ that the State’s obligation towards its PF retirees must be the same as that towards the pension retirees. An imaginary definition of obligation to include all the government retirees in a class was not decided and could

not form the basis for any classification for the purpose of this case. *Nakara*¹ cannot, therefore, be an authority for this case.

- a 33. *Stare decisis et non quieta movere*. To adhere to precedent and not to unsettle things which are settled. But it applies to litigated facts and necessarily decided questions. Apart from Article 14 of the Constitution of India, the policy of courts is to stand by precedent and not to disturb settled point. When court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts
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- c of equal or lower rank in subsequent cases where the very point is again in controversy unless there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. It should be invariably applied and should not ordinarily be departed from where decision is of long standing and rights have been
- d acquired under it, unless considerations of public policy demand it. But in *Nakara*¹ it was never required to be decided that all the retirees formed a class and no further classification was permissible.

- e 34. The next argument of the petitioners is that the option given to the PF employees to switch over to the pension scheme with effect from a specified cut-off date is bad as violative of Article 14 of the Constitution for the same reasons for which in *Nakara*¹ the notification were read down. We have extracted the 12th option letter. This argument is fallacious in view of the fact that while in case of pension retirees who are
- f alive the government has a continuing obligation and if one is affected by dearness the others may also be similarly affected. In case of PF retirees each one's rights having finally crystallized on the date of retirement and receipt of PF benefits and there being no continuing obligation thereafter they could not be treated at par with the living pensioners. How the
- g corpus after retirement of a PF retiree was affected or benefitted by prices and interest rise was not kept any tack of by the Railways. It appears in each of the cases of option the specified date bore a definite nexus to the objects sought to be achieved by giving of the option. Option once exercised was told to have been final. Options were
- h exercisable vice versa. It is clarified by Mr Kapil Sibal that the specified date has been fixed in relation to the reason for giving the option and only the employees who retired after the specified date and before and after the date of notification were made eligible. This submission appears to have been substantiated by what has been stated by the successive Pay
- i Commissions. It would also appear that corresponding concomitant benefits were also granted to the Provident Fund holders. There was,

therefore, no discrimination and the question of striking down or reading down clause 3.1 of the 12th Option does not arise.

35. It would also appear that most of the petitioners before their filing these petitions had more than one opportunity to switch over to the Pension Scheme which they did not exercise. Some again opted for PF Scheme from the Pension Scheme. a

36. Mr Shanti Bhushan then submits that the same relief as is being canvassed by the petitioners herein has been upheld by this Hon'ble Court by dismissing the SLP No. 5973 of 1988 of the government in the case of *Union of India v. Ghansham Das and Ors.* against the judgment of the Central Administrative Tribunal, Bombay. The Tribunal had held the same notifications as were impugned herein to be discriminatory and had directed that a fresh option be given to all PF retirees subject to refund of the government contribution to Provident Fund received by adjusting it against their pensionary rights. Similarly, it is submitted, in a Rajasthan case, both the Single Judge and the Division Bench have held that all the retirees would have to be given a fresh option as the notifications giving the option only to some retirees are clearly discriminatory. This view has, it is urged, again been upheld by this Hon'ble Court by dismissing the Special Leave Petition No. 7192/87 of the government by order dated August 11, 1987. b
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37. We have perused the judgments. The Central Administrative Tribunal in Transferred Application No. 27 of 1987 was dealing with the case of the petitioners' right to revise options during the period from April 1, 1969 to July 14, 1972 as both the petitioners retired during that period. The Tribunal observed that no explanation was given to it nor could it find any such explanation. In *State of Rajasthan v. Retired CPF Holder Association, Jodhpur*, the erstwhile employees of erstwhile Princely State of Jodhpur who after becoming government servants opted for Contributory Provident Fund wanted to be given option to switch over to Pension Scheme, were directed to be allowed to do so by the Rajasthan High Court relying on *Nakara*¹ which was also followed in *Union of India v. Bidhubhushan Malik*⁴, subject matter of which was High Court Judges' pension and as such both are distinguishable on facts. e
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38. That the Pension Scheme and the PF Scheme are *structurally different* is also the view of the Central Pay Commissions and hence ex gratia benefits have been recommended, which may be suitably increased. h

39. In the report of the 3rd Central Pay Commission 1973 (Vol. 4 at page 49) dealing with State Railway Provident Fund it was said :

"49. Both gazetted and non-gazetted Railway employees with a service of not less than 15 years who are governed by the State Rail- i

4 (1984) 3 SCC 95 : 1984 SCC (L&S) 354

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a way Provident Fund Scheme are at present allowed a special contribution at the rate of one fourth of a month's pay for each completed 6 monthly period of service but not exceeding 15 months' pay or Rs 35,000, whichever is less. We have been informed by the Railway Board that for such employees the government contribution and the special contribution to the provident fund together constitute the retirement benefits which in other civil departments are given in the shape of pension and death-cum-retirement gratuity. Accordingly, b when pensionary benefits to the other civil employees were improved in 1956 and 1957, the maximum of the special contribution to the provident fund for the Railway employees was also increased from Rs 25,000 to Rs 35,000. We have not examined whether and to what extent any further increase in this contribution should be made c consequent upon the enhancement of the maximum pension and gratuity being recommended by us for pensionable employees. The government may decide the same as they deem fit."

d 40. In the Report of the 4th Central Pay Commission, in Chapter 9 the Commission has discussed the State Railway Provident Fund Scheme including Contributory Provident Fund Scheme. In para 9.1 of the report, the Commission said that the employees who joined railways prior to November 16, 1957 and did not opt for the pension scheme were also covered under the CPF Scheme known as State Railways Provident Fund Scheme (SRPF). About 50,000 employees were stated to be covered e under the CPF Scheme of which the majority were in the Railways. The number of employees who retired under the CPF and SRPF schemes were 1.20 lakhs. Under the CPF scheme every employee was required to subscribe a minimum of 8 1/3 per cent of his reckonable f emoluments to be credited to the Fund. The government makes a matching contribution. Both the contributions earned interest at a rate specified by the government from time to time. On retirement, employees governed under the scheme was paid his contribution, the contribution made by the government and the interest earned on the total amount. In para 9.3 of the Report it was stated :

g "The SRPF scheme in the railways was replaced by the pension scheme as applicable to other Central Government employees, in November 1957 and those employees who were in service on April 1, 1957 and were governed by the scheme were given an option to come under the pension scheme. Whenever changes occurred in the pension structure for the Central Government employees an option h was given to Railway employees still covered by the scheme. Such options have been given on eleven occasions in the past and the last such option was valid up to December 1985."

i Comparing the advantage and disadvantage of the schemes the Commission said :

“While pension scheme has been improved, enlarged and liberalised from time to time, there has been no similar improvement in the CPF scheme, excepting through improvement of rates of interest which were modified from 7 per cent in 1974 to 9 per cent in 1983-84, to 10 per cent in 1984-85 and to 12 per cent in 1985-86. While those governed by the pension scheme are entitled to receive dearness relief sanctioned from time to time to compensate for increase in the cost of living, those under the CPF scheme were not entitled to such relief. The employees governed by the CPF scheme are also not entitled to the family pension available to those governed by the pension scheme. The matching government contribution in the case of CPF employees is paid for the full period of service the restriction of 33 years for those governed by pension scheme does not apply in their case. Those who have retired under the CPF scheme have a corpus yielding regular return. In the case of Railway employees, special contribution to PF is paid at the time of retirement equivalent to half a month’s salary for each completed year of service subject to a maximum of 16 months’ salary or Rs 60,000 whichever is less. The amount of special contribution has been raised from time to time as and when the limit on death-cum-retirement gratuity was changed.”

In para 9.5 of the Report as to ex-gratia alternatives it is stated :

“As the pension scheme was introduced on the Railways in 1957, those who retired earlier did not have an opportunity to opt for pension. It was, therefore, decided to give some ex gratia payment to them in consideration of the fact that the retirement benefits were lower than what they would have received if they had retired under the pension scheme. Since this applied mainly to the low paid employees, the ex gratia payment ranging from Rs 15 to Rs 22.50 per mensem was sanctioned to those drawing pay up to Rs 500 per month. They were also given relief on a graded scale subsequently. The amount of ex gratia payment together with the relief now ranges from Rs 170 to Rs 283 per mensem.”

In para 9.6 the Commission said that the PF and Pension schemes are structurally different. Accordingly alternative ex gratia reliefs were suggested :

“We have received a number of suggestions from individuals, associations and other organisations in respect of the CPF scheme. It has been stated that the objective of both the schemes, viz. Pension scheme and the CPF scheme being the same, there should not be differences in the matter of retirement benefits between the pensioners and the beneficiaries of the CPF. It has been urged that the liberalisation in the pension scheme needs to be appropriately extended to the beneficiaries under the CPF scheme. Since the schemes are structurally different, equality of benefits under the two

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a schemes is not feasible. We are, however, of the view that the CPF beneficiaries who have retired on low scales of pay deserve some measure of relief. We accordingly recommend that all the CPF beneficiaries who have retired prior to March 31, 1985 with a basic pay up to Rs 500 per mensem may be given an ex gratia payment of Rs 300 per mensem which will be in addition to the benefits already received by them under the CPF scheme. The ex gratia payments and the periodic increases already received by those who retired on pay up to Rs 500 may be so adjusted that the total ex gratia amount is not less than Rs 300. We further recommend that ex gratia amount of Rs 300 per mensem may be reviewed as and when dear-ness relief is sanctioned to pensioners."

c "9.7. Railways have suggested grant of ex gratia payment to the widows and dependent children of deceased employees covered by CPF scheme at 50 per cent of the rate for ex gratia payment. We agree and recommend accordingly for those getting pay up to Rs 500 per mensem. The eligibility of widow and minor children for the purposes of this relief may be the same as laid down under the pension rules."

e "9.8. Insofar as the CPF beneficiaries still in service on January 1, 1986 are concerned, we recommend that they should be deemed to have come over to the pension scheme on that date unless they specifically opt out to continue under the CPF scheme. The CPF beneficiaries who decide to continue to remain under that scheme should not be eligible on retirement for ex gratia payment recommended by us for the CPF retirees. Government may, however, extend the benefit of DCRG to CPF beneficiaries in other departments on the same lines as in Railways."

f "9.9. Government may also consider the feasibility of giving an option to all other CPF retirees who are not covered under paragraph 9.6 above to come over to the pension scheme with effect from January 1, 1986 subject to their refunding to government the entire amount of government contribution inclusive of interest thereon credited to their provident fund account at the time of their retirement."

g 41. We have no doubt about the above recommendations receiving due consideration by the Union of India. The 12th option already given has to be viewed in this context.

h 42. The next question debated is that of financial implications. It is submitted that given the fact that the budget for the year 1990-91 for disbursement of pension is Rs 900 crores (as per page 11 of the Budget of the Railway Revenue and Expenditure of the Central Government for 1990-91), the additional liability which would arise by giving relief to the petitioners would be insignificant in comparison. According to the

petitioners as per their affidavit dated September 15, 1988, the additional liability would come to Rs 18 crores per annum and this figure would steadily decrease as the number of PF retirees diminishes every year due to the fact that this question arises only with respect to very old retirees, and a substantial number of them pass away every year. a

43. The government in its affidavit dated September 21, 1988 has stated that the additional liability as far as the Railway employees are concerned, would be Rs 50 crores a year. This is based on the assumption that there are 79,000 surviving PF retirees. Apart from the fact that this number of 79,000 was based on calculations made in 1988, and would be greatly reduced by this time, the petitioners submit that the actual number of survivors would only be about 38,000. Thus, the actual burden would be less than half. Further, even assuming that the figure of 79,000 put forth by the government is correct, the average annual expenditure per retiree for pension calculated by the government is incorrect as the calculation includes the non-recurring arrear payments for the year 1987-88. Taking the correct figures of total pension outlay and total number of beneficiaries the per capita pension expenditure per annum works out to Rs 4521. Multiplying this by 79,000 (assuming the figures of the Railways to be correct) the annual expenditure comes to Rs 35.71 crores. This compared to the current budget of pensions of Rs 900 crores, is quite insignificant and can be easily awarded by this Court as was done in *Nakara*¹, it is urged. b c d e

44. It is submitted in the alternative that if this Court feels that a positive direction cannot be made to the government in this regard, it is prayed that at least an option should be given to the respondents either to withdraw the benefit of switching over to pension from everyone or to give it to the petitioners as well, so that the discrimination must go. f

45. We are not inclined to accept either of these submissions. The PF retirees and pension retirees having not belonged to a class, there is no discrimination. In the matter of expenditure includible in the Annual Financial Statement, this Court has to be loath to pass any order or give any direction, because of the division of functions between the three co-equal organs of the government under the Constitution. g

46. Lastly, the question of feasibility of converting all living PF retirees to Pension retirees was debated from the point of view of records and adjustments. Because of the view we have taken in the matter, we do not consider it necessary to express any opinion. h

47. Mr C.V. Francis in W.P. No. 1165 of 1989 argued the case more or less adopting the arguments of Mr Shanti Bhushan. Mrs Swaran Mahajan, in W.P. No. 1575 of 1986, submitted that the rule as to commuted portion of the pension reviving after 15 years should be applied to i

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PF retirees so that the corpus of Provident Fund dues received more than 15 years ago should be treated as commuted portion of pension and
a be allowed to revive for adjustments against pension. In the view we have taken in this case it is not necessary to express any opinion on this question.

48. Mr K.B. Datar for the respondent in W.P. No. 1575 of 1986 and W.P. No. 352 of 1989 more or less adopted the arguments of the learned
b Additional Solicitor General.

49. In the result, all the writ petitions and the special leave petition are dismissed, but the petitioners being retirees, we make no order as to costs.

c

(1990) 4 Supreme Court Cases 239

(BEFORE SBYASACHI MUKHARJI, C.J. AND K.N. SAIKIA, J.)

NORTHERN CORPORATION

.. Petitioner;

d

Versus

UNION OF INDIA AND OTHERS

.. Respondents.

Civil Writ Petition No. 443 of 1988[†], decided on August 6, 1990

Customs Act, 1962 — Sections 15(1)(b), 49 and 59 — Date of 'actual removal' of the goods from warehouse as the date for determination of rate of
e duty — Where after arrival of the goods the same were stored in warehouse by executing bond and were allowed to be cleared only after obtaining no objection from income tax department in view of ban order then imposed under Section 132(1) of Income Tax Act, held, the rate of duty would be that in force on the date of actual removal of the goods from the warehouse after obtaining the no
f objection and not the date when bills of entry for ex bond clearance were filed — Prohibitory orders, arbitrary or not, would postpone the date of clearance and as such would postpone the determination of duty (Para 10)

Prakash Cotton Mills (P) Ltd. v. B. Sen, (1979) 2 SCC 174; (1979) 2 SCR 1142, *relied on*

Constitution of India — Article 32 — Maintainability of writ petition
g under — Payment of customs duty at the prevailing rate made a pre-condition under statute for clearance of goods imported — Refusal to allow clearance in case of non-payment or payment at a lower rate will not involve violation of any fundamental right of the assessee — Writ petition under Article 32 seeking to remove the goods without having recourse to the statutory procedure not maintainable — Mere claim of violation of law does not automatically involve
h violation of any fundamental right

Held :

Article 32 guarantees the right to move the Supreme Court for enforcement of fundamental rights. Whenever a petition is made under Article 32 the Court has to be circumventive of what is the right claimed. In a particular situation whether customs duty is payable at the rate prevalent on a particular date
i

† Under Article 32 of the Constitution of India

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retail prices of the sachets, particularly when the activity of “repacking” did not amount to “manufacture”. The appellants also contended that they were
a not guilty of suppression because the activity of “repacking” amounted to “deemed manufacture” under Section 2(f) only after introduction of Note 6 in Chapter 34 of the Schedule to the Tariff Act vide the Finance Bill, 1994.

13. The key question which was required to be decided by the Tribunal in the present case was concerning determination of the “assessable value” of 25 kg bulk packs of AMS from the appellants’ factory at Mandideep, Bhopal.
b If the activity of repacking did not amount to manufacture at the relevant time, was the Commissioner justified in computing the assessable value of the bulk packs based on the retail price of 20 gm and 30 gm sachets sold through the depots of the appellants? This question has not been decided by the Tribunal. Similarly, in the context of suppression and in the context of invocation of the extended period of limitation, the Tribunal has not
c considered the argument of the appellants that they were not guilty of suppression as the law was amended vide the Finance Bill, 1994, when the activity of “repacking” was treated as “manufacture” for the first time. In our view, these questions were required to be decided by the Tribunal in the present case, particularly in the light of the provisions of Section 4(4)(d)(i) of the said Act. They have not been decided by the Tribunal.

d 14. In the circumstances, this civil appeal filed by the assessee is allowed, the impugned judgment of the Tribunal is set aside and the matter is remitted to the Tribunal for its fresh decision in accordance with the principles enunciated hereinabove. There will be no order as to costs.

e (2006) 1 Supreme Court Cases 275

(BEFORE ARIJIT PASAYAT AND ARUN KUMAR, JJ.)

STATE OF ORISSA AND OTHERS . . . Appellants;

Versus

f MD. ILLIYAS . . . Respondent.

Civil Appeal No. 6980 of 2005[†], decided on November 22, 2005

g A. Panchayats and Zila Parishads — Orissa Gram Panchayats Act, 1964 (1 of 1965) — Ss. 115(1), (2), (3) & (3-A) — Suspension and removal of Sarpanch — Prerequisites for taking action under — Respondent Sarpanch alleged to have collected illegal gratification from poor beneficiaries of Indira Avas Yojana by giving them false assurances of houses, and from people for giving HUDCO loans — Sub-Collector recording statements of seven such beneficiaries and concluding that Sarpanch had misused his powers — Order of Collector suspending the Sarpanch categorically stating that he was satisfied that the respondent had wilfully abused the powers, rights and privileges vested in him and had acted in a manner prejudicial to the interests of the inhabitants of Gram — Writ petition filed by respondent

h [†] Arising out of SLP (C) No. 15626 of 2004. From the Judgment and Order dated 15-3-2004 of the Orissa High Court in WP (C) No. 5725 of 2003

Sarpanch submitting that the alleged acts were not wilful, no opportunity of hearing was given to him before holding enquiry and that Sub-Collector's report was not supplied to him — High Court by impugned judgment setting aside Collector's order holding that prerequisites for taking action under S. 115(1) were not satisfied — Held, High Court's judgment indefensible and liable to be set aside — For application of S. 115(1), acts complained of must be wilfully committed — Various acts of the respondent were prima facie indicative of abuse of powers and of rights and privileges vested in him which the Collector had opined to be wilful — Collector's opinion at the stage of consideration is really a prima facie view on basis of materials before him — Unless there is total absence of material and/or non-application of mind courts should not interfere — Further held, when Collector acts in terms of sub-section (1) there is no question of granting an opportunity of hearing to the person concerned — It is only at the stage of removal by the State Govt. as envisaged under sub-section (2) that opportunity to show cause needs to be granted — Administrative Law — Natural Justice — Audi alteram partem (Paras 6, 7, 8 and 13 to 16)

Sanatan Jena v. Collector, (2001) 1 Ori LR 206, referred to

Pradeep Kumar Karji v. Collector, (1998) 2 Ori LR 348; *Tarini Tripathy v. Collector*, (1986) 2 Ori LR 497, cited

B. Words and Phrases — “Wilful” — Held, to be “wilful”, act must be intentional, deliberate, calculated and conscious, with full knowledge of legal consequences flowing therefrom — It excludes casual, accidental, involuntary, negligent, unintentional acts or genuine inability — In law it implies nothing blameable, but merely that the person for whose action or default the expression is used is a free agent and that what has been done arises from spontaneous action of his will — Further held, when the allegation is of cheating or deceiving, whether the alleged act is wilful or not depends upon the circumstances of the case concerned and there cannot be any straitjacket formula (Paras 9 and 12)

Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Sehararao, (1989) 4 SCC 255;

Young and Harston's Contract, Re, (1885) 31 Ch D 168 : (1881-85) All ER Rep Ext 1239

(CA); *Wheeler v. New Merton Board Mills*, (1933) 2 KB 669 : 1933 All ER Rep 28 (CA);

Gayford v. Chouler, (1898) 1 QB 316 : 67 LJQB 404; *R. v. Senior*, (1899) 1 QB 283 : 68

LJQB 175, relied on

C. Constitution of India — Art. 141 — What is binding — “Law declared by Supreme Court” — Precedent — Only ratio decidendi is binding — Held, a case is a precedent and binding for what it explicitly decides and no more — What is of essence in a decision is its ratio and not every observation found therein nor what logically flows from various observations made in the judgment — Further held, a decision is a precedent on its own facts — Reliance on the decision without looking into its factual background is clearly impermissible

Reliance on the decision without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a judge while giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision

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- a contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein, nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent.
- b A case is a precedent and binding for what it explicitly decides and no more.

(Para 12)

State of Orissa v. Sudhansu Sekhar Misra, (1968) 2 SCR 154 : AIR 1968 SC 647; *Union of India v. Dhanwanti Devi*, (1996) 6 SCC 44, *relied on*

- c **D. Interpretation of Judgments — Held, words in judgments are not to be read as if they are words in Act of Parliament — Every judgment must be read as applicable to the particular facts proved or assumed to be proved**
(Para 12)

Quinn v. Leathem, 1901 AC 495 : 85 LT 289 : (1900-03) All ER Rep 1 (HL), *relied on*

Appeal allowed

P-M/33466/CL

Advocates who appeared in this case :

- d Janaranjan Das and Swetaketu Mishra, Advocates, for the Appellants;
Ms Promila, Advocate, for the Respondent.

Chronological list of cases cited**on page(s)**

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| 2. | (1998) 2 Ori LR 348, <i>Pradeep Kumar Karji v. Collector</i> | 278e, 278g-h |
| 3. | (1996) 6 SCC 44, <i>Union of India v. Dhanwanti Devi</i> | 282e |
| e 4. | (1989) 4 SCC 255, <i>Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Shehararao</i> | 281e-f |
| 5. | (1986) 2 Ori LR 497, <i>Tarini Tripathy v. Collector</i> | 278e, 279a |
| 6. | (1968) 2 SCR 154 : AIR 1968 SC 647, <i>State of Orissa v. Sudhansu Sekhar Misra</i> | 282e |
| 7. | (1933) 2 KB 669 : 1933 All ER Rep 28 (CA), <i>Wheeler v. New Merton Board Mills</i> | 282a |
| f 8. | 1901 AC 495 : 85 LT 289 : (1900-03) All ER Rep 1 (HL), <i>Quinn v. Leathem</i> | 282e-f |
| 9. | (1899) 1 QB 283 : 68 LJQB 175, <i>R. v. Senior</i> | 282a |
| 10. | (1898) 1 QB 316 : 67 LJQB 404, <i>Gayford v. Chouler</i> | 282a |
| 11. | (1885) 31 Ch D 168 : (1881-85) All ER Rep Ext 1239 (CA), <i>Young and Harston's Contract, Re</i> | 281h |

- g The Judgment of the Court was delivered by

ARJIT PASAYAT, J.— Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Orissa High Court. By the impugned judgment the High Court held that the prerequisites for taking such action under Section 115(1) of the Orissa Gram Panchayats Act, 1964 (in short “the Act”) were not satisfied and, therefore,
- h the order of the Collector, Jajpur, dated 3-6-2003 directing suspension of the respondent was illegal.

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3. The factual background needs to be noted in brief:

The respondent was elected as Sarpanch of Neulapur Gram Panchayat in March 2002. Purportedly acting on the basis of the allegations made by several villagers of that Gram Panchayat, inquiry was conducted by the Sub-Collector, Jajpur. Several allegations were received by the Sub-Collector from the villagers as well as the Member of Legislative Assembly. By order dated 17-5-2003 the Collector directed the Sub-Collector to inquire into the allegations made against the respondent Sarpanch. On 23-5-2003 the Sub-Collector conducted inquiry and recorded the statements of the complainants and thereafter of the respondent. On 27-5-2003 the Sub-Collector submitted his report concluding that the respondent had misused his power as Sarpanch and had failed to discharge his duties. Considering the report of the Sub-Collector, by order dated 3-6-2003 the Collector suspended the respondent from the office of Sarpanch in purported exercise of powers conferred under Section 115(1) of the Act. The order was challenged by the respondent by filing a writ petition before the High Court. It was submitted that there was no material to show that the alleged acts of the respondent were wilful. The State Government filed its counter-affidavit pointing out that serious allegations were made which were inquired into by the Sub-Collector, who had categorically reported that there was truth in the allegations, clearly indicating abuse of powers, rights and privileges vested in him (the respondent) and the acts were prejudicial to the interest of the inhabitants of the Gram, and his further continuance would be detrimental to the interest of the Gram Panchayat and the inhabitants of the Gram. The High Court referred to an earlier decision in *Sanatan Jena v. Collector*¹ where reference was made to two earlier decisions i.e. *Pradeep Kumar Karji v. Collector*² and *Tarini Tripathy v. Collector*³. On the basis of the said judgment in *Sanatan case*¹ the High Court held as follows:

“This being the settled position of law and bare perusal of the report of the Sub-Collector, we are of the opinion that the same do not satisfy the prerequisite conditions stipulated under Section 115(1) of the Orissa Gram Panchayats Act. For the aforesaid reasons, the order of suspension fails to withstand the judicial scrutiny which is in our considered opinion liable to be quashed. Accordingly, we quash the impugned order passed in Annexure I.”

The portion of the judgment in *Sanatan case*¹ which was quoted by the High Court to conclude as above reads as follows:

“Suspension of an elected representative is indeed a drastic action and should not be taken recourse to cursorily and in a mechanical manner. This view was adopted in an earlier decision of this Court in *Pradeep Kumar Karji v. Collector*². Further, while vesting the power upon the executive to suspend an elected representative, the legislature

1 (2001) 1 Ori LR 206

2 (1998) 2 Ori LR 348

3 (1986) 2 Ori LR 497

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a thought it just and prudent to provide certain safeguards against the arbitrary exercise of such power. As has been held in the decision of the Court in *Tarini Tripathy v. Collector*³ all the ingredients stipulated under Section 115(1) of the Act are cumulative. Absence of any one of the said ingredients would make the order of suspension vulnerable. In consonance with Section 115(1) of the Act, the Collector must have to form an opinion that the omissions or commissions found against a Sarpanch were wilful. While bringing the tenure of an elected

b representative to a premature end, either temporarily or permanently, utmost care and circumspection ought to be exercised. In other words, the right of an elected representative to continue in office for the full tenure should not be lightly tinkered with by the executive."

c 4. In support of the appeal, learned counsel for the appellants submitted that the High Court is clearly in error in its analysis of Section 115(1) of the Act. The Sub-Collector's report clearly indicates the manner in which there was abuse of powers, rights and privileges vested in Respondent 1 and as to how the acts were prejudicial to the interest of the Gram Panchayat and the inhabitants of the Gram. The Collector had categorically stated in his order that the acts were wilful in nature.

d 5. Learned counsel for the respondent submitted that by merely referring to the language of the section, the Collector could not have concluded that the acts of the respondent were prejudicial acts or amounted to abuse of powers and rights and privileges vested in him. It was submitted that before the inquiry was conducted by the Sub-Collector, the respondent was not granted any opportunity. On the other hand the statement of the respondent was recorded after the statements of the so-called complainants were

e recorded. Even a copy of the Sub-Collector's report was not supplied to the respondent.

6. In order to appreciate the rival submissions, Section 115 needs to be quoted. The same reads as under:

f "115. *Suspension and removal of Sarpanch, Naib Sarpanch and member.*—(1) If the Collector, on an inquiry or inspection made by him or on the report of the Sub-Divisional Officer is of the opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch of a Gram Panchayat wilfully omits or refuses to carry out or violates the provisions of this Act, or the rules or orders made thereunder or abuses the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Gram and that the further continuance of such person

g in office would be detrimental to the interest of the Gram Panchayat or the inhabitants of the Gram, he may, by order, suspend the Sarpanch or Naib Sarpanch, as the case may be, from office and report the matter to the State Government.

h (2) The State Government, on the report of the Collector under sub-section (1) shall, or if the State Government themselves are of the opinion that the circumstances specified in the said sub-section exist in relation to a Sarpanch or Naib Sarpanch, then on their own motion, may, after giving the

person concerned a reasonable opportunity of showing cause, remove him from the office of Sarpanch or Naib Sarpanch, as the case may be.

(3) In the case of Sarpanch or Naib Sarpanch, if he is not already under suspension in pursuance of an order under sub-section (1), the State Government may, pending the disposal of the proceedings before them under sub-section (2), suspend the Sarpanch or Naib Sarpanch, as the case may be. a

(3-a) The State Government may, at any time during the pendency of proceedings before them under sub-section (2), revoke the order of suspension of a Sarpanch or Naib Sarpanch passed under sub-section (1) or under sub-section (3). b

(4) A Sarpanch or Naib Sarpanch, on removal from office under sub-section (2), shall also cease to be a member of the Gram Panchayat, and such person shall not be eligible for election as a member for a period not exceeding four years as the State Government may specify.

(5) The provisions of this section shall, so far as may be, apply in respect of any member of the Gram Panchayat not being a Sarpanch or Naib Sarpanch, provided that no such member shall be liable to be placed under suspension under the said provisions. c

(6)(a) Whenever the Collector is of the opinion that the Sarpanch of a Gram Panchayat has failed in convening any meeting of the Gram Panchayat within a period of three continuous months he may, after making such enquiry as he deems fit, by order, remove the Sarpanch from office and may also declare him not to be eligible for election as a member for a period not exceeding one year as he may specify in his order, and on such order being made the Sarpanch shall cease to be a member of the Gram Panchayat. d

(b) Nothing contained in the preceding sub-sections shall apply in respect of a default as specified above." e

The scheme of Section 115 shows that the Collector can take action either on the basis of an inquiry or inspection made by him or on the report of the Sub-Collector. On the basis of such inquiry or inspection or report of the Sub-Divisional Officer, as the case may be, he has to form opinion whether circumstances exist to show that the Sarpanch has wilfully omitted or refused to carry out or has violated the provisions of the Act or the rules or orders made thereunder or has abused the powers, rights and privileges vested in him or has acted in a manner prejudicial to the interest of the inhabitants of the Gram, and that further continuance of such person in office would be detrimental to the interest of the Gram Panchayat or the inhabitants of the Gram. On formation of such opinion he may by order suspend the Sarpanch or Naib Sarpanch, as the case may be, from office and report the matter to the State Government. After the report of the Collector is received by the State Government or if the State Government itself is of the opinion that the circumstances specified in sub-section (1) exist in relation to a Sarpanch or Naib Sarpanch then on their own motion after giving the person concerned reasonable opportunity of showing cause remove him from the office of Sarpanch or Naib Sarpanch as the case may be. It is only at the stage of f
g
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removal, a reasonable opportunity to show cause is to be granted to the Sarpanch or Naib Sarpanch concerned, as the case may be.

- a 7. When the Collector acts in terms of sub-section (1), there is no question of granting an opportunity to the Sarpanch or Naib Sarpanch concerned, as the case may be, to have his say in the matter. Sub-section (3) empowers the State Government to suspend the Sarpanch or Naib Sarpanch, as the case may be, if he is not already suspended in pursuance of the order under sub-section (1) while the proceedings before him are pending under sub-section (2). Further, during the pendency of the proceedings under sub-section (2) the State Government may under sub-section (3-a) revoke the order passed either under sub-section (1) or under sub-section (3).

8. For bringing in the application of Section 115(1) the acts complained of must have been done wilfully by the Sarpanch or Naib Sarpanch, as the case may be. The order of the Collector after referring to the acts purportedly done by the respondent categorically stated that he was satisfied that the respondent had wilfully abused the powers, rights and privileges vested in him and had acted in a manner prejudicial to the interest of the inhabitants of the Gram. The allegations were to the effect that he had collected illegal gratification from poor beneficiaries of Indira Avas Yojana by giving false assurance to provide them Indira Avas houses, and also from some people for providing HUDCO loans. The Sub-Collector had recorded statements of seven of such beneficiaries and had concluded that by taking advantage of the simplicity of the poor persons, the respondent had cheated the poor beneficiaries who relied upon the words of the respondent and were finally deceived.

- c 9. At this juncture it is desirable to consider the true import of the word "wilful". An act is said to be "wilful" if it is intentional, conscious and deliberate. (See *Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Sehararao*⁴.)

- d 10. The expression "wilful" excludes casual, accidental, bona fide or unintentional acts or genuine inability. It is to be noted that a wilful act does not encompass accidental, involuntary, or negligent. It must be intentional, deliberate, calculated and conscious with full knowledge of legal consequences flowing therefrom. The expression "wilful" means an act done with a bad purpose, with an evil motive.

- e 11. "Wilful" is a word of familiar use in every branch of law, and although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent. (Per Bowen, L.J. in *Young and Harston's Contract, Re*⁵.) It does not necessarily connote blame,

- f
- g
- h 4 (1989) 4 SCC 255
5 (1885) 31 Ch D 168 : (1881-85) All ER Rep Ext 1239 (CA)

although the word is more commonly used for bad conduct than of good. (See *Wheeler v. New Merton Board Mills*⁶.) Whatever is intentional is wilful. (Per Day, J. in *Gayford v. Chouler*⁷.) As observed by Russel, C.J. in *R. v. Senior*⁸ “wilfully” means deliberately and intentionally. a

12. When the allegation is of cheating or deceiving, whether the alleged act is wilful or not depends upon the circumstances of the case concerned and there cannot be any straitjacket formula. The High Court unfortunately did not discuss the factual aspects and by merely placing reliance on an earlier decision of the Court held that prerequisite conditions were absent. Reliance b on the decision without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge’s decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the c ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an d authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (See *State of Orissa v. Sudhansu Sekhar Misra*⁹ and *Union of India v. Dhanwanti Devi*¹⁰.) A case is a precedent and binding e for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In *Quinn v. Leatham*¹¹ the Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by f the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.

13. The High Court has not indicated as to why according to it the prerequisite conditions stipulated were not satisfied. Vulnerability of the High Court’s judgment is also apparent from the fact that it referred to the report of the Sub-Collector and held that the same did not satisfy the prerequisite g

6 (1933) 2 KB 669 : 1933 All ER Rep 28 (CA)

7 (1898) 1 QB 316 : 67 LJQB 404

8 (1899) 1 QB 283 : 68 LJQB 175

9 (1968) 2 SCR 154 : AIR 1968 SC 647

10 (1996) 6 SCC 44

11 1901 AC 495 : 85 LT 289 : (1900-03) All ER Rep 1 (HL.)

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- a conditions stipulated. The Sub-Collector's report indicated circumstances to show that the Sarpanch had wilfully omitted or refused to carry out or has violated the provisions of the Act or the rules or orders made thereunder or has abused the powers, rights and privileges vested in him or has acted in a manner prejudicial to the interests of the inhabitants of the Gram.

- b 14. In the instant case, various acts of the respondent are prima facie indicative of abuse of powers, rights and privileges vested in the Sarpanch. The Collector, on the basis of materials contained in the report of the Sub-Collector, has opined that these are wilful acts. The High Court has completely lost sight of these relevant facts. The Collector's opinion at the stage of consideration is really a prima facie view on the basis of materials before him. Unless there is total absence of material and/or non-application of mind, the courts should not interfere. The case at hand does not belong to that category.

- c 15. A plea has been advanced by the learned counsel for the appellant that the Collector does not have to opine on the wilful aspect when the act impugned is an abuse of the powers, rights and privileges, there is no need to examine that aspect as the Collector has himself characterised the act as wilful.

- d 16. Looked at from any angle, the High Court's judgment is indefensible and is set aside. We make it clear that we have not expressed any opinion on the merits of the case, so far as action under sub-section (2) of Section 115 is concerned. That is a matter which is to be adjudicated by the State Government. Learned counsel for the respondent submitted that prayers shall be made before the State Government to revoke the suspension in terms of sub-section (3-a) of Section 115. If any prayer is made, the same shall be considered in accordance with law, and we express no opinion in that regard.

- e 17. The appeal is allowed with no order as to costs.

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(BEFORE H.K. SEMA AND TARUN CHATTERJEE, JJ.)

- f VISHNU ALIAS UNDRYA . . . Appellant;

Versus

- STATE OF MAHARASHTRA . . . Respondent.

Criminal Appeals Nos. 1112-13 of 1999[†], decided on November 24, 2005

- g A. Penal Code, 1860 — Ss. 375, 376 and 366 — Rape — Age of prosecutrix — Determination of — Date of birth as recorded in the birth register of the Municipal Corporation and the register of the hospital where the prosecutrix was born, was 29-11-1964 (in which case the prosecutrix was below sixteen years of age on the date the offence was committed), while the date of birth recorded in the school-leaving certificate was 29-6-1963 (in

- h [†] From the Judgment and Order dated 4-5-1998 of the Bombay High Court in CrI. As. Nos. 147 and 356 of 1984

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(BEFORE K.G. BALAKRISHNAN, C.J. AND R.V. RAVEENDRAN
AND J.M. PANCHAL, JJ.)

SOM MITTAL

.. Appellant;

Versus

GOVERNMENT OF KARNATAKA

.. Respondent.

Criminal Appeal No. 206 of 2008[†], decided on February 21, 2008

A. Precedents — Ratio decidendi — Determination of — Considerations while interpreting words or phrases in the judgment — Held, judgments are not to be construed as statutes — Nor words or phrases in judgments to be interpreted like provisions of statute — Some words used in a judgment should be read and understood contextually and are not intended to be taken literally — Many a time a judge uses a phrase or expression with the intention of emphasising a point or accentuating a principle or even by way of a flourish of writing style — Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation — Constitution of India — Art. 141 — “law declared” (Para 9)

B. Words and Phrases — Expression “the rarest of rare cases” used after “sparingly and with circumspection” — Use of, while describing scope of S. 482 CrPC, considered — Held, those words merely emphasise and reiterate what is intended to be conveyed by the words “sparingly and with circumspection” — Expression “the rarest of rare cases” is not used in the sense in which it is used with reference to punishment for offences under S. 302 IPC, but to emphasise that power under S. 482 CrPC to quash the FIR or criminal proceedings should be used sparingly and with circumspection — It may not therefore be correct to say that the words “the rarest of rare cases” are appropriate only when considering death sentence for an offence under S. 302 IPC or that those words are inappropriate when referring to the ambit of the power to be exercised under S. 482 CrPC — Criminal Procedure Code, 1973 — S. 482 — Penal Code, 1860, S. 302

The appellant filed a petition under Section 482 CrPC for setting aside the order passed by the court below taking cognizance of an offence punishable under Section 30(3) of the Karnataka Shops and Commercial Establishments Act, 1961 for violation of Section 25 of the Act, in the complaint lodged against him, and for quashing the complaint. The High Court rejected the prayer for quashing the complaint, but altered the offence in respect of which cognizance was taken. The said order of the High Court was challenged by the appellant in appeal before the Supreme Court.

In view of the difference of opinion on legal issues, the appeal was directed to be placed before the Chief Justice of India for appropriate orders, though both the learned Judges concurred that the appeal should be dismissed. The matter was accordingly placed before the Bench of three Judges.

Though the learned Judges did not set down the legal issues, the following two issues were discerned from their opinions:

[†] From the Final Judgment and Order dated 28-3-2006 of the High Court of Karnataka at Bangalore in Crl. P. No. 1535 of 2006

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(i) Whether the power under Section 482 CrPC should be exercised “sparingly” or “sparingly and with circumspection and in the rarest of rare cases”?

a

(ii) Whether the recommendations and directions relating to anticipatory bail and enforcement of the directions relating to arrest laid down in *Joginder Kumar case*, (1994) 4 SCC 260 were warranted in this case?

Answering the said questions, the Supreme Court

Held :

- b When the words “the rarest of rare cases” are used after the words “sparingly and with circumspection” while describing the scope of Section 482 CrPC, those words merely emphasise and reiterate what is intended to be conveyed by the words “sparingly and with circumspection”. They mean that the power under Section 482 CrPC to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression “the rarest of rare cases” is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasise that the power under Section 482 CrPC to quash the FIR or criminal proceedings should be used sparingly and with circumspection. It may not therefore be correct to say that the words “the rarest of rare cases” are appropriate only when considering death sentence for an offence under Section 302 IPC or that those words are inappropriate when referring to the ambit of the power to be exercised under Section 482 CrPC. (Paras 9 and 7)

- c *Kurukshetra University v. State of Haryana*, (1977) 4 SCC 451 : 1977 SCC (Cri) 613; *State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426, *relied on*
- d *Som Mittal v. Govt. of Karnataka*, (2008) 3 SCC 753, *referred to*
- Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898, *cited*

C. Criminal Procedure Code, 1973 — Ss. 354 and 353 — Judgment —

- e **Considerations while rendering judgment — Held, while rendering judgments, courts should only deal with the subject-matter of the case and issues involved therein — Courts should desist from issuing directions affecting executive or legislative policy, or general directions unconnected with the subject-matter of the case — A court may express its views on a particular issue in appropriate cases only where it is relevant to the subject-matter of the case — The subject-matter of an appeal, whether civil or criminal, is the correctness of the decision of the court below — There is no question of the appellate court travelling beyond and making observations alien to the case — Even when it becomes necessary for a court for whatsoever reason, to decide or comment upon an issue not raised by the parties, it may do so only after notifying parties concerned so that they can put forth their views on such issue — Herein, observations, recommendations and directions in the concurring judgment, do not relate to subject-matter of the criminal appeal and being the expression of an expectation or hope by only one of the Judges constituting the Bench and not agreed to by the other, is not a decision, order or direction of the Court — Hence, directions issued to Secretary General of the Supreme Court, State Governments and Union Territories, and recommendations to the Government of U.P. in the concurring judgment are not directions to be complied with — Civil Procedure Code, 1908 — S. 33 (Paras 10, 11 and 13)**

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Joginder Kumar v. State of U.P., (1994) 4 SCC 260 : 1994 SCC (Cri) 1172, *cited*

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D. Constitution of India — Art. 141 — Binding effect of law declared by Supreme Court — Onerous responsibility under — Held, when the Supreme Court renders judgments, it does so with great care and responsibility — Law declared by the Supreme Court is binding on all courts — All authorities in the territory of India are required to act in aid of it — Any interpretation of a law or a judgment, by the Supreme Court, is a law declared by the Supreme Court — The wider the power, more onerous is the responsibility to ensure that nothing is stated or directed in excess of what is required or relevant for the case, and to ensure that the Court's orders and decisions do not create any doubt or confusion in regard to a legal position in the minds of any authority or citizen, and also to ensure that they do not conflict with any other decision or existing law (Para 12) a

E. Criminal Procedure Code, 1973 — S. 482 — Quashing of complaint or criminal proceedings under, when proper — Held, quashing of complaint or criminal proceedings under S. 482 depends on the facts and circumstances of each case — Scope and ambit of power under S. 482 has been explained by the Supreme Court in a series of decisions (Para 8) b

State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426; *R.P. Kapur v. State of Punjab*, AIR 1960 SC 866; *State of U.P. v. R.K. Srivastava*, (1989) 4 SCC 59 : 1989 SCC (Cri) 713; *Rupan Deol Bajaj v. Kanwar Pal Singh Gill*, (1995) 6 SCC 194 : 1995 SCC (Cri) 1059; *Pepsi Foods Ltd. v. Special Judicial Magistrate*, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400; *Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque*, (2005) 1 SCC 122 : 2005 SCC (Cri) 283; *Indian Oil Corpn. v. NEPC India Ltd.*, (2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188; *Sonapareddy Maheedhar Seshagiri v. State of A.P.*, (2007) 13 SCC 165 : (2007) 14 Scale 321, *relied on* c

Y-M/37410/CR

Advocates who appeared in this case :

K.K. Venugopal and K.G. Raghavan, Senior Advocates [Amit Dhingra and Aman Leekha (for M/s Dua Associates), Advocates] for the Appellant;
Sanjay R. Hegde, Vikrant Yadav, Amit Kr. Chawla and Arul Varma, Advocates, for the Respondent. d

<i>Chronological list of cases cited</i>	<i>on page(s)</i>	
1. (2008) 3 SCC 753, <i>Som Mittal v. Govt. of Karnataka</i>	577d	
2. (2007) 13 SCC 165 : (2007) 14 Scale 321, <i>Sonapareddy Maheedhar Seshagiri v. State of A.P.</i>	579g	
3. (2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188, <i>Indian Oil Corpn. v. NEPC India Ltd.</i>	579g	f
4. (2005) 1 SCC 122 : 2005 SCC (Cri) 283, <i>Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque</i>	579f-g	
5. (1998) 5 SCC 749 : 1998 SCC (Cri) 1400, <i>Pepsi Foods Ltd. v. Special Judicial Magistrate</i>	579f-g	
6. (1995) 6 SCC 194 : 1995 SCC (Cri) 1059, <i>Rupan Deol Bajaj v. Kanwar Pal Singh Gill</i>	579f-g	
7. (1994) 4 SCC 260 : 1994 SCC (Cri) 1172, <i>Joginder Kumar v. State of U.P.</i> 578c-d, 579c		g
8. 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426, <i>State of Haryana v. Bhajan Lal</i>	579d, 579d-e, 579f-g, 579a	
9. (1989) 4 SCC 59 : 1989 SCC (Cri) 713, <i>State of U.P. v. R.K. Srivastava</i>	579f	
10. (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898, <i>Bachan Singh v. State of Punjab</i>	577h	
11. (1977) 4 SCC 451 : 1977 SCC (Cri) 613, <i>Kurukshetra University v. State of Haryana</i>	579d	h
12. AIR 1960 SC 866, <i>R.P. Kapur v. State of Punjab</i>	579f	

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The Order of the Court was delivered by

- K.G. BALAKRISHNAN, C.J.**— The Government of Karnataka represented by Senior Labour Inspector, 8th Circle, Bangalore, lodged a complaint under Section 200 of the Code of Criminal Procedure against the appellant, who was the Managing Director of M/s Hewlett-Packard GlobalSoft Ltd., in the Court of the Metropolitan Magistrate (TC-3), Bangalore, for taking cognizance of an offence punishable under Section 30(3) of the Karnataka Shops and Commercial Establishments Act, 1961 (“the Act”, for short) for violation of Section 25 of the said Act. The learned Magistrate took cognizance by order dated 30-12-2005 and directed issue of notice to the appellant. The appellant filed a petition under Section 482 CrPC for setting aside the said order dated 30-12-2005 and for quashing the complaint. The High Court, by order dated 28-3-2006, rejected the prayer for quashing the complaint, but altered the offence in respect of which cognizance was taken as one under Section 30(1) read with Section 25 of the said Act. The said order of the High Court was challenged by the appellant in this appeal.

2. The appeal was heard by a Bench consisting of H.K. Sema and Markandey Katju, JJ. By the main judgment dated 29-1-2008¹ Sema, J. dismissed the appeal, making it clear that the Court was not expressing any opinion on the merits of the case and the learned Magistrate shall decide the maintainability of the complaint at the time of framing of the charge uninfluenced by any observations made by this Court or the High Court. In the course of his judgment, Sema, J. observed:

- “In a catena of decisions this Court has deprecated the interference by the High Court in exercise of its inherent powers under Section 482 of the Code in a routine manner. It has been consistently held that the power under Section 482 must be exercised sparingly, with circumspection and in the rarest of rare cases. Exercise of inherent power under Section 482 of the Code of Criminal Procedure is not the rule but it is an exception. The exception is applied only when it is brought to the notice of the Court that grave miscarriage of justice would be committed if the trial is allowed to proceed where the accused would be harassed unnecessarily if the trial is allowed to linger...”

3. In his concurring judgment, Katju, J. agreed that the appeal should be dismissed without expressing any opinion on merits. He stated that he was rendering a separate opinion as he was not in agreement with the view expressed by Sema, J. that the power under Section 482 CrPC should be used only in the “rarest of rare cases”, though he agreed with the observation that the said power should be used sparingly. He was of the view that the words “rarest of rare cases” are used only with reference to the death penalty for an offence under Section 302 IPC (see *Bachan Singh v. State of Punjab*²) and the use of the said words was inappropriate while referring to the scope of

¹ *Som Mittal v. Govt. of Karnataka*, (2008) 3 SCC 753
² (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898

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exercise of power under Section 482 CrPC. Paras 1 to 16 of his judgment related to the criminal appeal. However in Paras 17 to 39 of his judgment, the learned Judge expressed concern over the situation prevailing in Uttar Pradesh on account of omission of Section 438 CrPC relating to anticipatory bail by an amendment to the Code by Section 9 of the U.P. Act 16 of 1976 and the consequential hardship created for the public and difficulties caused to the Allahabad High Court. He made a recommendation to the U.P. Government to immediately issue an ordinance repealing Section 9 of the U.P. Act 16 of 1976 so as to restore Section 438 CrPC in Uttar Pradesh empowering the High Court and the Sessions Courts to grant anticipatory bail. He directed the Registry of this Court to send a copy of his judgment to the Chief Secretary, Home Secretary and Law Secretary of the State of U.P. and also to the Registrar General of the Allahabad High Court and the President/Secretary of the Allahabad Bar Association, the Allahabad High Court Advocates' Association and the Oudh Bar Association forthwith. He also referred to the prevailing practice of the police arresting those suspected of involvement in a crime and the directions issued by this Court in *Joginder Kumar v. State of U.P.*³ in regard to the procedure to be followed when arresting a person, and directed that copies of his judgment be sent to the Chief Secretaries, Home Secretaries and Law Secretaries of all State Governments and Union Territories with a direction to ensure strict compliance with the said decision.

4. In view of the difference of opinion on legal issues, the appeal was directed to be placed before the Chief Justice of India for appropriate orders, though both the learned Judges concurred that the appeal should be dismissed. The matter is accordingly placed before the Bench of three Judges.

5. When the matter came up, Mr K.K. Venugopal, learned Senior Counsel for the appellant submitted that having regard to the exemption under Section 3(h) of the Act in respect of persons in management of an establishment, the Act in entirety was inapplicable to the appellant who was the Managing Director of the establishment. He also submitted that the question of violation of Section 25 of the Act did not arise as the appellant's establishment was exempted from the provisions of Section 25 of the Act by the Government Order dated 9-2-2005 and therefore there was no question of violation of Section 25 or commission of an offence punishable under Section 31(1) of the Act by his establishment. He therefore submitted that the complaint ought to have been quashed when its establishment invoked the High Court to exercise its power under Section 482 CrPC. On the other hand the learned counsel for the respondent State submitted that the object of Section 3(h) of the Act was to exclude persons in the management from being considered as employees entitled to seek benefits and reliefs under the Act. He submitted that the intention of Section 3(h) was not to exempt "persons in management" from incurring liability under the Act. He also submitted that the complaint disclosed violation of the provisions of the

³ (1994) 4 SCC 260 : 1994 SCC (Cri) 1172

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a proviso to Section 25 of the Act and therefore the learned Magistrate rightly took cognizance. It is unnecessary to examine these contentions urged by the parties, on merits. As already noticed, both the learned Judges have concurred and dismissed the appeal. What is referred is only the legal issues which did not affect the final decision of the learned Judges that the appeal should be dismissed.

6. Though the learned Judges did not set down the legal issues, we discern the following two issues from their opinions:

b (i) Whether the power under Section 482 CrPC should be exercised “sparingly” or “sparingly, with circumspection and in the rarest of rare cases”?

(ii) Whether the recommendations and directions relating to anticipatory bail and enforcement of the directions relating to arrest laid down in *Joginder Kumar*³ were warranted in this case?

c 7. When Sema, J. observed that the power under Section 482 CrPC was to be used “sparingly, with circumspection and in the rarest of rare cases”, he did not lay down any new proposition of law, but was merely reiterating what was stated by this Court in several cases, including *Kurukshetra University v. State of Haryana*⁴ and *State of Haryana v. Bhajan Lal*⁵. In *Kurukshetra University*⁴ this Court observed (SCC p. 451, para 2) “that the statutory power under Section 482 has to be exercised sparingly with circumspection and in the rarest of rare cases”. In *Bhajan Lal*⁵, this Court reiterated the word of caution that the power of quashing a criminal proceeding should be exercised “very sparingly and with circumspection and that too in the rarest of rare cases”. It may not therefore be correct to say that the words “rarest of rare cases” are appropriate only when considering death sentence for an offence under Section 302 IPC or that those words are inappropriate when referring to the ambit of the power to be exercised under Section 482 CrPC.

e 8. Quashing of a complaint or criminal proceedings under Section 482 CrPC depends on the facts and circumstances of each case. The scope and ambit of the power under Section 482 has been explained by this Court in a series of decisions — *R.P. Kapur v. State of Punjab*⁶, *State of U.P. v. R.K. Srivastava*⁷, *State of Haryana v. Bhajan Lal*⁵, *Rupan Deol Bajaj v. Kanwar Pal Singh Gill*⁸, *Pepsi Foods Ltd. v. Special Judicial Magistrate*⁹, *Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque*¹⁰, *Indian Oil Corpn. v. NEPC India Ltd.*¹¹ and *Sonapareddy Maheedhar Seshagiri v. State of A.P.*¹² This Court in *Bhajan Lal*⁵ listed the following categories of cases where

- g 4 (1977) 4 SCC 451 : 1977 SCC (Cri) 613
 5 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426
 6 AIR 1960 SC 866
 7 (1989) 4 SCC 59 : 1989 SCC (Cri) 713
 8 (1995) 6 SCC 194 : 1995 SCC (Cri) 1059
 9 (1998) 5 SCC 749 : 1998 SCC (Cri) 1400
 h 10 (2005) 1 SCC 122 : 2005 SCC (Cri) 283
 11 (2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188
 12 (2007) 13 SCC 165 : (2007) 14 Scale 321

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power under Section 482 could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice: (SCC pp. 378-79, para 102)

"102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with *mala fide* and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

It was also made clear that it was not possible to lay down precise and inflexible guidelines or any rigid formula or to give an exhaustive list of the circumstances in which such power could be exercised.

9. When the words "rarest of rare cases" are used after the words "sparingly and with circumspection" while describing the scope of Section 482, those words merely emphasise and reiterate what is intended to be conveyed by the words "sparingly and with circumspection". They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case

- for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression “rarest of rare cases” is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasise that the power under Section 482 CrPC to quash the FIR or criminal proceedings should be used sparingly and with circumspection. Judgments are not to be construed as statutes. Nor words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a judge uses a phrase or expression with the intention of emphasising a point or accentuating a principle or even by way of a flourish of writing style. Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation.

10. The second issue involves the recommendations made to the Government of U.P. and directions issued to all States and Union Territories in paras 17 to 39 of the concurring judgment. The appeal related to the question whether the complaint against the appellant disclosed the ingredients of an offence under Section 25 of the Karnataka Shops and Commercial Establishments Act, 1961. The appeal did not relate to grant of anticipatory bail nor did it relate to rights of arrested persons. This Court has repeatedly cautioned that while rendering judgments, courts should only deal with the subject-matter of the case and issues involved therein. The courts should desist from issuing directions affecting executive or legislative policy, or general directions unconnected with the subject-matter of the case. A court may express its views on a particular issue in appropriate cases only where it is relevant to the subject-matter of the case.

11. The subject-matter of an appeal, whether civil or criminal, is the correctness of the decision of the court below. There is no question of the appellate court travelling beyond and making observations alien to the case. Any opinion, observation, comment or recommendation dehors the subject of the appeal, may lead to confusion in the minds of litigants, members of public and authorities as they will not know how to regulate their affairs, or whether to act upon it. Another aspect that requires to be kept in view is the fact that even when it becomes necessary for a court for whatsoever reason, to decide or comment upon an issue not raised by the parties, it may do so only after notifying the parties concerned so that they can put forth their views on such issue.

12. When this Court renders judgments, it does so with great care and responsibility. The law declared by this Court is binding on all courts. All authorities in the territory of India are required to act in aid of it. Any interpretation of a law or a judgment, by this Court, is a law declared by this Court. The wider the power, more onerous is the responsibility to ensure that nothing is stated or directed in excess of what is required or relevant for the case, and to ensure that the Court’s orders and decisions do not create any doubt or confusion in regard to a legal position in the minds of any authority or citizen, and also to ensure that they do not conflict with any other decision or existing law. Be that as it may.

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13. Insofar as the observations, recommendations, and directions in paras 17 to 39 of the concurring judgment is concerned, suffice it to say that they do not relate to the subject-matter of the criminal appeal and being the expression of an expectation or hope by only one of the learned Judges constituting the Bench and not agreed to by the other, is not a decision, order or direction of the Court. That being so, the directions issued to the Secretary General of the Supreme Court, State Governments and Union Territories and recommendations to the Government of U.P. in the “aside” contained in paras 17 to 39 of the concurring judgment are not directions to be complied with.

14. The two questions are answered accordingly.

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(BEFORE S.H. KAPADIA AND B. SUDERSHAN REDDY, JJ.)

STATE OF KERALA AND OTHERS .. Appellants;

Versus

KURIAN ABRAHAM (P) LTD.
AND ANOTHER . . . Respondents.

Civil Appeals Nos. 7965-66 of 2004[†], decided on February 8, 2008

A. Constitution of India — Arts. 265 and 14 — Tax administration — Nature of the function of, and approach of Government in that regard — Need to address concerns of assesseees — Held, tax administration is a complex and multi-aspect subject — While imposing tax, the Government has to strike a balance between collection of revenue and business-friendly approach — Hence, it has to take into account the difficulties faced by the business and has to work through its senior officers including the Board of Revenue in the matter of such difficulties — Taxation — Sales Tax — Income Tax — Excise — Central Excise Act, 1944 — Ss. 3, 4 and 5-A — Customs Act, 1962 — Ss. 12 and 25 — Administrative Law — Administrative action — Tax administration — Kerala General Sales Tax Act, 1963 (15 of 1963) — S. 3(1-A)(c) — Board of Revenue — Role of, in tax administration

B. Constitution of India — Arts. 265 and 14 — Exemption — Power to grant exemption — Nature of — Grant of administrative relief by Senior Officers/Board of Revenue having the effect of exemption (to avoid double taxation) — Permissibility — Power to treat two products/commodities covered by one entry in tariff/rate schedule as one for purpose of granting administrative relief — Held, exemption is a matter of policy and policy decisions have to be taken by the Government but in the matter of difficulties that might be faced by the business in matter of tax administration, the Government has to work through its senior officers including the Board of Revenue who, in turn, may take administrative decisions to grant administrative relief — In the present case, the same

† From the common Final Judgment dated 8-12-2003 of the High Court of Kerala at Ernakulam in OP No. 12376 of 2003 (W) and WP (C) No. 30288 of 2003 (E)

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(2004) 3 Supreme Court Cases 75

(BEFORE DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.)

a UNION OF INDIA . . . Appellant;

Versus

AMRIT LAL MANCHANDA AND ANOTHER . . . Respondents.

Criminal Appeals No. 223 of 2004[†] with No. 224 of 2004[‡],
decided on February 16, 2004

b **A. Preventive Detention — Detention order — Delay in execution — Challenge to detention order at pre-execution stage — Different considerations apply from those applicable at post-execution stage — Writ petition filed by respondent challenging order of detention passed against him — Stay of operation of the detention granted and ultimately writ petition allowed and detention order quashed by High Court on ground of passage of time between date of detention order and date on which High Court had taken up the writ petition for consideration — Held, High Court erred in quashing the detention order as respondent cannot be allowed to take advantage of his own action which resulted in such delay — COFEPOSA Act, 1974, S. 3**

c **B. Preventive Detention — Generally — Nature and object restated — Distinct from criminal proceedings**

d **C. Preventive Detention — Detention order — Challenge to, at pre-execution stage — Where detention order passed against more than one person, individual role of each one of them along with other factors has to be considered separately and no advantage can be allowed on the basis of proceedings taken against others**

e **D. Precedents — Observations of court — Must be read in the context in which they appear — One additional or different fact may make a world of difference**

f An order of detention was passed against the respondent under Section 3(1), COFEPOSA Act on 31-10-2001. The respondent filed a writ petition before the High Court on 20-12-2001 and on 21-12-2001 an order staying operation of the detention order was passed. On 31-5-2002 the High Court decided that it had territorial jurisdiction to deal with the matter, but dismissed the writ petition. An application for review was filed on the ground that though it was noted that the writ petition was dismissed, in fact the various points urged in support of the writ application were not considered. The High Court issued notice on the review petition and pending consideration stayed the operation of detention order. When the matter was heard afresh before the High Court only one point was urged i.e. passage of time between the date of the detention order and the date on which the High Court had taken up the writ petition for consideration. Relying on a decision of the Supreme Court in *Sunil Fulchand Shah v. Union of India*, (2000) 3 SCC 409 the High Court held the order of detention dated 31-10-2001 to be unsustainable on the ground of delay.

g *h* [†] Arising out of SLP (Crl.) No. 3901 of 2003. From the Judgment and Order dated 10-1-2003 of the Punjab and Haryana High Court in Crl. M. No. 249 of 2003 in Crl. WP No. 1472 of 2001

[‡] Arising out of SLP (Crl.) No. 3902 of 2003

Allowing the appeals, the Supreme Court

Held :

Merely because the High Court had granted stay of the order of detention, the respondent cannot take advantage of the order of stay passed by the High Court to contend that there is a passage of time. The petitioner cannot be allowed to have an unfair advantage and double benefit of his own action, which delayed the execution of the detention order. (Para 19) a

The reliance sought to be placed on the fate of proceedings taken against others is wholly inappropriate. The individual role, behavioural attitude and prognostic propensities have to be considered, personwise, and no advantage can be allowed to be gained by the petitioners in these cases based on considerations said to have been made as to the role of the others and that too as a matter of post-detention exercise undertaken so far as they are concerned. (Para 19) b

The High Court does not appear to have considered the case in the background of whether any relief was available to the writ petitioner even before the order of detention was executed. Cases involving challenges to orders of detention before and after execution of the order stand on different footings. (Paras 19 and 15) c

Sunil Fulchand Shah v. Union of India, (2000) 3 SCC 409 : 2000 SCC (Cri) 659, distinguished

Addl. Secy. to the Govt. of India v. Alka Subhash Gadia, 1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301; *Sayed Taher Bawamiya v. Jt. Secy. to the Govt. of India*, (2000) 8 SCC 630 : 2001 SCC (Cri) 56; *Union of India v. Parasmal Rampuria*, (1998) 8 SCC 402 : 1998 SCC (Cri) 1537; *Hare Ram Pandey v. State of Bihar*, (2004) 3 SCC 289 : JT (2003) 10 SC 114, relied on d

Union of India v. Muneesh Suneja, (2001) 3 SCC 92 : 2001 SCC (Cri) 433, referred to

Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper. (Paras 15 and 17) e

London Graving Dock Co. Ltd. v. Horton, 1951 AC 737 : (1951) 2 All ER 1 (HL); *Home Office v. Dorset Yacht Co.*, (1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2 WLR 1140 (HL); *Herrington v. British Railways Board*, (1972) 2 WLR 537 : (1972) 1 All ER 749 : 1972 AC 877 (HL), relied on f

The High Court was not justified in quashing the order of detention. The writ petition filed by the respondent is dismissed. It is open to the respondent to surrender to custody. (Para 19) g

Preventive detention is an anticipatory measure and does not relate to an offence, while criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the h

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- a executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the law concerned. The action of the executive in detaining a person being only precautionary, normally the matter has necessarily to be left to the discretion of the executive authority. (Para 9)

- b It is not practicable to lay down objective rules of conduct in an exhaustive manner, the failure to conform to which should lead to detention. The satisfaction of the detaining authority, therefore, is considered to be of primary importance, with great latitude in the exercise of its discretion. The detaining authority may act on any material and on any information that it may have before it. Such material and information may merely afford basis for a sufficiently strong suspicion to take action, but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable. (Para 9)

- c The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty of citizens would lose all their meanings, provide the justification for the laws of preventive detention. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State or corroding financial base provides grounds for satisfaction for a reasonable prognostication of possible future manifestations of similar propensities on the part of the offender. This jurisdiction has at times been even called a jurisdiction of suspicion. The compulsions of the very preservation of the values of freedom of democratic society and of social order might compel a curtailment of individual liberty. The actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by striking the right balance between individual liberty on the one hand and the needs of an orderly society on the other. (Para 9)

R-M/AZ/29656/CR

- e Advocates who appeared in this case :
L. Nageswara Rao, Additional Solicitor General (Manish Singhvi, Rajiv Nanda and B. Krishna Prasad, Advocates, with him) for the Appellant;
Gopal Subramaniam, Senior Advocate (Vikram Chaudhari, Rakesh Dahiya, Sunil Verma and Mahabir Singh, Advocates, with him) for the Respondents.

Chronological list of cases cited

on page(s)

- f 1. (2004) 3 SCC 289, *Hare Ram Pandey v. State of Bihar* 83c
2. (2001) 3 SCC 92 : 2001 SCC (Cri) 433, *Union of India v. Muneesh Suneja* 79a
3. (2000) 8 SCC 630 : 2001 SCC (Cri) 56, *Sayed Taher Bawamiya v. Jt. Secy. to the Govt. of India* 81f, 83b-c, 84f
4. (2000) 3 SCC 409 : 2000 SCC (Cri) 659, *Sunil Fulchand Shah v. Union of India* 78e, 78f, 83a-b
5. (1998) 8 SCC 402 : 1998 SCC (Cri) 1537, *Union of India v. Parasmal Rampuria* 82d-e, 84f-g
g 6. 1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301, *Addl. Secy. to the Govt. of India v. Alka Subhash Gadia* 80c, 81f-g, 82b-c
7. (1972) 2 WLR 537 : (1972) 1 All ER 749 : 1972 AC 877 (HL), *Herrington v. British Railways Board* 83g-h
8. (1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2 WLR 1140 (HL), *Home Office v. Dorset Yacht Co.* 83f-g
h 9. 1951 AC 737 : (1951) 2 All ER 1 (HL), *London Graving Dock Co. Ltd. v. Horton* 83e-f

The Judgment of the Court was delivered by

ARJIT PASAYAT, J.— Leave granted.

2. In both these two appeals the Union of India questions legality of the judgment rendered by the Punjab and Haryana High Court quashing the order of detention passed by the authority concerned under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short “the COFEPOSA”). a

3. A brief reference to the factual aspects which is almost undisputed would suffice. b

4. Since the points for adjudication are common to both the appeals, the factual position in SLP (Crl.) No. 3901 of 2003 is noted for convenience as the only difference between this case and the other case relates to the dates. The order of detention was passed under Section 3(1) of COFEPOSA on 31-10-2001. The respondent filed a writ petition before the Punjab and Haryana High Court on 20-12-2001 and on 21-12-2001 an order staying operation of the detention order was passed. On 31-5-2002 the High Court decided that it had territorial jurisdiction to deal with the matter, but dismissed the writ petition. An application for review was filed on the ground that though it was noted that the writ petition was dismissed, in fact the various points urged in support of the writ application were not considered. The High Court issued notice on the review petition and pending consideration stayed the operation of detention order. When the matter was heard afresh before the High Court it appears that only one point was urged i.e. passage of time between the date of the detention order and the date on which the High Court had taken up the writ petition for consideration. Relying on a decision of this Court in *Sunil Fulchand Shah v. Union of India*¹ the High Court held the order of detention dated 31-10-2001 to be unsustainable. However, it permitted the authority concerned to examine the matter and pass a fresh order if necessary and the circumstances so warrant. c
d
e

5. Learned Additional Solicitor General submitted that the decision in *Sunil Fulchand case*¹ had no application to the present case. In that case the question adjudicated was whether the period during which the detenu is on parole can be adjusted from the period of detention indicated in the detention order. While dealing with that issue the Court observed that where there is considerable gap of time, the desirability of sending any detenu to custody has to be considered in the background of the issue as to whether a live link for preventive detention still existed. That had nothing to do with a challenge to the order of detention before its execution. f
g

6. Mr Gopal Subramaniam, learned Senior Counsel appearing for the respondent submitted that the writ petitioner was not in custody pursuant to the order of stay passed by the High Court. The stay order can be treated at par with an order of parole. In any event, a live link has to be established to detain a person in custody by way of preventive detention. The liberty of a h

¹ (2000) 3 SCC 409 : 2000 SCC (Cri) 659

person is sacrosanct and it should not be affected except on grounds legally available to the detaining authority.

- a* 7. With reference to a decision of this Court in *Union of India v. Muneesh Suneja*² it is submitted that the detaining authority has to be satisfied afresh whether the detention was still necessary. It was submitted that liberty was given to the detaining authority and, therefore, it would not be proper to interfere. It is also pointed out that in the case of four similarly situated persons relating to the alleged offending acts, detention orders have
- b* been revoked in respect of two and in respect of two others, the High Court has quashed the orders of detention and no appeal has been filed.

8. So far as these four persons are concerned, learned Additional Solicitor General submitted that their cases were not considered at the pre-execution stage. All the four persons were in custody and their cases were considered by the Advisory Board or the High Court as the case may be. They do not
- c* stand at par with the present respondents.

9. Before dealing with rival submissions, it would be appropriate to deal with the purpose and intent of preventive detention. Preventive detention is an anticipatory measure and does not relate to an offence, while criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is
- d* not punitive but only preventive. It is resorted to when the executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the law concerned. The action of the executive in detaining a person being only precautionary, normally the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay
- e* down objective rules of conduct in an exhaustive manner, the failure to conform to which should lead to detention. The satisfaction of the detaining authority, therefore, is considered to be of primary importance, with great latitude in the exercise of its discretion. The detaining authority may act on any material and on any information that it may have before it. Such material and information may merely afford basis for a sufficiently strong suspicion to
- f* take action, but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable. The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty of citizens would lose all their meanings, provide the justification for the laws of preventive detention. Laws that provide for preventive detention posit that an individual's conduct
- g* prejudicial to the maintenance of public order or to the security of State or corroding financial base provides grounds for satisfaction for a reasonable prognostication of possible future manifestations of similar propensities on the part of the offender. This jurisdiction has at times been even called a jurisdiction of suspicion. The compulsions of the very preservation of the values of freedom of democratic society and of social order might compel a
- h*

curtailment of individual liberty. "To lose our country by a scrupulous adherence to the written law" said Thomas Jefferson "would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the needs." This, no doubt, is the theoretical jurisdictional justification for the law enabling preventive detention. But the actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by striking the right balance between individual liberty on the one hand and the needs of an orderly society on the other.

10. The question whether the detenu or anyone on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it has been examined by this Court on various occasions. One of the leading judgments on the subject is *Addl. Secy. to the Govt. of India v. Alka Subhash Gadia*³. In para 12 of the said judgment, it was observed by this Court as under: (SCC pp. 506-07)

"12. This is not to say that the jurisdiction of the High Court and the Supreme Court under Articles 226 and 32 respectively has no role to play once the detention — punitive or preventive — is shown to have been made under the law so made for the purpose. This is to point out the limitations which the High Court and the Supreme Court have to observe while exercising their respective jurisdiction in such cases. These limitations are normal and well known, and are self-imposed as a matter of prudence, propriety, policy and practice and are observed while dealing with cases under all laws. Though the Constitution does not place any restriction on these powers, the judicial decisions have evolved them over a period of years taking into consideration the nature of the right infringed or threatened to be infringed, the scope and object of the legislation or of the order or decision complained of, the need to balance the rights and interests of the individual as against those of the society, the circumstances under which and the persons by whom the jurisdiction is invoked, the nature of relief sought etc. To illustrate these limitations: (i) in the exercise of their discretionary jurisdiction the High Court and the Supreme Court do not, as courts of appeal or revision, correct mere errors of law or of facts; (ii) the resort to the said jurisdiction is not permitted as an alternative remedy for relief which may be obtained by suit or other mode prescribed by statute. Where it is open to the aggrieved person to move another tribunal or even itself in another jurisdiction for obtaining redress in the manner provided in the statute, the Court does not, by exercising the writ jurisdiction, permit the machinery created by the statute to be bypassed; (iii) it does not generally enter upon the determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed; (iv) it does not interfere on the merits with the determination of the issues made by the authority invested with statutory

3 1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301

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power, particularly when they relate to matters calling for expertise, unless there are exceptional circumstances calling for judicial intervention, such as, where the determination is mala fide or is prompted by extraneous considerations or is made in contravention of the principles of natural justice or any constitutional provision; (v) the Court may also intervene where (a) the authority acting under the law concerned does not have the requisite authority or the order which is purported to have been passed under the law is not warranted or is in breach of the provisions of the law concerned or the person against whom the action is taken is not the person against whom the order is directed; or (b) where the authority has exceeded its power or jurisdiction or has failed or refused to exercise jurisdiction vested in it; or (c) where the authority has not applied its mind at all or has exercised its power dishonestly or for an improper purpose; (vi) where the Court cannot grant a final relief, the Court does not entertain petition only for giving interim relief. If the Court is of opinion, that there is no other convenient or efficacious remedy open to the petitioner, it will proceed to investigate the case on its merit and if the Court finds that there is an infringement of the petitioner's legal rights, it will grant final relief but will not dispose of the petition only by granting interim relief; (vii) where the satisfaction of the authority is subjective, the Court intervenes when the authority has acted under the dictates of another body or when the conclusion is arrived at by the application of a wrong test or misconstruction of a statute or it is not based on material which is of a rationally probative value and relevant to the subject-matter in respect of which the authority is to satisfy itself. If again the satisfaction is arrived at by taking into consideration material which the authority properly could not, or by omitting to consider matters which it ought to have, the Court interferes with the resultant order; (viii) in proper cases the Court also intervenes when some legal or fundamental right of the individual is seriously threatened, though not actually invaded."

11. In *Sayed Taher Bawamiya v. Jt. Secy. to the Govt. of India*⁴ it was observed by this Court as follows: (SCC p. 632, paras 6-7)

"6. This Court in *Alka Subhash case*³ was also concerned with a matter where the detention order had not been served but the High Court had entertained the petition under Article 226 of the Constitution. This Court held that equitable jurisdiction under Article 226 and Article 32 which is discretionary in nature would not be exercised in a case where the proposed detenu successfully evades the service of the order. The Court, however, noted that the courts have the necessary power in appropriate cases to interfere with the detention order at the pre-execution stage but the scope for interference is very limited. It was held that the courts will interfere at the pre-execution stage with the detention orders only after they are prima facie satisfied—

4 (2000) 8 SCC 630 : 2001 SCC (Cri) 56

(i) that the impugned order is not passed under the Act under which it is purported to have been passed,

(ii) that it is sought to be executed against a wrong person,

(iii) that it is passed for a wrong purpose,

(iv) that it is passed on vague, extraneous and irrelevant grounds, or

(v) that the authority which passed it had no authority to do so.

7. As we see it, the present case does not fall under any of the aforesaid five exceptions for the court to interfere. It was contended that these exceptions are not exhaustive. We are unable to agree with this submission. *Alka Subhash case*³ shows that it is only in these five types of instances that the court may exercise its discretionary jurisdiction under Article 226 or Article 32 at the pre-execution stage. The petitioner had sought to contend that the order which was passed was vague, extraneous and on irrelevant grounds but there is no material for making such an averment for the simple reason that the order of detention and the grounds on which the said order is passed has not been placed on record inasmuch as the order has not yet been executed. The petitioner does not have a copy of the same and therefore it is not open to the petitioner to contend that the non-existent order was passed on vague, extraneous or on irrelevant grounds.”

12. This Court's decision in *Union of India v. Parasmal Rampuria*⁵ throws considerable light as to what would be the proper course for a person to adopt when he seeks to challenge an order of detention on the available grounds like delayed execution of detention order, delay in consideration of the representation and the like. These questions are really hypothetical in nature when the order of detention has not been executed at all and challenge is made at pre-execution stage. It was observed as under: (SCC p. 403, paras 4-5)

“4. In our view, a very unusual order seems to have been passed in a pending appeal by the Division Bench of the High Court. It is challenged by the Union of India in these appeals. A detention order under Section 3(1) of the COFEPOSA Act was passed by the authorities on 13-9-1996 against the respondent. The respondent before surrendering filed a writ petition in the High Court on 23-10-1996 and obtained ad interim stay of the proposed order which had remained unserved. The learned Single Judge after hearing the parties vacated the ad interim relief. Thereafter, the respondent went in appeal before the Division Bench and again obtained ad interim relief on 10-1-1997 which was extended from time to time. The writ appeal has not been still disposed of.

5. When the writ petition was filed, the respondent had not surrendered. Under these circumstances, the proper order which was required to be passed was to call upon the respondent first to surrender

⁵ (1998) 8 SCC 402 : 1998 SCC (Cri) 1537

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a pursuant to the detention order and then to have all his grievances examined on merits after he had an opportunity to study the grounds of detention and to make his representation against the said grounds as required by Article 22(5) of the Constitution of India.”

b 13. In *Sunil Fulchand Shah case*¹ a Constitution Bench of this Court observed that a person may try to abscond and thereafter take a stand that period for which detention was directed is over and, therefore, order of detention is infructuous. It was clearly held that the same plea even if raised deserved to be rejected as without substance. It should all the more be so when the detenu stalled the service of the order and/or detention in custody by obtaining orders of court. In fact, in *Sayed Taher case*⁴ the fact position shows that 16 years had elapsed yet this Court rejected the plea that the order had become stale.

c 14. These aspects were highlighted recently in *Hare Ram Pandey v. State of Bihar*⁶.

d 15. Cases involving challenges to orders of detention before and after execution of the order stand on different footings. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid’s theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton*⁷ (AC at p. 761) Lord Macdermott observed: (All ER p. 14 C-D)

f “The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge....”

g 16. In *Home Office v. Dorset Yacht Co.*⁸ Lord Reid said (at All ER p. 297g-h), “Lord Atkin’s speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances.” Megarry, J. in (1971) 1 WLR 1062 observed: “One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament.” And, in *Herrington v. British Railways Board*⁹ Lord Morris said: (All ER p. 761c)

6 JT (2003) 10 SC 114 : (2004) 3 SCC 289

7 1951 AC 737 : (1951) 2 All ER 1 (HL)

8 (1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2 WLR 1140 (HL)

9 (1972) 2 WLR 537 : (1972) 1 All ER 749 : 1972 AC 877 (HL)

h

There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. a

17. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

18. The following words of Lord Denning in the matter of applying precedents have become locus classicus: b

“Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. c

* * *

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.” d

19. The High Court does not appear to have considered the case in the background of whether any relief was available to the writ petitioner even before the order of detention was executed. The decision relied upon by it was not strictly applicable. Merely because the High Court had granted stay of the order of detention, the respondent cannot take advantage of the order of stay passed by the High Court to contend that there is a passage of time. The petitioner cannot be allowed to have an unfair advantage and double benefit of his own action, which delayed the execution of the detention order. In fact in *Sayed Taher Bawamiya case*⁴ the time gap was nearly 16 years. The inevitable conclusion therefore is that the High Court was not justified in quashing the order of detention. The writ petition filed by the respondent is dismissed. It is open to the respondent to surrender to custody as was observed in *Parasmal Rampuria case*⁵ and take such plea as is available in law. The reliance sought to be placed on the fate of proceedings taken against others is wholly inappropriate. The individual role, behavioural attitude and prognostic propensities have to be considered, personwise, and no advantage can be allowed to be gained by the petitioners in these cases based on considerations said to have been made as to the role of the others and that too as a matter of post-detention exercise undertaken so far as they are concerned. The appeal is allowed. The order of the High Court is set aside and the writ petition filed before the High Court shall stand dismissed. e
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SLP (Crl.) No. 3902 of 2003

20. The conclusions in *SLP (Crl.) No. 3901 of 2003* shall be equally applicable to this case in view of the fact that the position in law is the same h

CHITIVALASA JUTE MILLS v. JAYPEE REWA CEMENT

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on the similar fact situation of this case as well, though the dates are different.

- a **21.** The appeal is allowed. The order of the High Court is set aside and the writ petition filed in the High Court shall stand dismissed.

(2004) 3 Supreme Court Cases 85

(BEFORE R.C. LAHOTI AND ASHOK BHAN, JJ.)

- b CHITIVALASA JUTE MILLS . . . Petitioner;

Versus

- JAYPEE REWA CEMENT . . . Respondent.

Transfer Petition (C) No. 16 of 2002[†], decided on February 4, 2004

- c **A. Civil Procedure Code, 1908 — S. 25 — Transfer of suit — Two suits in two courts at different places — Parties substantially the same in both the suits — Cause of action alleged in two complaints referring to the same period and same transaction — Same set of evidence needed for determining issues of facts and law which were common — Possibility of conflicting decrees — Transfer of the later suit directed to the court where the suit earlier in time was filed — There the two suits directed to be consolidated for trial and decision**

B. Civil Procedure Code, 1908 — Ss. 25 and 10 — Transfer of suit — Petition filed after rejection of plea for stay of suit under S. 10 — Held, even if plea of stay of suit under S. 10 was erroneously rejected and High Court in revision failed to correct the error, held, Supreme Court has power to allow the petition for transfer where ends of justice so require

- e **C. Civil Procedure Code, 1908 — S. 151 — Consolidation of two suits — Held, can be directed in exercise of inherent powers under S. 151 for meeting ends of justice**

- f The respondent Company, which works at Rewa (M.P.), entered into an agreement with Willard India Ltd. for supply of jute bags from its jute mills, the petitioner, situated at Chitivalasa, Visakhapatnam (A.P.). Dispute arose between the parties relating to the period between 7-1-1992 and 31-12-1993 and is referable to several dispatches of jute bags from Chitivalasa to Rewa. In 1997, Willard India filed a suit against the respondent in the Court of Ist Additional Subordinate Judge at Visakhapatnam praying for money decree for the price of the goods supplied and not paid and for interest thereon. In Jan. 1998, the respondent filed a suit against “Chitivalasa Jute Mills (a division of Willard India Limited), Chitivalasa, District Visakhapatnam”, in the Court of District Judge, Rewa praying for a money decree with interest and costs. According to the respondent, deducting the value of the jute bags which were rejected and taking into account the price of the cement supplied, there was an excess payment. The petitioner, on being served with summons in the suit at Rewa, filed its written statement and also took a plea under Section 10 CPC that the suit filed at Rewa being subsequent in point of time, and raising the issues which are directly and substantially in issue in the previously instituted suit between the same parties at

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[†] Under Article 139(A)(2) of the Constitution of India

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(1976) 3 SCC

30. In view of the orders being quashed the appellant will be deemed to be an Additional District Judge up to the date he retired. Parties will pay and bear their own costs.

Order in Civil Appeal No. 1513 of 1974

31. This appeal was not pressed. The appeal is dismissed. There will be no order as to costs.

(1976) 3 Supreme Court Cases 334

(Before A. N. Ray, C.J. and M. H. Beg and Jaswant Singh, JJ.)

THE REGIONAL MANAGER AND ANOTHER .. Appellants ;
Versus

PAWAN KUMAR DUBEY .. Respondent.

Civil Appeal No. 1844 of 1975[†], decided on March 8, 1976

Constitution of India — Article 311(2) — Reversion from officiating post for being “not fit yet” while juniors still retained and no administrative reason shown for such action — Background of vague adverse entries in the record — Reversion order held to be one by way of punishment — Further, words “not fit”, held, cast a stigma likely to affect promotion chances

The respondent was reverted from his officiating post to his substantive post by means of the impugned order dated February 20, 1973. The order gave the reason that he was “not fit yet” for the higher post. His juniors, meanwhile, were still officiating in the senior post. The background was that on the one hand there was fulsome praise in the testimonials given to the respondent by the superior officers for meritorious work done by him. On the other hand, preceding the order of reversion there was a spurt of warnings and very vague complaints and adverse remarks presumably by a particular superior officer of insubordination and disobedience. These particulars were not supplied to the respondent despite his demand. His allegations that his juniors were still officiating in the higher post and that there were no administrative reasons for his reversion stood uncontroverted. The High Court following *Sughar Singh* case held the order of reversion to be a measure of punishment inflicted upon him for alleged misconduct indicated by the adverse entry. The State appealed.

Held :

Though there is no magic formula or uniform set of facts which could convert even an apparently colourless or innocuous order into punitive or unjustifiably discriminatory action, an apparently inoffensive order may fail to pass tests imposed by Articles 16 and 311 of the Constitution. Dealings of superior officers with their subordinates in government service in a welfare State must be shown to be based on fairplay and reason when facts are actually proved which indicate that those requirements may be lacking. (Para 18)

On facts, the sudden reversion of the petitioner, for the reason given in the reversion order, could be held to amount to an unjustified stigma which could not be said to be “devoid of an element of punishment”. (Para 17)

The reversion order is punitive and is quashed since it was passed contrary to the rules of natural justice embodied in Article 311(2). However it is still open for the authorities to proceed in a just and legal way against the respondent if there is really a substantial case against him deserving punitive action. (Para 19)

State of U. P. v. Sughar Singh, (1974) 1 SCC 218: 1974 SCC (L & S) 124, explained and followed.

[†]Appeal by Special Leave from the Judgment and Order dated July 17, 1974 of the Allahabad High Court in Special Appeal No. 121 of 1974.

Constitution of India — Article 16 — Discrimination on ground of being subjected to mala fide action — Onus — Nature and extent of — Sughar Singh case explained

Held :

Before Article 16 is held to have been violated by some action there must be a clear demonstration of discrimination between one government servant and another, similarly placed, which cannot be reasonably explained except on an assumption or demonstration of "malice in law" or "malice in fact". In other words, before any such case of "malice in law" can be accepted, the person who alleged it must satisfactorily establish it on proved or admitted facts. (Paras 13 and 15)

Acting on a legally extraneous or obviously misconceived ground of action would be a case of "malice in law". Orders of reversion passed as a result of administrative exigencies, without any suggestion of malice in law or in fact, are unaffected by *Sughar Singh's case*. They are not vitiated merely because some other government servants, juniors in the substantive rank, have not been reverted. (Para 13)

However, no question of applying Article 14 or 16 could arise where termination of service takes place in terms of a contract of service. (Para 14)

It may be noted that *Sughar Singh's case* did not depart from earlier decisions on applicability of Article 311(2) or Article 16. In that case what weighed with the Supreme Court was not only that there was a sufficient "element of punishment" in reverting *Sughar Singh* for a supposed wrong done, from which the order of reversion could not be divorced, so that Article 311(2) had to be complied with, but, there was also enough of an impropriety and unreasonableness in the action taken against *Sughar Singh* solely for a very stale reason, which had become logically quite disconnected, to make out a case of "malice in law" even if it was not a case of "malice in fact". If an authority acts on what are, justly and logically viewed, extraneous grounds, it would be such a case. (Para 13)

State of U. P. v. Sughar Singh, (1974) 1 SCC 218 : 1974 SCC (L & S) 124, explained.

State of Bombay v. F. A. Abraham, 1962 Supp 2 SCR 92 : AIR 1962 SC 794 : (1963) 2 LLJ 422 ; *Champaklal Chimanlal Shah v. Union of India*, (1964) 5 SCR 190 : AIR 1964 SC 1854 : (1964) 1 LLJ 752 ; *Divisional Personnel Officer v. Raghavendrachar*, (1966) 3 SCR 106 : AIR 1966 SC 1529 : (1967) 1 LLJ 401, *Shamsher Singh v. State of Punjab*, (1974) 2 SCC 831 : 1974 SCC (L & S) 550 ; *Gopi Kishore Prasad v. Union of India*, AIR 1960 SC 689 : (1960) 1 LLJ 577 ; *State of Orissa v. Ram Narayan Das*, (1961) 1 SCR 606 : AIR 1961 SC 177 : (1961) 1 LLJ 552 ; *Madan Gopal v. State of Punjab*, (1963) 3 SCR 716 : AIR 1963 SC 531 : (1964) 1 LLJ 68 ; *R. C. Lacy v. State of Bihar*, C. A. No. 590 of 1962 decided on October 23, 1963 ; *R. C. Banerjee v. Union of India*, (1964) 2 SCR 135 : AIR 1963 SC 1552 ; *Jagdish Mitter v. Union of India*, AIR 1964 SC 449 : (1964) 1 LLJ 418 ; *Parshotam Lal Dhingra v. Union of India*, 1958 SCR 828 : AIR 1958 SC 36 ; (1958) 1 LLJ 544 ; *State of Punjab v. Sukh Raj Bahadur*, (1968) 3 SCR 234 : AIR 1968 SC 1089 : (1970) 1 LLJ 373 ; *A. G. Benjamin v. Union of India*, (1967) 1 LLJ 718 ; *Ram Gopal Chaturvedi v. Union of India*, (1969) 2 SCC 240 ; *Union of India v. Gajendra Singh*, (1973) 3 SCC 797 : 1973 SCC (L & S) 269 ; *Union of India v. Joswan Ram*, AIR 1958 SC 905 ; *Madhav v. State of Mysore*, AIR 1962 SC 8 : (1962) 1 SCR 886 ; *State of Bihar v. Shiva Bhikshuk Mishra*, (1970) 2 SCC 871 and *State of Mysore v. P. R. Kulkarni*, (1973) 3 SCC 597 : 1973 SCC (L & S) 142, referred to.

Constitution of India — Articles 226 and 16 — Plea of mala fides — Jurisdiction of High Court open only if malice in law is pleaded — In case of malice in fact the proper remedy is an ordinary civil suit

Held :

Where infringement of Article 16 is alleged before any such case of "malice in law" can be accepted, the person who alleges it must satisfactorily establish it on proved or admitted facts. Where the allegations are of malice in fact, which are generally seriously disputed and the case cannot be satisfactorily decided without a detailed adduction of evidence or cross-examination of witnesses, courts will leave the party aggrieved to an ordinary civil suit. (Para 15)

Constitution of India — Article 141 — Ratio decidendi of a case — Meaning and determination of

Held :

It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts. (Para 7)

Appeal dismissed

M/2906/CL

Advocates who appeared in this case ;

R. N. Trivedi and O. P. Rana, Advocates, for the Appellants ;

S. C. Agarwal and V. J. Francis, Advocates of M/s Ramamurthi & Co., for the Respondent.

The Judgment of the Court was delivered by

BEG, J.—This appeal by special leave granted to the Regional Manager of U. P. State Road Transport Corporation, Allahabad, challenges the findings of a learned Single Judge, affirmed by a Division Bench of the Allahabad High Court, holding that the respondent, Pawan Kumar Dubey, was reverted from the post of a Senior Station Incharge, in which he was officiating to his substantive post of a Junior Station Incharge by means of an order dated February 20, 1973 passed as a measure of punishment inflicted upon him for alleged misconduct indicated by an adverse entry communicated to him by a letter dated January 25, 1973. His juniors, it was found, were still officiating in posts of Senior Station Incharge. The respondent's chances of promotion were said to be adversely affected by the reason given for the reversion in the impugned orders that the respondent was "not fit yet" for the higher post.

2. The learned Single Judge and the Division Bench in the Allahabad High Court were referred to several decisions of this Court mentioned by the Division Bench. These were : *State of Bombay v. F. A. Abraham*¹; *Champaklal Chimanlal Shah v. Union of India*²; *Divisional Personnel Officer v. Raghavendrachar*³; and *State of U. P. v. Sughar Singh*⁴.

3. The Allahabad High Court had followed what it considered to be the ratio decidendi of *Sughar Singh's case* (supra), the last case of this Court available at the time. Special leave to appeal was sought in the case before us on the ground that *Sughar Singh's case* had been misunderstood by the High Court and required some elucidation by this Court. Special leave was granted on condition that, in any event, the costs of the respondent will be borne by the appellants. The question to be determined was assumed to be one of law only. The appeal was, therefore, to be heard on the special leave paper book with such additional documents from the record of the case as the parties may choose to file.

4. We find that, although a number of documents were filed, neither side has chosen to file a copy of the order impugned which has been

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| 1. 1962 Supp 2 SCR 92 : AIR 1962 SC 791 : (1963) 2 LLJ 422. | 3. (1966) 3 SCR 106 : AIR 1966 SC 1529 : (1967) 1 LLJ 401. |
| 2. (1964) 5 SCR 190 : AIR 1964 SC 1854 : (1964) 1 LLJ 752. | 4. (1974) 2 SCR 335 : (1974) 1 SCC 218 : 1974 SCC (L & S) 124. |

interpreted by the Single Judge as well as by the Division Bench of the Allahabad High Court as one amounting to award of a punishment not merely in the light of the circumstances preceding the order but also from the terms of the order itself and its effect upon the respondent's future. The question, therefore, arises whether we really have before us any point of law of such a nature as to justify interference in exercise of the exceptional powers of this Court under Article 136 of the Constitution.

5. Even though we have come to the conclusion that the question before us is substantially one of fact, we would like to explain a little the law applicable to such cases in view of the submission that *Sughar Singh's case* had led to some misunderstanding of it. Not much clarification seems necessary so far as conditions for the application of Article 311(2) are concerned as this question has been considered and decided by this Court in a number of cases including the recent decision by a Bench of seven Judges of this Court in *Shamsher Singh v. State of Punjab*⁵. It was pointed out in that case (at p. 837) : [SCC p. 851 : SCC(L & S) p. 570, para 63]

No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment on the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or, inefficiency, or, for similar reason, without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge, it may, in a given case, amount to removal from service within the meaning of Article 311(2) of the Constitution.

6. *Shamsher Singh's case* related to an order of termination of services of a probationer which, on the face of it, appeared to be innocuous. Nevertheless, this Court, after examining the facts and circumstances constituting the background of the order and its consequences, held it to be substantially one of punishment and set it aside for a violation of Article 311(2) of the Constitution. It was explained there (at p. 837): [SCC p. 851 : SCC (L&S) p. 570, para 64]

Before a probationer is confirmed, the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other reason not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal or an inquiry. But, in those cases, the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an inquiry on charges of misconduct or inefficiency or corruption, and, if his services are terminated without following the provisions of Article 311(2), he can claim protection. In *Gopi Kishore Prasad v. Union of India*⁶ it was said that if the Government proceeded against the probationer in the direct way without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment. Instead of taking the easy course, the Government chose the more difficult one of starting proceedings against him and branding him as a dishonest and incompetent officer.

5. (1975) 1 SCR 814; (1974) 2 SCC 831; 6. AIR 1960 SC 609; (1960) 1 LLJ 577. 1974 SCC (L & S) 550.

It was also observed in *Shamsher Singh's case* (at p. 838) :[SCC pp. 851-852 : SCC (L & S) pp. 570-571, para 65]

The fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. (See *State of Orissa v. Ram Narayan Das*⁷.) If there is an enquiry, the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance (see *Madan Gopal v. State of Punjab*⁸). In *R. C. Lacy v. State of Bihar*⁹, it was held that an order of reversion passed following an enquiry into the conduct of the probationer in the circumstances of that case was in the nature of preliminary inquiry to enable the Government to decide whether disciplinary action should be taken. A probationer whose terms of service provided that it could be terminated without any notice and without any cause being assigned could not claim the protection of Article 311(2). (See *R. C. Banerjee v. Union of India*¹⁰.) A preliminary inquiry to satisfy that there was reason to dispense with the services of a temporary employee has been held not to attract Article 311 [see *Champaklal C. Shah v. Union of India* (supra)]. On the other hand, a statement in the order of termination that the temporary servant is undesirable has been held to import an element of punishment (see *Jagdish Mitter v. Union of India*¹¹).

7. We think that the principles involved in applying Article 311(2) having been sufficiently explained in *Shamsher Singh's case* it should no longer be possible to urge that *Sughar Singh's case* could give rise to some misapprehension of the law. Indeed, we do not think that the principles of law declared and applied so often have really changed. But, the application of the same law to the differing circumstances and facts of various cases which have come up to this Court could create the impression sometimes that there is some conflict between different decisions of this Court. Even where there appears to be some conflict, it would, we think, vanish when the ratio decidendi of each case is correctly understood. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

8. We have examined the record of the case of *Sughar Singh*. Our judgment in the case perhaps does not fully bring out the factual background on which the decision of that case was based. In that case, the government servant concerned had been suspected of making an alteration in his own service record. It was not shewn how he could possibly have had access to his service record as he was not in charge of the record. One of the alterations made meant an increase in his age so that he would, according to the altered state of the record, have had to retire earlier. *Sughar Singh* complained, when asked to show cause against the alleged tampering, that it must have been manipulated by his enemies interested in injuring him. It could not be determined who was responsible for the alterations. Nevertheless, the following adverse entry was made on

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| 7. (1961) 1 SCR 606 : AIR 1961 SC 177 : (1961) 1 LLJ 552. | 9. C. A. No. 590 of 1962 decided on October 23, 1963. |
| 8. (1963) 3 SCR 716 : AIR 1963 SC 531 : (1964) 1 LLJ 68. | 10. (1964) 2 SCR 135 : AIR 1963 SC 1552. |
| | 11. AIR 1964 SC 449 : (1964) 1 LLJ 418. |

Sughar Singh's record :

1966 — Is suspected to have got entries of date of birth and educational qualifications altered on the authority of a fictitious certificate which had to be corrected later on. Severely warned.

9. Two years later, as a result of this entry, based expressly on bare suspicion, without further inquiry into the question whether Sughar Singh could be responsible for tampering with the record, a reversion order, innocuous on the face of it, had been made on August 12, 1968. The effect of the reversion order was that Sughar Singh who, apart from this entry, had an excellent record, was reverted from a post in which he had been officiating from March 16, 1961, until the reversion order dated August 12, 1968. It was shewn that about 200 officers, junior to him, were still officiating in the cadre from which Sughar Singh had been reverted to his substantive post of Head Constable. No administrative need or exigency could be shewn to justify the reversion order. All officers, including Sughar Singh, who had been officiating, had been selected after special training for the higher cadre. The question naturally arose: Why was Sughar Singh selected for this discriminatory treatment?

10. A Single Judge of the Allahabad High Court held, acting on the principle that a mere reversion, from a post to which the incumbent had no right, did not amount to punishment within the meaning of Article 311(2) so that Sughar Singh had no remedy. He only took the form of the action into account. No further probe was considered necessary by the learned Judge. When the case came before a Division Bench, in special appeal, one of the learned Judges agreed with the learned Single Judge who had dismissed Sughar Singh's petition merely on the ground that Sughar Singh had no right to the post without considering the impact of the surrounding facts or the background of the order. The other learned Judge, however, carefully examined the background of Sughar Singh and the reversion order as revealed by facts on record. He pointed out that the averments of Sughar Singh, that he had a splendid record, apart from the adverse entry in question, and that there was no inefficiency on his part, were not controverted in the counter-affidavit filed. This learned Judge found the reversion order against Sughar Singh to be punitive. He, however, added that, even if the order could not be held to be punitive, it was certainly violative of the guarantee contained in Article 16(1) of the Constitution.

11. When the matter was heard by Verma, C.J. on a reference occasioned by the difference of opinion between the two learned Judges on the Division Bench, it was again argued that both Articles 16(1) and 311(2) had been infringed. The learned Chief Justice did not find sufficient material to uphold a violation of Article 16. But, after taking into account the admission of the Counsel appearing for the State that the sudden reversion of Sughar Singh could not at all be explained or accounted for unless it could be linked with the adverse entry, the learned Chief Justice held the action against Sughar Singh to be punitive and violative of Article 311(2), of the Constitution. Sughar Singh had been held to have been punished for nothing beyond what had taken place two

years before the reversion order so that it could not have been justly or reasonably connected with the delayed action based upon it. This Court could have dismissed the appeal by special leave solely on the ground that no question of law arose on the finding of fact, also upheld by this Court, that Sughar Singh was punished, in substance, so that Article 311(2) was attracted.

12. This Court's judgment in *Sughar Singh's case* shows that it was only following the law on Article 311(2) of the Constitution as laid down repeatedly earlier by this Court. It specifically referred to the following cases: *Parshottam Lal Dhingra v. Union of India*¹²; *State of Punjab v. Sukh Raj Bahadur*¹³; *State of Orissa v. Ram Narayan Das* (supra); *R. C. Lacy v. State of Bihar* (supra); *Jagdish Mitter v. Union of India* (supra); *A. G. Benjamin v. Union of India*¹⁴; *Ram Gopal Chaturvedi v. State of Madhya Pradesh*¹⁵; *Union of India v. Gajendra Singh*¹⁶; *Divisional Personnel Officer v. Raghavendrachar* (supra); *Union of India v. Joswan Ram*¹⁷; *Madhav v. State of Mysore*¹⁸; *State of Bombay v. Abraham* (supra). In *Sughar Singh's case*, this Court summarised the propositions of law deducible from the cases mentioned above; and, while considering the applicability of some of the propositions of law to the facts of the case, it did observe that, on the face of it, the action against Sughar Singh did not appear to be punitive. Nevertheless, on a total consideration of all the facts, including the admission in the High Court before Verma, C.J. by the Standing Counsel appearing on behalf of the State, that the reversion order could not be explained except as a result of the adverse entry made two years earlier, it had finally applied the ratio decidendi of the *State of Bihar v. Shiva Bhikshuk Mishra*¹⁹, where this Court had affirmed the opinion of the High Court, on facts, that the

reversion was not in the usual course or for administrative reasons but it was after the finding on an enquiry about some complaint against the plaintiff and by way of punishment to him.

On this view of the case, it was not really necessary for this Court to consider whether the reversion of Sughar Singh was contrary to the provisions of Article 16 also. Nevertheless, this Court held there, alternatively, after referring to *State of Mysore v. P. R. Kulkarni*²⁰, that the action taken against Sughar Singh also resulted in a violation of the provisions of Articles 14 and 16 of the Constitution. It seems to us to be clear, after examining the record of *Sughar Singh's case*, that what weighed with this Court was not only that there was a sufficient "element of punishment" in reverting Sughar Singh for a supposed wrong done, from which the order of reversion could not be divorced, so that Article 311(2) had to be complied with, but, there was also enough of an impropriety and unreasonableness in the action taken against Sughar Singh, solely for a very stale reason, which had become logically quite disconnected, to make

12. 1958 SCR 828: AIR 1958 SC 36:
(1958) 1 LLJ 544
13. (1968) 3 SCR 234: AIR 1968 SC 1089:
(1970) 1 LLJ 373.
14. (1967) 1 LLJ 718.
15. (1970) 1 SCR 472: (1969) 2 SCC 240.
16. (1972) 3 SCR 660: (1973) 3 SCC 797:

1973 SCC (L & S) 269.
17. AIR 1958 SC 905.
18. AIR 1962 SC 8: (1962) 1 SCR 886.
19. (1971) 2 SCR 191: (1970) 2 SCC 871.
20. (1973) 3 SCC 597: 1973 SCC (L & S)
142.

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out a case of "malice in law" even if it was not a case of "malice in fact". If an authority acts on what are, justly and logically viewed, extraneous grounds, it would be such a case. All these aspects of the case were kept in view by this Court when it recorded the conclusion : [scc p. 230 : SCC (L & S) p. 136, para 20]

In this view of the matter, we have no doubt that the order was passed by way of punishment, though all outward indicia show the order to be a mere order of reversion. Even if it were not so, we have no doubt that the order would be liable to be quashed on the ground of contravention of Articles 14 and 16 of the Constitution.

13. We do not think that *Sughar Singh's case*, in any way, conflicts with what has been laid down by this Court previously on Article 311(2) of the Constitution or Article 16 of the Constitution. We would, however, like to emphasize that, before Article 16 is held to have been violated by some action there must be a clear demonstration of discrimination between one government servant and another, similarly placed, which cannot be reasonably explained except on an assumption or demonstration of "malice in law" or "malice in fact". As we have explained, acting on a legally extraneous or obviously misconceived ground of action would be a case of "malice in law". Orders of reversion passed as a result of administrative exigencies, without any suggestion of malice in law or in fact, are unaffected by *Sughar Singh's case*. They are not vitiated merely because some other government servants, juniors in the substantive rank, have not been reverted.

14. This Court has held in *S. C. Anand v. Union of India*²¹, that no question of applying Article 14 or 16 could arise where a termination of service takes place in terms of a contract of service. Again, in *Champaklal Chimanal Shah* (supra), this Court held that the motive behind an order of termination of service, in accordance with the terms of a contract, would not be really relevant even if an enquiry had been held to decide whether proceedings under Article 311(2) should be instituted or the services of a government servant terminated in terms of his contract. *Champaklal Chimanal Shah's case* was not one in which any question of mala fides arose. Protection of Article 16 was claimed there on the ground that Rule 5, providing for termination of services of temporary servants, was itself hit by Article 16. Such a contention was repelled. On the other hand, *Kulkarni's case* (supra), relied upon in *Sughar Singh's case*, was one in which "misuse of power" or "*detournement de pouvoir*" (as it is called in French administrative law), had been proved. Another term for such use of power for an improper object is "malice in law".

15. We repeat that, before any such case of "malice in law" can be accepted, the person who alleges it must satisfactorily establish it on proved or admitted facts as it was in *Kulkarni's case*. Where the allegations are of malice in fact, which are generally seriously disputed and the case cannot be satisfactorily decided without a detailed adduction of evidence or cross-examination of witnesses, courts will leave the party aggrieved to an ordinary civil suit. This rule, relating to exercise of discretionary powers under Article 226, is also well settled.

21. AIR 1953 SC 250 : 1953 SCR 655.

16. We have tried to gather, from such materials on the record of the case before us as have been made available to us by the parties, the "spirit and substance", to use the expressions employed by this Court in *Champaklal's case* (supra), of the action taken against the contesting respondent. We have examined the background of the order of reversion. We find that, on the one hand, there is fulsome praise, in testimonials given to the respondent by his superior officers, for meritorious work done by him. On the other hand, we find that preceding the order of reversion, passed on February 20, 1973, against the respondent, there is a spurt of warnings and very vague complaints and adverse remarks of September 30, 1972, and October 4, 1972, October 21, 1972, and January 25, 1973, presumably all by a particular superior officer, alleging disrespect shewn, disobedience to orders given, and aspersions said to have been cast by the respondent against the conduct of the superior officer. The respondent was warned by this superior officer, an Assistant General Manager, by a letter dated October 4, 1972. There is also a copy of an order on a complaint against the respondent that the respondent had misused the services of a chowkidar. The detailed order of June 2, 1970, shows that, although, the complaint was dismissed by the General Manager, yet, he had admonished the respondent and had advised him to conduct himself more respectfully towards superior officers and to be "sweet tempered". There were some old adverse entries also against the respondent. But, they must be deemed to have been washed off by orders of his promotion, on an "ad hoc" or officiating basis, by an order of March 7, 1972, which had been approved by the Deputy Transport Commissioner of Uttar Pradesh on March 18, 1972, as required by the rules. It appears that the respondent had asked for particulars to meet the vague allegations of insubordination and disobedience which had found their way into his service record for 1972-1973. It has not been shewn that the respondent was supplied with these particulars. He professed ignorance of occasions on which he had been disrespectful or of existence of any orders which had been disobeyed by him. These particulars could have been easily supplied to him if the allegations against him were justified. The respondent's representation against the last adverse entry, of the kind indicated above, made on January 25, 1973, was pending when the reversion order of February 20, 1973 was passed. His allegations that his juniors are still holding the posts in the cadre in which he was officiating and that there are no administrative reasons for his reversion are not controverted. In these respects, the facts of the case are similar to those of *Sughar Singh's case*. In addition, as the High Court points out, the express condemnation of the respondent as "not fit" for the higher post, in which his juniors were allowed to officiate, categorises him as inferior to his juniors even if it was qualified by the addition of the word "yet". The only possible justifications which could be offered for this discriminatory treatment were the sudden adverse entries of 1972-73 against the respondent which were quite vague.

17. If there had been anything really serious against the respondent, proceedings under Article 311(2) of the Constitution should have been instituted. Indeed, they can still be taken if there are substantial grounds

against the respondent. On the other hand, if the action against him is due merely to a feeling of pique or anger with him on the part of his superior officers, to which the respondent's tactlessness may have contributed, it did not deserve anything more than the warnings and the adverse entry. Indeed, even the bona fides of the last adverse entry becomes doubtful when we find that the respondent was not, despite his requests, given particulars of any facts upon which the conclusion that he was disrespectful or disobedient was based. To allege such misconduct against him and then to stigmatise the respondent as "not fit" for working in the higher post could appear, on the facts and circumstances of the particular case, to be more vindictive than just and fair. It may mar or delay his chances of promotion in future. We, however, refrain from commenting further on what may or may not have been the real cause of the respondent's reversion. If the respondent is really unfit or inefficient, as compared with his juniors, there is no reason why, on a comparative assessment of merits, at a time when such assessment may be called for under the rules (there should be rules on the subject if there are none so far), his juniors in service should not be preferred over him. A decision given after fair comparisons with records of others officiating in the same cadre would have ensured that no violation of Article 16 took place. The sudden reversion of the petitioner, for the reason given in the reversion order, could be held to amount to an unjustified stigma which could not be said to be "devoid of an element of punishment".

18. As we have indicated, there is no magic formula or uniform set of facts which could convert even an apparently colourless or innocuous order into punitive or unjustifiably discriminatory action. It is, however, well established that even an apparently inoffensive order may fail to pass tests imposed by Articles 16 and 311 of the Constitution. Dealings of superior officers with their subordinates in government service in a welfare State must be shewn to be based on fairplay and reason when facts are actually proved which indicate that these requirements may be lacking.

19. Even if the case before us could be one in which the High Court could have refrained from interfering, we do not consider it to be a fit case for invoking our jurisdiction under Article 136 of the Constitution. The High Court has only quashed an order of reversion which was detrimental to the respondent and was passed in violation of rules of natural justice. It did not give the respondent any other or consequential relief. And, as we have already indicated, it is still open for the authorities to proceed in a just and legal way against the respondent if there is really a substantial case against him deserving punitive action.

20. As we are leaving the authorities free to take action, in accordance with either applicable rules for a comparative assessment of merits of the respondent and others who may be eligible to officiate in the post of a Senior Station Incharge, or, to take disciplinary proceedings, if considered necessary, no observation made by us in this judgment or by the High Court will operate as a finding on any question except that the quashed reversion order was punitive and passed contrary to rules of natural justice embodied in Article 311(2). It is not necessary to invoke the aid of

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Article 16 of the Constitution at all on such a finding. This, we think, was also the position in *Sughar Singh's case*.

21. This appeal is dismissed with costs.

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(Before Y. V. Chandrachud, V. R. Krishna Iyer and N. L. Untwalia, JJ.)

THE PUNJAB UNIVERSITY, CHANDIGARH .. Appellant ;

Versus

VIJAY SINGH LAMBA AND OTHERS .. Respondents.

Civil Appeal Nos. 1121 to 1125 of 1975†, decided on April 15, 1976

Universities — Examinations — Enquiry into charges of use of unfair means — Constitution of committee — Fixation of quorum — Committee appointed under Regulation 31 of the Punjab University Calendar, 1973, Volume II — Quorum of two out of three fixed by the syndicate — Held, participation by all three members in the meetings not essential

Meetings — “Quorum” — Any committee, not a court, can before functioning fix the quorum of its own meetings — Company law

Words and phrases — “Quorum” — Meaning of

The High Court struck down the decision of the standing committee of the University enquiring into charges of use of unfair means by the petitioner students, on the ground that despite the fact that two members of the committee formed the quorum, the impugned decision was vitiated by the fact that only two and not all the three members of the committee participated in the proceedings.

Held :

The body which has the power to appoint a committee has the incidental power to fix the quorum for its meetings. (Para 7)

‘Quorum’ denotes the minimum number of members of any body of persons whose presence is necessary in order to enable that body to transact its business validly so that its acts may be lawful. It is generally left to committees themselves to fix the quorum for their meetings and if it is not fixed by the authority which constituted it then it is competent for the committee itself to fix the quorum as part of its power to devise its day-to-day procedure. (Para 7)

Quorum does not apply to bodies doing judicial function. Quorum is fixed for meetings of committees and not for the sittings of courts. (Para 7)

Fixation of quorum means that that number of persons can validly transact the business of that body. (Para 7)

By the quorum, a minimum number of members of the committee must be present in order that its proceedings may be lawful but that does not mean that more than the minimum are denied an opportunity to participate in the deliberations and the decisions of the committee. Hence as to what would have been the effect of possible dissent by the absent members becomes immaterial for as such every member was entitled to attend and be heard. (Para 8)

Here when Regulation 32.1 speaks of the committee being unanimous, it refers to the unanimity of the members who for the time being are sitting as the

†From the Judgment and Order dated March 31, 1975 of the Punjab and Haryana High Court in Civil Writ Petition Nos. 5948, 6115, 6726, 6779 and 6780 of 1974.

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6. The impugned judgment stands modified in the above terms. The civil appeals are, accordingly, disposed of.

a 7. No costs.

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(BEFORE ARIJIT PASAYAT AND C.K. THAKKER, JJ.)

b BHARAT PETROLEUM CORPN. LTD. AND ANOTHER .. Appellants;
Versus
 N.R. VAIRAMANI AND ANOTHER .. Respondents.

Civil Appeals No. 7467 of 2003[†] with No. 4463 of 2004,
 decided on October 1, 2004

c A. Rent Control and Eviction — Madras City Tenants' Protection Act, 1921 (3 of 1922) — S. 9 — Right of tenant to purchase demised premises under — Nature, scope and object of — Held, does not create any interest or right to the property — It is only a privilege granted to him by the statute, which is equitable in nature — Moreover, this privilege is not absolute — The tenant has the right to secure conveyance of only such portion of the holding as would be necessary for his convenient enjoyment — The policy underlying S. 9 is directed to safeguard against the eviction of those tenants
 d who may have constructed a superstructure on the demised land, so they may continue to occupy the same for the purposes of their residence or business — Power and duty of court under — Enquiry to be held — Prerequisites for grant of relief under — Transfer of Property Act, 1882 — Ss. 108(p), (q), 106 and 105

e B. Rent Control and Eviction — Landlord-tenant relationship — Right of tenant to purchase demised premises at common law/under Transfer of Property Act, 1882 — Held, there is no such right at any price — The only right of a tenant who may have put up a structure on the demised land is to remove the structure at the time of delivery of possession on determination of the lease — Transfer of Property Act, 1882 — Ss. 108(p), (q), 106 and 105

f C. Rent Control and Eviction — Madras City Tenants' Protection Act, 1921 (3 of 1922) — Ss. 9 and 3 — Appropriate forum for adjudication of questions under — Held, writ proceedings not appropriate therefor — Constitution of India — Art. 226 — Maintainability — Alternative remedy/Exhaustion of remedies

CA No. 7467 of 2003

g Respondent 1 was the landlord and on the basis of a lease agreement, the appellant Bharat Petroleum Corporation Ltd. ("the tenant") occupied the premises. The lease was operative from 1-4-1958 to 31-5-1978. A petrol pump was set up on the leased property. It is to be noted that the lease dated 7-10-1960 was executed between the erstwhile Burmah Shell Oil Storage and Distributing Co. of India Ltd. ("Burmah Shell"), the predecessor-in-title of the tenant, and Respondent 1. In view of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976, the currency of the lease agreement was extended and on expiry
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[†] From the Judgment and Order dated 20-10-2000 of the Madras High Court in WP No. 2302 of 1999

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of the period a request was made by the tenant for extending the currency of the lease agreement. A letter of refusal was sent. The landlord filed a writ petition before the High Court taking the stand that since he was not willing for renewal of the lease deed in favour of the tenant, it was liable for eviction. The tenant took the stand that certain benefits under the Madras City Tenants' Protection Act, 1921 ("the Tenants Act") were available to it. In any event, without taking recourse to the remedies available under the Tenants Act a writ petition could not have been filed. A Single Judge dismissed the writ petition permitting the landlord to take appropriate proceedings in the proper court or forum. The landlord filed a writ appeal before a Division Bench. By the impugned judgment the High Court came to hold that since no factual controversy was involved, therefore, in the background of what has been said in *Hindustan Petroleum case*, (1999) 4 SCC 450, the order of eviction was to be passed, and accordingly allowed the writ petition.

CA No. 4463 of 2004

In this case the Single Judge allowed the prayer of the landlord by following the decision in the case of the other landlord (Respondent 1 in CA No. 7467 of 2003). The Division Bench affirmed the view of the Single Judge.

Allowing the appeals, the Supreme Court

Held:

Under the common law as well as under the Transfer of Property Act, a tenant is liable to eviction and he has no right to purchase the land demised to him at any price. The only right of a tenant who may have put up structure on the demised land is to remove the structure at the time of delivery of possession on the determination of the lease. Section 9 confers an additional statutory right on a tenant against whom suit for ejectment is filed to exercise an option to purchase the demised land to that extent only which he may require for convenient enjoyment of the property. The right conferred by Section 9 is a statutory right to purchase land and it does not create any interest or right to the property, instead it is a privilege granted to him by the statute which is equitable in nature. (Para 15)

Section 9 confers a privilege on a tenant against whom a suit for eviction has been filed by the landlord but that privilege is not absolute. Section 9 itself imposes restriction on the tenant's right to secure conveyance of only such portion of the holding as would be necessary for his convenient enjoyment. It creates a statutory right to purchase land through the medium of court on the fulfilment of conditions specified in Section 9 of the Tenants Act. It is not an absolute right, as the court has discretion to grant or refuse the relief for the purchase of the land. (Para 15)

The policy underlying Section 9 of the Tenants Act is directed to safeguard the eviction of those tenants who may have constructed a superstructure on the demised land, so that they may continue to occupy the same for the purposes of their residence or business. (Para 16)

Whenever an application is made by a tenant before the court for issuance of direction to the landlord for the sale of the whole or part of the land to him, the court is under a mandatory duty to determine the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. The court must hold an enquiry to determine whether the tenant requires the land for his convenient enjoyment, and if so, what area or portion of the land would be

- a necessary for his convenient enjoyment. This determination can obviously be made only after an enquiry is held by the court having regard to the area of the demised land and the extent of superstructure standing thereon, and the tenant's need for the land for the beneficial enjoyment of the superstructure which he may have constructed thereon. The enquiry presupposes that the tenant making the application has been in the occupation of the land and the superstructure wherein he may be either residing or carrying on business, and on his eviction he would be adversely affected. The court may on the facts of a particular case come to the conclusion that the tenant does not require any portion of the land and in that event it may reject the application and decree the suit for ejectment and direct the landlord to pay compensation to the tenant. But if the court finds that the tenant needs the whole or any portion of the demised land for "convenient enjoyment", the court has to fix the price of the land on the basis of market value of three years immediately preceding the date of the order. If the tenant does not occupy the land or the superstructure or if he is not residing therein or carrying on any business, the question of convenient enjoyment of the land by him cannot arise. (Paras 16 and 14)
- b
- c

Swami Motor Transport (P) Ltd. v. Sri Sankaraswamigal Mutt, 1963 Supp (1) SCR 282 : AIR 1963 SC 864; *P. Ananthakrishnan Nair v. Dr. G. Ramakrishnan*, (1987) 2 SCC 429, relied on

Hindustan Petroleum Corpn. Ltd. v. Dolly Das, (1999) 4 SCC 450, distinguished

- d In a writ petition, some benefits available to the tenant under the Tenants Act could not have been diluted. There is some dispute about the entitlement of the tenant to get protection under the Tenants Act, which can be more effectively decided in case action in terms of what is required under the Tenants Act is taken by the landlord. The High Court in none of the two cases before it considered the effect of various provisions of the Tenants Act, more particularly, Sections 3 and 9 thereof. The impugned judgment of the Division Bench of the High Court is indefensible and is set aside. It is made clear that what would be the position if the proceeding is taken under the Tenants Act, shall be decided by the appropriate court. (Paras 13, 7 and 18)
- e

Hindustan Petroleum Corpn. v. Raja D.V. Appa Rao Bahadur, 1995 Supp (3) SCC 397; *Bharat Petroleum Corpn. Ltd. v. P. Kesavan*, (2004) 9 SCC 772, referred to

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- f The foundation of the impugned judgment in this case is the decision of the Division Bench which was assailed in CA No. 7467 of 2003. The impugned judgment has been set aside and directions have been given as regards proceedings under the Tenants Act. Those shall also be applicable in this case as well. (Para 19)

- g **D. Precedents — Application of, to facts of case — Principles for — Held, courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed — Constitution of India — Art. 141**

(Paras 9, 11 and 8)

- h **E. Precedents — Interpretation of judgments — Principles for — Held, judgments of courts are not to be construed as statutes — Constitution of India — Art. 141**

(Paras 9 and 11)

London Graving Dock Co. Ltd. v. Horton, 1951 AC 737 : (1951) 2 All ER 1 (HL); *Home Office v. Dorset Yacht Co.*, (1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2

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WLR 1140 (HL); *Herrington v. British Railways Board*, (1972) 2 WLR 537 : (1972) 1 All ER 749 (HL), *relied on*

Shepherd Homes Ltd. v. Sandham (No. 2), (1971) 1 WLR 1062 : (1971) 2 All ER 1267, *approved*

D-M/TZ/30653/C

Advocates who appeared in this case :

Sudhir Chandra and K. Ramamoorthy, Senior Advocates (Snehasish Mukherjee, S.C. Ghosh, Mrinal Kanti Mandal and Parijat Sinha, Advocates, with them) for the Appellants;

R. Sundaravardan and Kailash Vasdev, Senior Advocates (Ram Lal Roy, Ramesh N. Keswani and V. Ramasubramanian, Advocates, with them) for the Respondents.

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7. (1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2 WLR 1140 (HL), *Home Office v. Dorset Yacht Co.* 585b-c
8. 1963 Supp (1) SCR 282 : AIR 1963 SC 864, *Swami Motor Transport (P) Ltd. v. Sri Sankaraswamigal Muti* 586f-g
9. 1951 AC 737 : (1951) 2 All ER 1 (HL), *London Graving Dock Co. Ltd. v. Horton* 585a-b

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J.— These two appeals are interlinked in the sense that identical issues in law are involved. We shall indicate the factual position in CA No. 7467 of 2003 as basically the impugned judgment in the said case is the foundation of the judgments impugned in CA No. 4463 of 2004.

2. Factual background in CA No. 7467 of 2003 is as follows:

Undisputedly, Respondent 1 was the landlord and on the basis of a lease agreement, the appellant Bharat Petroleum Corporation Ltd. (hereinafter referred to as “the tenant”) occupied the premises. The lease was operative from 1-4-1958 to 31-5-1978. A petrol pump was set up on the leased property. It is to be noted that the lease dated 7-10-1960 was executed between the erstwhile Burmah Shell Oil Storage and Distributing Co. of India Ltd. (in short “Burmah Shell”) the predecessor-in-title of the tenant and Respondent 1. In view of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976, the currency of the lease agreement was extended and on expiry of the period a request was made by the tenant for extending the currency of the lease agreement.

3. According to the landlord a letter of refusal was sent. The landlord filed a writ petition before the Madras High Court taking the stand that since

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- he was not willing for renewal of the lease deed in favour of the tenant, it was liable for eviction. The tenant took the stand that certain benefits under the
- a Madras City Tenants' Protection Act, 1921 (in short "the Tenants Act") were available to it. In any event, without taking recourse to the remedies available under the said Act a writ petition could not have been filed. A learned Single Judge dismissed the writ petition vide order dated 23-8-1999 permitting the landlord to take appropriate proceedings in the proper court or forum. It was noted that what was impugned was not any order but a letter of the tenant.
 - b Though reliance was placed by the landlord on the decision of this Court in *Hindustan Petroleum Corpn. Ltd. v. Dolly Das*¹ the High Court held that where the landlord had rejected the request for extension, the only remedy available was to take appropriate proceedings to evict the tenant by moving the appropriate court. It was held that the matter could not have been agitated in the writ petition. The landlord filed a writ appeal before the Division
 - c Bench of the Madras High Court. By the impugned judgment, the High Court came to hold that since no factual controversy was involved, therefore, in the background of what has been said in *Hindustan Petroleum case*¹ the order of eviction was to be passed and accordingly allowed the writ petition.

- d 4. Learned counsel for the appellants submitted that the course adopted by the Division Bench is clearly erroneous. Decision in *Hindustan Petroleum case*¹ had no application to the facts of the case. Under the Tenants Act, certain benefits are available to the tenants, more particularly, in view of what is said in Sections 3 and 9 of the Tenants Act. The statutory remedies available could not have been permitted by the High Court to be bypassed by filing a writ petition. In any event, in *Hindustan Petroleum case*¹ there was no provision parallel to either Section 3 or 9 of the Tenants Act. The ratio in the
- e said decision has, therefore, no application. It was pointed out that in terms of Section 2(4)(ii) of the Tenants Act the expression "tenant" includes

"any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement".

Obviously, that refers to a statutory tenant.

- f 5. It is to be noted that in the other case i.e. CA No. 4463 of 2004, learned Single Judge allowed the prayer of the landlord by following the decision in the case of the other landlord (Respondent 1 in CA No. 7467 of 2003). The Division Bench affirmed the view of the learned Single Judge.

- g 6. According to learned counsel for the landlord in each case there was no factual controversy involved, there was no removal of the lease possible in view of what has been stated in *Hindustan Petroleum case*¹ and, therefore, the High Court was justified in directing eviction.

7. We find that the High Court in none of the two cases before it considered the effect of various provisions of the Tenants Act, more particularly, Sections 3 and 9 thereof. The provisions read as follows:

- h "3. *Payment of compensation on ejectment.*—Every tenant shall on ejectment be entitled to be paid as compensation the value of any building,

¹ (1999) 4 SCC 450 : JT (1999) 3 SC 61

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which may have been erected by him, by any of his predecessors-in-interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid. A tenant who is entitled to compensation for the value of any building shall also be paid the value of trees which may have been planted by him on the land and of any improvements which may have been made by him.

* * *

9. *Application to court for directing the landlord to sell land.*—(1)(a)(i) Any tenant who is entitled to compensation under Section 3 and against whom a suit in ejectment has been instituted or proceeding under Section 41 of the Presidency Small Cause Courts Act, 1882, taken by the landlord, may, within one month of the date of the publication of the Madras City Tenants' Protection (Amendment) Act, 1979 in the Tamil Nadu Government Gazette or of the date with effect from which this Act is extended to the municipal town, township or village in which the land is situate or within one month after the service on him of summons, apply to the court for an order that the landlord shall be directed to sell for a price to be fixed by the court, the whole or part of, the extent of land specified in the application.

(ii) Notwithstanding anything contained in clause (a)(i) of this sub-section, any such tenant as is referred to in sub-clause (ii)(b) of clause (4) of Section 2 or his heirs, may, within a period of two months from the date of the publication of the Madras City Tenants' Protection (Amendment) Act, 1973 apply to the court whether or not a suit for ejectment has been instituted or proceeding under Section 41 of the Presidency Small Cause Courts Act, 1882 (Act 15 of 1882) has been taken by the landlord or whether or not such suit or proceeding is pending having jurisdiction to entertain a suit for ejectment or in the City of Madras either to such court or to the Presidency Small Cause Court, for an order that the landlord under the tenancy agreement shall be directed to sell for a price to be fixed by the court the whole or part of the extent of land specified in the application.

(b) On such application, the court shall first decide the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. The court shall then fix the price of the minimum extent of the land decided as aforesaid, or of the extent of the land specified in the application under clause (a) whichever is less. The price aforesaid shall be the average market value of the three years immediately preceding the date of the order. The court shall order that within a period to be determined by the court, not being less than three months and not more than three years from the date of the order, the tenant shall pay into court or otherwise as directed the price so fixed in one or more instalments with or without interest."

8. As rightly submitted by learned counsel for the appellants, provisions similar to Sections 3 and 9 of the Tenants Act were not under consideration in *Hindustan Petroleum case*¹.

9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear

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a to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton*² (AC at p. 761) Lord MacDermott observed: (All ER p. 14 C-D)

b “The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge...”

c 10. In *Home Office v. Dorset Yacht Co.*³ (All ER p. 297g-h) Lord Reid said, “Lord Atkin’s speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances”. Megarry, J. in *Shepherd Homes Ltd. v. Sandham (No. 2)*⁴ observed: “One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament.” And, in *Herrington v. British Railways Board*⁵ Lord Morris said: (All ER p. 761c)

d “There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.”

e 11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

f “Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

* * *

g Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.”

h 2 1951 AC 737 : (1951) 2 All ER 1 (HL)
3 (1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2 WLR 1140 (HL)
4 (1971) 1 WLR 1062 : (1971) 2 All ER 1267
5 (1972) 2 WLR 537 : (1972) 1 All ER 749 (HL)

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13. In a writ petition, some benefits available to the tenant under the Tenants Act could not have been diluted. There is some dispute about the entitlement of the tenant to get protection under the Tenants Act which can be more effectively decided in case action in terms of what is required under the Tenants Act is taken by the landlord. a

14. Once a suit is filed by the landlord for the eviction of a tenant from the land the tenant has right to apply to the court within one month from the date of the service of summons for the issuance of order directing the landlord to sell the whole or part of the extent of land as specified in the application to him for a price to be fixed by the court. On making of such an application the court is under a mandatory duty to first decide the minimum extent of the land “which may be necessary for the convenient enjoyment by the tenant”. The court must hold enquiry to determine whether the tenant requires the land for his convenient enjoyment, and if so, what area or portion of the land would be necessary for his convenient enjoyment. The court may on the facts of a particular case come to the conclusion that the tenant does not require any portion of the land and in that event it may reject the application and decree the suit for ejection and direct the landlord to pay compensation to the tenant. But if the court finds that the tenant needs the whole or any portion of the demised land for “convenient enjoyment”, the court has to fix the price of the land on the basis of market value of three years immediately preceding the date of the order. The court may thereupon direct the tenant to deposit the amount so determined within a specific period being less than three months and not more than three years. If the tenant fails to pay the amount so determined, the tenant’s application shall stand dismissed. b
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15. Section 9 confers a privilege on a tenant against whom a suit for eviction has been filed by the landlord but that privilege is not absolute. Section 9 itself imposes restriction on the tenant’s right to secure conveyance of only such portion of the holding as would be necessary for his convenient enjoyment. It creates a statutory right to purchase land through the medium of court on the fulfilment of conditions specified in Section 9 of the Tenants Act. It is not an absolute right, as the court has discretion to grant or refuse the relief for the purchase of the land. In *Swami Motor Transport (P) Ltd. v. Sri Sankaraswamigal Mutr*⁶ this Court considered the question whether the right of a tenant to apply to a court for an order directing the landlord to sell the land to him for a price to be fixed by it under Section 9 of the Tenants Act is a property right. The Court held that the law of India does not recognise equitable estates, a statutory right to purchase land does not confer any right or interest in the property. The right conferred by Section 9 is a statutory right to purchase land and it does not create any interest or right to the property. The tenant’s right to secure only such portion of the holding as may be necessary for his convenient enjoyment is equitable in nature. Under the common law, a tenant is liable to eviction and he has no right to purchase the e
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6 1963 Supp (1) SCR 282 : AIR 1963 SC 864

BHARAT PETROLEUM CORPN. LTD. v. N.R. VAIRAMANI (*Pasayat, J.*) 587

- land demised to him at any price; as well as under the Transfer of Property Act. The only right of a tenant who may have put up structure on the demised
- a land is to remove the structure at the time of delivery of possession on the determination of the lease. Section 9 confers an additional statutory right on a tenant against whom suit for ejectment is filed to exercise an option to purchase the demised land to that extent only which he may require for convenient enjoyment of the property. The tenant has no vested right in the property instead; it is a privilege granted to him by the statute which is
- b equitable in nature.

16. Whenever an application is made by a tenant before the court for issuance of direction to the landlord for the sale of the whole or part of the land to him, the court is under a mandatory duty to determine the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. This determination can obviously be made only after an enquiry is
- c held by the court having regard to the area of the demised land and the extent of superstructure standing thereon, and the tenant's need for the land for the beneficial enjoyment of the superstructure which he may have constructed thereon. The enquiry presupposes that the tenant making the application has been in the occupation of the land and the superstructure wherein he may be
- d either residing or carrying on business, and on his eviction he would be adversely affected. The policy underlying Section 9 of the Tenants Act is directed to safeguard the eviction of those tenants who may have constructed superstructure on the demised land, so that they may continue to occupy the same for the purposes of their residence or business. Section 9(1)(b) ordains the court to first decide the minimum extent of the land which may be
- e necessary for the convenient enjoyment by the tenant, it therefore contemplates that the tenant requires the land for the convenient enjoyment of the property. If the tenant does not occupy the land or the superstructure or if he is not residing therein or carrying on any business, the question of convenient enjoyment of the land by him could not arise. The court has to consider the need of the tenant and if it finds that the tenant does not require any part of the land, it may reject the application and direct eviction of the
- f tenant, in that event the landlord has to pay compensation to the tenant for the superstructure.

17. The above position was highlighted in *P. Ananthakrishnan Nair v. Dr. G. Ramakrishnan*⁷.

18. In paras 4 and 8 of *Hindustan Petroleum Corpn. v. Raja D.V. Appa Rao Bahadur*⁸ the nature of right on the successor of a tenant has been
- g indicated. The effect of the acquisition on the operation of the Transfer of Property Act, 1882 has been dealt with in detail by a three-Judge Bench of this Court in *Bharat Petroleum Corpn. Ltd. v. P. Kesavan*⁹. The application and relevance of these decisions shall be considered in case the landlord

h 7 (1987) 2 SCC 429
 8 1995 Supp (3) SCC 397
 9 (2004) 9 SCC 772

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moves the appropriate court and initiates proceedings as prescribed under the Tenants Act. The impugned judgment of the Division Bench of the High Court is indefensible and is set aside. It is made clear that what would be the position if the proceeding is taken under the Tenants Act, shall be decided by the appropriate court. a

CA No. 4463 of 2004

19. The foundation of the impugned judgment in this case is the decision of the Division Bench which was assailed in CA No. 7467 of 2003. The impugned judgment has been set aside and directions have been given as regards proceedings under the Tenants Act. Those shall also be applicable in this case. b

20. The appeals are accordingly allowed. There will be no order as to costs.

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(BEFORE ASHOK BHAN AND S.H. KAPADIA, JJ.)

A.C. ANANTHASWAMY AND OTHERS . . . Appellants;

Versus

BORAIAH (DEAD) BY LRS. . . Respondent. d

Civil Appeal No. 3768 of 2000[†], decided on August 20, 2004

Fraud — Requirements for proving — Held, it must be proved that the representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true — Level of proof required in such a case is extremely high — An ambiguous statement cannot per se make the representor guilty of fraud — Where the only fraud alleged is a bare non-service of summons then such a suit to set aside the decree on alleged ground of fraud is not maintainable — On facts, there is no evidence of fraud and there is a bare allegation of fraud — Moreover, in two proceedings taken prior to the institution of the suit from which this civil appeal arose, relating to the same subject-matter, no allegation of fraud was made by the appellant — The present case is a matter of non-service of summons and passing of an ex parte decree thereon, and therefore no case of fraud is made out — Contract Act, 1872 — S. 17 — Civil Procedure Code, 1908 — Or. 6 R. 4 and Or. 9 R. 13 e

(Paras 5 and 6)

Pollock & Mulla: *Indian Contract & Specific Relief Acts* (2001), 12th Edn., p. 489, *relied on*

Choksi Bhidarbhai Mathurbhai v. Purshottamdas Bhogilal Shah, AIR 1962 Guj 10 : (1961) 2 Guj LR 509, *approved* g

Appeal dismissed

D-M/ATZ/30403/C

[†] From the Judgment and Order dated 17-12-1998 of the Karnataka High Court in RFA No. 358 of 1989 h

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(BEFORE DR A.S. ANAND, C.J. AND S.B. MAJMUDAR, SUJATA V.
MANOHAR, K. VENKATASWAMI AND V.N. KHARE, JJ.)

STATE OF PUNJAB

.. Appellant;

Versus

BALDEV SINGH

.. Respondent.

Criminal Appeal No. 396 of 1990[†] with SLPs (Crl.) Nos. 2187, 2188, 2186,
2139, 2141, 2142, 2138, 2137, 2140 of 1990, Crl. As. Nos. 483 and 573 of
1989, SLP (Crl.) No. 2496 of 1989, Crl. As. Nos. 783 of 1991 and 78 of
1992, SLP (Crl.) No. 950 of 1996, Crl. As. Nos. 1704 of 1996, 808 of
1997, Crl. MP No. 6675 of 1997, SLPs (Crl.) Nos. 3463, 2492 of
1998, Crl. As. Nos. 1185, 744, 745 and 815 of 1998,
decided on July 21, 1999

**A. Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 50 —
Search and seizure — It is imperative for the investigating officer to inform
the suspect, orally or in writing, about his right to be searched before a
gazetted officer or a Magistrate — Failure to give such information would
not vitiate the trial but render the recovery of illicit article illegal and vitiate
the conviction and sentence if recorded only on the basis of possession of
such illicit article — So also if the person so informed requires to be
searched before a gazetted officer or a Magistrate, the empowered officer is
obliged to comply else it would render the search and conviction solely
based on it bad — Court must be satisfied about due compliance with S. 50
requirements and prosecution should get opportunity to establish such
compliance — S. 50 embodies reasonable, fair and just procedure that must
be honoured — Constitution of India, Art. 21**

It is an *obligation* of the empowered officer and his *duty* before conducting
the search of the person of a suspect, on the basis of prior information, to *inform*
the suspect that he has the right to require his search being conducted in the
presence of a gazetted officer or a Magistrate. The failure to so inform the
suspect of his right would render the search illegal because the suspect would
not be able to avail of the protection which is inbuilt in Section 50. Similarly, if
the person concerned requires, on being so informed by the empowered officer
or otherwise, that his search be conducted in the presence of a gazetted officer or
a Magistrate, the empowered officer is obliged to do so and failure on his part to
do so would cause prejudice to the accused and also render the search illegal and
the conviction and sentence of the accused based solely on recovery made
during that search bad. (Paras 24, 32 and 57)

The question whether the provisions of Section 50 are mandatory or
directory and, if mandatory, to what extent and the consequences of non-
compliance with it does not strictly speaking arise in the context in which the
protection has been incorporated in Section 50 for the benefit of the person
intended to be searched. Therefore, without expressing any opinion as to
whether the provisions of Section 50 are mandatory or not, but bearing in mind
the purpose for which the safeguard has been made, it is held that the provisions
of Section 50 of the Act implicitly make it *imperative and obligatory* and cast a

[†] From the Judgment and Order dated 31-1-1989 of the Punjab and Haryana High Court in Crl.
M.P. No. 8797-M(A) of 1988

STATE OF PUNJAB v. BALDEV SINGH

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- duty* on the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by *intimating* to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a Magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded *only* on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. The omission may not *vitate* the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazetted officer or a Magistrate, if he so requires, is sacrosanct and indefeasible — it cannot be disregarded by the prosecution except at its own peril. (Paras 32 and 57)

- To be searched before a gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a gazetted officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceedings. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information to effect the search, of not informing the person concerned of the existence of his right to have his search conducted before a gazetted officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the person concerned of his right of being searched in the presence of a Magistrate or a gazetted officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. (Paras 25 and 57)

- The *safeguard* or *protection* to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. Severe punishments have been provided under the Act for *mere possession* of illicit drugs and narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The *duty* to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right under Section 50. (Paras 26 and 57)

It cannot be said that the right to personal liberty can be curtailed even temporarily, by a procedure which is not "reasonable, fair and just". When a statute itself provides for a "just" procedure, it must be honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a gazetted officer or a Magistrate, would be violative of the "reasonable, fair and just procedure" and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law cannot be considered to be a "fair", just or reasonable procedure. It cannot be contended that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect about the existence of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of the law. There is a clear distinction between ignorance of the law and ignorance of the right to a "reasonable, fair and just procedure". (Para 26)

The court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. There is no reason as to why the empowered officer should shirk from affording a real opportunity to the suspect, by intimating to him that he has a right "that if he requires" to be searched in the presence of a gazetted officer or a Magistrate, he shall be searched only in that manner. The compliance with the procedural safeguards contained in Section 50 are intended to serve a dual purpose — to protect a person against false accusation and frivolous charges as also to lend creditability to the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above-board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. (Paras 28 and 57)

There is indeed a need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. (Paras 31 and 57)

The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish at the trial that the

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- provisions of Section 50 and, particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial. (Paras 33 and 57)
- a *State of Punjab v. Balbir Singh*, (1994) 3 SCC 299 : 1994 SCC (Cri) 634; *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*, (1994) 6 SCC 569 : 1995 SCC (Cri) 32; *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat*, (1995) 3 SCC 610 : 1995 SCC (Cri) 564; *State of H.P. v. Pirthi Chand*, (1996) 2 SCC 37 : 1996 SCC (Cri) 210; *State of Punjab v. Labh Singh*, (1996) 5 SCC 520 : 1996 SCC (Cri) 1036; *State of Punjab v. Jasbir Singh*, (1996) 1 SCC 288 : 1996 SCC (Cri) 1; *Mohinder Kumar v. State, Panaji, Goa*, (1998) 8 SCC 655, followed
- b *State of Punjab v. Baldev Singh*, (1998) 2 SCC 724 : 1998 SCC (Cri) 677, considered *M.P. Sharma v. Satish Chandra, District Magistrate, Delhi*, AIR 1954 SC 300 : 1954 SCR 1077; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Kamleshkumar Ishwardas Patel v. Union of India*, (1995) 4 SCC 51 : 1995 SCC (Cri) 643; *D.K. Basu v. State of W.B.*, (1997) 1 SCC 416 : 1997 SCC (Cri) 92, relied on *Miranda v. Arizona*, 384 US 436 : 16 L Ed 2d 694 (1966), referred to
- c **B. Constitution of India — Art. 21 — Fair trial — Concept of — Necessary for society as well as for accused — Nature of evidence obtained and nature of safeguard violated are both relevant factors — Hence evidence collected in violation of statutory provision cannot be admitted — Narcotic Drugs and Psychotropic Substances Act, 1985**
- d **C. Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 50 and 54 — Admissibility of evidence collected during search conducted in contravention of S. 50 — Held, illicit article seized during illegal search cannot be used as evidence of proof of unlawful possession of that article — However, other material recovered during that search can be relied upon by the prosecution in other proceedings against the accused — An illegal search cannot entitle the prosecution to raise a presumption under S. 54**
- e The prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused. If after careful consideration of the material on the record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded. (Paras 45 and 57)
- f
- g An illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot *by itself* be used as admissible *evidence of proof of unlawful possession* of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in *other/independent* proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.
- h (Paras 55 and 57)

Even if it be assumed for the sake of argument that all the material seized during an illegal search may be admissible as relevant evidence in *other* proceedings, the illicit drug or psychotropic substance seized in an illegal search cannot by itself be used as *proof of unlawful conscious possession* of the contraband by the accused. An illegal search cannot also entitle the prosecution to raise a presumption under Section 54 of the Act because presumption is an inference of fact drawn from the facts which are known as proved. A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. (Paras 54 and 57)

The judgment in *Pooran Mal case* cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search. [Paras 45 and 57(9)]

The judgment in *Ali Mustaffa case* correctly interprets and distinguishes the judgment in *Pooran Mal case* and the broad observations made in *Pirithi Chand case* and *Jasbir Singh case* are not in tune with the correct exposition of law as laid down in *Pooran Mal case*. [Paras 56 and 57(10)]

Ali Mustaffa Abdul Rahman Moosa v. State of Kerala, (1994) 6 SCC 569 : 1995 SCC (Cri) 32, followed

Pooran Mal v. Director of Inspection (Investigation), (1974) 1 SCC 345 : 1974 SCC (Tax) 114, explained

State of H.P. v. Pirithi Chand, (1996) 2 SCC 37 : 1996 SCC (Cri) 210; *State of Punjab v. Jasbir Singh*, (1996) 1 SCC 288 : 1996 SCC (Cri) 1, overruled

R. v. Collins, (1987) 1 SCR 265 (Canada); *R. v. Stillman*, (1997) 1 RCS 607; *Bocking v. Roberts*, (1973) 3 All ER 962; *R. v. Young*, (1984) 2 All ER 164; *Louis Beaver v. Her Majesty The Queen*, 1957 SCR 531; *Sanjay Dutt v. State through CBI*, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433, relied on

D. Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 50 — Applies to search of a person as distinguished from search of any premises etc. (Para 12)

E. Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 50 and 42 — Recovery of contraband in search and arrest of a person during normal course of investigation — Requirement of S. 50 not attracted

On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted. (Para 12)

F. Criminal Procedure Code, 1973 — Ss. 100, 102, 103 and 165 — Chance recovery of narcotic drug or psychotropic substance — Investigation under CrPC — Duty of Investigating Officer who comes across a person being in possession of contraband indicated — Provisions of NDPS Act attracted thereafter — Narcotic Drugs and Psychotropic Substances Act, 1985, S. 50

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- The provisions of Sections 100 and 165 CrPC are not inconsistent with the provisions of the NDPS Act and are applicable for affecting search, seizure or arrest under the NDPS Act also. However, when an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure, comes across a person being in possession of the narcotic drug or the psychotropic substance, then he must follow from that stage onwards the provisions of the NDPS Act and continue the investigation as provided thereunder. If the investigating officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. Failure to comply with the provisions of CrPC in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 per se would not vitiate the prosecution case. If there is such a violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view. (Para 14)

State of Punjab v. Balbir Singh, (1994) 3 SCC 299 : 1994 SCC (Cri) 634, *relied on*

- G. Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 50(4) and 51 — CrPC, 1973 — S. 51(2) — Search of female — Applicability of provisions of CrPC — Search must be conducted by a female — Procedure indicated — Failure to observe the requirements not only affects the credibility of the prosecution case but also is violative of basic right of a female to be treated with decency and proper dignity — Constitution of India, Art. 21 — Right of women to be treated with decency and proper dignity**

- While conducting search and seizure, in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the NDPS Act are also required to be followed. Section 50(4) of the NDPS Act lays down that no female shall be searched by anyone excepting a female. This provision is similar to the one contained in Section 52 of CrPC, 1898 and Section 51(2) of CrPC, 1973 relating to search of females. Section 51(2) of CrPC, 1973 lays down that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency. The empowered officer must, therefore, act in the manner provided by Section 50(4) of the NDPS Act read with Section 51(2) of CrPC, 1973 whenever it is found necessary to cause a female to be searched. The document prepared by the investigating officer at the spot must invariably disclose that the search was conducted in the aforesaid manner and the name of the female official who carried out the personal search of the female concerned should also be disclosed. The personal search memo of the female concerned should indicate compliance with the aforesaid provisions. Failure to do so may not only affect the credibility of the prosecution case but may also be found as violative of the basic right of a female to be treated with decency and proper dignity. (Para 13)

- H. Constitution of India — Art. 141 — Precedent — Everything said in a decision does not constitute a precedent — A decision has to be considered in the context in which it was rendered — Doctrines — Stare decisis, doctrine of** (Para 43)

- CIT v. Sun Engg. Works (P) Ltd.*, (1992) 4 SCC 363, *relied on*

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Suggested Case Finder Search Text (*inter alia*) :

narcotic

Advocates who appeared in this case :

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8. (1995) 4 SCC 51 : 1995 SCC (Cri) 643, *Kamleshkumar Ishwardas Patel v. Union of India* 198g-h
9. (1995) 3 SCC 610 : 1995 SCC (Cri) 564, *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat* 179b, 180a, 181c, 182g, 183a-b, 195a
10. (1994) 6 SCC 569 : 1995 SCC (Cri) 32, *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala* 179b, 179c, 180a, 180g, 181a-b, 182a-b, 196c-d, 201e-f, 201f, 201h, 202g, 208f, 210d
11. (1994) 5 SCC 410 : 1994 SCC (Cri) 1433, *Sanjay Dutt v. State through CBI* 207d-e, 208a-b
12. (1994) 3 SCC 299 : 1994 SCC (Cri) 634, *State of Punjab v. Balbir Singh* 179b, 179f, 180a, 180d-e, 180g-h, 181f-g, 182a-b, 182f, 182g, 191c-d, 191g, 192b-c, 192f-g, 192h, 195a, 195c-d, 196e, 197c
13. (1992) 4 SCC 363, *CIT v. Sun Engg. Works (P) Ltd.* 205a
14. (1987) 1 SCR 265 (Canada), *R. v. Collins* 206c, 206e
15. (1984) 2 All ER 164, *R. v. Young* 207c
16. (1978) 1 SCC 248, *Maneka Gandhi v. Union of India* 198c-d
17. (1974) 1 SCC 345 : 1974 SCC (Tax) 114, *Pooran Mal v. Director of Inspection (Investigation)* 179c, 179d-e, 180a-b, 180b-c, 180e-f, 182b, 182d, 182g-h, 183b-c, 184g, 201e, 201f, 201g, 202a, 202a-b, 202d, 202g-h, 203a, 204f, 204g, 204g-h, 205c-d, 205d-e, 205e-f, 205f, 205f-g, 205g, 208f, 208f-g, 210c, 210d-e, 210d-e
18. (1973) 3 All ER 962, *Bocking v. Roberts* 207a
19. 384 US 436 : 16 L Ed 2d 694 (1966), *Miranda v. Arizona* 200c-d
20. 1957 SCR 531, *Louis Beaver v. Her Majesty The Queen* 207c-d
21. AIR 1954 SC 300 : 1954 SCR 1077, *M.P. Sharma v. Satish Chandra, District Magistrate, Delhi* 188c

The Judgment of the Court was delivered by

- DR A.S. ANAND, C.J.— On 15-7-1997 when this batch of appeals/special leave petitions was placed before a two-Judge Bench, it was noticed that there was divergence of opinion between different Benches of this Court with regard to the ambit and scope of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter “the NDPS Act”) and in particular with regard to the admissibility of the evidence collected by an investigating officer during search and seizure conducted in violation of the provisions of Section 50 of the NDPS Act. In the cases of *State of Punjab v. Balbir Singh*¹, *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*², *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat*³ and a number of other cases, it was laid down that failure to observe the safeguards, while conducting search and seizure, as provided by Section 50 would render the conviction and sentence of an accused illegal. In *Ali Mustaffa case*² the judgment in *Pooran Mal v. Director of Inspection (Investigation)*⁴ was also considered and it was opined that the judgment in *Pooran Mal case*⁴ could not be interpreted to have laid down that a contraband seized as a result of illegal search or seizure could by itself be treated as *evidence of possession* of the contraband to fasten liability, arising out of unlawful possession of the contraband, on the person from whom the alleged contraband had been seized during an illegal search conducted in violation of the provisions of Section 50 of the NDPS Act. However, in *State of H.P. v. Pirthi Chand*⁵ and *State of Punjab v. Labh Singh*⁶ relying upon a judgment of this Court in *Pooran Mal case*⁴ a discordant note was struck and it was held that evidence collected in a search conducted in violation of Section 50 of the NDPS Act did not become inadmissible in evidence under the Evidence Act. The two-Judge Bench, therefore, on 15-7-1997, by the following order, referred the batch of cases to a larger Bench:

- “One of the questions that has been raised in these appeals/special leave petitions is whether compliance with Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is mandatory and, if so, what is the effect of the breach thereof. This question has been engaging the attention of this Court and answered in a number of cases. In *State of Punjab v. Balbir Singh*¹ a two-Judge Bench of this Court held that the above section is mandatory and it is obligatory on the part of the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a gazetted officer or a Magistrate. It was further held that non-compliance with the above section would affect the prosecution case and vitiate the trial. This

1 (1994) 3 SCC 299 : 1994 SCC (Cn) 634
 2 (1994) 6 SCC 569 : 1995 SCC (Cn) 32
 3 (1995) 3 SCC 610 : 1995 SCC (Cn) 564
 4 (1974) 1 SCC 345 : 1974 SCC (Tax) 114
 5 (1996) 2 SCC 37 : 1996 SCC (Cn) 210
 6 (1996) 5 SCC 520 : 1996 SCC (Cn) 1036

judgment was affirmed by a three-Judge Bench in *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat*³. In *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*² a submission was made on behalf of the State of Kerala to reconsider the judgment in *Balbir Singh case*¹ keeping in view the judgment of this Court in *Pooran Mal v. Director of Inspection*⁴. It was contended that even if the search and seizure of the contraband was held to be illegal and contrary to the provisions of Section 50, it would not affect the conviction because the seized articles could be used as evidence of unlawful possession of the contraband. In repelling the contention, the Court observed: (SCC p. 572, paras 8-9) a

‘The judgment in *Pooran Mal case*⁴ only lays down that the evidence collected as a result of illegal search or seizure, could be used as evidence in proceedings against the party under the Income Tax Act. The judgment cannot be interpreted to lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten the liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner. “Unlawful possession” of the contraband is the sine qua non for conviction under the NDPS Act and that factor has to be established by the prosecution beyond a reasonable doubt. Indeed the seized contraband is evidence but in the absence of proof of possession of the same, an accused cannot be held guilty under the NDPS Act. b

In view of the law laid down in *Balbir Singh case*¹ we hold that there has been violation of the provisions of Section 50 of the NDPS Act and consequently the conviction of the appellant cannot be sustained.’ c

(emphasis supplied) d

It, however, appears that while dealing with Section 50 in *State of H.P. v. Pirithi Chand*⁵ another two-Judge Bench of this Court referred to and relied upon the judgment in *Pooran Mal case*⁴ and held that the evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act. The Court further observed that even if search was found to be in violation of law, what weight should be given to the evidence collected was a question to be gone into during trial. With the above observations, the Bench recorded a finding that the Sessions Judge was not justified in discharging the accused after filing of the charge-sheet holding that mandatory requirements of Section 50 had not been complied with. It, however, appears that the Court’s attention was not drawn to *Ali Mustaffa*². The view expressed in *Pirithi Chand*⁵ was reiterated in *State of Punjab v. Labh Singh*⁶ wherein this Court considered the case of *Balbir Singh*¹ besides other cases and held as follows: (SCC p. 521, para 4) e

‘4. In *State of H.P. v. Pirithi Chand*⁵ this Court further elaborately considered the effect of the violation of Section 50 and held that any evidence recorded and recovered in violation of the f

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search and the contraband seized in violation of the mandatory requirement does not ipso facto invalidate the trial.’

- a From the above resume, it would thus appear that though a two-Judge Bench of this Court considered the earlier judgments of this Court, it held in the case of *Pirithi Chand*⁵ (and affirmed in the case of *Labh Singh*⁶), that breach of Section 50 does not affect the trial while in the case of *Ali Mustaffa*² another Bench categorically laid down that breach of Section 50 makes the conviction illegal. In view of the divergent opinions so expressed, we deem it fit to refer these matters to a larger Bench.

b Let the records be placed before the Chief Justice for necessary orders.”

- c 2. The batch of cases was thereafter listed before a three-Judge Bench. However, when the three-Judge Bench took up the matter, it was of the opinion that the judgment of a three-Judge Bench in *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat*³ required reconsideration and, therefore, the cases were required to be considered still by a larger Bench and on 19-11-1997, the three-Judge Bench made the following order⁷: (SCC pp. 725-26, paras 1-7)

- d “1. In this bunch of appeals/special leave petitions the following questions of law (besides other questions of law and facts) fall for determination:

- e (i) Is it the mandatory requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (‘Act’ for short) that when an officer, duly authorised under Section 42 of the Act, is about to search a person he must inform him of his right under sub-section (1) thereof of being taken to the nearest gazetted officer or nearest Magistrate for making the search?

- (ii) If any search is made without informing the person of his such right would the search be illegal even if he does not of his own exercise his right under Section 50(1)? and

- f (iii) Whether a trial held in respect of any recovery of contraband articles pursuant to such a search would be void ab initio?

2. The above questions came up for consideration before a two-Judge Bench of this Court in *State of Punjab v. Balbir Singh*¹ and it answered them as under: (SCC p. 322, para 25)

- g ‘25. (5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. *Failure to inform the*

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7 *State of Punjab v. Baldev Singh*, (1998) 2 SCC 724 : 1998 SCC (Cri) 677

person to be searched and if such person so requires, failure to take him to the gazetted officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial.' (emphasis supplied) a

3. In *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*² a submission was made on behalf of the State of Kerala to reconsider the judgment in *Balbir Singh case*¹ in view of the judgment of the Constitution Bench of this Court in *Pooran Mal v. Director of Inspection (Investigation)*⁴ wherein it was observed that where the test of admissibility of evidence lay on relevancy (as in India and England), unless there was an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure was not liable to be shut out. Relying upon the above observation it was contended that even if the search and seizure of the contraband were held to be illegal and contrary to the provisions of Section 50 it would not affect the conviction because the seized articles could be used as evidence of unlawful possession. In repelling this contention the two-Judge Bench of this Court observed as under: (SCC p. 572, paras 8-9) b

'The judgment in *Pooran Mal case*⁴ only lays down that the evidence collected as a result of illegal search or seizure, could be used as evidence in proceedings against the party under the Income Tax Act. The judgment cannot be interpreted to lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten that liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner. "Unlawful possession" of the contraband is the sine qua non for conviction under the NDPS Act and that factor has to be established by the prosecution beyond a reasonable doubt. Indeed the seized contraband is evidence but in the absence of proof of possession of the same, an accused cannot be held guilty under the NDPS Act. c

In view of the law laid down in *Balbir Singh case*¹ we hold that there has been violation of the provisions of Section 50 of the NDPS Act and consequently the conviction of the appellant cannot be sustained.' d

4. The judgment in *Balbir Singh case*¹ was affirmed by a three-Judge Bench in *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat*³. e

5. A discordant note was however struck by a two-Judge Bench of this Court in *State of H.P. v. Pirthi Chand*⁵ relying upon the judgment of this Court in *Pooran Mal case*⁴ when it held that the evidence collected in a search in violation of law did not become inadmissible in evidence under the Evidence Act. The Court further observed that even if the search was found to be in violation of law, what weight should be given to the evidence collected was a question to be gone into during trial. The f

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a same view was reiterated by a two-Judge Bench in *State of Punjab v. Labh Singh*⁶ with the observation that any evidence recorded and recovered in violation of the search and the contraband seized in violation of the mandatory requirement *did not ipso facto invalidate the trial.* (emphasis supplied)

b 6. In our considered opinion the judgment of this Court in *Saiyad Mohd. Saiyad Umar Saiyad case*³ (which was delivered by a three-Judge Bench) requires reconsideration and the questions formulated above answered by a larger Bench, not only in view of the subsequent judgments of this Court (delivered by a two-Judge Bench) referred to above, but also in view of the Constitution Bench judgment in *Pooran Mal case*⁴.

c 7. Let these matters be, therefore, placed before the Hon'ble Chief Justice for necessary orders."

c That is how this batch of criminal appeals/special leave petitions has been placed before this Constitution Bench.[†]

d 3. Drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. There is no doubt that drug trafficking, trading and its use, which is a global phenomena and has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. It has the effect of producing a sick society and harmful culture. Anti-drug justice is a criminal dimension of social justice. The United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances which was held in Vienna, Austria in 1988 was perhaps one of the first efforts, at an international level, to tackle the menace of drug trafficking throughout the comity of nations. The Government of India has ratified this convention.

f 4. Prior to the passing of the NDPS Act, 1985 control over narcotic drugs was being generally exercised through certain Central enactments though some of the States also had enacted certain statutes with a view to deal with illicit traffic in drugs. The Opium Act, 1857 related mainly to preventing illicit cultivation of poppy, regulating cultivation of poppy and manufacture of opium. The Opium Act, 1878 supplemented the Opium Act, 1857 and made possession, transportation, import, export, sale, etc. of opium also an offence. The Dangerous Drugs Act, 1930, was enacted with a view to suppress traffic in contraband and abuse of dangerous drugs, particularly derived from opium, Indian hemp and coca leaf etc. The Act prescribed maximum punishment of imprisonment for three years with or without fine, insofar as the first offence is concerned and for the second or the subsequent offence the punishment could go up to four years' RI. These Acts, however, failed to control illicit drug traffic and drug abuse on the other hand exhibited

† Ed.: See also *Namid Francis Nwazor v. Union of India*, (1998) 8 SCC 657 : 1999 SCC (Cri) 81

an upward trend. New drugs of addiction known as psychotropic substances also appeared on the scene posing serious problems. It was noticed that there was an absence of comprehensive law to enable effective control over psychotropic substances in the manner envisaged by the International Convention on Psychotropic Substances, 1971. The need for the enactment of some comprehensive legislation on narcotic drugs and psychotropic substances was, therefore, felt. Parliament with a view to meet a social challenge of great dimensions, enacted the NDPS Act, 1985 to consolidate and amend existing provisions relating to control over drug abuse etc. and to provide for enhanced penalties particularly for trafficking and various other offences. The NDPS Act, 1985 provides stringent penalties for various offences. Enhanced penalties are prescribed for the second and subsequent offences. The NDPS Act, 1985 was amended in 1988 w.e.f. 29-5-1989. Minimum punishment of 10 years' imprisonment which may extend up to 20 years and a minimum fine of Rs 1 lakh which may extend up to Rs 2 lakhs have been provided for most of the offences under the NDPS Act, 1985. For the second and subsequent offences, minimum punishment of imprisonment is 15 years which may extend to 30 years while minimum fine is Rs 1.5 lakhs which may extend to Rs 3 lakhs. Section 31(a) of the Act, which was inserted by the Amendment Act of 1988, has even provided that for certain offences, after previous convictions, death penalty shall be imposed, without leaving any discretion in the court to award imprisonment for life in appropriate cases. Another amendment of considerable importance introduced by the Amendment Act, 1988 was that all the offences under the Act were made triable by a Special Court. Section 36 of the Act provides for constitution of Special Courts manned by a person who is a Sessions Judge or an Additional Sessions Judge. Appeals from the orders of the Special Courts lie to the High Court. Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail. However, despite the stringent provisions of the NDPS Act, 1985 as amended in 1988 drug business is booming; addicts are rapidly rising; crime with its role in narcotics is galloping and drug trafficking network is ever-growing. While interpreting various provisions of the statute, the object of the legislation has to be kept in view but at the same time the interpretation has to be reasonable and fair.

5. With a view to answer the questions framed by the referring Bench and resolve the divergence of opinion expressed by different Benches particularly on the applicability of the law laid down in *Pooran Mal case*⁴ to the admissibility of evidence collected as a result of search conducted in violation of the provisions of Section 50 of the NDPS Act, to offences under the NDPS Act, it would be appropriate to first notice some of the relevant statutory provisions. For the purpose of this batch of cases we are primarily concerned with Chapter V in general and Sections 35, 41, 42, 43, 50, 51, 54 and 57 of the Act in particular.

6. Section 35 lays down:

“35. *Presumption of culpable mental state.*—(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the

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- a accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.—In this section ‘culpable mental state’ includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.”

- b Section 41 reads as follows:

“41. *Power to issue warrant and authorisation.*—(1) A Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

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 f (2) Any such officer of gazetted rank of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer of the Revenue, Drugs Control, Excise, Police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under Section 42.”

- g Sections 42 and 43 provide:

“42. *Power of entry, search, seizure and arrest without warrant or authorisation.*—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the Revenue, Drugs Control, Excise, Police or any other department of a State

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Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,—

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

43. *Power of seizure and arrest in public places.*—Any officer of any of the departments mentioned in Section 42 may—

- (a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under Chapter IV relating to such drug or substance;
- (b) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.—For the purposes of this section, the expression 'public place' includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

Section 50 of the NDPS Act reads as follows:

"50. *Conditions under which search of persons shall be conducted.*—
(1) When any officer duly authorised under Section 42 is about to search

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a any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in sub-section (1).

b (3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female."

Section 51 provides:

c "51. *Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures.*—The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, insofar as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act."

Section 52 reads thus:

d "52. *Disposal of persons arrested and articles seized.*—(1) Any officer arresting a person under Section 41, Section 42, Section 43 or Section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to—

- e (a) the officer in charge of the nearest police station, or
 (b) the officer empowered under Section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article."

f Section 54 provides:

"54. *Presumption from possession of illicit articles.*—In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV in respect of—

- g (a) any narcotic drug or psychotropic substance;
 (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
 (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance; or
 h (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance, or any residue left of the materials from which any narcotic drug or psychotropic substance has been manufactured,

for the possession of which he fails to account satisfactorily.”

Section 57 reads as follows:

“57. *Report of arrest and seizure.*—Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.” a

Section 132(13) of the Income Tax Act, 1961 provides:

“132. *Search and seizure.*—(1)-(12) * * *

(13) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1) or sub-section (1-A).” b

7. Search and seizure are essential steps in the armoury of an investigator in the investigation of a criminal case. The Code of Criminal Procedure itself recognises the necessity and usefulness of search and seizure during the investigation as is evident from the provisions of Sections 96 to 103 and Section 165 of the Criminal Procedure Code. In *M.P. Sharma v. Satish Chandra, District Magistrate, Delhi*⁸ the challenge to the power of issuing a search warrant under Section 96(1) CrPC as violative of the fundamental rights was repelled by the Constitution Bench on the ground that the power of search and seizure in any system of jurisprudence is an overriding power of the State for the protection of social security. It was also held that a search by itself is not a restriction on the right to hold and enjoy property, though a seizure may be a restriction on the right of possession and enjoyment of the seized property, but it is only temporary and for the limited purpose of an investigation. The Court opined: c

“A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches.” d

The Court also opined:

“A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is a necessary and reasonable restriction and cannot per se be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. We are unable to see how any question of violation of Article 19(1)(f) is involved in this case in respect of the warrants in question which purport e

⁸ AIR 1954 SC 300 : 1954 SCR 1077

to be under the first alternative of Section 96(1) of the Criminal Procedure Code.”

- a* 8. Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of and for search of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Vide sub-section (2) the power has also been vested in gazetted officers of the
- b* Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force, *empowered* in that behalf by a general or special order of the State Government to arrest any person, who he has reason to believe to have committed an offence punishable under Chapter IV or to search any person or conveyance or vessel or building etc. with a view to seize any contraband
- c* or document or other article which may furnish evidence of the commission of such an offence, concealed in such building or conveyance or vessel or place.

9. Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his personal
- d* knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without a warrant between sunrise and sunset, and he may do so without recording his reasons of belief.

10. The proviso to sub-section (1) lays down that if the empowered
- e* officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the
- f* grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a *public place*. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the
- g* commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession
- h* appears to him to be unlawful.

11. Section 50 of the Act prescribes the conditions under which search of a person shall be conducted. Sub-section (1) provides that when the empowered officer is about to search any suspected person, he shall, *if the person to be searched so requires*, take him to the nearest gazetted officer or the Magistrate for the purpose. Under sub-section (2) it is laid down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such gazetted officer or the Magistrate. Sub-section (3) lays down that when the person to be searched is brought before such a gazetted officer or the Magistrate and such gazetted officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct that the search be made.

12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.

13. Vide Section 51, the provisions of the Code of Criminal Procedure, 1973 shall apply, *insofar as they are not inconsistent* with the provisions of the NDPS Act, to all warrants issued and arrests, searches and seizures made under the NDPS Act. Thus, the NDPS Act, 1985 after incorporating the broad principles regarding search, seizure and arrest etc. in Sections 41, 42, 43, 49 and 50 has laid down in Section 51 that the provisions of the Code of Criminal Procedure shall apply *insofar as they are not inconsistent with the provisions of the NDPS Act*. The expression "insofar as they are not inconsistent with the provisions of this Act" occurring in Section 51 of the NDPS Act is of significance. This expression implies that the provisions of the Code of Criminal Procedure relating to search, seizure or arrest apply to search, seizure and arrest under the NDPS Act also except to the extent they are "inconsistent with the provisions of the Act". Thus, while conducting search and seizure, in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the NDPS Act are also required to be followed. Section 50(4) of the NDPS Act lays down that no female shall be searched by anyone excepting a female. This provision is similar to the one contained in Section 52 of the Code of Criminal Procedure, 1898 and Section 51(2) of the Code of Criminal Procedure, 1973 relating to search of females. Section 51(2) of the Code of Criminal Procedure, 1973 lays down that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency. The empowered officer must, therefore, act in the manner provided by Section 50(4) of the NDPS Act read with Section 51(2) of the Code of Criminal Procedure, 1973 whenever it is found necessary to cause a female to be searched. The document prepared by the investigating officer at the spot must invariably disclose that the search was conducted in the aforesaid

- manner and the name of the female official who carried out the personal search of the female concerned should also be disclosed. The personal search
- a memo of the female concerned should indicate compliance with the aforesaid provisions. Failure to do so may not only affect the credibility of the prosecution case but may also be found as violative of the basic right of a female to be treated with decency and proper dignity.

14. The provisions of Sections 100 and 165 CrPC are not inconsistent with the provisions of the NDPS Act and are applicable for affecting search,
- b seizure or arrest under the NDPS Act also. However, when an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure, comes across a person being in possession of the narcotic drug or the psychotropic substance, then he must follow from that stage onwards the provisions of the NDPS Act and continue the investigation as provided thereunder. If the investigating officer
- c is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. In *Balbir Singh case*¹ after referring to a number of judgments, the Bench opined that failure to comply with the provisions of CrPC in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 per se does
- d not vitiate the prosecution case. If there is such a violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view.

15. What is the import of the expression "*if such person so requires*" he
- e shall be taken to the nearest gazetted officer or Magistrate and his search shall be made before such Officer or Magistrate as occurring in Section 50. Does the expression not visualise that to enable the person concerned to require his search to be conducted before a gazetted officer or a Magistrate, the empowered officer is under an obligation to inform him that he has such a right? Learned counsel appearing for the State of Punjab as also the learned
- f counsel appearing for the State of Gujarat argued that it would not be proper to read into the provisions of Section 50, any legislative intent of prescribing a duty on the part of the empowered officer to *inform* the suspect *that if he so requires*, the search would be conducted before a gazetted officer or a Magistrate, as the case may be. According to the learned counsel, the view expressed in *State of Punjab v. Balbir Singh*¹ laying down that it is
- g obligatory on the part of such an officer to so inform the person to be searched or if such person requires, failure to take him for search before the gazetted officer or the Magistrate, would amount to non-compliance with the provisions of Section 50 and would affect the prosecution case and vitiate the trial requires reconsideration. As a matter of fact, the order of the referring Bench itself centres around whether there is any requirement of Section 50,
- h making it obligatory for the empowered officer, who is about to search a person, to *inform him* of his right of being taken to the nearest gazetted

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officer or nearest Magistrate for making the search if he so requires. Learned counsel for the parties, however, agree that in case the obligation to *inform* the suspect of his right to be searched before a gazetted officer or a Magistrate is read as a *duty* cast on the empowered officer, then failure to give information regarding that right to the suspect would be a serious infirmity amounting to denial of a valuable right to an accused and would render his conviction for an offence under the NDPS Act bad and unsustainable.

16. The question as to what is the effect of non-compliance with the provisions of Section 50 on the recovery of the contraband was answered in *State of Punjab v. Balbir Singh*¹. The common question which arose for consideration in a batch of appeals filed by the State of Punjab was "whether any arrest or search of a person or search of a place conducted without conforming to the provisions of the NDPS Act would be rendered illegal and consequently vitiate the conviction".

17. The trial court in those cases had acquitted the accused on the ground that the arrest, search and seizure were conducted in violation of some of the "relevant and mandatory" provisions of the NDPS Act. The High Court declined to grant appeal against the order of acquittal. The State of Punjab thereupon filed appeals by special leave in this Court. In some other cases, where the accused had been convicted, they also filed appeals by special leave questioning their conviction and sentence on the ground that their trials were illegal because of non-compliance with the safeguards provided under Section 50 of the NDPS Act. A two-Judge Bench speaking through K. Jayachandra Reddy, J. considered several provisions of the NDPS Act governing arrest, search and seizure and, in particular, the provisions of Sections 41, 42, 43, 44, 49, 50, 51, 52 and 57 of the NDPS Act as well as the provisions of the Code of Criminal Procedure relating to search and seizure effected during investigation of a criminal case. Dealing with Section 50, it was held that in the context in which the right had been conferred, it must naturally be presumed that it is imperative on the part of the officer to *inform* the person to be searched of his right that if he so requires he shall be searched before a gazetted officer or Magistrate and on such request being made by him, to be taken before the gazetted officer or Magistrate for further proceedings. The reasoning given in *Balbir Singh case*¹ was that to afford an opportunity to the person to be searched "if he so requires to be searched before a gazetted officer or a Magistrate" he must be made aware of that right and that could be done only by the empowered officer by *informing* him of the existence of that right. The Court went on to hold that failure to inform the person to be searched of that right and if he so requires, failure to take him to the gazetted officer or the Magistrate, would mean non-compliance with the provisions of Section 50 which in turn would "affect the prosecution case and vitiate the trial". The following conclusions were arrived at by the two-Judge Bench in *State of Punjab v. Balbir Singh*¹ (SCC pp. 320-22, para 25)

“25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

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(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

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(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

f

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

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(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

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To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case. a
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(4-A) If a police officer, even if he happens to be an 'empowered' officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity. c

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial. d

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact. e
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(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case." g
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(emphasis ours)

18. A three-Judge Bench in *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat*³ upheld the view taken in *Balbir Singh case*¹ on the point of duty of the empowered officer to *inform* the suspect about his right to be searched before a gazetted officer or a Magistrate. It considered the provisions of Section 50 and opined: (SCC p. 615, para 8)

- a “8. We are unable to share the High Court’s view that in cases under the NDPS Act it is the duty of the court to raise a presumption, when the officer concerned has not deposed that he had followed the procedure mandated by Section 50, that he had in fact done so. *When the officer concerned has not deposed that he had followed the procedure mandated by Section 50, the court is duty-bound to conclude that the accused had not had the benefit of the protection that Section 50 affords; that, therefore, his possession of articles which are illicit under the NDPS Act is not established; that the precondition for his having satisfactorily accounted for such possession has not been met; and to acquit the accused.*” (emphasis ours)

- b 19. In *State of H.P. v. Pirthi Chand*⁵ the Bench agreed with the view in *Balbir Singh case*¹ regarding the duty to inform the suspect of his right as emanating from Section 50 of the NDPS Act. The Court opined: (SCC p. 41, para 3)

- d “Compliance of the safeguards in Section 50 is mandatory obliging the officer concerned to inform the person to be searched of his right to demand that search could be conducted in the presence of a gazetted officer or a Magistrate. The possession of illicit articles has to be satisfactorily established before the court. The officer who conducts search must state in his evidence that he had informed the accused of his right to demand, while he is searched, in the presence of a gazetted officer or a Magistrate and that the accused had not chosen to so demand. If no evidence to that effect is given, the court must presume that the person searched was not informed of the protection the law gives him and must find that possession of illicit articles was not established. The presumption under Article 114 Illustration (e) of the Evidence Act, that the official duty was properly performed, therefore, does not apply.”

- e 20. In *State of Punjab v. Labh Singh*⁶ again it was reiterated that the accused has been provided with a protection of being informed of his right to be searched in the presence of a gazetted officer or a Magistrate and failure to give an opportunity to the person concerned to avail of the protection would render the prosecution case unsustainable.

- f 21. In *State of Punjab v. Jasbir Singh*⁹ it was opined: (SCC p. 289, para 2)

- g “2. Having considered the evidence we find it difficult to set aside the order of acquittal recorded by the Additional Sessions Judge. Though the offence involved is of a considerable magnitude of 70 bags containing 34 kgs of poppy husk, each without any permit/licence, this

Court is constrained to confirm the acquittal for the reasons that the mandatory requirements of Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 has not been complied with. *a*
Protection given by Section 50 is a valuable right to the offender and compliance thereof intended to be mandatory. In case the police officers had prior knowledge that illegal transport of the contraband is in movement and persons are in unlawful possession and intends to intercept it, conduct search and consequentially to seize the contraband, they are required to inform the offender that he has the right that the search will be conducted in the presence of a gazetted officer or a Magistrate. Thereafter on their agreeing to be searched by the police officers, the search and seizure of the contraband from their unlawful possession would become legal and valid. However, the evidence collected in breach of mandatory requirement does not become inadmissible. It is settled law that evidence collected during investigation in violation of the statutory provisions does not become inadmissible and the trial on the basis thereof does not get vitiated. Each case is to be considered on its own backdrop. *b*
(emphasis added) *c*

22. In *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*² a two-Judge Bench of this Court (to which one of us, C.J., was a party) it had been found that the appellant had not been given any choice as to whether he desired to be searched in the presence of a gazetted officer or a Magistrate as envisaged under Section 50 of the NDPS Act. The argument raised in that case to the effect that Section 50 of the Act could not be said to have been violated because the appellant did not “require” to have himself searched before a gazetted officer or a Magistrate was rejected following the law laid down in *Balbir Singh case*¹. The Court opined that to enable the person concerned to require that his search be carried out in the presence of a gazetted officer or a Magistrate makes, it is *obligatory* on the part of the empowered officer to inform the person concerned that he has a right to require his search to be conducted in the presence of a gazetted officer or a Magistrate. *d*
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23. In *Mohinder Kumar v. State, Panaji, Goa*¹⁰ a three-Judge Bench (to which one of us, Sujata V. Manohar, J., was a party) once again considered the requirements of Sections 42 and 50 of the Act. In that case the police officer “accidentally” reached the house while on patrol duty and had it not been for the conduct of the accused persons in trying to run into the house on seeing the police party, he would perhaps not have had any occasion to enter the house and effect search. But when the conduct of the accused persons raised a suspicion, he went into the house and effected the search, seized the illicit material and caused the arrest. The Court opined that in the facts and circumstances of the case, when the investigating officer accidentally stumbled upon the offending articles and himself not being the empowered officer, then on coming to know that the accused persons were in possession *f*
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- of illicit articles, then from that stage onwards he was under an obligation to proceed further in the matter only in accordance with the provisions of the
- a Act. On facts it was found that the investigating officer did not record the grounds of his belief at any stage of the investigation, subsequent to his realising that the accused persons were in possession of charas and since he had made no record, he did not forward a copy of the grounds to his superior officer nor did he comply with the provisions of Section 50 of the Act, inasmuch as he did not inform the person to be searched that if he required,
 - b his search could be conducted before a gazetted officer or a Magistrate. The Bench held that for failure to comply with the provisions of Sections 42 and 50, the accused was entitled to an order of acquittal and consequently the appeal was allowed and the order of conviction and sentence against the accused was set aside.

- 24. It would, thus, be seen that none of the decisions of the Supreme
- c Court after *Balbir Singh case*¹ have departed from that opinion. At least none has been brought to our notice. There is, thus, unanimity of judicial pronouncements to the effect that it is an *obligation* of the empowered officer and his *duty* before conducting the search of the person of a suspect, on the basis of prior information, to *inform* the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a
- d Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so
- e would also render the search illegal and the conviction and sentence of the accused bad.

- 25. To be searched before a gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to
- f have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a gazetted officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on
- g prior information, to effect the search, of not informing the person concerned of the existence of his right to have his search conducted before a gazetted officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the presence of some
- h independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer

had conveyed the information to the person concerned of his right of being searched in the presence of a Magistrate or a gazetted officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with. a

26. The *safeguard or protection* to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right under Section 50 because after *Maneka Gandhi v. Union of India*¹¹ it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not "reasonable, fair and just" and when a statute itself provides for a "just" procedure, it must be honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a gazetted officer or a Magistrate, would be violative of the "reasonable, fair and just procedure" and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be a "fair", just or reasonable procedure. We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of the law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a "reasonable, fair and just procedure". b c d e f

27. Requirement to *inform* has been read in by this Court in other circumstances also, where the statute did not explicitly provide for such a requirement. While considering the scope of Article 22(5) of the Constitution of India and various other provisions of the COFEPOSA Act and the NDPS Act as amended in 1988, a Constitution Bench of this Court in *Kamleshkumar Ishwardas Patel v. Union of India*¹² concluded: (SCC p. 59, para 14) g

¹¹ (1978) 1 SCC 248

¹² (1995) 4 SCC 51 : 1995 SCC (Cri) 643

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- a “14. Article 22(5) must, therefore, be construed to mean that *the person detained has a right to make a representation against the order of detention* which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. *The right to*
- b *make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation.*”

(emphasis ours)

- c 28. This Court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shirk from affording a real opportunity to the suspect, by intimating to him that he has a
- d right “that if he requires” to be searched in the presence of a gazetted officer or a Magistrate, he shall be searched only in that manner. As already observed the compliance with the procedural safeguards contained in Section 50 are intended to serve a dual purpose — to protect a person against false accusation and frivolous charges as also to lend creditability to the search and seizure conducted by the empowered officer. The argument that keeping
- e in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above board. The
- f remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted.

- g 29. In *D.K. Basu v. State of W.B.*¹³ it was opined: (SCC p. 434, para 31)

- h “We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hard-core criminals

¹³ (1997) 1 SCC 416 : 1997 SCC (Cri) 92

like extremists, terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. *It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worse than the disease itself.*" (emphasis ours)

30. In *D.K. Basu case*¹³ the Court also noticed the response of the Supreme Court of the United States of America to such an argument in *Miranda v. Arizona*¹⁴ wherein that Court had said: (SCC pp. 434-35, para 33)

"The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus reipublicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. *The action of the State, however, must be 'right, just and fair'.*" (emphasis supplied)

31. There is indeed a need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed.

32. However, the question whether the provisions of Section 50 are mandatory or directory and, if mandatory, to what extent and the consequences of non-compliance with it does not strictly speaking arise in the context in which the *protection* has been incorporated in Section 50 for the benefit of the person intended to be searched. Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicitly make it *imperative and obligatory* and cast a *duty* of the investigating officer (empowered officer) to ensure that search of the person

¹⁴ 384 US 436 : 16 L Ed 2d 694 (1966)

- (suspect) concerned is conducted in the manner prescribed by Section 50, by *intimating* to the person concerned about the existence of his right, that if he
- a so requires, he shall be searched before a gazetted officer or a Magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded *only* on the basis of the possession of the illicit article, recovered during a search conducted in
 - b violation of the provisions of Section 50 of the Act. The omission may not *viti*ate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazetted officer or a
 - c Magistrate, if he so requires, is sacrosanct and infeasible — it cannot be disregarded by the prosecution except at its own peril.

33. The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal.

- d Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50 and, particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial.

- e 34. The next question which arises for our consideration is whether evidence collected in a search conducted in violation of Section 50, is admissible in evidence. This question arises in the context of the judgment of the Constitution Bench in *Pooran Mal case*⁴.

- f 35. A submission was made in *Ali Mustaffa Abdul Rahman Moosa case*² before the Bench on behalf of the State of Kerala to reconsider the judgment in *Balbir Singh case* in view of the judgment of this Court in *Pooran Mal v. Director of Inspection (Investigation)*⁴. It was urged in *Ali Mustaffa case*² that even if search and seizure of the contraband was held to be illegal having been conducted in violation of the provisions of Section 50, it could not affect the conviction because the recovered articles could still be used as “admissible evidence” under the Evidence Act to establish unlawful possession of the contraband on the person concerned from whom it was recovered during that search. This Court repelled that contention and held
- g that the judgment in *Pooran Mal case*⁴ could not be read to have laid down that a contraband seized as a result of an illegal search or seizure could still be used as admissible evidence “of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner”. The Bench in *Ali Mustaffa case*² observed: (SCC p. 572, para 8)

- h “8. The last submission of the learned counsel for the respondents is that even if the search and seizure of the contraband are held to be illegal

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and contrary to the provisions of Section 50 of the NDPS Act, it would still not affect the conviction because the seized articles could be used as 'evidence' of unlawful possession of a contraband. Reliance for this submission is placed on the judgment of this Court in *Pooran Mal v. Director of Inspection*⁴. We are afraid the submission is misconceived and the reliance placed on the said judgment is misplaced. The judgment in *Pooran Mal case*⁴ only lays down that the evidence collected as a result of illegal search or seizure, could be used as evidence in proceedings against the party under the Income Tax Act. The judgment cannot be interpreted to lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten that liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner. 'Unlawful possession' of the contraband is the sine qua non for conviction under the NDPS Act and that factor has to be established by the prosecution beyond a reasonable doubt. Indeed the seized contraband is evidence but in the absence of proof of possession of the same, an accused cannot be held guilty under the NDPS Act."

36. However, a later two-Judge Bench in *Pirthi Chand case*⁵ relying upon *Pooran Mal case*⁴ observed: (SCC p. 45, para 14)

"14. The evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act. The consequence would be that evidence discovered would be to prove unlawful possession of the contraband under the Act. It is founded in panchnama to seize the contraband from the possession of the suspect/accused. Though the search may be illegal but the evidence collected, i.e., panchnama etc., nonetheless would be admissible at the trial. At the stage of filing charge-sheet it cannot be said that there is no evidence and the Magistrate or the Sessions Judge would be committing illegality to discharge the accused on the ground that Section 50 or other provisions have not been complied with. At the trial an opportunity would be available to the prosecution to prove that the search was conducted in accordance with law. Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into." (emphasis supplied)

37. This view was reiterated in *Jasbir Singh case*⁹ also. It appears that the earlier judgment in *Ali Mustaffa case*² was not brought to the notice of their Lordships in both the above cases.

38. Let us, therefore, first examine the fact situation and the law as laid down in *Pooran Mal case*⁴ and the question of its applicability to cases arising out of offences under the NDPS Act, based only on proof of unlawful possession of an illicit drug or a psychotropic substance on the person of an accused, where the illicit article only was seized during the search conducted in breach of the provisions of Section 50.

- 39.** In *Pooran Mal case*⁴ the relief claimed by the main appellant in this case was in respect of action taken under Section 132 of the Income Tax Act, 1961 by way of search and seizure of certain premises on the ground that the authorisation for the search as also the search and seizure of the materials were illegal. In that case articles consisting of account-books and documents besides some cash, jewellery and other valuables were seized by the Income Tax Authorities purporting to act under the authorisation of a search and seizure issued under Section 132 of the Income Tax Act. The Constitution Bench dealt both with the challenge on constitutional and non-constitutional grounds to the search and seizure. The Court opined that the power of search and seizure in any system of jurisprudence is “an overriding power of the State for the protection of social security and that power is necessarily regulated by law”. The Court then noticed the safeguards provided in Section 132 of the Act and observed: (SCC pp. 357-58, para 11)
- “11. We are, therefore, to see what are the inbuilt safeguards in Section 132 of the Income Tax Act. In the first place, it must be noted that the power to order search and seizure is vested in the highest officers of the department. Secondly, the exercise of this power can only follow a reasonable belief entertained by such officer that any of the three conditions mentioned in Section 132(1)(a), (b) and (c) exists. In this connection it may be further pointed out that under sub-rule (2) of Rule 112, the Director of Inspection or the Commissioner, as the case may be, has to record his reasons before the authorisation is issued to the officers mentioned in sub-section (1). Thirdly, the authorisation for the search cannot be in favour of any officer below the rank of an Income Tax Officer. Fourthly, the authorisation is for specific purposes enumerated in (i) to (v) in sub-section (1) all of which are strictly limited to the object of the search. Fifthly, when money, bullion, etc. is seized the Income Tax Officer is to make a summary enquiry with a view to determine how much of what is seized will be retained by him to cover the estimated tax liability and how much will have to be returned forthwith. The object of the enquiry under sub-section (5) is to reduce the inconvenience to the assessee as much as possible so that within a reasonable time what is estimated due to the Government may be retained and what should be returned to the assessee may be immediately returned to him. Even with regard to the books of account and documents seized, their return is guaranteed after a reasonable time. In the meantime the person from whose custody they are seized is permitted to make copies and take extracts. Sixthly, where money, bullion, etc. is seized, it can also be immediately returned to the person concerned after he makes appropriate provision for the payment of the estimated tax dues under sub-section (5) and lastly, and this is most important, the provisions of the Criminal Procedure Code relating to search and seizure apply, as far as they may be, to all searches and seizures under Section 132. Rule 112 provides for the actual search and seizure being made after observing normal decencies of behaviour. The person in*

charge of the premises searched is immediately given a copy of the list of articles seized. One copy is forwarded to the authorising officer. Provision for the safe custody of the articles after seizure is also made in Rule 112. In our opinion, the safeguards are adequate to render the provisions of search and seizure as less onerous and restrictive as is possible under the circumstances. The provisions, therefore, relating to search and seizure in Section 132 and Rule 112 cannot be regarded as violative of Article 19(f) and (g).” (emphasis supplied) a

40. Dealing with the effect of search and seizure conducted in breach of the provisions of Section 132 of the Income Tax Act, the Court opined: b

“25. In that view, *even assuming*, as was done by the High Court, that the search and seizure were in contravention of the provisions of Section 132 of the Income Tax Act, still the material seized was liable to be used subject to law before the Income Tax Authorities against the person from whose custody it was seized and, therefore, no Writ of Prohibition in restraint of such use could be granted. It must be, therefore, held that the High Court was right in dismissing the two writ petitions. The appeals must also fail and are dismissed with costs.” (SCC p. 366, para 25) c

“Now, if the Evidence Act, 1872 which is a law consolidating, defining and amending the law of evidence, no provision of which is challenged as violating the Constitution — permits relevancy as the only test of admissibility of evidence (See Section 5 of the Act) and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence.” (SCC pp. 363-64, para 23) d

“It, therefore, follows that neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search.” (SCC p. 364, para 23) (emphasis supplied) e

41. On facts, the Court in *Pooran Mal case*⁴ however, found: (SCC p. 369, para 31) f

“31. On the whole, therefore, *we are not inclined to hold that the search and seizure in this writ petition was vitiated by any illegality.*” (emphasis supplied)

42. Similarly, in the other writ petitions dealt with in *Pooran Mal case*⁴ the Court opined: (SCC p. 371, para 34) g

“The search and seizure, therefore, impugned in this writ petition cannot be regarded as illegal.” (emphasis supplied)

43. The judgment in *Pooran Mal case*⁴ has to be considered in the context in which it was rendered. It is a well-settled proposition of law that a decision is an authority for what it decides and not that everything said therein constitutes a precedent. The courts are obliged to employ an intelligent technique in the use of precedents bearing it in mind that a h

decision of the court takes its colour from the questions involved in the case in which it was rendered.

- a **44.** In *CIT v. Sun Engg. Works (P) Ltd.*¹⁵ this Court rightly pointed out: (SCC pp. 385-86, para 39)

b “It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be complete ‘law’ declared by this Court. *The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings.*” (emphasis supplied)

- c **45.** The judgment in *Pooran Mal case*⁴ therefore, cannot be understood to have laid down that an illicit article seized during the search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act can be used as evidence of *unlawful possession of the illicit article* on the person from whom that contraband had been seized during an illegal search. Apart from the position that in *Pooran Mal case*⁴ on facts, it was found that the search and seizure conducted in the cases under consideration in that case were not vitiated by any illegality, the import of that judgment, in the present context, can only be to the effect that material seized during search and seizure, conducted in contravention of the provisions of Section 132 of the Income Tax Act cannot be restrained from being used, subject to law, before the Income Tax Authorities in *other* legal proceedings against the persons, from whose custody that material was seized by issuance of a writ of prohibition. It was not the seized material, in *Pooran Mal case*⁴ which by *itself* could attract any penal action against the assessee. What is implicit from the judgment in *Pooran Mal case*⁴ is that the *seized material* could be used in *other* legal proceedings against an assessee, before the Income Tax Authorities under the Income Tax Act, dealing with escaped income. It is, therefore, not possible to hold that the judgment in *Pooran Mal case*⁴ can be said to have laid down that the “recovered illicit article” can be used as *proof of unlawful possession* of the contraband seized from the suspect as a result of illegal search and seizure. If *Pooran Mal*⁴ judgment is read in the manner in which it has been construed in *State of H.P. v. Pirithi Chand*⁵ (though that issue did not strictly speaking arise for consideration in that case), then there would remain no distinction between recovery of illicit drugs etc. seized during a search conducted “*after*” following the provisions of Section 50 of the NDPS Act and a seizure made during a search conducted “*in breach of*”

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*the provisions of Section 50 of the NDPS Act. Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused. If after careful consideration of the material on record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded. In *R. v. Collins*¹⁶ the Supreme Court of Canada speaking through Lamer, J. (as his Lordship, Chief Justice of the Supreme Court of Canada then was) opined that the use of evidence collected in violation of the Charter rights of an accused would render a trial unfair and the evidence inadmissible. In the words of the Supreme Court of Canada:*

"The situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial." (emphasis ours)

46. The opinion in *Collins case*¹⁶ has been relied upon by the majority of the Supreme Court of Canada in *R. v. Stillman*¹⁷ also.

47. The question of admissibility of evidence, which may be relevant to the question in issue, has thus to be decided in the context and the manner in which the evidence was collected and is sought to be used.

48. In view of the provisions of Chapter IV of the NDPS Act, *mere unlawful possession of a contraband amounts to an offence and is punishable with rigorous imprisonment for terms which shall not be less than 10 years but can extend to 20 years or 30 years in addition to a fine which shall not be less than one lakh of rupees but which may extend to two lakhs or three lakhs of rupees. On a charge of possession of a dangerous drug or a psychotropic substance, if it is established that the accused had the contraband in his possession without authority, he is liable to be punished. "Unlawful possession" of the contraband is the sine qua non for recording conviction under the NDPS Act and the most important ingredient of an offence under the NDPS Act.*

¹⁶ (1987) 1 SCR 265 (Canada)

¹⁷ (1997) 1 RCS 607

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49. Explaining the concept of *possession*, in *Bocking v. Roberts*¹⁸ Lord Widgery, C.J. observed:

- a "In my judgment it is quite clear that *when dealing with a charge of possession of a dangerous drug without authority*, the ordinary maxim of *de minimis* is not to be applied, in other words if it is clearly established that the accused had a dangerous drug in his possession without authority, it is no answer for him to say: 'Oh, but the quantity of the drug which I possessed was so small that the law should take no account of it.'
- b The doctrine of *de minimis* as such in my judgment does not apply but, on the other hand, since the accused is possessing a dangerous drug, it is quite clear that *the prosecution have to prove that there was some of the drug in the possession of the accused to justify the charge....*"
(emphasis ours)

- c 50. In *R. v. Young*¹⁹ it was held that if an accused being in possession of the prohibited substance on seeing the police party swallows the same to avoid detection, he can be convicted for *possession* of the prohibited substance and *not* for *consumption* thereof.

- d 51. Similarly, in *Louis Beaver v. Her Majesty The Queen*²⁰ the Supreme Court of Canada while dealing with a case relating to an offence of possession of forbidden narcotic substance held that the element of knowledge formed a part of the ingredient of possession, where *mere possession* of the forbidden substance *amounts to an offence*.

52. A Constitution Bench of this Court in *Sanjay Dutt v. State through CBI*²¹ while dealing with Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) which reads:

- e "5. *Possession of certain unauthorised arms, etc., in specified areas.*—
Where any person is in possession of any arms and ammunition specified in Columns 2 and 3 of Category I or Category III(a) of Schedule I to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

f spelt out the ingredients of the offence created by Section 5 of TADA and opined: (SCC p. 432, para 26)

- g "26. The position which emerges is this. For constituting the offence made punishable under Section 5 of the TADA Act, the prosecution has to *prove* the aforesaid three ingredients. Once the prosecution has proved '*unauthorised*' '*conscious possession*' of any of the specified arms and ammunition etc. in a '*notified area*' by the accused, the conviction would follow on the strength of the presumption unless the accused proves the

18 (1973) 3 All ER 962

19 (1984) 2 All ER 164

20 1957 SCR 531

21 (1994) 5 SCC 410 · 1994 SCC (Cri) 1433

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non-existence of a fact essential to constitute any of the ingredients of the offence. Undoubtedly, the accused can set up a defence of non-existence of a fact which is an ingredient of the offence to be proved by the prosecution.” (emphasis ours) a

53. The Constitution Bench in *Sanjay Dutt case*² thus clearly held that once the prosecution has proved *unauthorised conscious possession* of any of the specified arms and ammunition etc. in a notified area by the accused, the offence is complete and the conviction must follow on the strength of the statutory presumption, unless the accused proves the non-existence of a fact essential to constitute any of the ingredients of that offence. Indeed, the presumption, even though statutory in nature, was held to be rebuttable. b

54. Thus, even if it be assumed for the sake of argument that all the material seized during an illegal search may be admissible as relevant evidence in *other* proceedings, the illicit drug or psychotropic substance seized in an illegal search cannot *by itself* be used as *proof of unlawful conscious possession* of the contraband by the accused. An illegal search cannot also entitle the prosecution to raise a presumption under Section 54 of the Act because presumption is an inference of fact drawn from the facts which are known as proved. A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. c
d

55. We, therefore, hold that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot *by itself* be used as admissible *evidence of proof of unlawful possession* of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in *other/independent* proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case. e

56. Thus, considered we are of the opinion that the judgment in *Ali Mustaffa case*² correctly interprets and distinguishes the judgment in *Pooran Mal case*⁴ and the broad observations made in *Pirthi Chand case*⁵ and *Jasbir Singh case*⁹ are not in tune with the correct exposition of law, as laid down in *Pooran Mal case*⁴. f

57. On the basis of the reasoning and discussion above, the following conclusions arise: g

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to *search a person*, it is *imperative* for him to *inform* the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing. h

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a (2) That failure to *inform* the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

b (3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded *only* on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

c (4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 a. the trial, would render the trial unfair.

f (5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the *trial*. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

g (6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50,

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may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search. a

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act. b

(9) That the judgment in *Pooran Mal case*⁴ cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search. c

(10) That the judgment in *Ali Mustaffa case*² correctly interprets and distinguishes the judgment in *Pooran Mal case*⁴ and the broad observations made in *Pirthi Chand case*⁵ and *Jasbir Singh case*⁹ are not in tune with the correct exposition of law as laid down in *Pooran Mal case*⁴. d

58. The above conclusions are not a summary of our judgment and have to be read and considered in the light of the entire discussion contained in the earlier part. e

59. We, accordingly, answer the reference in the manner aforesaid.

60. Let the criminal appeals and special leave petitions be now placed for disposal before an appropriate Bench. f

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(BEFORE G.T. NANAVATI AND S.N. PHUKAN, JJ.)

BANNALAL VAHILDA CHAVLA . . . Petitioner;

Versus

UNION OF INDIA AND OTHERS . . . Respondents. g

Writ Petition (Crl.) No. 51 of 1999[†], decided on July 29, 1999

A. Preventive Detention — Detention order — Non-application of mind — Petitioner found in possession of 1140 litres of white-coloured kerosene and 515 litres of blue-coloured kerosene — No restriction on possession, h

[†] Under Article 32 of the Constitution of India

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(BEFORE ALTAMAS KABIR AND MARKANDEY KATJU, JJ.)

RAJBIR SINGH DALAL (DR.)

.. Appellant;

Versus

CHAUDHARI DEVI LAL UNIVERSITY, SIRSA

AND ANOTHER

.. Respondents.

Civil Appeal No. 4908 of 2008[†], decided on August 6, 2008

A. Universities — Appointment — Eligibility — Appointment to post of Reader — Qualification in “relevant subject” — Necessary requirement of — Appellant possessing MA and PhD in Political Science selected to post of Reader in Public Administration — Appointment, if valid — Held, academic experts have regarded Political Science and Public Administration to be one discipline — For the posts of Reader and Lecturer in Public Administration and Political Science, a large number of appointments have been made in the respondent University as well as in the Higher Education Department treating Political Science and Public Administration as one discipline — There are a large number of persons who have an MA and PhD degrees in Political Science and are working as teachers in Public Administration Department, and vice versa — UGC (Qualifications Required of a Person to be Appointed to the Teaching Staff of a University and Institutions Affiliated to it) Regulations, 1991, Regns. 2 and 1.3.2 (Paras 25 and 26)

B. Universities — UGC Regulations regarding Minimum Qualifications for Appointment of Teachers in Universities and Colleges, 1991 — Regns. 2 and 1.3.2 — Qualification — Post of Reader — Regulations though stipulating requirement of Masters degree in “relevant subject” for Lecturer’s post, not mentioning it for post of Reader — Held, the words “in the relevant subject” have to be read into the qualification for the post of Reader also — Interpretation of Statutes — Subsidiary rules — Casus omissus (Paras 12, 13, 26 and 48 & 49)

Siraj-ul-Haq Khan v. Sunni Central Board of Waqf, AIR 1959 SC 198; *State Bank of Travancore v. Mohd. M. Khan*, (1981) 4 SCC 82; *Gujarat Composite Ltd. v. Ranip Nagarpalika*, (1999) 8 SCC 675; *Southern Railway v. T.R. Chellappan*, (1976) 3 SCC 190 : 1976 SCC (L&S) 398; *Beni Prasad v. Hardai Bibi*, ILR (1892) 14 All 67, referred to

Justice G.P. Singh: *Principles of Statutory Interpretation*, 9th Edn., pp. 71-76; K.L. Sarkar: *Mimansa Rules of Interpretation*, P.V. Kane: *History of the Dharmashastra*, Vol. V, Pt. II, Chs. XXIX and XXX, pp. 1282-1351, referred to

C. Interpretation of Statutes — Mimansa principles — Aid/tool for interpretation — Appropriateness of — Held, per Katju, J., the matter may also be considered from our traditional principles of interpretation known as the “Mimansa rules of interpretation” — In Mimansa, casus omissus is known as adhyahara — The adhyahara principle permits us to add words to a legal text — Superiority of Mimansa principles over Maxwell’s principles in this respect is shown by the fact that Maxwell does not go into further detail and does not mention the sub-categories coming under the general category of casus omissus — Anusanga principle (or elliptical extension)

[†] Arising out of SLP (C) No. 19142 of 2006. From the Judgment and Final Order dated 21-9-2006 of the High Court of Punjab and Haryana at Chandigarh in CWP No. 6642 of 2005 : (2007) 7 SLR 120

a states that an expression occurring in one clause is often meant also for a neighbouring clause, and it is only for economy that it is only mentioned in the former — In the present case, the anusanga principle of Mimansa should be utilised and the expression “relevant subject” should also be inserted in the qualification for the post of Reader after the words “at the Masters degree level” (Paras 21, 22 and 25)

Beni Prasad v. Hardai Bibi, ILR (1892) 14 All 67, referred to

Justice G.P. Singh: *Principles of Statutory Interpretation*, 9th Edn., pp. 71-76; K.L. Sarkar: *Mimansa Rules of Interpretation*, P.V. Kane: *History of the Dharmashastra*, Vol. V, Pt. II, Chs. XXIX and XXX, pp. 1282-1351, referred to

b D. Practice and Procedure — Academic issue/question — Decisions/Opinion of experts — Courts reviewing such opinions — Propriety of — University and University Grants Commission holding Public Administration and Political Science to be interchangeable and interrelated — High Court holding them to be distinct and separate disciplines — Held, per Katju, J. it is not appropriate for the Supreme Court to sit in appeal over the opinion of the experts who are of the view that Political Science and Public Administration are interrelated and interchangeable subjects (Paras 25, 29 to 31)

Tariq Islam v. Aligarh Muslim University, (2001) 8 SCC 546 : 2002 SCC (L&S) 1; *University of Mysore v. C.D. Govinda Rao*, AIR 1965 SC 491, followed

d *Uma Kant (Dr.) v. Dr. Bhikalal Jain*, (1992) 1 SCC 105 : 1992 SCC (L&S) 1 : (1992) 19 ATC 35; *Bhushan Uttam Khare v. B.J. Medical College*, (1992) 2 SCC 220 : 1992 SCC (L&S) 554 : (1992) 20 ATC 223; *Rajendra Prasad Mathur v. Karnataka University*, 1986 Supp SCC 740; *P.M. Bhargava v. UGC*, (2004) 6 SCC 661; *J&K State Board of Education v. Feyaz Ahmed Malik*, (2000) 3 SCC 59; *Varanaseya Sanskrit Vishwavidyalaya v. Dr. Rajkishore Tripathi*, (1977) 1 SCC 279 : 1977 SCC (L&S) 121; *Medical Council of India v. Sarang*, (2001) 8 SCC 427; *Bhagwan Singh v. State of Punjab*, (1999) 9 SCC 573 : 2000 SCC (L&S) 185, referred to

e E. Precedents — Binding effect of judgment — In absence of reasoning and based on a concession — Whether to be considered an authority on the matter — Appellant selected for the post of Reader in Public Administration — Writ petition filed challenging appellant’s appointment on grounds of not possessing requisite qualification for the post as he had MA and PhD in Political Science and not in Public Administration — High Court relying on the decision of the Supreme Court in *Bhanu Prasad Panda (Dr.) case*, (2001) 8 SCC 532 wherein it was held, subjects of Public Administration and Political Science are distinct and separate and a person possessing the academic qualification in the discipline of Political Science could not be appointed in the discipline of Public Administration — Applicability — Held, the decision of this Court in *Bhanu Prasad Panda (Dr.) case* cannot be read as a Euclid’s formula or treated as a precedent, since it has not given any reason for holding that Political Science and Public Administration are distinct and separate subjects, and since the aforesaid decision was given on a concession

Held :

Per Katju, J.

h As regards the decision in *Bhanu Prasad Panda (Dr.) case*, (2001) 8 SCC 532 it has been observed therein that “it is not in controversy” that the post of Lecturer in Public Administration and Political Science are distinct and separate. The use of the words “it is not in controversy” shows that a concession was made

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on the point by learned counsel for the respondent in that case. Hence the observation cannot be regarded as a precedent. Moreover, no reasoning has been given in the aforesaid passage (quoted above) as to why it has been held that Political Science and Public Administration are distinct and separate subjects. a

(Para 33)

The decision of a court is a precedent if it lays down some principle of law supported by reasons. Mere casual observations or directions without laying down any principle of law and without giving reasons does not amount to a precedent. b

(Para 34)

The decision of the Supreme Court in *Bhanu Prasad Panda (Dr.) case* cannot be read as a Euclid's formula or treated as a precedent, since it has not given any reason for holding that Political Science and Public Administration are distinct and separate subjects, and since the aforesaid decision was given on a concession. c

(Para 41)

State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080, *relied on*

Bhanu Prasad Panda (Dr.) v. Chancellor, Sambalpur University, (2001) 8 SCC 532 : 2002 SCC (L&S) 14, *explained and distinguished* d

Karnataka SRTC v. Mahadeva Shetty, (2003) 7 SCC 197 : 2003 SCC (Cri) 1722; *State of Orissa v. Sudhansu Sekhar Misra*, AIR 1968 SC 647; *Quinn v. Leathem*, 1901 AC 495 : (1900-03) All ER Rep 1 (HL); *Allen v. Flood*, 1898 AC 1 : (1895-99) All ER Rep 52 (HL); *Ambica Quarry Works v. State of Gujarat*, (1987) 1 SCC 213; *Bhavnagar University v. Palitana Sugar Mill (P) Ltd.*, (2003) 2 SCC 111; *Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani*, (2004) 8 SCC 579; *London Graving Dock Co. Ltd. v. Horton*, 1951 AC 737 : (1951) 2 All ER 1 (HL); *Home Office v. Dorset Yacht Co. Ltd.*, 1970 AC 1004 : (1970) 2 WLR 1140 : (1970) 2 All ER 294 (HL); *Shepherd Homes Ltd. v. Sandham (No. 2)*, (1971) 1 WLR 1062 : (1971) 2 All ER 1267; *British Railways Board v. Herrington*, 1972 AC 877 : (1972) 2 WLR 537 : (1972) 1 All ER 749 (HL), *referred to* e

Per Kabir, J. (concurring)

The distinction made by the High Court between Public Administration and Political Science in *Bhanu Prasad Panda (Dr.) case* is not based on any jurisprudential reasoning but on the basis of a personal evaluation of the prevailing circumstances. On the other hand, in the instant case, both the University and the University Grants Commission, have supported the stand of the appellant and have filed affidavits in support thereof. In deciding *Bhanu Prasad Panda (Dr.) case*, the Supreme Court did not have the benefit of the views of the University and the University Grants Commission and the conclusion was arrived at on the basis of a personal understanding of Public Administration and Political Science. This is where the distinction lies between the decision in *Bhanu Prasad Panda (Dr.) case* and the case in hand. The decision in *Bhanu Prasad Panda (Dr.) case* does not reflect the aforesaid position and does not also indicate the reason why and on what basis such a decision holding Public Administration and Political Science to be two distinct disciplines had been arrived at. f

(Paras 47 and 50) g
 B-M/A/38860/CL

Advocates who appeared in this case :

P.S. Patwalia, Senior Advocate (Rupansh Purit, Harikesh Singh and Kamal Mohan Gupta, Advocates) for the Appellant;

Nidhesh Gupta, Senior Advocate (Tarun Gupta, Deepak Goel, Ms S. Janani, Amitesh Kumar, Gopal Singh, Jasbir Singh Malik, R.K. Tripathi, Rahul Tyagi, K.P. Singh and S.K. Sabharwal, Advocates) for the Respondents. h

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- b 6. (2001) 8 SCC 532 : 2002 SCC (L&S) 14, *Bhanu Prasad Panda (Dr.) v. Chancellor, Sambalpur University* 288h, 294b, 297a-b, 297g-h, 298a-b, 298b, 298c, 298f
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- d 13. (1992) 1 SCC 105 : 1992 SCC (L&S) 1 : (1992) 19 ATC 35, *Uma Kant (Dr.) v. Dr. Bhikalal Jain* 293b
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- e 18. (1976) 3 SCC 190 : 1976 SCC (L&S) 398, *Southern Railway v. T.R. Chellappan* 290f-g
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- g 26. 1901 AC 495 : (1900-03) All ER Rep 1 (HL), *Quinn v. Leathem* 295a-b
27. 1898 AC 1 : (1895-99) All ER Rep 52 (HL), *Allen v. Flood* 295b
28. ILR (1892) 14 All 67, *Beni Prasad v. Hardai Bibi* 291b

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The Judgments[†] of the Court were delivered by

MARKANDEY KATJU, J.— Leave granted.

2. This appeal has been filed against the impugned judgment and order dated 21-9-2006 of the High Court of Punjab and Haryana in CWP No. 6642 of 2005.

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

4. The short question in this appeal is whether the appellant fulfils the requisite academic qualification for appointment to the post of Reader in Public Administration in Chaudhary Devi Lal University, Sirsa.

5. The respondent University issued an advertisement for direct recruitment for various posts, including the post of Reader in Public Administration. The appellant herein, claiming to be fully eligible and qualified for the post of Reader in Public Administration, applied for the aforementioned post on the prescribed format. A Selection Committee interviewed the appellant on 18-7-2004 as per the call letter dated 8-7-2004. The appellant was selected as Reader and he joined as such on 4-4-2005.

6. Respondent 2 herein, Dr. Raj Kumar Siwach, who was a Lecturer in Public Administration had also applied for the post of Reader, but he was not selected and instead the appellant was selected. Hence, Respondent 2 filed a writ petition in the Punjab and Haryana High Court being CWP No. 6642 of 2005 in which he alleged that the appellant herein, Dr. Rajbir Singh Dalal, did not possess the requisite qualification for the post of Reader in Public Administration. It was alleged in the writ petition that the appellant was an MA and PhD in Political Science and not in Public Administration. Hence, it was alleged that the appellant was not eligible for being selected and appointed as Reader in Public Administration.

7. In the counter-affidavit filed by Respondent 1, the University, it was stated that Public Administration is one of the branches of Political Science, and hence the appellant herein was rightly selected by the Selection Committee consisting of eminent experts after evaluating his academic qualifications.

8. In the counter-affidavit filed by the appellant herein before the High Court it was admitted that the appellant had his qualification from the discipline of Political Science, but it was asserted that he was subjected to a process of selection before an expert committee consisting of the Vice-Chancellor of the University, Dr. L. Goyal, Professor of Public Administration, Punjab University and Dr. R.K. Tiwari, a Professor in Indian Institute of Public Administration, New Delhi.

9. The High Court by the impugned judgment dated 21-9-2006 allowed the writ petition and set aside the selection and appointment of the appellant. The High Court relied on the decision of this Court in *Bhanu Prasad Panda (Dr.) v. Chancellor, Sambalpur University*¹ in which it was observed that the

[†] Ed.: Kabir, J. delivered a concurring judgment.

¹ (2001) 8 SCC 532 : 2002 SCC (L&S) 14

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a subjects of Public Administration and Political Science are distinct and separate and a person possessing the academic qualification in the discipline of Political Science could not be appointed in the discipline of Public Administration.

10. The High Court also relied on Regulation 2 of the UGC Regulations which states as under:

b “2. *Qualification.*—No person shall be appointed to a teaching post in a university or in any institution including constituent or affiliated colleges recognised under clause (f) of Section 2 of the University Grants Commission Act, 1956 or in an institution deemed to be a university under Section 3 of the said Act in a subject if he/she does not fulfil the requirements as to the qualifications for the appropriate subjects as provided in the annexure:

c Provided that any relaxation in the prescribed qualifications can only be made by the University Grants Commission in a particular subject in which NET is not being conducted or enough number of candidates are not available with NET qualifications for a specified period only. (This relaxation, if allowed, would be given based on sound qualification and would apply to affected universities for that particular subject for the specified period. No individual applications would be entertained.):

d Provided further that these Regulations shall not be applicable to such cases where selections of the candidates having had the then requisite minimum qualification as were existing at that time through duly constituted Selection Committee for making appointments to the teaching posts have been made prior to the enforcement of these Regulations.

e 1.3.2. *Reader.*—Good academic record with a doctoral degree or equivalent published work. In addition to these, candidates when join from outside the university system, shall also possess at least 55% of the marks or an equivalent grade of B in the seven-point scale with latter grades, O, A, B, C, D, E and F at the Masters degree level.

f Five years of experience of teaching and/or research excluding the period spent for obtaining the research degrees and has made one mark in the areas of scholarship as evidenced by quality of publications, contribution to educational innovation, design of new courses and curricula.

1.3.3. *Lecturer.*—Good academic record with at least 55% of the marks or, an equivalent grade of B in the seven-point scale with latter grades, O, A, B, C, D, E and F at the Masters degree level, *in the relevant subject* from an Indian university, or an equivalent degree from a foreign university.

g Besides fulfilling the above qualifications, candidates should have cleared the eligibility test (NET) for lecturers conducted by UGC, CSIR, or similar test accredited by UGC.

Note.—NET shall remain the compulsory requirement for appointment as Lecturer even for candidates having PhD degree. However, the candidate who have completed MPhil degree or have submitted PhD thesis in the subject concerned up to 31-12-1993 are exempted from appearing in the NET examination.”

h 11. The High Court was of the view that a person is not qualified for appointment as Reader unless he has qualification in the appropriate subject.

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The High Court was also of the view that since the appellant had a qualification in the discipline of Political Science he could not be appointed in the discipline of Public Administration. Aggrieved, this appeal has been filed by the appellant in this Court. a

12. Mr P.S. Patwalia, learned Senior Counsel for the appellant submitted that in the UGC Regulations for the post of Lecturer the requirement was a Masters degree *in the relevant subject*, whereas the expression “in the relevant subject” is not mentioned in the qualifications for the post of Reader. Hence, he submitted that it was not necessary for the appellant to have a Masters degree in the relevant subject for appointment to the post of Reader. We regret we cannot agree. In our opinion, the words “in the relevant subject” has to be read into the qualification for the post of Reader also. To take a contrary view would lead to a strange situation as that would mean that a person who has an MA degree in Music or History, is qualified to be appointed as Reader in Political Science. b c

13. No doubt, the ordinary principle of interpretation is that words should neither be added nor deleted from a statutory provision. However, there are some exceptions to the rule where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a strict construction which leads to absurdity or deprives certain existing words of all meaning, and in this situation it is permissible to supply the words (vide *Principles of Statutory Interpretation* by Justice G.P. Singh, 9th Edn., pp. 71-76). d

14. Thus, in *Siraj-ul-Haq Khan v. Sunni Central Board of Waqf*², the Supreme Court interpreted the words “any person interested in a waqf” in Section 5(2) of the U.P. Muslim Waqfs Act, 1936 as meaning “any person interested in what is held to be a waqf”. e

15. Similarly, in *State Bank of Travancore v. Mohd. M. Khan*³, while construing Section 4(1) of the Kerala Agriculturists’ Debt Relief Act, 1970 the Supreme Court interpreted the words “any debt due before the commencement of this Act to any banking company” as meaning “any debt due at and before the commencement of this Act”. f

16. Similarly, in *Gujarat Composite Ltd. v. Ranip Nagarpalika*⁴ the Supreme Court interpreted the words “grog minerals” to mean “grog and minerals”. In *Southern Railway v. T.R. Chellappan*⁵ the Supreme Court interpreted the words “any party to an arbitration agreement” occurring in Section 33 of the Arbitration Act, 1940 to mean “a person who is alleged to be a party to an arbitration agreement”. g

17. We may also consider the matter from our traditional principles of interpretation known as the “Mimansa rules of interpretation”. h

2 AIR 1959 SC 198

3 (1981) 4 SCC 82 : AIR 1981 SC 1744

4 (1999) 8 SCC 675 : AIR 2000 SC 135

5 (1976) 3 SCC 190 : 1976 SCC (L&S) 398 : AIR 1975 SC 2216

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18. It is deeply regrettable that in our courts of law lawyers quote Maxwell and Craies but nobody refers to the Mimansa principles of interpretation. Most lawyers would not have even heard of their existence. Today our so-called educated people are largely ignorant about the great intellectual achievements of our ancestors and the intellectual treasury which they have bequeathed us. Mimansa principles of interpretation is part of that great intellectual treasury, but it is distressing to note that apart from the reference to these principles in the judgment of Sir John Edge, the then Chief Justice of the Allahabad High Court, in *Beni Prasad v. Hardai Bibi*⁶, over a hundred years ago and in some judgments of one of us (M. Katju, J.) there has been almost no utilisation of these principles even in our own country. Many of the Mimansa principles are rational and scientific and can be utilised in the legal field (see in this connection *K.L. Sarkar's Mimansa Rules of Interpretation* which is a collection of Tagore Law Lectures delivered in 1905 containing the best exposition of these principles in English. Most other books on Mimansa are in Sanskrit).

19. The Mimansa principles of interpretation, as laid down by Jaimini around 5th century BC in his sutras and as explained by Sabar, Kumarila Bhatta, Prabhakar, Mandan Mishra, Shalighnath, Parthasarathy Mishra, Apadeva, Shree Bhat Shankar, etc. were regularly used by our renowned jurists like Vijñaneshwara (author of *Mitakshara*), Jimutvahana (author of *Dayabhaga*), Nanda Pandit (author of *Dattaka Mimansa*), etc. whenever they found any conflict between the various smritis e.g. *Manusmriti* and *Yajnavalkya Smriti*, or ambiguity, ellipse or absurdity in any smriti. Thus, the Mimansa principles were our traditional system of interpretation of legal texts. Although originally they were created for interpreting religious texts pertaining to the yagya (sacrifice), they were so rational and logical that gradually they came to be utilised in law, philosophy, grammar, etc., that is, they became of universal application. Thus, Shankaracharya has used the Mimansa adhikaranas (principles) in his bhashya on the vedanta sutras.

20. The Mimansa principles were regularly used by our great jurists for interpreting legal texts (see also in this connection *P.V. Kane's History of the Dharmashastra*, Vol. V, Pt. II, Ch. XXIX and Ch. XXX, pp. 1282-1351).

21. In Mimansa, casus omissus is known as adhyahara. The adhyahara principle permits us to add words to a legal text. However, the superiority of the Mimansa principles over Maxwell's principles in this respect is seen by the fact that Maxwell does not go into further detail and does not mention the sub-categories coming under the general category of casus omissus. In the Mimansa system, on the other hand, the general category of adhyahara has under it several sub-categories e.g. anusanga, anukarsha, vakyashesha, etc. Since in this case we are concerned with the anusanga principle, we may explain it in some detail.

22. The anusanga principle (or elliptical extension) states that an expression occurring in one clause is often meant also for a neighbouring

clause, and it is only for economy that it is only mentioned in the former (see Jaimini 2, 2, 16). The anusanga principle has a further sub-categorisation. If a clause which occurs in a subsequent sentence is to be read into a previous sentence it is a case of tadapakarsha, but when it is vice versa it is a case of tadutkarsha. a

23. The anusanga principle of Mimansa was used by Jimutvahana in *Dayabhaga*. Jimutvahana found that there is a text of Manu which states:

“Of a woman married according to the Brahma, Daiva, Arsha, Gandharva and Prajapartya form, the property shall go to her husband if she dies without issue. But her property, given to her on her marriage in the form called Asura, Rakshasa and Paisacha, on her death without issue, shall become the property of her parents.” b

It can be seen that in the second sentence the word “property” is qualified by the words “given to her on her marriage”, whereas in the first sentence there is no such qualification. Jimutvahana, using the anusanga principle of Mimansa, said that the words “given to her on her marriage” should also be inserted in the first sentence after the word “property”, and hence there also the word “property” must be interpreted in a qualified sense. c

24. In MITAKSHARA also the anusanga principle of Mimansa has been used. *Yajnavalkya II*, 135-36 lays down the order of succession to the wealth of a person dying sonless. *Yajnavalkya II*, 137 deals with succession to property of a forest hermit, an ascetic, or a perpetual vedic student. *Mitakshara* then holds that *Yajnavalkya II*, 138 “*samaristinastu samaristi*” is to be construed as an exception to *Yajnavalkya II*, 135, 136 and understands that the words “of one dying without having a son” (grandson or great grandson) are to be supplied before *Yajnavalkya II*, 138 from II, 136 i.e. there is to be anusanga of the words “*svaryatasya-putrasya*”. d e

25. In our opinion, in the present case, the anusanga principle of Mimansa should be utilised and the expression “relevant subject” should also be inserted in the qualification for the post of Reader after the words “at the Masters degree level”. Hence, we cannot accept the submission of Mr Patwalia in this respect. However, we agree with Mr Patwalia that since academic experts have regarded Political Science and Public Administration to be one discipline, it is not right for this Court to sit in appeal over the opinion of the experts. f

26. Mr Patwalia, learned counsel has pointed out that for the posts of Reader and Lecturer in Public Administration and Political Science, a large number of appointments have been made in the respondent University as well as in the Higher Education Department of Haryana treating Political Science and Public Administration as one discipline. There are a large number of persons who have MA and PhD degrees in Political Science and are working as teachers in Public Administration Department, and vice versa. g

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27. In *Tariq Islam v. Aligarh Muslim University*⁷ following its earlier decision of the Constitution Bench of this Court in *University of Mysore v. C.D. Govinda Rao*⁸, this Court observed that “normally it is wise and safe for the courts to leave the decision of academic matters to experts who are more familiar with the problems they face than the courts generally are”.

28. A similar view has been expressed in several decisions of this Court e.g. *Uma Kant (Dr.) v. Dr. Bhikalal Jain*⁹ (SCC para 9 : JT para 9), *Bhushan Uttam Khare v. B.J. Medical College*¹⁰ (SCC para 8 : JT para 8), *Rajendra Prasad Mathur v. Karnataka University*¹¹ (para 7), *P.M. Bhargava v. UGC*¹² (SCC para 13), *J&K State Board of Education v. Feyaz Ahmed Malik*¹³, *Varanaseya Sanskrit Vishwavidyalaya v. Dr. Rajkishore Tripathi*¹⁴ (SCC para 12), *Medical Council of India v. Sarang*¹⁵ (SCC para 6) and *Bhagwan Singh v. State of Punjab*¹⁶ (SCC para 6).

29. It may be mentioned that on a clarification sought from UGC whether a candidate who possesses a Masters degree in Public Administration is eligible for the post of Lecturer in Political Science and vice versa, UGC wrote a letter dated 5-3-1992 to the Registrar, M.D. University, Rohtak stating that the subjects of Political Science and Public Administration are interchangeable and interrelated, and a candidate who possesses Masters degree in Public Administration is eligible as Lecturer in Political Science and vice versa. Thus, this is the view of UGC, which is an expert in academic matters, and the Court should not sit in appeal over this opinion and take a contrary view.

30. Learned counsel for the appellant has also pointed out that a large number of universities in this country have a single department for both the subjects of Political Science and Public Administration, and this also demonstrates that the subjects Political Science and Public Administration are interchangeable and interrelated. Political Science is the mother subject and Public Administration is the offshoot of the same.

31. We agree with Mr Patwalia, learned counsel, that it is not appropriate for this Court to sit in appeal over the opinion of the experts who are of the view that Political Science and Public Administration are interrelated and interchangeable subjects, and hence a candidate who possesses Masters degree in Public Administration is eligible for the post of Lecturer in Political Science and vice versa. We are told that a large number of persons having

7 (2001) 8 SCC 546 : 2002 SCC (L&S) 1
 8 AIR 1965 SC 491
 9 (1992) 1 SCC 105 : 1992 SCC (L&S) 1 : (1992) 19 ATC 35 : JT (1991) 4 SC 75
 10 (1992) 2 SCC 220 : 1992 SCC (L&S) 554 : (1992) 20 ATC 223 : JT (1992) SC 583
 11 1986 Supp SCC 740 : AIR 1986 SC 1448
 12 (2004) 6 SCC 661
 13 (2000) 3 SCC 59
 14 (1977) 1 SCC 279 : 1977 SCC (L&S) 121
 15 (2001) 8 SCC 427
 16 (1999) 9 SCC 573 : 2000 SCC (L&S) 185

qualifications in the interchangeable/interrelated subjects have been appointed Readers/Professors/Lecturers and are continuing as such in various colleges and universities in the State.

32. In Para 5 of the counter-affidavit filed by the respondent University before the High Court, it has been specifically stated that Public Administration is one of the branches of Political Science, and the appellant was selected by a Selection Committee consisting of eminent experts after evaluating his qualifications and work.

33. As regards the decision in *Bhanu Prasad Panda (Dr.) v. Chancellor, Sambalpur University*¹ we have carefully perused the same. In para 5 of the said judgment it has been observed: (SCC pp. 535-36)

“5. ... Though the Department concerned for which the appointment is to be made is that of ‘Political Science and Public Administration’, the appointment with which we are concerned, is of Lecturer in Political Science and not Public Administration and subject-matterwise they are different and not one and the same. It is not in controversy that the posts of Lecturers in Public Administration and in Political Science are distinct and separate and on selection the appellant could not have been appointed as Lecturer in Public Administration...”

A perusal of the above passage shows that the observation that Political Science and Public Administration are distinct and separate subjects was apparently given on a concession, because what has been stated therein is that “it is not in controversy” that the post of Lecturer in Public Administration and Political Science are distinct and separate. The use of the words “it is not in controversy” shows that a concession was made on the point by learned counsel for the respondent in that case. Hence the observation cannot be regarded as a precedent. Moreover, no reasoning has been given in the aforesaid passage (quoted above) as to why it has been held that Political Science and Public Administration are distinct and separate subjects.

34. The decision of a court is a precedent if it lays down some principle of law supported by reasons. Mere casual observations or directions without laying down any principle of law and without giving reasons does not amount to a precedent.

35. In *State of Punjab v. Baldev Singh*¹⁷ a Constitution Bench of this Court observed (vide SCC para 43) that a decision is an authority for what it decides (i.e. the principle of law it lays down), and not that everything said therein constitutes a precedent.

36. In *Karnataka SRTC v. Mahadeva Shetty*¹⁸ (vide SCC para 23) this Court observed that the only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided.

1 (2001) 8 SCC 532 : 2002 SCC (L&S) 14

17 (1999) 6 SCC 172 : 1999 SCC (Cri) 1080

18 (2003) 7 SCC 197 : 2003 SCC (Cri) 1722

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37. As observed by this Court in *State of Orissa v. Sudhansu Sekhar Misra*¹⁹ (vide AIR para 13): (AIR pp. 651-52, para 13)

a “13. ... A decision is only an authority for what it actually decides. *What is of the essence in a decision is its ratio* and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in *Quinn v. Leatham*²⁰: (All ER p. 7 G-I)

b Now before discussing *Allen v. Flood*²¹ and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, *but governed and qualified by the particular facts of the case* in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.” (emphasis supplied)

d 38. In *Ambica Quarry Works v. State of Gujarat*²² (vide SCC para 18) this Court observed: (SCC p. 221)

e “18. ... The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.”

39. In *Bhavnagar University v. Palitana Sugar Mill (P) Ltd.*²³ (vide SCC para 59) this Court observed: (SCC p. 130)

f “59. ... It is also well settled that *a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.*” (emphasis supplied)

g 40. As held in *Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani*²⁴ a decision cannot be relied on without disclosing the factual situation. In the same judgment this Court also observed: (SCC pp. 584-85, paras 9-12)

“9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. *Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute* and that too taken out of their context. These observations must be read in the

19 AIR 1968 SC 647

20 1901 AC 495 : (1900-03) All ER Rep 1 (HL)

21 1898 AC 1 : (1895-99) All ER Rep 52 (HL)

22 (1987) 1 SCC 213

23 (2003) 2 SCC 111

24 (2004) 8 SCC 579 : AIR 2004 SC 4778

context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton*²⁵ (AC at p. 761), Lord MacDermot observed: (All ER p. 14 C-D)

‘The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge.’

10. In *Home Office v. Dorset Yacht Co. Ltd.*²⁶ (All ER p. 297g-h) Lord Reid said, ‘Lord Atkin’s speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances.’ Megarry, J. in *Shepherd Homes Ltd. v. Sandham (No. 2)*²⁷, (All ER p. 1274d-e) observed: ‘One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament;’ and, in *British Railways Board v. Herrington*²⁸ Lord Morris said: (All ER p. 761c)

‘There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.’

11. Circumstantial flexibility, *one additional or different fact may make a world of difference between conclusions in two cases*. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

‘Each case depends on its own facts and a close similarity between one case and another is not enough because *even a single significant detail may alter the entire aspect*, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

* * *

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My

25 1951 AC 737 : (1951) 2 All ER 1 (HL)

26 1970 AC 1004 : (1970) 2 WLR 1140 : (1970) 2 All ER 294 (HL)

27 (1971) 1 WLR 1062 : (1971) 2 All ER 1267

28 1972 AC 877 : (1972) 2 WLR 537 : (1972) 1 All ER 749 (HL)

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plea is to keep the path of justice clear of obstructions which could impede it.' ” (emphasis supplied)

a 41. In view of the above, we are of the opinion that the decision of this Court in *Bhanu Prasad Panda (Dr.) case*¹ cannot be read as a Euclid's formula or treated as a precedent, since it has not given any reason for holding that Political Science and Public Administration are distinct and separate subjects, and since the aforesaid decision was given on a concession.

b 42. For the foregoing reasons, we are of the opinion that the impugned judgment and order of the High Court cannot be sustained and it is hereby set aside. The appeal is allowed and the writ petition filed in the High Court stands dismissed. There shall be no order as to costs.

c ALTAMAS KABIR, J. (*concurring*)— Having had the benefit of going through my learned Brother's draft judgment, I wish to indicate my own views in arriving at the same conclusion as arrived at by my learned Brother but by traversing a different route. Since the facts of the case have been adequately dealt with by my learned Brother, I shall confine myself to the legal aspect only.

d 44. In my view, the main question which falls for consideration in this appeal is whether the appellant, who has a postgraduate degree and PhD in Political Science could have been appointed as Reader in Public Administration by the respondent University. The answer to the connected question, which flows from the first, as to whether the High Court was right in quashing the appellant's appointment as Reader in Public Administration, depends on the answer to the first.

e 45. As has been pointed out by my learned Brother, the University has in its counter-affidavit taken a stand that Public Administration is one of the branches of Political Science and the Selection Committee comprised of eminent scholars had rightly chosen the appellant for the post of Reader after considering his academic achievements and also relying upon the view of the University Grants Commission in its letter dated 5-3-1992 stating that the subjects of Political Science and Public Administration are interchangeable and interrelated and that a candidate who possesses a Masters degree in Public Administration is eligible to be appointed as Lecturer in Political Science. Similarly, a candidate possessing a Masters degree in Political Science is eligible for appointment to the post of Lecturer in Public Administration.

g 46. Despite the aforesaid views expressed by the expert bodies such as the University and the University Grants Commission, the High Court has held Public Administration and Political Science to be distinct and separate disciplines. In arriving at such conclusion, the High Court has relied on a decision of this Court in *Bhanu Prasad Panda (Dr.) v. Chancellor, Sambalpur University*¹, wherein this Court had held Public Administration and Political Science to be two separate disciplines. Further reliance has been placed by the High Court on Regulation 2 of the University Grants Commission Rules

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¹ *Bhanu Prasad Panda (Dr.) v. Chancellor, Sambalpur University*, (2001) 8 SCC 532 : 2002 SCC (L&S) 14

to arrive at the finding that for appointment to the post of Reader a candidate would have to be qualified in the relevant subject.

47. As has also been commented upon by my learned Brother, the distinction made by the High Court between Public Administration and Political Science in *Bhanu Prasad Panda (Dr.) case*¹ is not based on any jurisprudential reasoning but on the basis of a personal evaluation of the prevailing circumstances. On the other hand, in the instant case, both the University and the University Grants Commission, have supported the stand of the appellant and have filed affidavits in support thereof. In deciding *Bhanu Prasad Panda (Dr.)*¹ this Court did not have the benefit of the views of the University and the University Grants Commission and the conclusion was arrived at on the basis of a personal understanding of Public Administration and Political Science. This is where the distinction lies between the decision in *Bhanu Prasad Panda (Dr.) case*¹ and the case in hand.

48. The recruitment rules followed by the University clearly indicate that in order to be appointed as Lecturer in a particular discipline a candidate must have a postgraduate degree in the relevant subject. On the other hand, for appointment to the post of Reader such a condition has not been specified. In fact, in Regulation 2 it has been generally indicated that no person shall be appointed to a teaching post in the University or in any institution, including constituent or affiliated colleges recognised under the UGC Act, 1956, or any institution deemed to be a university under Section 3 of the said Act, in a subject, if he/she does not fulfil the requirement as to the qualifications for the appropriate subject.

49. In my view, the omission in the Regulations cannot be said to be unintentional or a case of casus omissus. In my view, the expression “appropriate subject” was intended to cover the post of Reader and once the expert bodies had indicated that the appellant who held a postgraduate degree in Political Science was eligible to be appointed to the post of Reader in Public Administration and had been rightly appointed to such post, it is normally not for the courts to question such opinion, unless it has specialised knowledge of the subject.

50. Significantly, the decision in *Bhanu Prasad Panda (Dr.) case*¹ does not reflect the aforesaid position and does not also indicate the reason why and on what basis such a decision holding Public Administration and Political Science to be two distinct disciplines had been arrived at.

51. In such circumstances, I agree with my learned Brother that the judgment of the High Court impugned in this appeal cannot be sustained. The appeal is accordingly allowed; the writ petition filed in the High Court by the respondent University is dismissed and the appointment of the respondent as Reader in Public Administration is upheld.

52. There will be no order as to costs.

¹ *Bhanu Prasad Panda (Dr.) v. Chancellor, Sambalpur University*, (2001) 8 SCC 532 : 2002 SCC (L&S) 14

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resolutions or deliberations is not acceptable in the domain of law. The question of estoppel also cannot stand in the way as the High Court has correctly pointed out that the freedom guaranteed under the Constitution with regard to the faith and religion, cannot take away the right in changing the faith and religion after giving a fresh look and thinking at any time and thereby cannot be bound by any rules of estoppel. Therefore, the resolution only resolved to accept the recommendation of joint unification but does not refer to dissolution. a

31. Having analysed the facts and the law in the matter, we are of the opinion that the High Court and the City Civil Court have rightly adjudicated on the matter in question and correctly set aside the order passed by the Charity Commissioner. b

32. Accordingly, we affirm the order¹ passed by the High Court.

33. For the reasons aforementioned, we do not find any merit in the present appeals and the same are dismissed accordingly. c

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(BEFORE ANIL R. DAVE AND DIPAK MISRA, JJ.)

ARASMETA CAPTIVE POWER COMPANY
PRIVATE LIMITED AND ANOTHER . . . Appellants; d

Versus

LAFARGE INDIA PRIVATE LIMITED . . . Respondent.

Civil Appeal No. 11003 of 2013[†], decided on December 12, 2013

A. Arbitration and Conciliation Act, 1996 — Ss. 11(6) and 16 — e
Appointment of arbitrator — Preliminary matters that may be decided by Chief Justice or designate — Arbitrability of a claim/dispute — Claim raised by one of the parties if falls under matters excepted from scope of arbitration agreement — Determination of, by Chief Justice or designate on merits — Permissibility — Held, while dealing with application under S. 11(6), Chief Justice/designate would not be justified in deciding whether a claim falls under excepted matter or not under the arbitration agreement — f
Decision as to such issues, held, to be left to arbitrator — Such issue falls within “third category” of issues that may come up before Chief Justice/designate, as classified in para 22 of *Boghara Polyfab*, (2009) 1 SCC 267, which category of issues must be left exclusively to be determined by arbitrator g

— Application for referring disputes between parties to arbitration objected to on ground that disputes concerned fell under excepted matters and were liable to be referred to an expert for resolution as per agreement but

1 *Shirish Christian v. Maganlal Mangaldas Gameti*, First Appeal No. 1535 of 2009, decided on 23-4-2012 (Guj) h

[†] Arising out of SLP (C) No. 29651 of 2013. From the Judgment and Order dated 22-7-2013 of the High Court of Chhattisgarh at Bilaspur in Arbitration Application No. 24 of 2012

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- not to an arbitrator — Chief Justice considering various terms in agreement, on merits decided that said disputes do not fall under excepted matters and appointed arbitrator — Sustainability — Held, Chief Justice or designate may not examine issue of “arbitrability” of a dispute — Once Chief Justice/designate finds valid arbitration agreement between parties, issue of arbitrability of disputes must be left for decision of arbitrator — Thus, held, in instant case designate Judge erred in deciding said issue on merits instead of leaving it to decision of arbitrator — Hence, while retaining order of appointment of arbitrator, order of Chief Justice on excepted matters, set aside

- B. Precedents — Ratio Decidendi — What is — Explained — Held, ratio decidendi of a judgment has to be culled out from entire judgment, upon reading it as a whole — A line from a judgment or one observation from here and there does not acquire status of “ratio decidendi” of the judgment — Constitution of India, Art. 141**

Held :

- For the purpose of setting into motion the arbitral procedure, the Chief Justice or his designate is required to decide the issues, namely: (i) territorial jurisdiction, (ii) existence of an arbitration agreement between the parties, (iii) existence or otherwise of a live claim, and (iv) existence of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator. That apart, under certain circumstances the Chief Justice or his designate is also required to see whether a long-barred claim is sought to be restricted and whether the parties had concluded the transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection. (Para 18)

- It is only for the purpose of finding out whether the arbitral procedure has to be started, that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is true about the issue of limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue had not become dead by the lapse of time or that any party to the agreement has not slept over its right beyond the time permitted by law to agitate those issues covered by the agreement. The Chief Justice or his designate is required to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, whether the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation. (Para 20)

- The ratio of any decision must be understood in the background of the facts of that case. The case is only an authority for what it actually decides, and not what logically follows from it. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or Judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. It is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If

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more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi. (Paras 32 to 34)

Ambica Quarry Works v. State of Gujarat, (1987) 1 SCC 213; *Quinn v. Leatham*, 1901 AC 495 (HL); *Krishena Kumar v. Union of India*, (1990) 4 SCC 207 : 1991 SCC (L&S) 112 : (1990) 14 ATC 846; *Caledonian Railway Co. v. Walker's Trustees*, (1882) LR 7 AC 259 : (1881-85) All ER Rep 592 : 46 LT 826 (HL), followed a

According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. (Para 35) b

State of A.P. v. A.P. Jaiswal, (2001) 1 SCC 748 : 2001 SCC (L&S) 316; *State of Orissa v. Mohd. Illiyas*, (2006) 1 SCC 275 : 2006 SCC (L&S) 122, followed c

The ratio decidendi of a judgment has to be found out only on reading the entire judgment. The ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment. (Para 36) d

Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697; *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1, followed

The judgments rendered by a court are not to be read as statutes. Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. The observations must be read in the context in which they appear to have been stated. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. Judgments are not to be construed as statutes. Nor words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a Judge uses a phrase or expression with the intention of emphasising a point or accentuating a principle or even by way of a flourish of writing style. Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation. (Paras 38 and 39) e

Union of India v. Amrit Lal Manchanda, (2004) 3 SCC 75 : 2004 SCC (Cri) 662; *Som Mittal v. State of Karnataka*, (2008) 3 SCC 574 : (2008) 2 SCC (Cri) 1 : (2008) 1 SCC (L&S) 910, followed f

The argument that the phraseology used in *SBP*, (2005) 8 SCC 618 i.e. "subsistence of an arbitrable dispute required to be decided" has to be read in harmony with the words "when there existed no arbitrable dispute" cannot be brought to the eminence of ratio decidendi of the judgment. The stress laid thereon may be innovative but when the Supreme Court itself culled out the ratio g

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ARASMETA CAPTIVE POWER CO. (P) LTD. v. LAFARGE INDIA (P) LTD. 417

- a decidendi in para 39 of *SBP case*, it is extremely difficult to state that the principle stated in *SBP case* requires the Chief Justice or his designate to decide the controversy when raised pertaining to arbitrability of the disputes, or to express an opinion on excepted matters. Such an inference by syllogistic process is likely to usher in catastrophe in jurisprudence developed in this field. It is not apposite to pick up a line from here and there from the judgment or to choose one observation from here or there for raising it to the status of “the ratio decidendi”. That is most likely to pave one on the path of danger and it is to be scrupulously avoided. The propositions set out in *SBP case* have been correctly understood by the two-Judge Bench in *Boghara Polyfab case* and the same have been appositely approved by the three-Judge Bench in *Chloro Controls India (P) Ltd.*, (2013) 1 SCC 641. (Para 40)

- b *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618; *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117; *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, (2007) 4 SCC 599; *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689, explained and followed
- c *Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388, held, overruled

- d Three facets relate to the jurisdiction of the Arbitral Tribunal. One facet of arbitrability is whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the “excepted matters” excluded from the purview of the arbitration agreement. While considering an application under Section 11 of the 1996 Act, the Chief Justice or his designate would not embark upon an examination of the issue of “arbitrability” or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the 1996 Act, relying upon sub-section (2)(b)(i) of that section. (Para 42)

- e *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781; *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618, followed
- f *Lafarge India (P) Ltd. v. Arasmeta Captive Power Co. (P) Ltd.*, Arbitration Application No. 24 of 2012, order dated 22-7-2013 (Chh), partly reversed
- APS Kushwaha v. Municipal Corpn., Gwalior*, (2011) 13 SCC 258 : (2012) 3 SCC (Civ) 459, referred to

- g Thus, in the present case, the Designated Judge, as perceived from the impugned order, while dealing with an application under Section 11(6) of the 1996 Act, on an issue raised with regard to the excepted matters, was not justified in addressing the same on merits whether it is a dispute relating to excepted matters under the agreement in question or not, and the same should have been left to be adjudicated by the arbitrator. (Paras 43.1 to 43.3)

Appeal partly allowed

N-D/52686/SV

Advocates who appeared in this case :

- h Ranjit Kumar, Senior Advocate (Ramesh Singh, Ms Bina Gupta and Ranjit Raut, Advocates) for the Appellants;
- Harish N. Salve and Dr A.M. Singhvi, Senior Advocates [Manu Nair, Abhijeet Sinha, Anuj Berry and Tanuj Bhushan (for M/s Suresh A. Shroff & Co.), Advocates] for the Respondent.

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8. (2007) 4 SCC 599, *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.* 424b, 424b-c, 424d-e, 424f, 426a-b, 426c, 427b, 427d-e, 427f
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12. (2003) 6 SCC 697, *Islamic Academy of Education v. State of Karnataka* 431d-e
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16. (1987) 1 SCC 213, *Ambica Quarry Works v. State of Gujarat* 430a-b
17. 1901 AC 495 (HL), *Quinn v. Leathem* 430b, 430b-c, 430e
18. (1882) LR 7 AC 259 : (1881-85) All ER Rep 592 : 46 LT 826 (HL), *Caledonian Railway Co. v. Walker's Trustees* 430e

The Judgment of the Court was delivered by

DIPAK MISRA, J.— Leave granted. In *State of A.P. v. A.P. Jaiswal*¹ a three-Judge Bench has observed thus: (SCC p. 761, para 24) g

“24. Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the

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¹ (2001) 1 SCC 748 : 2001 SCC (L&S) 316 : AIR 2001 SC 499

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a courts have evolved the rule of precedents, principle of stare decisis, etc. These rules and principle are based on public policy....”

2. We have commenced our opinion with the aforesaid exposition of law as arguments have been canvassed by Mr Ranjit Kumar, learned Senior Counsel for the appellants, with innovative intellectual animation how a three-Judge Bench in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*² has inappositely and incorrectly understood the principles stated in the major part of the decision rendered by a larger Bench in *SBP & Co. v. Patel Engg. Ltd.*³ and, in resistance, Mr Harish Salve and Dr A.M. Singhvi, learned Senior Counsel for the respondent, while defending the view expressed later by the three-Judge Bench, have laid immense emphasis on consistency and certainty of law that garner public confidence, especially in the field of arbitration, regard being had to the globalisation of economy and stability of the jurisprudential concepts and pragmatic process of arbitration that sparkles the soul of commercial progress. We make it clear that we are not writing the grammar of arbitration but indubitably we intend, and we shall, in course of our delineation, endeavour to clear the maze, so that certainty remains “A Definite” and finality is “Final”.

3. The present appeal, by special leave, is directed against the judgment and order dated 22-7-2013 passed by the learned Judge, the designate of the Chief Justice of the High Court of Chhattisgarh at Bilaspur, in *Lafarge India (P) Ltd. v. Arasmeta Captive Power Co. (P) Ltd.*⁴ whereby and whereunder, while dealing with an application preferred under Sections 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for brevity “the Act”), the learned Judge has repelled the submission of the appellant herein, the respondent in the original proceedings, that the disputes raised by the applicant, being excepted matters, were squarely covered within the ambit of Clause 9.3 of the agreement and hence, it was only to be referred to an expert for resolution and not to an arbitrator and, further addressing the issue on merits, opined that as the disputes are not covered under the subject-matter of billing disputes that find place in Clause 9.3 of the agreement, the parties are not under obligation to refer the matter to the expert, and, accordingly, called for the names from both the parties and taking note of the inability expressed by the counsel for the respondents therein, appointed an arbitrator to adjudicate the disputes that have arisen between the parties.

4. Regard being had to the narrow compass of the controversy that has emanated for consideration before this Court, we need not dwell upon the factual matrix in extenso. Suffice it to state that Appellant 1 is a company carrying on business in generation of power. The respondent owns 49% equity of Appellant 1 Company and Appellant 2 owns 51% equity of Appellant 1 Company. The appellant Company had entered into two

h 2 (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689

3 (2005) 8 SCC 618

4 Arbitration Application No. 24 of 2012, order dated 22-7-2013 (Chh)

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agreements with the respondent for supply of power to the respondent. The first agreement, namely, a power purchase agreement (PPA) was entered into on 10-2-2005 and the second agreement of similar nature was entered into on 1-11-2007 for supply of power. In course of subsistence of the agreements dispute arose between the parties relating to amounts that are due and payable. a

5. The appellants treated the dispute raised to be a “billing dispute” and sought to appoint an expert in accordance with Clause 16.2 of the agreements and, accordingly, communicated with the respondent vide letter dated 4-5-2012 proposing for appointment of one of the three persons of expertise and repute for appointment as an expert in respect of both the PPAs. Appellant 1 requested the Confederation of Indian Industry vide letter dated 30-5-2012 to appoint a suitable expert. As put forth by the appellant, the respondent did not accede to resolve the dispute by way of appointing an expert instead, it moved the High Court for appointment of an arbitrator. b
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6. In support of the application for appointment of an arbitrator, it was contended before the learned Designated Judge that as the claims for recovery of arrears had not been settled and the respondents therein had communicated that the claims came within the ambit of sub-clause (a) of Clause 9.3 of the agreement and required the matter to be dealt with by an expert and an expert should be appointed in terms of Clauses 16.2 and 16.4 of the agreement and declined to take recourse to arbitration, it had become incumbent to move the Court for appointment of an arbitrator. d

7. The said stand and stance put forth by the respondent before the High Court was resisted by the present appellants that disputes would come within Clause 16.2 of the agreement that deals with “Dispute Resolution” which provides a specific mechanism and not arbitration, for it has been clearly postulated therein that where any dispute is not resolved as provided for in Clause 16.2 then only the matter shall be submitted to arbitration at the request of either of the parties by written notice in accordance with the provisions contained in the Act. e

8. The High Court adverted to the meanings of “billing date”, “billing period”, “billing year”, “clarification notice” and various terms used in the agreement, scanned the anatomy of Clause 9.3 of the agreement that deals with “billing disputes” and arrived at the conclusion that the disputes raised do not come within the purview of sub-clause (a) of Clause 9.3 and, accordingly, appointed an arbitrator, as has been stated hereinbefore. f

9. Mr Ranjit Kumar, learned Senior Counsel appearing for the appellants, criticising the view expressed by the Designated Judge, has submitted that the dispute raised by the respondent being a “billing dispute” which is an excepted matter, it was obligatory on the contracting parties to resolve the dispute through an expert committee by the mechanism provided in the agreement itself and the same could not have been referred to an arbitrator to be arbitrated upon. Pyramiding the said proponent, the learned Senior Counsel would submit that once a dispute falls in the realm of an excepted g
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- a matter, as stipulated in the agreement, it is a non-arbitrable claim and hence, the Court alone has the jurisdiction to decide the issue of arbitrability and it cannot be left to be adjudicated by an arbitrator and as in the present case the learned Judge has erroneously decided that it is not a “billing dispute” and thereby not an excepted matter, the same warrants interference. In essence, the submission is that advertence to the spectrum of arbitrability or to the sphere of excepted matter to decide the issue of jurisdiction as contemplated under Section 11(6) of the Act is justified but the analysis and the conclusion as regards the nature of dispute is indefensible. To buttress his submissions he has commended us to the decisions in *SBP*³ and *APS Kushwaha v. Municipal Corpn., Gwalior*⁵.

- c 10. Mr Harish N. Salve and Dr A.M. Singhvi, learned Senior Counsel appearing for the respondent, in oppugnation, have submitted that the principles stated in *SBP case*³ have been appositely understood by a two-Judge Bench in the decision in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*⁶ and the analysis therein has been accepted and approved by a three-Judge Bench in *Chloro Controls India (P) Ltd.*² and, therefore, whether it is an excepted matter or not, despite strenuous urging of the same by the appellants, is required to be left to be adjudicated in the arbitral proceedings. The learned Senior Counsel would further submit that what has been opined in *SBP case*³ has already been reflected upon and that being the settled position of law, certainty in the realm of adjudication should be allowed to stay. That apart, it is urged by Mr Salve and Dr Singhvi that the Designated Judge has fallen into error by delving into the merits of the matter i.e. whether the disputes are “billing disputes” or not, for it should have been left to be adjudicated upon by the learned arbitrator. It is submitted that if any interference is warranted the said findings should be set aside and the matter should be allowed to be arbitrated upon by the learned arbitrator as other conditions precedent for invocation of the arbitration clause have been accepted and are not under assail.

- f 11. In reply to the submissions of the learned Senior Counsel for the respondent, Mr Ranjit Kumar, learned Senior Counsel for the appellants, would contend that the analysis made in *Boghara Polyfab (P) Ltd.*⁶ by the two-Judge Bench is contrary to what has been stated in *SBP case*³ and similarly the seal of concurrence given by the three-Judge Bench in *Chloro Controls India (P) Ltd.*² is neither justified nor correct, and in fact, on a studied scrutiny, the lis deserves to be referred to a larger Bench. The learned Senior Counsel would further submit that certainty of law in its fundamental conceptuality has to be in consonance with the principles stated in larger

3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618
5 (2011) 13 SCC 258 : (2012) 3 SCC (Civ) 459
h 6 (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117
2 *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689

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Bench decisions and not to be allowed to exist despite striking a note of discordance.

12. To appreciate the controversy it is pertinent to refer to certain provisions, namely, Sections 8, 9, 11 and 16 of the Act. a

13. Section 8 deals with power to refer the parties to arbitration where there is an arbitration agreement. The said power is conferred on a judicial authority before which an action is brought in a matter which is the subject-matter of agreement. Certain conditions precedent have been incorporated in sub-sections (1) and (2) of the said provision. Section 9 provides for grant of interim measures by the Court. b

14. Section 11 deals with appointment of arbitrators. Section 11(2) stipulates that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-sections (3) to (5) deal with requisite procedure to be followed in certain circumstances for appointment of arbitrator. Sub-sections (6) and (8) of the said provision, which are relevant for the present purpose, read as follows: c

“11. (6) Where, under an appointment procedure agreed upon by the parties—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or d

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment. e

* * *

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.” f

15. Section 16 provides for competence of Arbitral Tribunal to rule on its own jurisdiction. It stipulates that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.

16. Regard being had to the anatomy of the Act and the contours of the aforesaid provisions, a Bench of seven Judges in *SBP*³ by majority has stated about the functions to be performed by the Chief Justice or his designate to do. Or, to put it differently, what are required to be determined by the Chief Justice or his designate, have been exposted thus: (SCC pp. 660-61, para 39) g

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³ *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618

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- a “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
- b 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
- c 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
- d 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.”
- e 17. In the said case, in para 47 the majority has summed up the conclusions in seriatim. Conclusion (iv), as summed up in the said paragraph, reads as follows: (*SBP case*³, SCC pp. 663-64)
- f “47. (iv) The Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the Designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the
- g arbitrator could only be that of the Chief Justice or the Designated Judge.”
- h 18. On a careful reading of para 39 and Conclusion (iv), as set out in para 47 of *SBP case*³, it is limpid that for the purpose of setting into motion the arbitral procedure the Chief Justice or his designate is required to decide the issues, namely, (i) territorial jurisdiction, (ii) existence of an arbitration

3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618

agreement between the parties, (iii) existence or otherwise of a live claim, and (iv) existence of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator. That apart, under certain circumstances the Chief Justice or his designate is also required to see whether a long-barred claim is sought to be restricted and whether the parties had concluded the transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection. a

19. At this stage we may notice the opinion expressed by a two-Judge Bench in *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*⁷, pertaining to the issues which are to be dealt with by the Chief Justice or his designate. The two-Judge Bench, after referring to para 39 in *SBP*³, opined that: (*Shree Ram case*⁷, SCC pp. 607-08, para 27) b

“27. ... the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the Court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining [the said aspect] if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining.” c d

20. It is further observed in *Shree Ram case*⁷ that in the said context “the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given”. (*Shree Ram Mills Ltd. case*⁷, SCC p. 608, para 27) e

That apart, as observed, it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue had not become dead by the lapse of time or that any party to the agreement has not slept over its right beyond the time permitted by law to agitate those issues covered by the agreement. The Chief Justice or his designate is required to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, whether the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation. f g

7 (2007) 4 SCC 599

3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618

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a 21. In *Boghara Polyfab (P) Ltd.*⁶ a two-Judge Bench, while understanding and explaining the duty of the Chief Justice or his designate, as defined in *SBP*³, has ruled thus: [*Boghara Polyfab (P) Ltd.*⁶, SCC p. 283, para 22]

b “22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP*³ This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

c 22.1. The issues (**first category**) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

d (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (**second category**) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

e (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (**third category**) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

f (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

g 22. In *Boghara Polyfab case*⁶, it has been further held that in regard to the issues falling in the second category, if raised in an application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. In case the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The learned Judges have

h ⁶ *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117

³ *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618

observed by placing reliance on *SBP*³ that the Chief Justice/his designate would, in choosing whether he would decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act i.e. expediting the arbitration process with minimum judicial intervention. a

23. Recently in *Chloro Controls India (P) Ltd.*² a three-Judge Bench considered the issue whether there is any variance between *Shree Ram Mills Ltd.*⁷ and *Boghara Polyfab (P) Ltd.*⁶ and observed that both the judgments are free from contradiction and capable of being read in harmony in order to bring them in line with the statutory law declared by the larger Bench in *SBP*³. The Court observed that where the Chief Justice or his designate actually decides the issue, then it can no longer be prima facie, but would be a decision binding in law and on such an issue the Arbitral Tribunal will have no jurisdiction to redetermine the issue. b

24. The three-Judge Bench in *Chloro Controls case*² reproduced para 27 of *Shree Ram Mills Ltd.*⁷ and we think that we should quote the relevant part on which an opinion has been expressed: (*Shree Ram Mills Ltd. case*⁷, SCC p. 608) c

“27. ... If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above paragraph that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation.” d
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3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618
2 *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689
7 *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, (2007) 4 SCC 599 h
6 *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117

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a 25. Thereafter, the three-Judge Bench explained the decision in the following terms: [*Chloro Controls India (P) Ltd. case*², SCC p. 700, para 119]

“119. Thus, the Bench while explaining the judgment of this Court in *SBP*³ has stated that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the Arbitral Tribunal to decide.”

b Thereafter, the three-Judge Bench referred to para 20 of *SBP*³ and stated that in *Shree Ram Mills Ltd.*⁷ clearly the Bench did not intend to lay down any law in direct conflict with the seven-Judge Bench in *SBP*³

c 26. At that juncture, dealing with the classification carved out by the Court in *Boghara Polyfab (P) Ltd.*⁶, the three-Judge Bench observed that it draws its origin from para 39 of the judgment in *SBP*³ and thereafter proceeded to state thus: [*Chloro Controls India (P) Ltd. case*², SCC p. 702, paras 124-26]

d “124. The foundation for Category (2) in para 22.2 of *National Insurance Co. Ltd.*⁶ is directly relatable to para 39 of the judgment of this Court in *SBP*³ and matters falling in that category are those which, depending on the facts and circumstances of a given case, could be decided by the Chief Justice or his designate or even may be left for the decision of the arbitrator, provided there exists a binding arbitration agreement between the parties. Similar is the approach of the Bench in *Shree Ram Mills*⁷ and that is why in para 27 thereof, the Court has recorded that it would be appropriate sometimes to leave the question regarding the claim being alive to be decided by the Arbitral Tribunal and the Chief Justice may record his satisfaction that parties have not closed their rights and the matter has not been barred by limitation.

e 125. As already noticed, the observations made by the Court have to be construed and read to support the ratio decidendi of the judgment. Observations in a judgment which are stared upon by the judgment of a larger Bench would not constitute a valid precedent as it will be hit by the doctrine of stare decisis. In *Shree Ram Mills*⁷ surely the Bench did not intend to lay down the law or state a proposition which is directly in conflict with the judgment of the Constitution Bench of this Court in *SBP*³

f 126. We have no reason to differ with the classification carved out in *National Insurance Co.*⁶ as it is very much in conformity with the judgment of the Constitution Bench in *SBP*³.” (emphasis supplied)

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 h 2 *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689
 3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618
 7 *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, (2007) 4 SCC 599
 6 *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117

27. Mr Ranjit Kumar, learned Senior Counsel appearing for the appellants, has drawn our attention to various paragraphs of the decision in *SBP*³ to highlight that excepted matters as per the agreement have to be decided by the Chief Justice or his designate. Drawing our attention to para 9 of the said judgment the learned Senior Counsel has submitted that the larger Bench has clearly observed that while functioning under Section 11(6) of the Act, a Chief Justice or the person or the institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him is a party, whether the conditions for exercise of the power have been fulfilled, and if an arbitrator is to be appointed, who is the fit person, in terms of the provisions and the conditions for exercise of power is dependent upon the nature of the agreement and the arbitration clause and in its sweep it commands that there should be an adjudication in respect of excepted matters and once it is found that they are excepted matters, an arbitrator should not be appointed in respect of such matters or the disputes should not be referred to arbitration.

28. The learned Senior Counsel has also drawn immense inspiration from para 25 of the judgment of *SBP case*³ wherein, while discussing about the jurisdiction of the Chief Justice, it has been stated that he has to enquire whether the conditions for exercise of his power under Section 11(6) of the Act exist in the case and only on being satisfied in that behalf could he appoint an arbitrator or an Arbitral Tribunal on the basis of the request. It further observed that it is difficult to say that when one of the parties raises an objection that there is no arbitration agreement, raises an objection that the person who has come forward with a request is not a party to the agreement, the Chief Justice can come to a conclusion on those objections without following an adjudicatory process. Thereafter the seven-Judge Bench³ stated thus: (*SBP case*³, SCC p. 653, para 25)

“25. ... Can he constitute an Arbitral Tribunal, without considering these questions? If he can do so, why should such a function be entrusted to a high judicial authority like the Chief Justice. Similarly, when the party raises an objection that the conditions for exercise of the power under Section 11(6) of the Act are not fulfilled and the Chief Justice comes to the conclusion that they have been fulfilled, it is difficult to say that he was not adjudicating on a dispute between the parties and was merely passing an administrative order. It is also not correct to say that by the mere constitution of an Arbitral Tribunal the rights of the parties are not affected. Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party, and, even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be the preliminary expenses and his objection is upheld by the Arbitral Tribunal. Therefore, it is not possible to accept the position that no adjudication is involved in the constitution of an Arbitral Tribunal.”

3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618

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a Mr Ranjit Kumar, learned Senior Counsel, has placed heavy emphasis on the words “when there existed no arbitrable dispute” to spiral the submission that the Chief Justice or his designate is under the legal obligation to decide the said facet when the issue is raised and it cannot be left to the arbitrator or an Arbitral Tribunal for adjudication.

b 29. Before we comment on this, we may also refer to the observations made in para 38 of the judgment in *SBP*³ as the same has also been repeatedly commended to us by Mr Ranjit Kumar. For understanding of the ratio decidendi we think it apt to reproduce the relevant portion which has intellectually stimulated the learned Senior Counsel for the appellants: (*SBP case*³, SCC p. 660)

c “38. ... the basic requirement for exercising his power under Section 11(6), is the existence of an arbitration agreement in terms of Section 7 of the Act and the application before the Chief Justice being shown to be a party to such an agreement. It would also include the question of the existence of jurisdiction in him to entertain the request and an enquiry whether at least a part of the cause of action has arisen within the State concerned. Therefore, a decision on jurisdiction and on the existence of the arbitration agreement and of the person making the request being a party to that agreement and the subsistence of an arbitrable dispute require to be decided and the decision on these aspects is a prelude to the Chief Justice considering whether the requirements of sub-section (4), sub-section (5) or sub-section (6) of Section 11 are satisfied when approached with the request for appointment of an arbitrator.”

e The aforesaid passage is pressed into service for the Simon pure reason that the seven-Judge Bench has used the phraseology “subsistence of an arbitrable dispute required to be decided”. It is emphatically submitted that it has to be read in harmony with the words used in para 25, namely, “when there existed no arbitrable dispute”. In this backdrop it is propounded that the decisions in *Boghara Polyfab (P) Ltd.*⁶ and *Chloro Controls India (P) Ltd.*² require reconsideration.

f 30. Mr Salve and Dr Singhvi, learned counsel for the respondent, in their turn, have submitted that para 39 in *SBP*³ speaks about the role of the Chief Justice in definitive exactitude and the same has been emphatically stated in sub-para (iv) of para 47 where there is summation of the conclusions. Quite apart from the above, it is contended that in *Chloro Controls India (P) Ltd.*² the three-Judge Bench has correctly understood the decision in *SBP*³ and, accordingly, did not differ with the classification carved out in *Boghara Polyfab (P) Ltd.*⁶

h 3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618
 6 *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117
 2 *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689

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31. At this juncture, we think it condign to refer to certain authorities which lay down the principle for understanding the ratio decidendi of a judgment. Such a deliberation, we are disposed to think, is necessary as we notice that contentions are raised that certain observations in some paragraphs in *SBP*³ have been relied upon to build the edifice that latter judgments have not referred to them. a

32. In *Ambica Quarry Works v. State of Gujarat*⁸ it has been stated (SCC p. 221, para 18) that the ratio of any decision must be understood in the background of the facts of that case. Relying on *Quinn v. Leathem*⁹ it has been held that the case is only an authority for what it actually decides, and not what logically follows from it. b

33. Lord Halsbury in *Quinn*⁹ has ruled thus: (AC p. 506)

“... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. *The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.*” c d

(emphasis supplied)

34. In *Krishena Kumar v. Union of India*¹⁰ the Constitution Bench, while dealing with the concept of ratio decidendi, has referred to *Caledonian Railway Co. v. Walker's Trustees*¹¹ and *Quinn*⁹ and the observations made by Sir Frederick Pollock and thereafter proceeded to state as follows: (*Krishena Kumar case*¹⁰, SCC pp. 226-27, para 20) e

“20. ... The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. *The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or Judge-made, and a minor premise consisting of the material facts of the case under immediate consideration.* If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th Edn., Vol. 26, para 573): f g

3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618

8 (1987) 1 SCC 213

9 1901 AC 495 (HL)

10 (1990) 4 SCC 207 : 1991 SCC (L&S) 112 : (1990) 14 ATC 846

11 (1882) LR 7 AC 259 : (1881-85) All ER Rep 592 : 46 LT 826 (HL)

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a ‘The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear ... it is not part of a tribunal’s duty to spell out with difficulty a ratio decidendi in order to be bound by it, *and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi.*’ ” (emphasis supplied)

35. In *State of Orissa v. Mohd. Illiyas*¹² it has been stated thus: (SCC p. 282, para 12)

c “12. ... According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment.”

36. In *Islamic Academy of Education v. State of Karnataka*¹³ the Court has made the following observations: (SCC p. 719, para 2)

e “2. ... The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. *In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment.*”

(emphasis supplied)

37. The said authorities have been relied upon in *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*¹⁴, SCC p. 68, para 73.

g 38. At this stage, we may also profitably refer to another principle which is of assistance to understand and appreciate the ratio decidendi of a judgment. The judgments rendered by a court are not to be read as statutes. In *Union of India v. Amrit Lal Manchanda*¹⁵ it has been stated that: (SCC p. 83, para 15)

12 (2006) 1 SCC 275 : 2006 SCC (L&S) 122

13 (2003) 6 SCC 697

14 (2012) 10 SCC 1

15 (2004) 3 SCC 75 : 2004 SCC (Cri) 662

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"15. ... Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. [The] observations must be read in the context in which they appear to have been stated. ... To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."

39. In *Som Mittal v. State of Karnataka*¹⁶ it has been observed that: (SCC p. 581, para 9)

"9. ... Judgments are not to be construed as statutes. Nor words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a Judge uses a phrase or expression with the intention of emphasising a point or accentuating a principle or even by way of a flourish of writing style. Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation."

40. From the aforesaid authorities it is luculent that the larger Bench in *SBP*³, after deliberating at length with regard to the role of the Chief Justice or his designate, while dealing with an application under Section 11(6) of the Act, has thought it appropriate to define what it precisely meant in para 39 of the judgment. The majority, if we allow ourselves to say so, was absolutely conscious that it required to be so stated and hence, it did so. The deliberation was required to be made as the decision in *Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*¹⁷ where the Constitution Bench had held that an order passed by the Chief Justice under Section 11(6) is an administrative order and not a judicial one and, in that context, the Bench in many a paragraph proceeded to state about the role of the Chief Justice or his designate. The phrases which have been emphasised by Mr Ranjit Kumar, it can be irrefragably stated, they cannot be brought to the eminence of ratio decidendi of the judgment. The stress laid thereon may be innovative but when the learned Judges themselves have culled out the ratio decidendi in para 39, it is extremely difficult to state that the principle stated in *SBP*³ requires the Chief Justice or his designate to decide the controversy when raised pertaining to arbitrability of the disputes. Or to express an opinion on excepted matters. Such an inference by syllogistic process is likely to usher in catastrophe in jurisprudence developed in this field. We are disposed to think so as it is not apposite to pick up a line from here and there from the judgment or to choose one observation from here or there for raising it to the status of "the ratio decidendi". That is most likely to pave one on the path of

16 (2008) 3 SCC 574 : (2008) 2 SCC (Cri) 1 : (2008) 1 SCC (L&S) 910

3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618

17 (2002) 2 SCC 388

ARASMETA CAPTIVE POWER CO. (P) LTD. v. LAFARGE INDIA (P) LTD. 433
(Dipak Misra, J.)

- a danger and it is to be scrupulously avoided. The propositions set out in *SBP*³, in our opinion, have been correctly understood by the two-Judge Bench in *Boghara Polyfab (P) Ltd.*⁶ and the same have been appositely approved by the three-Judge Bench in *Chloro Controls India (P) Ltd.*² and we respectfully concur with the same. We find no substance in the submission that the said decisions require reconsideration, for certain observations made in *SBP*³, were not noticed. We may hasten to add that the three-Judge Bench has been
- b satisfied that the ratio decidendi of the judgment in *SBP*³ is really inhered in para 39 of the judgment.

41. Before parting with this part of our ratiocination we may profitably reproduce the following words of Lord Denning which have become locus classicus:

- c “18. ... ‘Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.’ ”

The aforesaid passage has been referred to in *Amrit Lal Manchanda*¹⁵ at SCC p. 84, para 18.

- d 42. We will be failing in our duty if we do not take note of another decision in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*¹⁸ on which Mr Ranjit Kumar has heavily relied upon. He has drawn our attention to para 34 where the Court has dealt with the meaning of the term “arbitrability” and stated that arbitrability has different meanings in different
- e contexts. The Court enumerated three facets which relate to the jurisdiction of the Arbitral Tribunal. In sub-para (ii) of the said paragraph it has been stated that one facet of arbitrability is whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the “excepted matters” excluded from the purview of the arbitration agreement. On a careful reading of the said
- f judgment we find that the learned Judges have referred to para 19 of *SBP*³ and thereafter referred to Section 8 of the Act and opined what the judicial authority should decide. Thereafter the Court proceeded to deal with the nature and scope of the issues arising for consideration in an application under Section 11 of the Act for appointment of the arbitrator and, in that context, it opined thus: (*Booz Allen and Hamilton Inc. case*¹⁸, SCC p. 545, para 32)
- g

3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618

6 *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117

2 *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689

15 *Union of India v. Amrit Lal Manchanda*, (2004) 3 SCC 75 : 2004 SCC (Cri) 662

18 (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781

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“32. ... While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of ‘arbitrability’ or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(b)(i) of that section.”

The said ruling is absolutely in consonance with the principle laid down in *SBP*³ The meaning given to arbitrability thereafter has been restricted to the adjudication under Section 8 and not under Section 11 of the Act. Thus, the reliance on the said decision further reflects how the court has consistently understood the principles laid down in *SBP*³

43. In view of our foregoing analysis we sum up our conclusions as follows:

43.1. The decisions rendered in *Boghara Polyfab (P) Ltd.*⁶ and *Chloro Controls India (P) Ltd.*² are in accord with the principles of law stated in *SBP*³

43.2. The Designated Judge, as perceived from the impugned order⁴, while dealing with an application under Section 11(6) of the Act, on an issue raised with regard to the excepted matters, was not justified in addressing the same on merits whether it is a dispute relating to excepted matters under the agreement in question or not.

43.3. The Designated Judge has fallen into error by opining that the disputes raised are not “billing disputes”, for the same should have been left to be adjudicated by the learned arbitrator.

43.4. The part of the order impugned⁴ that reflects the expression of opinion by the designate of the Chief Justice on the merits of the disputes, being pregnable, deserves to be set aside and is hereby set aside.

44. In course of hearing we have been apprised that the learned arbitrator has adjourned the matter to 13-12-2013 for filing counter-affidavit/claim by the appellants and it has been submitted by Mr Ranjit Kumar that it would not be possible for the appellants to file the counter-affidavit/claim or objections to the claim by that date. Mr Harish Salve, learned Senior Counsel appearing for the respondent, fairly stated that this Court may take note of the concession given by him that the learned arbitrator should grant six weeks’ time commencing 13-12-2013 for filing the counter-affidavit/counterclaim/

3 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618

6 *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117

2 *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689

4 *Lafarge India (P) Ltd. v. Arasmata Captive Power Co. (P) Ltd.*, Arbitration Application No. 24 of 2012, order dated 22-7-2013 (Chh)

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a objections. In view of the concession given, the time stands extended. We have also been told that the learned arbitrator has fixed the schedule for adjudication of the disputes. We would request the learned arbitrator to reschedule the dates as we have extended the time for filing of counter-affidavit/claim by the appellants.

45. Ex consequenti, the appeal is allowed in part to the extent as has been stated in our conclusions. There shall be no order as to costs.

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(2013) 15 Supreme Court Cases 435

(BEFORE G.S. SINGHVI AND C. NAGAPPAN, JJ.)

SLP (C) No. 25237 of 2010[†]

ABHAY SINGH

.. Petitioner;

c

Versus

STATE OF UTTAR PRADESH
 AND OTHERS

.. Respondents.

With

SLP (C) No. 23984 of 2010

d ABHAY SINGH

.. Petitioner;

Versus

UNION OF INDIA AND ANOTHER

.. Respondents.

SLPs (C) No. 25237 of 2010 with No. 23984 of 2010,
 decided on December 10, 2013

e

A. Constitution of India — Arts. 14, 21, 18 and 38 and Preamble — Republicanism and principle of egalitarian society with equal status and dignity of all individuals under — Symbols of authority/warning/importance in vehicles — Use of red lights in front of vehicles of “high dignitaries” only under R. 108(1) proviso (iii), 1989 Rules and prohibition of multitone horns in vehicles except exempted categories under R. 119(3), 1989 Rules like ambulance, police, fire-fighting and construction vehicles, etc. — Scope of and valid implementation of said usage, prohibition and exemptions without compromising principles of republicanism and egalitarianism — Directions issued

f

— Red lights in front of vehicles of “high dignitaries”

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— Clarified that “high dignitaries” are those mentioned in Constitution and specified/reproduced in Noti. No. SO 52(E) dt. 11-1-2002 which was amended by Noti. No. SO 1070(E) dt. 28-7-2005 issued by Central Government under R. 108(1) proviso (iii) — And that State Government and UTs cannot enlarge the scope term “high dignitaries” beyond what is prescribed in Cls. (c) and (d) of Noti. dt. 11-1-2002 as amended by 28-7-2005 — But State Government or UTs were framing Rules/

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[†] From the Judgment and Order dated 21-8-2009 of the High Court of Judicature of Allahabad in CMWP No. 15440 of 1998

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- State Bank of India to nominate any of the Managing Directors of any other nationalised bank as a Chairman/member. In the petition, they have given the names of six persons, two of them may be nominated as members of the Committee. For that the petitioner has no objection for appointment of Mr Kathuria, Deputy Managing Director (Treasury and Investments Management). Since it is desirable that a Committee of three would be feasible to decide the matter, we direct that Mr R. Vishwanathan, Deputy Managing Director (Commercial Banking) be nominated as third member.
- a This three-member Committee would consider and decide the claim of the appellant for extension of the term in the light of the directions issued by this Court's order dated 11-3-1994¹ according to rules. It is made clear that it is not open to the parties to challenge the constitution of the Committee as per the directions of this Court in any of the proceedings hereafter. Three weeks' time is granted to constitute the Committee for consideration of the claim for extension. Thereafter, two weeks' time is granted to the competent authority to take the decision. IAs are disposed of accordingly.
- b
- c

(2006) 5 Supreme Court Cases 167

(BEFORE S.B. SINHA AND P.P. NAOLEKAR, JJ.)

- d STATE OF HARYANA .. Appellant;
- Versus
- RANBIR ALIAS RANA .. Respondent.

Criminal Appeal No. 650 of 1999[†], decided on April 5, 2006

- e A. Intoxicants — Narcotic Drugs and Psychotropic Substances Act, 1985 — S. 50 — Applicability of — Recovery of contraband article from plastic bag carried by accused at the relevant time — In view of *Pawan Kumar*, (2005) 4 SCC 350, held, S. 50 not applicable in such a case — Further held, observations made in *Namdi Francis Nwazor*, (1998) 8 SCC 534 that if the accused is carrying a handbag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with S. 50, is merely an obiter and does not constitute the ratio decidendi — Hence, *Namdi Francis Nwazor*, (1998) 8 SCC 534 was correctly distinguished in *Pawan Kumar*, (2005) 4 SCC 350
- f

(Paras 7, 11, 12 and 16)

State of H.P. v. Pawan Kumar, (2005) 4 SCC 350 : 2005 SCC (Cri) 943, affirmed*State of H.P. v. Pawan Kumar*, (2004) 7 SCC 735 : 2004 SCC (Cri) 2067; *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080, referred to

- g *Namdi Francis Nwazor v. Union of India*, (1998) 8 SCC 534 : 1998 SCC (Cri) 1516, distinguished

B. Precedents — Held, a decision is an authority for what it decides and not what can logically be deduced therefrom (Para 12)

C. Precedents — Obiter — Meaning and binding effect of

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[†] From the Judgment and Order dated 19-8-1998 of the High Court of Punjab and Haryana at Chandigarh in Crl. A. No. 715 of 1996

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The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect. The statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative. a

(Para 12)

ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521; *Divisional Controller, KSRTC v. Mahadeva Shetty*, (2003) 7 SCC 197 : 2003 SCC (Cri) 1722; *Director of Settlements, A.P. v. M.R. Apparao*, (2002) 4 SCC 638, *relied on*

Behrens v. Bertram Mills Circus Ltd., (1957) 2 QB 1 : (1957) 1 All ER 583 : (1957) 2 WLR 404, *referred to* b

Appeal allowed

W-M/34069/CL

Advocates who appeared in this case :

Rajeev Gaur 'Naseem' and T.V. George, Advocates, for the Appellant;
 Rishi Malhotra, Prem Malhotra and Kishan Datta, Advocates, for the Respondent.

Chronological list of cases cited**on page(s)** c

1. (2005) 4 SCC 350 : 2005 SCC (Cri) 943, *State of H.P. v. Pawan Kumar* 170b, 171a, 171a-b, 172f
2. (2004) 7 SCC 735 : 2004 SCC (Cri) 2067, *State of H.P. v. Pawan Kumar* 170b, 172f-g
3. (2003) 7 SCC 197 : 2003 SCC (Cri) 1722, *Divisional Controller, KSRTC v. Mahadeva Shetty* 172a
4. (2002) 4 SCC 638, *Director of Settlements, A.P. v. M.R. Apparao* 172a-b d
5. (1999) 6 SCC 172 : 1999 SCC (Cri) 1080, *State of Punjab v. Baldev Singh* 170b-c, 171d
6. (1998) 8 SCC 534 : 1998 SCC (Cri) 1516, *Namdi Francis Nwazor v. Union of India* 170c-d, 171a-b, 171b, 171e, 172f
7. (1976) 2 SCC 521, *ADM, Jabalpur v. Shivakant Shukla* 172a
8. (1957) 2 QB 1 : (1957) 1 All ER 583 : (1957) 2 WLR 404, *Behrens v. Bertram Mills Circus Ltd.* 172c e

The Judgment of the Court was delivered by

S.B. SINHA, J.— The State of Haryana is in appeal before us from a judgment and order dated 19-8-1998 of the High Court of Punjab and Haryana in Criminal Appeal No. 715 of 1996 allowing the appeal preferred by the respondent herein from a judgment of conviction and sentence dated 5-8-1996 passed by the learned Additional and Sessions Judge in Sessions Case No. 37 and Sessions Trial No. 118 of 1994 under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (for short “the Act”). f

2. The prosecution case against the respondent was as under:

On 15-11-1993 when a police party, comprising of Sub-Inspector Dunder Singh, Constable Randhir Singh, Head Constable Omkar, Constable Umed Singh and Head Constable Om Prakash, were proceeding from Bamla to CIA staff Bhiwani and reached the point on Rohtak-Bhiwani road near Sanjeev M. College, the respondent was seen coming from the opposite direction i.e. from the side of Bhiwani on foot, holding a plastic bag of white colour. Having seen them, the respondent allegedly turned towards his left side on the road as a result whereof a suspicion as regards his conduct arose in their mind. The respondent was, thereafter, taken into custody. A notice was g
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- a allegedly served on the respondent by the Sub-Inspector to the effect “you (accused) have some contraband in your possession and your search is to be effected in the presence of a gazetted police officer or a Magistrate”, if he so desired. The respondent is said to have had no objection if the search was conducted in presence of a gazetted officer or a Magistrate available at the spot. An intimation was thereafter sent to the DSP, Headquarters, Bhiwani who reached the spot along with his staff. The respondent was allegedly searched in his presence and on a search of the plastic bag, which the respondent was carrying, a “pipi” containing “charas” weighing 2 kg was found. The in charge of the police party separated 50 grams of “charas” by way of sample of the seized contraband and made a sealed parcel thereof. Remaining amount of the seized article was said to have been separately sealed and the entire property was taken into possession wherefor a recovery memo was prepared. The respondent accused could not produce any licence or permit for possession of the said contraband article. Therefore a “ruqa” was sent to the police station for registration of the case and a formal first information report was lodged.

3. On charge of possession of the said contraband article, the respondent was put on trial.

- d 4. The learned Sessions Judge found the appellant to be guilty of the said offence and sentenced him to undergo rigorous imprisonment for a period of 10 years and pay a fine of Rs 1,00,000. The respondent filed an appeal thereagainst before the High Court.

- e 5. Before the High Court only contention which was raised was that the mandatory provision of Section 50 of the Act had not been complied with. According to the respondent although the article in question was found from a bag, it was obligatory on the part of the DSP to bring it to his notice that he had a right to be searched by a Magistrate or a gazetted officer and he having not been informed of his right, the judgment of conviction and sentence was vitiated in law.

- f 6. The High Court in its judgment proceeded on the basis that Section 50 of the Act is mandatory in character. It was held:

- g “Reverting to the facts in hand, the notice, Ext. PW 4-A, is very material. A close reading of this notice only indicates that SI Dungar Singh had given the option to the appellant by informing him that his search was to be conducted in the presence of a gazetted police officer or a Magistrate. Beyond that, the notice, Ext. PW 4-A is silent. SI Dungar Singh never apprised the appellant that he had the right to be searched in the presence of a Magistrate or a gazetted officer as mentioned in Section 42 of the Act. Even the reply, Ext. PW 4-B, given by the appellant is not in consonance with the provisions of Section 50 of the Act. The reply simply states that the appellant was ready to give the search in the presence of a Magistrate or a gazetted police officer at the spot. Further, h the accused has stated vide Ext. PW 4-B that he had full confidence in the IO. Strange enough, the reply of the appellant has not been attested

by HC Randhir Singh or HC Omkar who, of course, have attested the notice, Ext. PW 4-A, allegedly given by SI Dungar Singh. This indicates that Exts. PW 4-A, and PW 4-B have been prepared at a different state and, unfortunately, and for the benefit of the appellant....” a

7. The question as regards applicability of Section 50 of the Act need not detain us for long. We may notice that in view of conflict in the opinions of different Benches as also difference of opinion between two Judges of this Court in *State of H.P. v. Pawan Kumar*¹ the question was referred to a larger Bench. A three-Judge Bench of this Court in *State of H.P. v. Pawan Kumar*² relying on or on the basis of a large number of decisions and in particular the decision of the Constitution Bench of this Court in *State of Punjab v. Baldev Singh*³ clearly held that Section 50 of the Act would be applicable only in a case of personal search of the accused and not when it is made in respect of some baggage like a bag, article or container, etc. which the accused at the relevant time was carrying. b

8. Before us, however, the learned counsel appearing on behalf of the respondent placed strong reliance on another three-Judge Bench of this Court in *Namdi Francis Nwazor v. Union of India*⁴ wherein the following observations were made: (SCC pp. 536-37, para 3) c

“3. On a plain reading of sub-section (1) of Section 50, it is obvious that it applies to cases of search of any person and not search of any article in the sense that the article is at a distant place from where the offender is actually searched. This position becomes clear when we refer to sub-section (4) of Section 50 which in terms says that no female shall be searched by anyone excepting a female. This would, in effect, mean that when the person of the accused is being searched, the law requires that if that person happens to be a female, the search shall be carried out only by a female. Such a restriction would not be necessary for searching the goods of a female which are lying at a distant place at the time of search. It is another matter that the said article is brought from the place where it is lying to the place where the search takes place but that cannot alter the position in law that the said article was not being carried by the accused on his or her person when apprehended. *We must hasten to clarify that if that person is carrying a handbag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the Act.* However, when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that it was not found on the accused person. So, on the facts of this case, it is d

1 (2004) 7 SCC 735 : 2004 SCC (Cri) 2067

2 (2005) 4 SCC 350 : 2005 SCC (Cri) 943

3 (1999) 6 SCC 172 : 1999 SCC (Cri) 1080

4 (1998) 8 SCC 534 : 1998 SCC (Cri) 1516 e

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difficult to hold that Section 50 stood attracted and non-compliance with that provision was fatal to the prosecution case.” (emphasis supplied)

a 9. It was urged that this Court in *Pawan Kumar*² wrongly distinguished *Namdi Francis Nwazor*⁴ stating that the observations made therein (underlined[†] by us) were obiter and did not lay down a law.

10. We may at once notice the observations made in *Pawan Kumar*² as regards *Namdi Francis Nwazor*⁴ which are in the following terms: (SCC p. 363, para 16)

b “The Bench then finally concluded that on the facts of the case Section 50 was not attracted. The facts of the case clearly show that the bag from which incriminating article was recovered had already been checked in and was loaded in the aircraft. Therefore, it was not at all a search of a person to which Section 50 may be attracted. The observations, which were made in the later part of the judgment (reproduced above), are more in the nature of obiter as such a situation was not required to be considered for the decision of the case. No reasons have been given for arriving at the conclusion that search of a handbag being carried by a person would amount to search of a person. It may be noted that this case was decided prior to the Constitution Bench decision in *State of Punjab v. Baldev Singh*³. After the decision in *Baldev Singh*³ this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him.”

e 11. We do not agree with the contention of the learned counsel for the respondent that in *Namdi Francis Nwazor*⁴ the observation of this Court constituted a dicta and not an obiter. The appellant therein was apprehended at the international airport, New Delhi. He had already checked in his baggage. The said baggage was cleared but later on, the same was called to the customs-counter at the airport and upon examination thereof, it was found to be containing 153 cartons of tetanus vaccine, which having been opened, found to be containing 152 cartons of ampoules whereas the remaining one carton carried a polythene packet containing brown-coloured powder packet with black adhesive tape, which was suspected to be heroin and which was then seized.

g 12. It is in that context the Court clearly came to the opinion that the provisions of sub-section (1) of Section 50 were not required to be complied with. The said conclusion was arrived at, inter alia, upon noticing the provision of sub-section (4) of Section 50 of the Act. It was, therefore, not necessary for the Bench, with utmost respect, to make any further observation. It was not warranted in the fact of the said case. A decision, it is well settled, is an authority for what it decides and not what can logically be deduced therefrom. The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect.

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† Ed.: Herein italicised.

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See *ADM, Jabalpur v. Shivakant Shukla*⁵. It is also well settled that the statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative. (See *Divisional Controller, KSRTC v. Mahadeva Shetty*⁶.) a

13. In *Director of Settlements, A.P. v. M.R. Apparao*⁷ it was held: (SCC pp. 650-51, para 7)

“An ‘obiter dictum’ as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent ... but it cannot be denied that it is of considerable weight.” b

14. We may usefully refer to an observation of Devlin, J. made in *Behrens v. Bertram Mills Circus Ltd.*⁸ which is in the following terms: (All ER pp. 593 I-594 C)

[I]f the judge gives two reasons for his decisions, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. But the practice of making judicial observation obiter is also well established. A judge may often give additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of the precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is the matter which the judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course he has adopted from the language used and not by consulting his own preference. c
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15. Although the said observation of Devlin, J. has been subjected to some criticism, it throws some light on the subject; but may not be treated to be an authority.

16. We are satisfied that the observations made in *Namdi Francis Nwazor*⁴ is merely an obiter and does not constitute a ratio decidendi. The three-Judge Bench of this Court in *Pawan Kumar*² therefore, correctly distinguished the same. It was, thus, not necessary for the Bench to follow the judgment of a coordinate Bench in *Pawan Kumar*¹ as was argued by the learned counsel. f

17. For the reasons aforementioned, the impugned judgment cannot be sustained. The judgment of the High Court is, therefore, set aside and that of the learned Sessions Judge is restored. The appeal is accordingly allowed. g

5 (1976) 2 SCC 521

6 (2003) 7 SCC 197 : 2003 SCC (Cri) 1722

7 (2002) 4 SCC 638

8 (1957) 2 QB 1 : (1957) 1 All ER 583 : (1957) 2 WLR 404

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**1998 SCC OnLine Cal 201 : AIR 1999 Cal 29 : (1999) 1 ICC 548 (Cal) (FB) :
(1998) 2 CHN 166 : (1999) 1 Cal LJ 164 : (1999) 1 AP LJ (DNC) 18 (FB) :
1999 AIHC 718 (FB)**

Calcutta High Court

BEFORE PRABHA SHANKER MISHRA, C.J. AND SHYAMAL KUMAR SEN, SATYABRATA SINHA, NURE
ALAM CHOWDHURY AND BARIN GHOSH, JJ.*

Ratanlal Nahata and etc. ... Petitioners;

Versus

Nandita Bose and etc. ... Respondents.

G.A. Nos. 586 and 743 of 1998 and 237 of 1997

Decided on June 30, 1998

A. Civil Procedure Code, 1908 — Or. 47 R. 5 — Review proceeding — Provisions therefor — Applicability of, in relation to a writ proceeding or a proceeding in the original or appellate side of a chartered High Court — Held, Or. 47 R. 5 although ipso facto has no application in relation to a writ proceeding or a proceeding in the original or appellate side of the Calcutta High Court, the procedure in principle in Or. 47 R. 5 should be followed — In a case where merely one of the learned judges attached to the bench is available, he may issue rule but the matter on merit must be heard by a Division Bench of two judges or such number of judges as the Chief Justice may constitute — It would be proper, even though the Chief Justice may have unfettered jurisdiction in the matter of constitution of benches, including for a review application, that the judge who is still attached to the court and was a party to the judgment under review is associated with the bench of two or such number of judges as the Chief Justice may constitute — Courts, Tribunals and Judiciary — High Courts — Calcutta High Court — Appellate Side Rules, Ch. 10 — Original Side Rules, Chap. 31 — High Courts Act, 1861, Ss. 13 and 14 — Constitutions, Constitutional Statutes and Orders — Government of India Act, 1915, S. 108 — Government of India Act, 1935, S. 223 — Constitution of India, Arts. 225 and 226

(Paras 3, 35, 77 and 152)

B. Constitutions, Constitutional Statutes and Orders — Government of India Act, 1935 — S. 223 — Power of the Chief Justice of High Court — Scope of — Held, the Chief Justice is a master of the roster, and he has the exclusive power of determination and to fix which matters will be taken by a particular judge — Further, it is for the Chief Justice to determine from time to time which judge in each case shall sit alone and which judges of the court, whether or without the Chief Justice shall constitute the several division courts — Government of India Act, 1915 — S. 108 — Courts, Tribunals and Judiciary — High Courts — High Courts Act, 1861, Ss. 13 and 14

(Paras 3 and 11)

C. Civil Procedure Code, 1908 — S. 114 — Review — Types of — Held, review is two types, i.e. procedural and substantive — Every Court or Tribunal has an inherent right of procedural review, while, jurisdiction of substantive review cannot be exercised in the absence of any express power conferred by a statute

(Paras 56 and 57)

D. Practice and Procedure — Generally — Procedural laws — Compliance with — Scope of — Held, the writ court or the High Court exercising its inherent jurisdiction can waive of the procedural rules as such rules are not in themselves an end, rather they are a means to achieve the goal of justice — Thus, any construction which puts obstruction in the

course of promotion of justice and prevention of miscarriage thereof must be discouraged and the Court in all such situations must adopt a pragmatic approach while construing a procedural provision — Approach of the court should not be to interpret the rules in a rigid manner — In the instant case, held that though Or. 47 R. 5 CPC ex facie seems imperative in nature, it should be construed in such a fashion that it does not result in any absurdity — Civil Procedure Code, 1908, Or. 47 R. 5 — Constitution of India, Art. 226

(Paras 112 and 115)

PRABHA SHANKER MISHRA, C.J.:—I have the privilege to go through the separate but concurring judgment of S.K. Sen, J. and S.B. Sinha, J.

2. It is indisputable that procedural laws are meant to advance justice and the same must apply to Order 47, Rule 5 of the Code of Civil Procedure. A Superior Court apart from its power under Section 229 read with Section 4 of the Code of Civil Procedure coupled with its power under Letters Patent as a matter of general policy may frame its procedural rules. This Court has framed Original Side Rules as well as Appellate Side Rules of procedure for civil cases as well as for petition under Art. 226 of the Constitution of India. In *High Court of Judicature for Rajasthan v. Ramesh Chand Paliwal*, AIR 1998 SC 1079 the Supreme Court has set at rest any controversy as respects power of the Chief Justice to constitute a bench of two or more Judges to decide a case or any question of law formulated by a bench hearing a case. It is pointed out by the Supreme Court that the Chief Justice enjoys special status not only under Constitution but also under Rules of Court made in exercise of the power conferred by Art. 225 of the Constitution. The Chief Justice can alone determine jurisdiction of various Judges of the Court. He alone can assign work to a Judge sitting alone and to the Judges sitting in the Division Bench or to Judges sitting in the Full Bench. He alone has the jurisdiction to decide which case will be heard by two or more Judges. The conferment of this power exclusively on the Chief Justice is necessary so that various Courts comprising of the Judges sitting alone or in Division Bench etc. work in a coordinated manner and the jurisdiction of one Court is not overlapped by other Court. If the Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the Court would collapse and the judicial functioning of the Court would cease by generation of internal strife on account of hankering for a particular jurisdiction or a particular case. The nucleus for proper functioning of the Court is the 'self' and 'judicial discipline of Judges which is sought to be achieved by Rules of Court by placing in the hands of the Chief Justice full authority and power to distribute work to the Judges and to regulate their jurisdiction and sitting.

3. As master of the roster, thus, the Chief Justice is expected to know the implication of a review and reference or any other matter of significance including proper hearing of a case by a Judge or more than one Judges of the Court constituting a Bench. In exceptional cases when there is a chance of injustice to a litigant notwithstanding the procedure under Order 47, Rule 5 of the Civil Procedure Code the review application can be placed before a Judge or a Bench of more than one Judge as constituted by the Chief Justice but it would be in conformity with the procedure and judicial discipline that—

1. Order 47, Rule 5 of the Code of Civil Procedure although ipso facto has no application in relation to a writ proceeding or a proceeding on the Original Side of this Court as well as in proceedings that arises on the Appellate Side, the procedure in principle in Order 47, Rule 5 should be followed and—
2. In a case where merely one of the learned Judges attached to the Bench is available, he may issue rule but the matter on merit must be heard by a Division Bench of two Judges or such number of Judges as the Hon'ble the Chief Justice may constitute and—

3. It would be proper, even though the Chief Justice may have unfettered jurisdiction in the matter of constitution of Benches including for a review application that the Judge who is still attached to the Court and was a party to the Judgment under review is associated with the Bench of two or such number of Judges as the Hon'ble the Chief Justice may constitute,

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reference is answered accordingly.

NURE ALAM CHOWDHURY, J.:—4. I agree.

BARIN GHOSH, J.:—5. I agree.

SHYAMAL KUMAR SEN, J.:—6. I have the privilege of going through elaborate judgment of my learned brother S.B. Sinha, J. wherein the scope of reference before us has been fully discussed and questions involved have been discussed at length including that of source of power of Chartered High Court and also of the Chief Justice vis-a-vis the scope of Order 47, Rule 5. My learned brother S.B. Sinha, J. has also referred to series of decisions and as such I refrain from repeating the same. I have also got the opportunity to consider the judgment rendered by Hon'ble Chief Justice. I, however, deal with the questions in the manner stated hereinafter.

7. It is not in dispute that the Chartered High Court has power to make rules regulating its own procedure irrespective of the provision that may have been made in the Civil Procedure Code. Such rules have accordingly been framed from time to time by the Full Court under the powers granted by the Letters Patent. It is quite true that such rules will have an overriding effect irrespective of the provision contained in the Civil Procedure Code. Accordingly, question of applying Order 47, Rule 5 so far as the Chartered High Court is concerned, will be subject to the Rules framed by the High Court under Letters Patent. Our High Court both in its Appellate and Original jurisdiction have framed rules so far as the review is concerned. Chapter X of the Appellate Side Rules provide for applications for review of judgment. The procedure to be followed in an application for review of the judgment have been enumerated in the said Chapter.

8. It appears that under Rule 4 of the said Rules, application for review of judgment has to be presented to the Stamp Reporter who will certify that the review application is in proper form and it is within the period of limitation.

9. Rules 5 and 6 have already been quoted by my learned brother. It appears that Rule 5 provides inter alia that within 7 days of the return of the Stamp Reporter, the said application has to be presented by way of motion in open Court to the Division Bench of whose Judgment review is sought; or if the Judges of the Division Bench may not be sitting together, to the senior of such Judges. Rule 6 contemplates a situation where there is no scope for hearing by an application in the manner as provided under Order 47, Rule 5 of the Civil Procedure Code and in such circumstances the matter has to be referred to the Chief Justice and the Chief Justice shall provide for hearing of the application.


10. In my view, therefore, although the High Court has overriding power to frame rules irrespective of the provisions contained in the Civil Procedure Code, our Appellate Side Rules have clearly recognised Order 47, Rule 5 and only in a situation when Order 47, Rule 5 cannot be given effect to, the Chief Justice will exercise his supreme authority.

11. There cannot be any dispute that the Chief Justice has exclusive power of

determination and to fix which matters will be taken by particular Judge concerned. In fact, there is no dispute with regard to the power of the Chief Justice to allocate the business in terms of Sections 13 and 15 of the 1861 Act and Section 108 of the Government of India Act and the fact that the same has been retained all through even after coming into force of the Constitution of India. In fact, it is for the Chief Justice to determine from time to time which Judge in each case shall sit alone and which Judges of the Court whether or without the Chief Justice shall constitute the several Division Courts as aforesaid.

12. It appears to me that the Appellate Side Rules have also taken into consideration, the fact that as and when the procedure relating to review as contemplated under Order 47, Rule 5 cannot be given effect to, it should be left to the Chief Justice to constitute a Bench for the purpose of hearing of such matters and that the same clearly pre-supposes that the said Rules have contemplated that as far as practicable Order 47, Rule 5 should be applied. These Rules however are rules applicable to civil proceeding and not to writ jurisdiction. So far as the procedure in Original Side is concerned, in exercise of powers under Letters Patent, rules have also been framed which appear under Chapter XXXI of the Original Side Rules.

13. Rule 34 of Chapter XXXI provides for memorandum of review and Rule 36 provides for filing of such memorandum and motion. Rule 36

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provides for presentation of such review of any decree or order within the time prescribed by law to the Registrar who shall file the same where it appears to satisfy the requirements of the Code and all these rules; and the parties seeking review shall, as soon as possible, move before the Judge who passed the decree or order for a rule calling on the other side to show cause why the application should not be granted and the suit set down for hearing.

14. It appears that Rule 37 of Chapter XXXI provides that where the Judge who passed the decree or order sought to be reviewed has left the High Court. Rule 37 provides the procedure when the Judge is absent. The said Rule makes it clear that the Judge who passed the decree or order sought to be reviewed has left the High Court or is absent on leave for more than 3 months, the application for review may be made to any other Judge on the Original Side.

15. It appears therefore to me that in terms of the said rules the parties seeking review shall move before the Judge who passed the decree or Order for a rule. It is, therefore, necessary that when such Judge is available, the application for review is to be moved before such Judge who passed the decree or order. The rules therefore contemplate a situation where as far as practicable and possible Order 47, Rule 5 should be followed where, however, it is not possible due to non-availability of the concerned Judge the Original Side Rule provides that this may be placed before any Judge.

16. In my view, therefore as far as possible Order 47, Rule 5 has to be applied and as and when the same is not possible to apply for any reason whatsoever or because of peculiar contingencies in a given case the Chief Justice will constitute a Bench as he may feel proper. It therefore appears that our High Court has taken into consideration such situation when it may not be possible to apply order 47, Rule 5 and accordingly the rules have been framed considering such circumstances. There

cannot be any dispute that a Single Judge can refer a matter to Chief Justice for a reference to Division Bench or a Division Bench may refer a case to Chief Justice for constitution of a larger Bench in terms of our rules.

17. It is beyond doubt that the Chief Justice has the absolute authority to constitute Bench and to make determination for the purpose of hearing matters by Judges. It is well settled, however that a review by its very nature contemplates reconsideration of the same subject by the same Judge or Judges while an appeal is reheard by another Tribunal. Section 114 of the Civil Procedure Code creates a right to make an application for review under certain conditions and Order 47 provides for mode, manner and circumstances under which review petition can be made, heard and determined. No doubt procedure is meant to advance justice and as such cannot be treated as mandatory. Procedure, however, should be followed as far as possible keeping in view the cause of justice.

18. In *Chhajju Ram v. Neki* reported in 49 IA 144 : AIR 1922 PC 112 it was held under Order 47, Rule 5 the same Judges must sit and if one of the Judges of the Original Bench is absent the other Judge should sit alone.

19. In *Jagat Chandra Acharji v. Syama Charan Bhattacharjee*, reported in AIR 1919 Cal 1033 (2), a Special Bench of this Court consisting of Hon'ble Chief Justice and two other puisne Judges, it was held that during the absence on leave of one of the two Judges of a High Court constituting a Division Bench, the other Judge has no jurisdiction to hear an application for review of its decree unless the former Judge has ceased to be a member of the Court or is precluded by absence or other cause, for a period of six months next after the application, from considering the decree to which the application refers. The judgment of a single Judge thus disposing of an application for review without jurisdiction is subject to appeal under Cl. 15 of the Letters Patent.

20. In the aforesaid decision what happened is as follows: Holmwood, J. sitting with Chapman, J., heard these second appeals under Order 41, Rule 11, Civil Procedure Code and dismissed them. After that Chapman, J. took a month's leave immediately before the long vacation, and while he was away applications were made to Holmwood, J. for a review of the judgments which had been delivered by him and Chapman, J. Holmwood, J. heard the applications for review and dismissed them. The parties did not object to the hearing of the matter by Holmwood, J. and raised no question on jurisdiction although consent cannot confer jurisdiction. In the aforesaid

decision reliance was placed on *Kailash Chandra Soamaddar v. Revati Mohan Roy* (AIR 1917 Cal 88) which was decided by a Division Bench comprising Woodroffe, J. and Mookherjee, J. In the said decision Teunon, J. sitting with Smither, J. who was then acting as a Judge of the High Court had dealt with a second appeal. Then after Smither, J. left the Court that is after his officiating period had come to an end he ceased to be a member of the Court, an application was made to Teunon, J. for a review of the judgment delivered by him and Smither, J. and he dealt with that application and then an appeal was filed against the decision of Teunon, J. under S. 15, Letters Patent. That appeal came on for hearing before Woodroffe, J. and Mookherjee, J. who came to the conclusion that no appeal lay. They referred to the Code and amongst other reasons they referred to the fact that if they had heard the appeal from Teunon, J., they would in effect be hearing an appeal from a decision of

two Judges, because after Smither, J. had ceased to be a member of the Court, Teunon, J. represented the Court which had been constituted by the two Judges, and therefore to hear an appeal from Teunon, J. would be to hear an appeal from the two Judges which of course, they could not.

21. The Special Bench considered the said judgment and was of view that "if I may say so I entirely agree with the judgment of Woodroffe, J. and Mookherjee, J. but that judgment does not cover the present case because Chapman, J. did not cease to be a member of this Court, nor was he in the words of the rule." The provisions of Order 47, Rule 5 has therefore been recognised by Special Bench of this Court as early as in 1990.

22. The Full Bench of the Rangoon High Court comprising of 5 Judges also considered the same question in the case of *J.N. Surty v. T.S. Chettyar Firm* reported in AIR 1927 Rangoon 20. In the aforesaid decision Full Bench of the Rangoon High Court followed the principles decided by our Court in the case of *Aubhoy Churn Mohunt v. Shamont Lochun Mohunt* reported in (1889) ILR 16 Cal 788. In the aforesaid decision the Full Bench held

"Where a case is decided by a Bench of two Judges and an application for review of that decision is made when one of the two Judges is on leave, the review application should be heard only by the other Judge, and if he grants the application he is to forward the papers to be laid before the Chief Justice for the appointment of a Bench to hear the review."

23. It is now necessary to consider the decision of the Special Bench in the case of *Aubhoy Chuun Mohunt v. Shamont Lochun Mohunt* reported in (1889) ILR 16 Cal 788.

24. In the said decision the case was originally a second appeal to this Court which was heard by this Court consisting of Mr. Justice Wilson and Mr. Justice Beverley. The second appeal was decided on the 1st June, 1888, and it was decided in favour of the defendant; and the plaintiff, being dissatisfied with that decision, was desirous of having it reviewed, and accordingly on the 24th July, 1888, an application for review bearing the proper stamp was filed with the Deputy Registrar of this Court. Section 623 of the Civil Procedure Code provides that such an application shall come before the Judge or Judges who were parties to the original decree. Those Judges, as I said just now, were Mr. Justice Wilson and Mr. Justice Beverley, various reasons prevented them from sitting together until the month of March 1889 and on the 6th of that month, the matter was presented before learned Judges, and upon its being so presented they issued a rule calling upon the other side to show cause why the application should not be granted. The practice is, that such applications should be presented in this way, and if the Judges, before whom the application is made, think there is anything in it, they grant a rule calling upon the other side to show cause against it: and the whole of these proceedings, the granting a rule and the argument of the rule when it is returned, are treated within the meaning of Chap. XLVII of the C.P.C. as being an entire application.

25. Since on the returnable day Mr. Justice Wilson was not available, the rule was heard by Mr. Justice Beverley. The point was taken that the procedure was wrong and either the matter stood over until Justice Wilson returned or else that an application ought to have been made to the Chief Justice to appoint another Judge to sit with Mr. Justice Beverley to form (the) Bench to hear it. Construing Section 627 of the C.P.C. which corresponds to Order 41, Rule 5 it was held that "no other Judge or Judges of the Court, excepting the Judge or Judges who was or were

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parties to the original judgment, shall hear the application for review if the Judge or Judges or any one of them is still attached to the Court, so that it seems to me that although the Chief Justice of this Court has in general the duty cast upon him of appointing the Judges who are to constitute particular Benches for particular business, in these cases the constitution of the Bench is taken out of his hands, and is provided for by the Code, for the Code says that these applications shall be heard by the Judge or Judges remaining attached to the Court by whom the original decree was given."

28. Petheram, C.J. speaking for the Special Bench observed as follows:— "As I said just now, at the time this rule was returned Mr. Justice Wilson had gone away on furlough and another gentleman had been appointed to perform his duties, and consequently, he had ceased to have any jurisdiction as a Judge of this Court for the time. He was not at the time attached to the Court, and consequently, Mr. Justice Baverley was the only one of the Judges who heard the appeal who remained attached to the Court, and was, in my opinion, the only Judge who could be appointed to hear this application. So that in our opinion Mr. Justice Baverley was quite right in deciding that he had jurisdiction to hear the matter, and was in fact the only person who could hear it. That ground therefore fails."

27. It was further held on the question of appealability from the said order making the order absolute that the same did not decide the rights of the parties in any sense. All it decided was that in his opinion the trial of the appeal had been unsatisfactory, and it would be in the interests of justice that it should be re-heard. It decides nothing more. The rights of the parties are still at large.

28. It may be noted in the said decision that by order of Mr. Justice Baverley, making this rule absolute, refer the matter to the Hon'ble Chief Justice for constituting a Bench for hearing the matter on merit.

29. The Full Bench of Lahore High Court in fact accepted the same principle. It therefore appears that there will be no difficulty when one Judge is not available, the Judge who available may hear out the matter for purpose of issuing rule and even make the rule absolute and thereby no harm will be caused since nothing is decided on merit. After the rule is made absolute, the matter will be referred to the Hon'ble Chief Justice the Chief Justice will constitute a Bench as he may feel proper.

30. In this connection, the principles in contempt jurisdiction may also be taken note of.

31. Rule 15 and Rule 17 of the Contempt Rules of our Court are set out hereinbelow:—

"15. All petitions in connection with a civil contempt grounded on wilful disobedience to a judgment, decree, direction, order or other process of a Court or wilful breach of an undertaking given to a Court shall be heard by the Judge or Judges who passed the judgment or the decree or gave the direction or the order or issued the writ or other process or before whom the undertaking was given."

"17. Rules issued by any Court on its own motion shall be dealt with by that particular. Court provided that such rules under S. 15 of the Act shall be heard and determined by such Bench of Judges as the Chief Justice may appoint."

32. Rule 18 however proves that notwithstanding in anything contained in Ruel 15-17 Chief Justice may assign a rule for hearing before another Judge or the Bench, if required, in the said circumstances of the case or if the Judge or the Bench reports

or report to the Chief Justice for so doing under such provision has been made in the review rules of our Court.

33. In this connection judgment and decision in the case of High Court of Judicature at Allahabad through its *Registrar v. Raj Kishore Yadav* reported in (1997) 3 SCC 11 : (AIR 1997 SC 1186) may be taken note of. In the aforesaid decision while dealing with the inherent power of the High Court to determine the question about its own jurisdiction and also to punish for contempt summarily and also the power of the Chief Justice to constitute a Bench for the purpose. The Supreme Court in paragraph 16 of the said judgment at page 24 of the said report observed as follows (of SCC): (Para 14 at p. 1193 of AIR):—

"It is also to be kept in view that while exercising original jurisdiction under Contempt of Courts Act, 1971 in connection with civil contempt of its own orders the High Court is not exercising any review jurisdiction wherein statutorily the proceedings may have to be placed for decision of the same Judge or Judges if they are available.

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Contempt jurisdiction is an independent jurisdiction of original nature whether emanating from Contempt of Courts Act or under Article 215 of the Constitution of India. How such original jurisdiction can be exercised is a matter which can legitimately be governed by the relevant Rules framed by the High Court on its administrative side by exercising its rule-making power under Section 23 of the Act or under its general rulemaking power flowing from the relevant provisions of the constitutional scheme as seen earlier. Consequently it cannot be said that the impugned Rule is violative of Article 215 of the Constitution of India as held by the judgment under appeal."

34. The Supreme Court therefore made a distinction between the exercise of power under Contempt jurisdiction and the review jurisdiction and held my review jurisdiction wherein statutorily the proceedings may have to be placed for decision of the same Judge or Judges if they are available.

35. Considering the principles laid down in all the aforesaid decisions, it appears to me to be proper that in terms of our rules read with Civil Procedure Code matters relating to review should be heard by the Judges if they are available and in the event one of the Judge does not remain attached to this Court, the matter may be heard for the purpose of issuing rule by one of the Judges who is available and the said Judge will hear the Rule also and in the event he makes the Rule absolute and is of the view that the matter should be re-heard, he will place the matter before the Hon'ble Chief Justice for constitution of a Bench. In other words question if review is permissible, should be heard and decided by the Judge who is available but the matter thereafter should be referred to the Chief Justice for constitution of Division Bench in the event the Judge concerned finds the order reviewable. It is, however, expected unless there is a special reason, the Judge issued the Rule should be made a party to the Division Bench. It may not be out of place to mention that so far as the writ application is concerned, there is no scope for application under Order 47, Rule 5 as explained in details in the Judgment of my learned brother S.B. Sinha, J. However, the principle and procedure analogous thereto may be applied.

SATYA BRATA SINHA, J.:—36. The reference to this bench has been made by two of us, Hon'ble the Chief Justice and Hon'ble Mr. Justice Barin Ghosh by an order

dated 30-4-1998 for determination of the following questions:—

1. Whether an application for review of a judgment/order of a division bench can be heard by the learned Judge, who was a party to the earlier proceeding alone when the other Judge is not available or by a Division Bench?
2. In the event such an application is required to be heard by a Division Bench whether the Judge who is available and heard the earlier matter shall be necessarily there.
3. Whether Order 47 Rule 5 of the Code of Civil Procedure is mandatory and there is no discretion in a civil proceeding except for the hearing of the Review Application by the learned Judge who was a party to the earlier proceeding and who is available.
4. Whether notwithstanding the common source of right of appeal being Clause 15 of the Letters Patent of the Court, Order 47, Rule 1 CPC shall not inhabit the Court's jurisdiction to hear any review application by a Division Bench even though one of the Judges constituting the Bench is not available and/or by a Bench other than the Bench which had earlier passed the judgment which is sought to be reviewed.

37. The reference of the Division Bench in each of the case arose in the following circumstances:—

1. G.A. No. 586/98 (*Ratanlal Nahata v. Nandita Bose*). When the matter was placed before one of us (S.B. Sinha, J.), it was observed:

"A review application has been filed for reviewing the judgment and order dated 18-7-96 passed by a Division Bench of this Court. Although in terms of Order 47, Rule 5, this Bench can hear the review application sitting singly but in view of the order passed in Appeal No. 94 of 1996 (*C.E.S.C. Limited v. Shankar Rubber Industries*), I am of the opinion that the matter should be heard by a Division Bench of this Court to review the application.

Let the records be placed before the Hon'ble the Chief Justice for assignment of the matter before an appropriate Division Bench. The applicant may, however, in the mean time serve a copy of the review application upon the other side.

Registrar, Original Side and all parties concerned

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are to act on a signed copy of the minutes of this order on the usual undertaking."

2. G.A. No. 743 of 1998 (*Indian Seamless Finance Service Ltd. v. Damodar Chakraborty*) arises out of a judgment and order passed in the Original Side of this Court. An appeal from the said decree was placed for hearing before a Division Bench as at the time when the review application was presented one of the Hon'ble Judges retired.

The record was placed before two of us (S.K. Sen and N.A. Chowdhury, JJ.) and on 6-4-98 the Division Bench passed the following order:—

"This is an application for review. One of the learned Judges who was a party to the earlier proceeding can hear.

Mr. Chatterjee, learned Advocate appearing for the respondents submits that this review application is not maintainable.

In this view of the matter we are not inclined to take up the matter. We are not going into the merits of this case."

3. Appeal No. 94/96 with Writ Petition No. 475/96 (*C.E.S.C. Limited v. Shanker Rubber Industries*) arose out of an interlocutory order. However, keeping in view the urgency of the matter the learned Counsel appearing on behalf of the parties prayed that the Writ Petition itself be heard by a Division Bench; whereafter the entire Writ Petition was disposed of by a division bench. When the review application was filed by the writ petitioner, one of the Hon'ble Judges hearing the Writ Petition had retired. By an order dated 8-4-97 one of us (S.B. Sinha, J.) keeping in view the provisions of Order 47 Rule 5, Appendix 4 of the Appellate Side Rules, Rules 48 and 53 of the writ rules framed by this Court under Article 225 of the Constitution of India and Chapter XXXI Rules 34 and 36 of the Original Side Rules expressed a doubt as to whether a power of review in a writ proceeding being not circumscribed by the procedures laid down under Order 47 Rule 1 read with Order 47 Rule 5 of the Code of Civil Procedure and being governed by the Letters Patent of this Court, the matter should be heard by a Division Bench comprising of two judges.

38. In the said order reference was made to *Manoharlal Verma v. State of Madhya Pradesh* reported in AIR 1970 Madh Pra 131, *J.N. Surty v. T.S. Chettyar Firm* reported in AIR 1927 Rangoon 20 and 1989 (9) ATC 671 at page 680 and keeping in view the fact that one of the matters had been placed by the Chief Justice before a Division Bench it was observed:—

"As the question posed in this application is not free from doubt, in my opinion, the matter should be placed before Hon'ble the Chief Justice for constituting an appropriate bench so that the question of jurisdiction may not be taken up at a latter stage. The question of law raised in this application may also be considered by a division bench or a larger bench as the Hon'ble the Chief Justice may seem fit and proper so that the law may be settled once for all so far as this Court is concerned."

39. Two extreme views have been taken before us by the learned Counsel for the parties but we must note that Mr. Panja appearing in A.P.O. No. 94/96 (*C.E.S.C. Ltd. v. Shanker Rubber Industries*) and Mr. P.K. Das appearing in A.P.O. No. 671 of 1994 (*Ratanlal Nahata v. Nandita Bose*) although at the initial stage took the view that the provision of Order 47 Rule 5 of the Code of Civil Procedure is mandatory in nature and the said rule applies to a writ proceeding also changed their stand before this bench and, inter alia, submitted that the power of the Chief Justice to allocate business is not inhibited by Order 47 Rule 5 of the Code of Civil Procedure and in any event, the said Rule will have no application in a writ proceeding.

40. However, Mr. Ranjan Deb, appearing on behalf of the plaintiff in O.S. 755 of 1985 and Mr. Arijit Banerjee, appearing on behalf of the appellant in APOT No. 61/98 submitted that Order 47 Rule 5 is mandatory in nature and in any event the Privy Council and this Court having held that the principles laid down in Order 47 Rule 5 should be followed, the same has developed into a law and thus, the said practice should not be deviated from by this Court.

41. In order to resolve the controversy as noticed hereinbefore, it is necessary to trace the history of creation of this Court. This High Court was created under High Courts Act, 1861, the relevant provisions whereof are as follows:—

"Para 13. Subject to any laws or regulations which may be made by the Governor General in Council the High Courts established in any Presidency under this Act may, by its own rules,

provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of Justice."

"Para 14. The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid."

42. The said Act was repealed and replaced by Government of India Act, 1915. The power of this Court and in particular the power of the Chief Justice as envisaged under Section 13 and 14 were reiterated in Section 108 of the Government of India Act, 1915 which reads thus:—

"S. 108. (1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more judges or by division Courts constituted by two or more judges of the High Court of the original and appellate jurisdiction vested in the Court.

(2) The chief justice of each High Court shall determine what judge in each case is to sit alone, and what judges of the Court, whether with or without the Chief Justice, are to constitute the several division Courts."

43. Such provisions were retained in Government of India Act, 1935 in Section 223 thereof which reads thus:—

"Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in division Courts, shall be the same as immediately before the Government of part III of this Act."

44. Upon coming into force of the Constitution of India, the power of the High Court to frame rules, the jurisdiction of and the law administered in, any existing High Court and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in division bench were retained as was immediately prevailing before the commencement of Constitution by reason of Article 225 of the Constitution of India.

45. This Court was constituted in terms of the Letters Patent, the relevant provisions whereof are Clauses 15, 36 and 37 read thus:—

"15. Appeal from the Courts of original jurisdiction to the High Court in its Appellate jurisdiction. And we do further ordain, that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S. 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to

S. 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to S. 108 of the Government of India Act made on or after the first day of February one thousand nine hundred twentynine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us. Our heirs or successors in our or Their Privy Council as hereinafter provided."

36. Single Judges and Division Court. And we do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in

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the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, in pursuance of section one hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there shall be a majority, but if the Judges should be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

37. Regulation of proceedings. And we do further ordain, that it shall be lawful for the said High Court of Judicature at Fort William in Bengal from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate, and Matrimonial jurisdictions respectively: Provided always, that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India."

46. Pursuant to the powers conferred upon this Court's Rules both on the Appellate Side and on the Original Side were framed. For the purpose of the present case Chapter-X Rule 5 and 6 of the Appellate Side Rule and Chapter XXXI Rules 34 and 36 of the Original Side Rule are relevant which read thus:—

Chapter X of the Appellate Side Rules—

"R. 5 — Within seven days of the return of the application by the Stamp Reporter, the applicant, either in person or by an advocate, shall present the application by way of motion in open Court to the Division Bench of whose judgment a review is sought; or, if the Judges of such Division Bench be not sitting together, to the senior of such Judges who may be then attached to the Court and present.

6. If an application for review of a judgment cannot be heard in the manner provided in Order XLVII, Rule 5, Civil Procedure Code, such application shall be

presented by the applicant or his advocate with the certificate of the Stamp Reporter, as required by rule 4, to the Chief Justice, who shall provide for the hearing of the application.

Chapter XXXI of the Original Side Rules—

34. Form of memorandum of review — Rules 2 and 3 shall, so far as applicable, apply, mutatis mutandis to applications for review. But an application resting on an alleged error in a judgment or other matter necessitating reference to the judgment shall be accompanied by a copy of such judgment, where a judgment has been recorded.

36. Filing of such memorandum and motion. Any person desiring a review of any decree or order shall, within the time prescribed by law, present his memorandum of review, properly stamped, to the Registrar, who shall file the same, where it appears to satisfy the requirements of the Code and of these rules; and the parties seeking review shall, as soon as possible, move before the Judge who passed the decree or order for a rule calling on the other side to show cause, why the application should not be granted and the suit set down for re-hearing."

47. Thus, neither in the Letters Patent of this Court, nor in the Rules of Appellate Side or the Original Side of this Court, there exists any provision of the nature of Order 47 Rule 5 of the Code of Civil Procedure.

48. In the instant case this Court is concerned with the Rules framed on the original side of this Court as the concerned Suits and the Writ Petitions were filed under the said jurisdiction.

49. Section 4(1) of the Code of Civil Procedure provides that in the absence of any specific provision to the contrary nothing in the Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

50. The Code of Civil Procedure thus saves the special provision or special procedure laid down under any other statute. It has not been disputed nor can it be disputed that the rules

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framed by Letters Patent of this Court as also the rules framed by this Court are special statute and thus where a matter is to be decided in terms of the procedures laid down under the Rules or the Letters Patent vis-a-vis the Code of Civil Procedure, the former shall prevail. The Code of Civil Procedure itself has empowered the High Court to make rules in terms of Section 122 subject to the provisions contained in Section 123 therein. However, such rules in terms of Section 126 of the Code of Civil Procedure shall be subject to the previous approval of the Government or the State.

51. Section 128 further specifies the matter for which rules may provide. However, Section 129 of the Code of Civil Procedure, reads thus:—

"129. Power of High Courts to make rules as to their original civil procedure.— Notwithstanding anything in this Code, any High Court, not being the Court of a Judicial Commissioner, may make such rules not inconsistent with the Letters Patent or order or other law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall effect the validity of any such rules in force at the commencement of this Code."

52. A Charter High Court, therefore, is entitled to make rules to regulate its own procedure in the exercise of its original civil jurisdiction which need not be consistent with the provisions of the Code but must be consistent with the Letters Patent, establishing the High Court. As the position of law in this regard is well settled it is not necessary to refer to a large number of decisions. Reference, however, may be made to (1907) ILR 34 Cal 619 at 624, AIR 1932 Cal 1 and AIR 1985 Delhi 163. While enacting rules High Court keeping in view the express provision or practice and procedure is also entitled to make a provision for correcting its own orders passed during the course of original trial.

53. Section 129 of the Code of Civil Procedure, although confers a wider power on the High Court, however, puts an embargo to its rule making power in so far as the same is circumscribed by the provisions of the Letters Patent referred to in the Section, there cannot be any doubt, may legitimately be read as the Original Letters Patent of this Court which was in force at the time of passing of the Code.

54. There cannot, therefore, be any doubt whatsoever that so far as practice and procedure of the Original Side of this Court is concerned, the provision of the Letters Patent coupled with Section 108 of the Government of India Act, 1918 shall prevail over the provisions of the Code of Civil Procedure (In case there exists any inconsistency).

55. So far as practice and procedure to be followed in the writ jurisdiction of this Court is concerned the rules have been framed by this Court in exercise of its power under Article 225 of the Constitution of India. Rules 48 and 53 which are relevant for the purpose of this case, read thus:—

"48. Appeals from orders in this jurisdiction shall be made in the same manner as appeals from orders in the Original Side and appeals from orders in the Appellate Side according as they arise out of 'Original Side' and 'Appellate Side' applications and all Rules applicable thereto in the Rules of the Original and Appellate Side, respectively, shall apply thereto *mutatis mutandis*:

Provided that unless the Court otherwise directs no prayer for any interim order shall be entertained unless a copy of an application for such an interim order has been served upon a party, who has lodged a caveat in the form and manner as may be prescribed, and given an opportunity of being heard.

53. Save and except as provided by these rules and subject thereto, the procedure provided in the Code of Civil Procedure (Act V of 1908) in regard to suits shall be followed, as far as it can be made applicable, in all proceedings for issue of a writ."

56. In this background the Court has to consider the power of review of this Court. Review is of two types:

(a) procedural and (b) substantive. Every Court or Tribunal has an inherent right of procedural review. See *Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal* reported in AIR 1981 SC 606.

57. But in absence of any express power conferred by a statute a Court or a Tribunal cannot exercise its jurisdiction of substantive review. In view of the aforementioned legal

position the Parliament had to enact Section 114 of the Code of Civil Procedure which reads thus:—

"S. 114. Subject as aforesaid, any person considering himself aggrieved —

(a) by a decree or order from which an appeal is allowed by this Court, but from which no appeal has been preferred.

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

58. However, Article 226 of the Constitution of India having conferred a plenary power upon the High Court to exercise its jurisdiction thereunder, a power of review is implied in the said provision itself. This has been so held by the Apex Court in *Shivdeo Singh v. State of Punjab* reported in AIR 1963 SC 1909 in the following terms (para 8):—

"The other contention of Mr. Gopal Singh pertains to the second order of Khosla, J., which, in effect, reviews his prior order. Learned counsel contends that Art. 226 of the Constitution does not confer any power on the High Court to review its own order and, therefore the second order of Khosla, J., was without jurisdiction. It is sufficient to say that there is nothing in Art. 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it."

59. In the aforementioned backdrop, the applicability of Order 47 Rule 5 of the Code of Civil Procedure in a writ proceeding has to be considered. There cannot be any denial whatsoever that the power of the Chief Justice to allocate the business in terms of Sections 13 and 14 of 1861 Act and Section 108 of the Government of India Act having been preserved all through even after coming into force of the Constitution of India particularly in view of the fact that Clause 15 of the Letters Patent refers to Section 108 of Government of India Act, 1915 is absolute. There cannot further be any doubt whatsoever that all subsequent statutes or enactments amending or modifying or reforming the order under Section 108 preserves the original power of the Chief Justice. Thus, whether, Order 47 Rule 5 of the Code of Civil Procedure takes away such jurisdiction of the Chief Justice is the basic question involved in these references. Order 47 Rule 5 of the Code of Civil Procedure reads thus:—

"Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same."

60. The answer to the aforementioned question must be rendered in negative in view of the clear language used in sub-section (2) of Section 108 of the Act of 1915 read with Clauses 36 and 37 of the Letters Patent of this Court. The words 'each case' contained in sub-section (2) of Section 108 bring within its fold an application for review under Order 47 Rule 5 as well. Order 47 Rule 5 must, therefore, be read harmoniously with the aforementioned provisions.

61. If such an interpretation is not given, the same would not only give rise to absurdity or anomaly if a strict literal interpretation is given to Order 47 Rule 5 but also would border on unconstitutionality. At this juncture we may examine some of the case laws relating to the subject.

62. In *National Sewing Thread Co. Ltd. Chidambaram v. James Chadwick & Bros. Ltd.* reported in AIR 1953 SC 357, a bench of 3 Judges of the Apex Court held that despite non-existence of any provision of appeal in the Trade Marks Act, a right of appeal is available to a litigant under Clause 15 of the Letters Patent. Expressing its disagreement with the view of this Court in *India Electric Works v. Registrar of Trade Marks* reported in AIR 1947 Cal 49, it was held (at p. 360, para 8):—

"It is thus difficult to accept the argument that the power vested in the High Court under sub-s. (1) of S. 106 was a limited one, and could only be

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exercised in respect to such jurisdiction as the High Court possessed on the date when the Act of 1915 came into force. The words of the sub-section 'vested in the Court' cannot be read as meaning 'now vested in the Court'. It is a well known rule of construction that when a power is conferred by a statute that power may be exercised from time to time when occasion arises unless a contrary intention appears. This rule has been given statutory recognition in S. 32, Interpretation Act. The purpose of the reference to S. 108 in Cl. 15 of the Letters Patent was to incorporate that power in the charter of the Court itself, and not to make it moribund at that stage and make it rigid and inflexible. We are therefore of the opinion that S. 108 of the Government of India Act 1915 conferred power on the High Court which that Court could exercise from time to time with reference to its jurisdiction whether existing at the coming into force of the Government of India Act 1915 or whether conferred on it by any subsequent legislation."

63. There cannot also be any doubt whatsoever that the Chief Justice has an inherent power to allocate cases to Judges.

64. In *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar* reported in AIR 1962 SC 876, the Apex Court referring to the various provision of the Calcutta High Court Rules Appellate Side (at p. 883, para 12) held:—

"The Chief Justice must have the inherent power to constitute a larger Bench in special circumstances. And in the exercise thereof he can surely constitute a larger Bench in a case of importance where the Division Bench hearing it considers that a question of the correctness or otherwise of earlier Division Bench decisions of the same Court will fall for consideration in the case."

65. The same view as reiterated by the Apex Court in *State of Maharashtra v. Narayan Shamrao Puranik* reported in AIR 1982 SC 1198, in the following words (at p. 1200):—

"In contrast, the power to appoint the sittings of the Judges and Division Courts of the High Court for a new State at places other than the place of the principal seat, is in the unquestioned domain of the Chief Justice, the only condition being that he must act with the approval of the Governor."

66. Suffice it to say that the said principles has also been stated in Allahabad High Court in *State v. Devi Dayal* reported in AIR 1959 Allahabad 421.

67. A Division Bench of this Court in *Sohan Lal Baid v. State of West Bengal*, reported in AIR 1990 Cal 168 in which one of us (S.K. Sen, J., was a member) upon tracing the history of this Court as also the decisions observed (para 23):—

"The foregoing review of the constitutional and statutory provisions and the case law on the subject leaves no room for doubt or debate the once the Chief Justice has determined what Judges of the Court are to sit alone or to constitute the

several Division Courts and has allocated the judicial business of the Court amongst them, the power and jurisdiction to take cognizance of the respective classes or categories of cases presented in a formal way for their decision, according to such determination, is acquired. To put it negatively, the power and jurisdiction to take cognizance of and to hear specified categories or classes of cases and to adjudicate and exercise any judicial power in respect of them is derived only from the determination made by the Chief Justice in exercise of his constitutional, statutory and inherent powers and from no other source and no cases which is not covered by such determination can be Entertained, dealt with or decided by the Judges sitting singly or in Division Courts till such determination remains operative. Till any determination made by the Chief Justice lasts, no Judge who sits singly can sit in a Division Bench nor can a Division Bench be split up and one or both of the Judges constituting such Bench sit singly or constitute a Division Bench with another Judge and take up any other kind of judicial business. Even cases which are required to be heard only by a particular single Judge or Division Bench, such as part-heard matters, review cases etc., cannot be heard, unless the Judge concerned is sitting singly or the same Division Bench has assembled and has been taking up judicial business under the extant determination. Such reconstitution of Benches can take place only if the Chief Justice specially determines accordingly."

68. The aforementioned views has been reiterated by the Apex Court recently in some decisions.

69. In *Indermani v. Matheshwari Prasad* reported

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in (1996) 6 SCC 587, it has been held:—

"The Registrar's affidavit discloses a somewhat alarming situation. It is the prerogative of the Chief Justice to constitute benches of his High Court and to allocate work to such benches. Judicial discipline requires that the puisne Judges of the High Court comply with directions given in this regard by their Chief Justice. In fact it is their duty to do so. Individual puisne Judges cannot pick and choose the matters they will hear or decide nor can they decide whether to sit singly or in a Division Bench. When the Chief Justice had constituted a Division Bench of Justice V.N. Khare and the learned Judge, it was incumbent upon the learned Judge to sit in a Division Bench with Justice V.N. Khare and dispose of the work assigned to this Division Bench. It was most improper on his part to disregard the administrative directions given by the Chief Justice of the High Court and to sit singly to take up matters that he thought he should take up. Even if he was originally shown as sitting singly on 22-12-1995, when the Bench was reconstituted and he was so informed, he was required to sit in a Division Bench on that day and was bound to carry out this direction. If there was any difficulty, it was his duty to go to the Chief Justice and explain the situation so that the Chief Justice could then give appropriate directions in that connection. But he could not have, on his own, disregarded the directions given by the Chief Justice and chosen to sit singly. We deprecate this behaviour which totally undermines judicial discipline and proper functioning of the High Court."

70. Yet recently in *State of Rajasthan v. Prakash Chand* reported in (1998) 1 SCC 1 : (AIR 1998 SC 1344), the Court approving the decisions of Allahabad High Court

in *State v. Devi Dayal*, reported in AIR 1959 All 421, *Sohan Lal Baid v. State of West Bengal* reported in AIR 1990 Cal 168 and *Inder Mani v. Matheshwari Prasad* reported in (1996) 6 SCC 587 and upon discussing the subject at great details held:—

- "(1) That the administrative control of the High Court vests in the Chief Justice alone. On the judicial side, however, he is only the first amongst the equals.
- (2) That the Chief Justice is the master of the roster. He alone has the prerogative to constitute benches of the court and allocate cases to the benches so constituted.
- (3) That the puisne Judges can only do that work as is allotted to them by the Chief Justice or under his directions.
- (4) That till any determination made by the Chief Justice lasts, no Judge who is to sit singly can sit in a Division Bench and no Division Bench can be split up by the Judges constituting the bench themselves and one or both the Judges constituting such bench sit singly and take up any other kind of judicial business not otherwise assigned to them by or under the directions of the Chief Justice.
- (5) That the Chief Justice can take cognizance of an application laid before him under Rule 55 (supra) and refer a case to the larger bench for its disposal and he can exercise this jurisdiction even in relation to a part-heard case.
- (6) That the puisne Judges cannot 'pick and choose' any case pending in the High Court and assign the same to himself or themselves for disposal without appropriate orders of the Chief Justice.
- (7) That no Judge or Judges can give directions to the Registry for listing any case before him or them which runs counter to the directions given by the Chief Justice."

71. In High Court of Judicature for *Rajasthan v. Ramesh Chand Paliwal* and reported in AIR 1998 SC 1079 (at p. 1085), it has been held:—

"The status, functions and duties of the Chief Justice qua other Judges of the High Court was considered by a Full Bench of the Allahabad High Court of which one of us (S. Saghir Ahmad, J.) was a member, in *Sanjay Kumar Srivastava v. Acting Chief Justice*. (1996) All WC 644, in which it was, inter alia, observed as under:—

'The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining question, if any, arising therein'.

It was further observed:—

'Under Rule 6 of Chapter V of the Rules of Court, it can well be brought to the notice of the

Chief Justice through an application or even otherwise that there was a case which is required to be heard by a larger Bench on account of an important question of law being involved in the case or because of the conflicting decisions on the point in issue in that case. If the Chief Justice takes cognizance of an application laid before him under Rule 6 of Chapter V of the Rules of Court and constitutes a Bench of two or more Judges to decide the case, he cannot be said to have acted in violation of

any statutory provisions”.

The Full Bench also observed:—

“In view of the above, it is clear that the Chief Justice enjoys a special status not only under Constitution but also under Rules of Court, 1952 made in exercise of powers conferred by Article 225 of the Constitution. The Chief Justice alone can determine jurisdiction of various Judges of the Court. He alone can assign work to a Judge sitting alone and to the Judges sitting in Division Bench or to Judges sitting in Full Bench. He alone has the jurisdiction to decide which case will be heard by a Judge sitting alone or which case will be heard by two or more Judges. The conferment of this power exclusively of the Chief Justice is necessary so that various Courts comprising of the Judges sitting alone or in Division Bench etc., work in a coordinated manner and the jurisdiction of one Court is not overlapped by other Court. If the Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the Court would collapse and the judicial functioning of the Court would cease by generation of internal strife on account of hankering for a particular jurisdiction or a particular case. The nucleus for proper functioning of the Court is the ‘self’ and ‘judicial’ discipline of judges which is sought to be achieved by Rules of Court by placing in the hands of the Chief Justice full authority and power to distribute work to the Judges and to regulate their jurisdiction and sittings.”

72-73. In view of the aforementioned authoritative pronouncement there cannot thus, be any doubt whatsoever that the Chief Justice being ‘the master of the roster’ can form any bench either single or division in respect of any matter which would include a review petition.

74. Coming now to the applicability of Code of Civil Procedure. In a proceeding under Article 226 of the Constitution of India we may at the very threshold take note of the fact that Section 141 of the Code of Civil Procedure as amended in 1976 excludes the applicability of said provision in a proceeding under Article 226 of the Constitution of India. It may be true that by reason of Rule 53 of the Writ Rules framed by this Court, the procedures provided in the Code of Civil Procedure in regard to suits as far as it can be made practicable may be followed in all proceeding for issue of a writ. The said rule, however, is subject to the rules framed by this Court, viz. Original Side Rules and Appellate Side Rules as would appear from Rule 48 itself. The Appellate Side Rules and the Original Side Rules make provision as regard procedure to be followed in review petition.

75. The Code of Civil Procedure per force, therefore, is not applicable in a proceeding under Art. 226 of the Constitution of India but only the procedural aspects thereof mutatis mutandis apply. Furthermore Rule 48 and 53 of the writ rules must be read in the light of Section 4(1) of the Code of Civil Procedure which protects powers under Letters Patent, Section 108 of Government of India Act, 1915, Section 223 of Government of India Act, 1935 and Article 225 of the Constitution of India, thus read, we have no doubt in our mind that Order 47 Rule 5 ipso facto cannot be made applicable by telescoping the same in the writ proceedings through Rule 53 of the writ rules. The extensive power of the Chief Justice to allocate business of the Court as noticed hereinbefore by no means can be curtailed or whittled down in terms of Order 47 Rule 5 so far as the proceedings before High Court is concerned. We intend to make it clear that Order 47 Rule 5 will have application in cases where Code of Civil Procedure alone applies i.e. before the Subordinate Courts and other Tribunals.

76. Apart from the reasons noticed hereinbefore, we reiterate that Order 47 Rule 5 having been framed in terms of Section 114 of the Code of Civil Procedure which provision itself being not applicable in relation to a writ proceeding, the procedures laid down in terms whereof would not ipso facto apply inasmuch whereas a civil Court trying a suit (not the High Court trying in exercise of its original jurisdiction) is bound by the provision of Order 47 Rule 5 of the

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Code of Civil Procedure, the High Court while exercising its writ jurisdiction is not, as the power of review is taken recourse to by the High Court in exercise of its inherent jurisdiction.

77. Power under Article 226 of Constitution of India is exercised by the High Court in its equity jurisdiction and thus, as it has to do equity to the parties and to do complete justice to them, its power of review is not and cannot be limited only in terms of Section 114 or Order 47 Rule 1 of the Code of Civil Procedure. By parity of the reasoning Order 47 Rule 5 ipso facto would not be attracted in a writ proceeding.

78. The reason as to why the provisions of Code of Civil Procedure are not applicable in a writ proceedings has been explained by the Apex Court in *Puran Singh v. State of Punjab* reported in AIR 1996 SC 1092, N.P. Singh, J., speaking for the Division Bench held that the provisions of Code of Civil Procedures were not applicable even before coming into force of 1976 Amendment Act in view of the decision of the Apex Court in *Babubhai v. Nandlal* reported in AIR 1974 SC 2105 and held (para 5 of AIR):—

"If because of the explanation, proceeding under Article 226 of the Constitution has been excluded, there is no question of making applicable the procedure of Code as far as it can be made applicable to such proceeding. The procedures prescribed in respect of suit in the Code if are made applicable to the writ proceedings then in many cases it may frustrate the exercise of extraordinary powers by the High Court under Articles 226 and 227 of the Constitution."

79. In that case also in terms of Rule 32 of the writ rules framed by the Punjab and Haryana High Court the provision of Code of Civil Procedure, 1908 was to apply mutatis and mutandis as far as they are not inconsistent with the said rules.

80. The said decision of the Apex Court has been followed by a full bench of the Andhra Pradesh High Court in *Hon'ble Secretary and Correspondent, Badruka College of Commerce and Arts v. State of Andhra Pradesh* reported in AIR 1997 Andh Pra 179, (which one of us P.S. Mishra, C.J. was a member), the Andhra Pradesh High Court also framed rules similar to Rule 53 of writ rules of this Court being Rule 24 which provided that all other Rules relating to matters coming before the Original Side and Appellate Side of the High Court and the provisions of the Code of Civil Procedure, 1908 will apply to the writ petitions and the writ appeals in so far as they are not inconsistent with these rules.

81. The Full Bench held that Rule 24 cannot be taken by any state of imagination to substitute Section 141 of the Code even after amending Act of 1976. The Apex Court referred to various decisions where similar arguments had been rejected and noticed that in *Puran Singh*, (AIR 1996 SC 1092) (*supra*), the Apex Court had observed (at pp. 183-84 of AIR 1997 AP 179):—

"The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be

held to be not only reasonable but also expeditious."

The Full Bench held:—

"Therefore, we conclude that notwithstanding Rule 24, the provisions of the Code cannot be made applicable to any extent to any of the proceedings under Art. 226 of the Constitution and the High Court in dealing with such matters should be left to adopt its own procedure for granting relief to persons concerned and by adopting a procedure which can be held not only reasonable but also expeditious."

82. Prior thereto another Full Bench of the Andhra Pradesh High Court had the occasion to deal with the very question raised before us.

83. In *A. Srinath v. Andhra Pradesh State Road Transport Corporation* reported in AIR 1996 Andh Pra 309, Hon'ble the Chief Justice speaking for the Full Bench not only traced the history of creation of the Court but also referred to the provisions of the Letters Patent of the Madras High Court which are pari materia with the provision of Letters Patent of this Court and upon taking note of the relevant provision of Government of India Act, Constitution of India and various decisions wherein it was held that Letters Patent is not controlled by the Code of Civil Procedure opined:—

"One of us (P.S. Mishra, C.J.), sitting in the Full Bench of the Madras Court in *Mayavaram Financial Corporation Limited, Mayiladuturai v. The Registrar of Chits, Pondicherry*, (1991) 2 Mad L.W. 80 had the occasion to deal with a similar question and noticed one of the earliest cases in which Section 623, CPC, 1882 and

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Clause 15 of the Letters Patent of the Calcutta Court were examined is in *Aubhoy Churn Mohunt v. Shamont Lochun Moruni*, (1889) ILR 16 Cal 788. The view expressed in the Calcutta judgment is so relevant that we are tempted to extract the observations in the said judgment in the judgment of the Full Bench of the Madras Court in *Mayavaram Financial Corporation Limited Mayiladuturai v. The Registrar of Chits, Pondicherry*, (1991 (2) Mad L.W. 80) (supra), which is as follows:—

'It seems to me that under the spirit of the section referred to, I and I alone, am bound to hear this rule. The section is apparently intended to refer to a High Court which is specially expected from the rule laid down in Section 624.... Section 627 imposes a very reasonable and proper restriction, and that restriction is this, that when the Judges, or any one of them who made the decree can hear the application, within six months after its presentation they or he and they or he only, shall hear it.'

The Calcutta High Court reiterated the above in a subsequent judgment in *Maksud Mahi v. Secretary of State*, (1911) 9 Ind Cas 532, a Full Bench of the Madras High Court was faced with an objection that an order of reference to a Full Bench made by the Travancore Cochin High Court before the State Reorganisation Act after transfer of the case to Madras High Court as a result of the reorganisation was required to be heard by a Full Bench. A learned single Judge of the Court, after taking notice of the various authorities on the subject, held that the procedure of the Court in the matter of reference to a Full Bench was not governed by any statutory provisions, but by prevailing practice and it was not permissible to any litigant to claim as a matter of right, in the absence of a statutory provision, to have his case decided by any particular Judge or Judges of the Court. After taking notice of the

scheme of the Letters Patent and other relevant provisions and the fact that there is an essential distinction between a substantive right of appeal and the procedure prescribed for disposing of that appeal, it is observed by the Full Bench of the Madras High Court in *Mayavaram Financial Corporation Limited v. The Registrar of Chits, Pondicherry*, (1991 (2) Mad L.W. 80) (supra) that, "The same thing can undoubtedly be said with respect to the right to make a review application and the procedure for disposing of the same."

The Hon'ble the Chief Justice observed:—

"If the Code of Civil Procedure applies perforce, a review petition has to be heard by a Judge or Judges or any of them who had passed the decree or made the order, a review of which is applied for, and no other Judge or Judges of the Court shall hear the same. If, however, it is applied as a rule of convenience or constructively as respects exercise of the Letters Patent power, the Court has to make its own rules, Code of Civil Procedure is applied only constructively.

84. The Full Bench of the Andhra Pradesh High Court considering the fact that the power of review is in a Court and not in a particular Judge observed:—

"That is why it is said that a review of a Bench order (as provided in R. 6 of O. 47 of the Code) has to be allowed only in a case of a majority opinion in favour of the review and in the case of a Bench of equal strength, in the event of equal division, the application for review must be rejected. This rule of prudence has been followed more as a practice than as a command of the Legislature in almost every Court in India and constructively applied to the writ proceeding as well. But it will still not be open to any party to insist that his case must be heard by the Judge or Judges, who had passed the decree or made the order. There may be cases where after passing the decree or making the order, one or all of the Judges constituting the Bench may feel embarrassed in hearing the review petition. They may in such a situation, order for the case being placed before some other Judge. They need not for this purpose make an open pronouncement except indicating their disinclination to hear the matter to the Hon'ble the Chief Justice. What would be done in such a case if the Hon'ble the Chief Justice did not exercise his inherent power to constitute a new Bench to hear the review petition. There may be many other circumstances and situations in which the Hon'ble the Chief Justice exercising his inherent power to constitute a new Bench to hear the review petition. There may be many other circumstances and situations in which the Hon'ble the Chief Justice exercising his inherent power, may not think it desirable to place the review petition before the Bench, which passed the decree or made the order. As this is a rule of procedure and not a

substantive right, it is not for the litigant to suggest who should hear the review petition. A prudent exercise of discretion by the Hon'ble the Chief Justice in this matter, and since this power has been held to inhere and vest with the Hon'ble the Chief Justice, in our view, by itself is a sufficient safeguard to ensure its prudential exercise, should be more than enough for the parties to accept the constitution of the Bench or allotment of the case to a Judge or Judges for the hearing of the review petition."

The findings were thus, summed up:—

(1) Code of Civil Procedure does not apply to a writ proceeding under Article 226

of the Constitution of India, Courts, however, sometimes constructively apply certain basic principles enshrined therein to the writ proceedings, on grounds of public policy or dictates of reason or necessity whenever it is found to be essential for the effective administration of justice.

- (2) A writ appeal is the continuation of the writ petition. Merely because it is an appeal under the Letters Patent of the Court, it does not change its character from being a writ proceeding to an ordinary civil proceeding.
- (3) The Hon'ble the Chief Justice has the inherent power to allocate the judicial business of the High Court including who of the Judges should sit alone and who should constitute the Bench of two or more Judges. No litigant shall, upon such constitution of a Bench or allotment of a case to a particular Judge of the Court will have a right to question the jurisdiction of the Judges or the Judge hearing the case. No person can claim as a matter of right that this petition be heard by a single Judge or a Division Bench or a particular single Judge or a particular Division Bench. No Judge or a Bench of Judges will assume jurisdiction unless the case is allotted to him or them under the orders of the Hon'ble the Chief Justice.
- (4) A judge or the Judges constituting the Bench will not decide whether to entertain a review petition or not unless the same is placed before him or them under the orders of the Hon'ble the Chief Justice.
- (5) Unless it is on account of exceptional circumstances or to meet an extraordinary situation the Hon'ble the Chief Justice decides to allot the work to some other Judge or Judges, as the case may be, we consider it to be prudent as well as desirable that the Judge or Judges who passed the judgment/decreed or made the order sought to be renewed, hear the review petition and in the case of the judgment, decree or order of a Bench the Judge or the Judges who are available are associated as members of the Bench."

85. The matter also came up for consideration although in a bit different context in *Reliance Industries Ltd. v. Pravinbhai Jasbhai Patel* reported in (1997) 7 SCC 300 : (AIR 1997 SC 3892), in that case the question of applicability of Section 98 of the Code of Civil Procedure arose vis-a-vis the rules framed by the High Court as also the Letters Patent and Order 47 Rule 6 of the Code of Civil Procedure. The question was framed by the Apex Court in the following manner (at P. 3894 of AIR):

—
 "When in review proceedings arising out of the decision of the Division Bench of two learned Judges of the High Court rendered in a writ petition under Article 226 of the Constitution of India which is in the nature of original proceedings, the two learned Judges deciding the review petition differ on question of fact or law, whether a reference to a third learned Judge is required to be made for disposal of the review petition as per the majority opinion of the three learned Judges or whether on difference of opinion between them on these questions, the petition is required to be dismissed under Order 47 Rule 6 Code of Civil Procedure, 1908 ('CPC' for short), keeping the order sought to be reviewed untouched."

86. The Apex Court laid down the law as regard the scope and purport of the review petition in the following manner (at pp. 3897-98 of AIR):—

"Therefore, the short question is whether the decision rendered by the Division Bench of the High Court in Special Civil Application No. 770 of 1995 allowing it as a public interest litigation petition in exercise of original jurisdiction of the High Court under Article 226 of the Constitution of India would not lend colour of the very same original jurisdiction to review proceedings arising out of that very judgment? It has to be kept in view, that review petitions are not by way of

appeals before the superior Court but they are by way of requests to the same Court which decided the matter, for persuading it to recall or reconsider its own decision on grounds which are

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legally permissible for reviewing such orders. As laid down by Order 47 Rule 5 CPC as far as possible the same two learned Judges or more Judges who decided the original proceedings have to hear the review petition arising from their own judgment. Thus in substance a review amounts to reconsideration of its own decisions by the very same Court. When the Court sits to review its own order, it obviously is not sitting in appeal over its judgment but is seeking to have a fresh look at its own judgment of course within the limits of review powers, but still invoking for that limited purpose the very same jurisdiction which it exercised earlier. It is axiomatic that if a Division Bench of two learned Judges deciding the appeal had exercised appellate powers and when its decision is sought to be reviewed it can be said to be required to reconsider its own decision within the limits of review jurisdiction but still in exercise of the same appellate jurisdiction which it earlier exercised. Similarly when a decision rendered in exercise of original jurisdiction by a Bench of two learned Judges is sought to be reviewed, the learned Judges exercising review jurisdiction subject to the limitations inhering in such an exercise, can be said to be called upon to reconsider their decision earlier rendered in exercise of the very same original jurisdiction. In that review jurisdiction takes colour from the nature of the jurisdiction exercised by the Court at the time when the main judgment, sought to be reviewed, was rendered. Review jurisdiction, therefore, cannot be said to be some independent jurisdiction sought to be exercised by the Court de hors the nature of the jurisdiction exercised by it when the judgment sought to be reviewed was rendered by it. As the decision sought to be reviewed in the present proceedings was rendered by the Division Bench in exercise of its original jurisdiction the review proceedings emanating from the very same judgment would partake the character of the very same exercise of original jurisdiction. It remained in the domain of original jurisdiction which could be said to have been invoked by the appellant when it requested the Court to review its earlier decision rendered in exercise of original jurisdiction.

(Underlining is mine for emphasis).

87. Upon consideration of the provisions of Sections 122 and 129 of the Code of Civil Procedure, Clause 37 of the Letters Patent which is in pari materia with Clause 37 of the Letters Patent of this Court and Rule 186 of the Rules.

88. It was held that Rule 186 of the Gujarat rules which related to the procedure in case of difference of opinion between Judges is of general nature cannot get attracted so far as Article 226 is concerned. But they shall apply in a case which comes under Section 98(3) and in relation to the decision of the Division Bench of the High Courts dealing with petition under Articles 226 and 228 of the Constitution. The Apex Court held that despite Order 47 Rule 6 of the Code of Civil Procedure, in view of the Letters Patent of the Bombay High Court in a case of difference of opinion between two Judges hearing a review application the matter has to be referred to a third Hon'ble Judge.

89. The said principles were reiterated in a recent decision of the Apex Court in *S.G.P. Committee v. M.P. Dass Chela* reported in (1998) 3 JT (SC) 604 : (AIR 1998

SC 1978, para 7) in the following term:—

"As per that sub-section, nothing in Section 98 shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court. Admittedly the High Court of Punjab has Letters Patent. Clause 26 of the Letters Patent provides that in the event of difference of opinion between two Judges as to the decision to be given on any point it shall be heard upon that point by one or more of the other Judges and the case must be decided on the basis of the majority opinion."

90. This aspect of the matter has also been considered by a Division Bench of this Court in which one of us (S.B. Sinha, J.) was a member in *Sri Pintu Acharyya v. State of West Bengal* reported in (1997) 2 Cal LJ 428, wherein it was held:—

"The power of review is exercised by this Court under Article 226 of the Constitution of India. A writ Court or for that matter any appeal Court deciding an appeal from a decision in exercise of its jurisdiction under Article 226 of the Constitution of India and not under Order 47 Rule 1 of the Code of Civil Procedure. In terms of Section 141 of the Code of Civil Procedure, the provisions of Code of Civil Procedure have no application in relation to a proceedings under Article 226 of the Constitution of India. It is true that in terms of Rule 53 of the writ rules, the Code of Civil Procedures are applicable but as rules

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can be framed only in respect of the procedural matters, the legal right of a person cannot thereby be taken away. In this view of the matter we are unable to hold that Order 47 Rule 1 of the Code of Civil Procedure ipso facto will have any application in a proceeding under Article 226 of the Constitution of India. This Court cannot loose sight of the fact that the writ Court is not only a Court of law but also a Court of equity. In exercise of its power of review, thus not only it can review its order when there exists an error apparent on the face of the record but also in exercise of its inherent jurisdiction and in the interest of Justice."

91. We respectfully agree with the aforementioned views. We may, however, further point out that there may be an inherent danger in holding that Order 47 Rule 5 perforce applies to the proceedings in a High Court whether exercising its jurisdiction under Article 226 or trying a suit or hearing appeal therefrom. There may be a case where a matter has been heard by a special Bench and a final judgment has been rendered in which one or more members had held a minority view. Even in a case temporary absence of Hon'ble Judges holding majority view, a review application can be filed before the Hon'ble Judges holding minority view and the entire judgment may be reversed.

92. There may also be a situation where a strict literal interpretation of Order 47 Rule 5 of the Code of Civil Procedure would nullify the object and purport of the review application in case of matter of urgent nature as owing to temporary absence of a Judge the matter cannot be placed at all causing irretrievable injury to the petitioners.

93. The reasonings aforementioned as regard applicability of Order 47 Rule 5 in a writ proceeding, shall also necessarily apply in a civil proceeding. As indicated hereinbefore, both the appeals arose out of the suits filed in the Original Side of this Court. The suits and consequently the appeals there against were thus, disposed of upon following the rules framed on the original side framed by this Court laying

down the procedures therefor. "The Court is, therefore, bound to follow the said rules and review application must also, necessarily be disposed of in terms of Rules made in Chapter XXXI of the Original Side Rules read with the provisions of the Letters Patent of this Court.

94. In Chapter XXXI of Original Side Rules no provision exists like Order 47 Rule 5 of the Code of Civil Procedure. Keeping in view the provisions of the Government of India Acts and the Rules framed by this Court, thus, Order 47 Rule 5 perforce will have no application in relation to the said appeals.

95. We are further of the view that in any view of the matter a learned Judge can always in terms of the Original Side Rules while hearing a review application may refer the matter to a Division Bench and in that view of the matter, the power of learned Judge to refer the matter to the Chief Justice for being heard by a Division Bench or a larger Bench cannot be curtailed by Order 47 Rule 5 of the Code of Civil Procedure.

96. However as regard the question as to whether Order 47 Rule 5 of Code of Civil Procedure is mandatory or discretionary even in a civil proceeding. There is a great deal of divergent views. In *Bhera v. Board of Revenue* reported in AIR 1975 Rajasthan 55, it agreed with the opinion of a Full Bench of Travancore-Cochin High Court in *Narayanan v. Raman* reported in AIR 1953 Trav-Co 306, which in turn disagreed with its earlier view with another Full Bench in *Sirkar v. Velayudhan Ponnann* reported in AIR 1953 Trav Co 1 and held that the limitation of six months waiting provided that Order 47 Rule 5 was not mandatory.

97. In *Bhera* (AIR 1975 Rajasthan 55) (supra) the Rajasthan High Court held (para 9):—

"It is easy to imagine that acceptance of an interpretation given by the Board of Revenue is likely to lead to strange results and anomalies. The review application of an applicant, however, good in law, will be lost if official exigencies force a certain Member of the Board of Revenue to leave that office whereas another applicant similarly situated may not suffer from such a handicap. Procedural law is not erratic but is an instrument for the attainment of justice and if the language can reasonably bear an interpretation of its uniform application, which in our opinion Order 47 Rule 5, Civil P.C. does then such an interpretation alone can be given to it rather than an interpretation which tends to strange results and anomalies. A legal battle is ordinarily a conflict of interests and the procedural law is the accepted path on which would travel the process

of settlement. This path has for its foundation principles of natural justice, sound reason and good conscience. Any interpretation which detracts from the certainty of the path or makes it freakish, anomalous or uncertain has to be avoided because it will lend unpredictability to the process."

98. However, in *Maji Mohan Kanwar v. State of Rajasthan* reported in AIR 1967 Rajasthan 264, a Division Bench of the Rajasthan High Court while stating that there are 3 stages of review application, it is only the Court which passed the decree or order is entitled to review. The said decision was rendered without taking into consideration the provision of the Letters Patent and the Government of India Act and the Constitution of India and thus, must be held to have been rendered per incurium.

99. In *State of Rajasthan v. Gopal Singh* reported in 1994 Supp (2) SCC 404 keeping in view Rule 64 of the Rajasthan High Court Rules, 1952 the Apex Court held that the proper procedure which would require to be followed was to lay the application before the learned Chief Justice and without following the said procedure a power of review exercised by a single Bench and reversing in the earlier order which would ordinarily go to a Division Bench was not in accordance with law.

100. In *Pitambar Mallik v. Ramchandra Prasad* reported in AIR 1968 Patna 320, the Chief Justice's power to place a review application before any other Judge has been upheld.

101. In *Manoharlal Verma v. State of Madhya Pradesh* reported in AIR 1970 Madh Pra 131 referring to rule 4 of M.P. High Court Rules, the Division Bench held that on retirement of one of the Judges review has to be heard by two Judges specially when the Chief Justice has directed and constituted a Bench.

102. Although a large number of decisions have been cited before us to show that Order 47 Rule 5 of the Code of Civil Procedure is mandatory in nature, we need not consider all the decisions but take into consideration only such decisions upon which strong reliance has been placed by Mr. Deb and Mr. Banerjee.

103. In *Chhojju Ram v. Neki* reported in AIR 1922 PC 112 : 26 Cal WN 697 : Law Reports 49 Indian Appeals 144, a Bench of seven Judges of the judicial committee was concerned with a question as to what is meant by a sufficient reason under Order 47 Rule 1 of the Code of Civil Procedure. While deciding the said question, however, a passing observation was made that provision of O. 47 R. 5 should be followed which was in the nature of obiter dictum as the said question was taken into consideration only for the purpose of the larger considerations and not independently. Neither any argument was advanced as to whether Order 47 Rule 5 of the Code of Civil Procedure was mandatory nor any precedent was cited. The learned Judges did not advert to themselves the question as to whether the said provisions are mandatory or not.

104. In *Maharaja Maheshwar Singh v. Bengal Government* reported in 1859 (7) Moor Ind App 283, the judicial committee held:—

"We do not say that there might not be cases in which a review might take place before another and a different Judge; because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it; but we do say that such exceptions are allowable only ex necessitate. We do say that in all practicable cases the same Judge ought to review; and that for the attainment of that object, expedition in presenting a period for the review is indispensable, and the only practicable course for attaining that end by accelerating the hearing of the review before accident or unexpected events shall have removed the original Judge. Looking at all these circumstances, we should naturally expect to meet in the Regulations upon this subject such provisions as would prevent the evils necessarily incidental to delay and procrastination."

105. Thus, even in that case the judicial committee has held that ex necessitate the provision of Order 47 Rule 5 may not strictly be adhered to and thus, the same cannot be said to be absolute or mandatory in nature.

106. In both the aforementioned cases the judicial committee was considering appeals from Chief Court of Punjab and/or Commissioners of Revenue respectively who did not have the same power as that of the High Court and thus, neither they were governed by the Letters Patent nor were governed by the rules framed in terms of Section 129 of the Code of Civil Procedure read with Section 4(1) thereof.

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107. In *Jagai Chandra Acharji v. Syama Charan Bhattacharjee* reported in AIR 1919 Cal 1033 (2), this Court was concerned with absolutely a different question. In that case a Division Bench had dismissed an application under Order 41 Rule 11 of the Code of Civil Procedure. One of the Hon'ble Judges went on leave but another Hon'ble Judge reviewed the judgment in contravention of Order 47 Rule 5 of the Code of Civil Procedure. Despite a contrary judgment of the Division Bench in *Meghraj v. Bijoy Gobind Nurral* reported in (1875) ILR 1 Cal 197 as also another view expressed in *Nusserooddeen Khan v. Indurnarain Chowdhry* reported in 5 Weekly Report 93, it was held that an appeal would be maintainable. It is thus, evident that the question posed in that case was also different. Furthermore, in that case even the provision of Order 47 Rule 7 which poses an inherent danger in the event of allowing the review application by a single Judge was not brought to its notice. The said decision is, therefore, also not applicable in the facts of the present case.

108. In *Abbhoy Churu Mohunt v. Samant Lochun Mohunt* reported in (1889) ILR 16 Cal 788, the Court was considering an appeal against an order admitting a review application and directing the papers to be laid before the Chief Justice for appointment of a Bench to hear the review. The Division Bench upon taking into consideration the fact of the matter held:—

"As I said just now, at the time this rule was returned Mr. Justice Wilson had gone away on furlough and another gentleman had been appointed to perform his duties, and, consequently, he had ceased to have any jurisdiction as a Judge of this Court for the time. He was not at the time attached to the Court, and, consequently, Mr. Justice Beverley was the only one of the Judges who heard the appeal who remained attached to the Court, and was, in my opinion, the only Judge who could be appointed to hear this application. So that in our opinion Mr. Justice Beverley was quite right in deciding that he had jurisdiction to hear the matter, and was in fact the only person who could hear it. That ground therefore fails."

109. Even in that case as noticed hereinbefore upon making the rules absolute, it was held that if there should be re-trial the matter should be referred to a Division Bench for a decision on merit.

110. In *J.N. Surty v. T.S. Chettyar Firm* reported in AIR 1927 Rangoon 20, however, an observation was made that the matter should be placed before a Division Bench for hearing on merit if the attached Judge sitting singly is of the view that the matter requires re-hearing.

111. Apart from the fact that the factors which have been taken into consideration by us had not been taken into consideration in the aforementioned cases, the question which now arises as to whether we are precluded from considering the matter afresh. The answer to the said question, to our opinion, must also be rendered in negative.

112. Order 47 Rule 5 occurs in the 1st Schedule appended to the Code of Civil Procedure. Normally it has to be considered to be a procedural matter. A superior Court apart from its power under Section 129 read with Section 4 of the Code of Civil Procedure coupled with its power under Letters Patent as a matter of general policy may frame its own procedure particularly when the same is required in the interest

of justice. Can we in a public interest litigation refuse to entertain an oral prayer or refuse to entertain an application which does not conform with the rule? The position which clearly emerges, by reason of the decision of the Apex Court, is that in a given case the writ Court or the High Court exercising its inherent jurisdiction can waive any of such procedural rules. The rules of procedure are not in themselves an end, rather they mean to achieve goal of justice; in other words, they have been framed with a view to achieve justice and not to frustrate the path way of justice. Any construction which puts obstruction to the course of promotion of justice and prevention of miscarriage thereof must be discouraged and the Court in all such situations must adopt a pragmatic approach while construing a procedural provision. Thus, the approach of the Court should be not to interpret the rules in a rigid matter.

113. In *Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh* reported in 1993 (5) JT (SC) 313 at page 318 : (1993 AIR SCW 3458 at p. 3464) in paragraph 3 it has been emphasised that the procedure is hand-maid to justice. In case the submissions of the learned counsel for the petitioners are accepted, it shall not only defeat the object and purpose of imparting justice but also

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in a given case may prove to be oppressive. It would also take away the jurisdiction of Hon'ble the Chief Justice as a "Master of the Roster". In any event the power given to the High Court under Article 225 of the Constitution of India is very comprehensive. The provisions of Article 225 of the Constitution have to be read conjointly with Article 226 thereof. In the matter of interpretation of the constitutional provisions I am reminded what his Lordship Oliver Wendell Holmes said in an American Supreme Court case in *Samuel Gampes v. United States*, (1913) 233 US 604 (619) which is as follows:—

"But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil, their significance is vital, not formal, it is to be gathered not simply by taking the words and a dictionary but by considering their origin and line of their growth."

114. The law is a part of human conduct which are only instruments for serving the needs of society. The purpose is to reconcile injustice with justice and to suppress the former when it clashes with the latter. Law has to be interpreted keeping in view the constitutional goal which would sub-serve the society as a whole.

115. Order 47 Rule 5, it is true, ex facie seems to be imperative in nature. A procedural law may be imperative but it should be construed in such a fashion so that it does not result in any absurdity.

116. In *Shreenath v. Rajesh* reported in (1998) 3 JT (SC) 244 : (AIR 1998 SC 1827, Para 3), it was held:—

"In interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding the justice is to be adopted. The procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed."

117. Order 47 Rule 5 also seeks to curtail the right of the Chief Justice and/or a learned single Judge who, is otherwise entitled to in a given situation to refer a

matter to a Division Bench in terms of the Original Side Rules as also Appellate Side Rules. Such a power of the Chief Justice or the learned Judge to refer a matter to the Division Bench cannot be curtailed.

118. In *Sachindra Nath Singh v. State of Bihar* reported in (1998) 1 JT (SC) 370, it has been held that the word 'shall' is not always decisive to hold that a particular statute is directory or mandatory. The same view has also been taken in *State of A.P. v. Dr. Rahimuddin Kamal* reported in (1997) 3 SCC 505 : (AIR 1997 SC 947).

119. Mr. Deb, the learned Counsel has placed strong reliance upon a decision of the House of Lords in the *Public Prosecutor v. Oie Hee Koi* reported in 1968 Appeal Cases 829 wherein it was held:—

"The direction not to proceed with the trial which is to be given in the case of a protected prisoner of war is mandatory that is to say imperative in character. It seems that enactments regulating the procedure to be followed in Courts are usually imperative and not merely directory. See Maxwell on Interpretation of Statutes, 11th ed. (p. 367). The direction is one which is given to the Court of trial itself, that is to say to the Court of first instance. It does not purport to be an ouster of jurisdiction but is a direction not to proceed until etc....."

120. In that case the Court was concerned with the right of a prisoner. However, in that case the Court or tribunal whose jurisdiction was laid down by Act was under a statutory duty not to make certain type of order, and in that situation it was held that the duty is mandatory. It is now well settled that even a discretion coupled with the duty would be mandatory in nature.

121. Francis Bennion in his *Statutory Interpretation*, Third Edn. at page 30 while considering the tests as to whether a provision is mandatory or directory observed:—

"S. 10(1) This section applies where —

- (a) a person (the person affected) may be affected by a thing done under an enactment, and
- (b) the legal effectiveness of that thing is subject to the performance by the same or any other person (the person bound) of some statutory requirement (the relevant requirement), and
- (c) the relevant requirement is not complied with, and
- (d) the intended consequence of the failure to comply is not stated in the legislation.

(2) In ascertaining, in a case where this

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section applies, the effect of the failure to comply with the relevant requirement, it is necessary to determine whether the requirement was intended by the legislature to be mandatory or merely directory. For this purpose it may be relevant to consider whether the person affected and the person bound are the same, and whether the thing done under the enactment is beneficial or adverse to the person affected."

122. It is true that the Apex Court in *Lachmi Narain v. Union of India* reported in AIR 1976 SC 714, held (para 66):—

"Section 6(2), as it stood immediately before the impugned notification, requires the State Government to give by Notification in the Official Gazette 'not less than 3 months' notice' of its intention to add to or omit from or otherwise amend the Second Schedule. The primary key to the problem whether a statutory provision is

mandatory or directory, is the intention of the law-maker as expressed in the law, itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of 'must' instead of 'shall', that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory (Crawford, the Construction of Statutes pp. 523-524). Here the language of sub-section (2) of Section 6 is emphatically prohibitive, it commands the Government in unambiguous negative terms that the period of the requisite notice must not be less than three months."

123. The Apex Court in that case, however, was considering the provisions of Section 6(2) of Bengal Finance (Sales Tax) Act, 1941 and the Notifications issued thereunder, and as such the said construction was made in favour of the assessee and against the revenue. However, it may be noted that even the Apex Court does not lay down any law in strict term, that in all such situations the statute has to be held as mandatory. As otherwise the word 'rarely' would not have been used. There may, therefore, be certain cases where despite such terminologies, the statute may be held to be directory.

124. Instead of encumbering this judgment with various decisions it would be profitable to reproduce a passage from *Principles of Statutory Interpretation by Justice G.P. Singh*, 5th Edn. 240 which is in the following terms:—

"But the principle is not without exception. Section 256 of the Government of India Act, 1935, was construed by the Federal Court as directory though worded in the negative form. Directions relating to solemnization of marriages though using negative words have been construed as directory in cases where the enactments in question did not provide for the consequence that the marriage in breach of those directions shall be invalid. Considerations for general inconvenience, which would have resulted in holding these enactments mandatory, appear to have outweighed the effect of the negative words in reaching the conclusion that they were in their true meaning merely directory. An interesting example, where negative words have been held to be directory, is furnished in the construction of section 25-F of the Industrial Disputes Act, 1947, where compliance of clause (c) has been held to be directory, although compliance of clauses (a) and (b) which are connected by the same negative words is understood as mandatory. Another example can be found in the Proviso to section 33(2)(b) of the same Act which is worded in a negative form and is prima facie imperative. But the Supreme Court after examining the language of sections 33 and 33A has held that a dismissal order passed without obtaining the permission as required by the proviso is not void and it may not be annulled if on merits the dismissal is well founded. These cases illustrate that the rule, that negative words are usually mandatory, is like any other rule subordinate to the context, and the object intended to be achieved by the particular requirement."

124. In *Smt. Mono Mohini Choudhury v. Nityananda Saha Choudhury* reported in AIR 1943 Cal 609 this Court was dealing with a situation where non-compliance of the provision of Section 10C of the Bengal Court of Wards Act rendered the sale void and in that situation it was held to be mandatory.

125. In *Banarsi Dass v. Brig. Maharaja Sukhjit Singh* reported in (1998) 2 SCC 81 : (AIR 1998 SC 179), the Apex Court merely held that the manner prescribed by law for exercising the

jurisdiction and conferring the power for that purpose should be exercised in the same manner. In that case the Apex Court was considering the power of the Court under Section 100 of the Code of Civil Procedure. The Apex Court, however, itself held (at p. 184 of AIR):—

"No doubt procedure is meant to advance justice but when law prescribes as to how jurisdiction is to be exercised that way. For a second appeal to be maintainable, it has to satisfy the parameters as laid in Section 41 of the Punjab Courts Act or Section 100 of the Code as the case may be. In this view of the matter, we consider it unnecessary to refer to any of the decisions cited at the Bar to contend when the High Court will interfere in the second appeal and when it will stay its hands."

126. In *M. Pentiah v. Muddala Veeramallappa* reported in AIR 1961 SC 1107 was again dealing with a case where the statute conferred an express power governing the rights of the parties and in that situation it was held that a power inconsistent with that expressly given cannot be implied. The said decision has, therefore, also no application to the fact of the matter.

127. It is not a case where the statutory body exercises its statutory function only in the event, such statutory functionary is bound to exercise its jurisdiction within the four corners of the statute but in that case where the Court has to exercise its power, being entitled to lay down its own procedure, it cannot be said that the procedure laid down must be held to be mandatory so as to stretch the same to the extent that thereby it may render injustice.

128. For the self-same reason, the decisions of the Privy Council in *Nazir Ahmad v. King Emperor* reported in AIR 1936 PC 253 and *Ramachandra Keshav Adke v. Govind Joti Chavare* reported in AIR 1975 SC 915 cannot be said to be applicable as in the former case the question was as regard the right of an accused in the later case the apex Court was concerned with a surrender by a tenant in terms of the provision of Bombay Tenancy & Agricultural Lands Rules.

129. On the other hand, in *Ganesh Prasad Sah Kesari v. Lakshmi Narayan Gupta* reported in AIR 1985 SC 964 while interpreting Section 11-A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 where consequences of striking off the defence was provided for on the tenant's failure to deposit the rent within the prescribed period the apex Court held that the word 'shall' used in the aforementioned provision is directory in nature.

130. In Crawford on 'Statutory Construction' (Ed. 1940 Art. 261, p. 516), the law is stated in the following terms:—

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also while considering its nature, its design and the consequences which would follow from constituting it the one way or the other."

131. This aspect of the matter has also been considered in Owners and Parties interested in *M.V. Mali Pero v. Fernando Lapez*, reported in AIR 1989 SC 2206 wherein the Apex Court while interpreting the provision of a rule of this High Court relating to obtaining of a signature of a witness observed:—

"Procedure is meant to subserve and not rule the cause of justice. Where the outcome and fairness of the procedure adopted is not doubted and the essentials of the prescribed procedure have been followed, there is no reason to discard the result simply because certain details which have not prejudicially affected the result have been inadvertently omitted in a particular case. In our view, this appears to be the pragmatic approach which needs to be adopted while construing a purely procedural provision. Otherwise, rules of procedure will become the mistress instead of remaining the handmaid of justice, contrary to the role attributed to it in our legal system."

It was further held:—

"If the word 'shall' used in this expression is construed as mandatory, non-compliance of which nullifies the deposition, drastic consequence of miscarriage of justice would ensue even where omission of the witness' signature is by inadvertence and correctness of the deposition as well as its authenticity is undisputed. On the other hand, if the word 'shall' used in the expression is treated as directory, the Court will have power to prevent miscarriage of justice where the omission

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does not cause any prejudice and the defect is only technical. The object of the provision being merely to obtain acceptance of the witness to the correctness of the deposition, that object would be advanced by taking this view and thereby empowering the Court to avoid the drastic consequence of nullifying the deposition where the correctness and authenticity is undisputed. In a case where the correctness has been disputed, it would be permissible for the Court to examine the effect of omission of the witness signature and to reject the deposition only if it does not accept the correctness and authenticity thereof on the available material."

132. We may, also usefully quote Articles 266, 269 and 271 from Crawford's Statutory Construction which are in the following terms:—

"Art. 266. As a general rule, a statute which regulates the manner in which public officials shall exercise the power vested in them, will be construed as directory rather than mandatory, especially where such regulation pertains to uniformity, order and convenience, and neither public nor private rights will be injured or impaired thereby. If the statute is negative in form, or if nothing is stated regarding the consequences or effect of non-compliance, the indication is all the stronger that it should not be considered mandatory.

Art. 289. As a general rule, a statute which specifies a time for the performance of an official duty will be construed as directory so far as the time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure.

Art. 271. Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the Courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their justification in consideration of justice. It is a well known fact that after to enforce the law to its letter produces manifest injustice, for frequently equitable and humane consideration, and other considerations of a closely related nature, would seem to be of a sufficient calibre to excuse or justify a technical violation of the law."

133. Mr. Deb has referred to a large number of decisions, viz., *Sm. Radharani Das v. Sisir Kumar*, reported in AIR 1953 Cal 524, *Air Carrying Corporation v. Shibendra Nath Bhattacharya* reported in AIR 1964 Cal 396, *Kishan Chand v. Ram Babu* reported in AIR 1965 All 65, *Jagadindra Kumar v. Revenue Commr., Orissa* reported in AIR 1953 Orissa 117, *State of Bombay v. Chhaganlal Gangaram Lavar* reported in AIR 1955 Bombay 1, *Santu v. Sohan Lal*, reported in AIR 1951 Pepsu 33 and *Hotha Sitarama v. State of Andhra Pradesh* reported in AIR 1959 Andh Pra 359 for the proposition that the decisions of the Privy Council are binding on this Court unless the Supreme Court speaks different. There cannot be any doubt whatsoever that Article 372 read with Article 374(2) of the Constitution of India are of wide amplitude. What, therefore, is binding on the High Court is the law laid down by the Privy Council, the ratio of decision is the reason. The law laid down by Privy Council is to be found out from its ratio. An obiter dicta, as well known, is not a ratio decidendi.

134. In *Dias on Jurisprudence*, Fifth Edn., at page 143, it is stated:—

"Pronouncements of law, which are not part of the ratio decidendi, and classed as obiter dicta and are not authoritative. Ratios and dicta tend to shade into each other. The former have law-quality and are binding on lower Courts, dicta, too, have law-quality but are not binding at all. Vis-a-vis a higher Court even the ratio decidendi of a lower Court decision has only persuasive force like that of a dictum. It has been pointed out that some dicta are so authoritative that the distinction between ratio and dictum is reduced to vanishing point. Dicta, which have no force, are propositions stated by way of illustration or on hypothetical facts. Greater difficulties attend rulings of law which are subsequently relegated to the status of dicta by interpretation. The distinction in such cases between ratio and dictum is but a device employed by subsequent Courts for the adoption or rejection of doctrine expressed in previous cases according to the inclination of the Judge. An example would be the treatment of Lord Atkin's 'neighbour' proposition in subsequent cases."

135. In *Salmond on Jurisprudence*, 12th Edn., page 29, it is stated:—

"One of the essential features of the doctrine of precedent in the common law is that rules of

law are developed in the very process of application. This means that they are created by Judges and not by teachers and other academic lawyers, however, learned they may be. It also means that they are created by Judges only when acting as Judges, i.e., when deciding cases and not for example when giving lectures or other addresses; statements made by Judges in their extra-judicial capacity, like other extra-judicial opinions, are without binding authority. For the fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides.

In the course of his judgment, however, a Judge may let fall various observations not precisely relevant to the issue before him. He may for instance illustrate his general reasoning by reference to hypothetical situations and the law which he considers to apply to them. Here of course, since the issue is not one that arises between the parties, full argument by counsel will be lacking, so that it would be unwise to accord the observation equal weight with that given to his actual

decision. Or again, having decided the case on one point, the Judge may feel it unnecessary to pronounce on the other points raised by the parties, but he may nevertheless want to indicate how he would have decided these points if necessary. Here again we are not given the Judge's final decision on a live issue, so that once more it would be unwise to endow it with as much authority as the actual decision. These observations by the way, obiter dicta, are without binding authority, but are nonetheless important: not only do they help to rationalise the law but they serve to suggest solutions to problems not yet decided by the Courts. Indeed dicta of the House of Lords or of Judges who were masters of their fields, like Lord Blackburn, may often in practice enjoy greater prestige than the rationales of lesser Judges."

136. An obiter may have persuasive value or coming from a renowned Judge, it may command respect but it would not be the law within the meaning of Article 372 read with Article 374(2) of the Constitution of India.

137. Similarly in text book of *Jurisprudence* by G.W. Paton, 4th Edn. at page 210 the learned Author states:—

"Ratio decidendi, literally, would refer to the 'reason of decision' or to the 'reason for deciding' but the use of the term to refer to the binding part of a case requires some attention to the actual terminology used in arguments about case law authority, for there has been much confusion. To begin with, ratio decidendi is almost always used in contra-distinction to obiter dictum. An obiter dictum, of course, is always something said by a Judge. It is frequently easier to show that something said in a judgment is obiter and has no binding authority. Clearly something said by a Judge about the law in his judgment, which is not part of the course of reasoning leading to the decision of some question or issue presented to him for resolution, has no binding authority however persuasive it may be, and it will be described as an obiter dictum."

138. However, in the instant case apart from the fact that we have shown hereinbefore that the decisions of the Privy Council are merely obiters, we have also noticed that there are decisions to the contrary. It is now a well known proposition of law that a decision is an authority for what it decides and not for what can logically be deduced therefrom. It is further well known that a decision is not a precedent on a point which was not argued. See *Goodyear India Ltd. v. State of Haryana*, reported in AIR 1990 SC 781 and *Mittal Engineering Works (P) Ltd. v. Collector of Central Excise, Meerut* reported in (1997) 1 SCC 203.

139. The ratio of Privy Council is binding on a High Court as a precedent, in terms of Article 372 of the Constitution of India. It has been noticed hereinbefore that the Supreme Court has decided the law in a different manner and thus, those Privy Council's decisions are no longer binding on this Court.

140. In any event, the law laid down by the Privy Council merely operates as a binding precedent. In *Assambrook Exports Ltd. v. Export Credit Guarantee Corporation of India* reported in 1998 (1) Cal WN 65 : AIR 1998 Cal 1, one of us (S.B. Sinha, J.) noticed, (At Pp. 8-9 of AIR):—

"In the *Regional Manager v. Pawan Kumar Dubey* reported in AIR 1976 SC 1766, the Supreme Court while considering the case of reservation observed (Para 7):—

'It is the rule deducible from the application of law to the facts and circumstances of a case which continues its ratio decidendi and not some conclusion

based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.'

In *Krishena Kumar v. Union of India*, reported in 1990 (4) SCC 207 : AIR 1990 SC 1782, it was held, (Paras 18 and 19 of AIR):—

"The doctrine, of precedent, that is being bound by a previous decision is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain 'propositions wider than the case itself required'. This was what Lord Selborne said in *Calendonian Railway Co. v. Walker's Trustees*, (1882) 7 AC 259 and Lord Halsbury in *Quinn v. Leathern*, 1901 AC 495. Sir Frederick Pollock has also said: "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principle accepted and applied as necessary grounds of the decision.'

In other words, the enunciation of the reason or principle upon which a question before a Court has been decided is alone binding as a precedent. The ratio decidendi is the underlying principle namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premises consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premises consisting of the material facts of the case under immediate consideration. If it is not the duty of the Court to spell it out with difficulty in order to be bound by it. In the words of *Halsbury* (4th Edn. Vol. 26, para 573).

'The concrete decision alone is binding between the parties to it but it is abstract ratio decidendi as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi."

141. Reference in this connection may also be made to *Commr. of I.T. v. Sun Engineering Works (P) Ltd.* reported in AIR 1993 SC 43.

142-143. It is not also correct to contend that the Court has to follow the practice of this Court blindly. During passage of time the situation has changed. The change in the situation in the conduct of business of the High Courts has also been taken note of the Supreme Court in the latest decision. The interpretation of law can never be rigid. It has to be purposive. The law has to develop. It shall not be allowed to stink by confining it as still water.

144. Justice Cardozo said:—

"The law has its epochs of ebb and flow, the flood tides are on us. The old order may change yielding place to new; but the transition is never an easy process."

145. From only 'justice' the Courts have now begun to think in terms of 'social justice', 'socio-economic justice' and 'distributive justice'. The end of the law is seen to be, not only vindication of legal equality, but also provision of equality in fact with regard to more and more of elements that make life meaningful in the contemporary community. It no longer plays a regulatory role but also a constructive one.

Albert Camus stated:—

"The wheel turns, history changes". Stability and change are the two sides of the same law-coin. In their pure form they are antagonistic poles: without stability the law becomes not a chart of conduct, but a game of chance: with only stability the law is as the still waters in which there are only stagnation and death."

146. Application of a statute may be varied from time to time. Difficulties may arise in the application of a statute by a Court in different situation and context.

147. Reed Dickerson in his *The Interpretation and Application of Statutes* at page 255 refers to such a case and noticed:—

"The doctrinal problem that the Court of Appeals faced was this: How could the selfsame statute, which had remained unchanged since 1831, have meant one thing in 1939 and another

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in 1941? The answer is that it could not, if by 'meaning' we mean true meaning. On the other hand, it could, if by 'meaning' we mean legal meaning; the same statute can have different legal meanings on different dates. Taking as our standard the assumed correctness of the 1941 interpretation (which was not in issue), we can say that in 1939 the legal meaning of the act, which is ordinarily what counts in Court, differed from its true meaning. When in 1941 the Supreme Court made the assumedly correct interpretation, it declared a meaning that, if correct, must have been the statute's meaning from the date of enactment. By that same determination it also made the true meaning, for the first time, the legal meaning. In short, the basic relevant juridical fact was that in 1941 the legal meaning of 'near' had changed.

This analysis would ordinarily liberate the Court from the false dilemma of having to choose between staying with a wrong legal meaning and declaring a new correct legal meaning that is necessarily effective from the date of enactment. Because only a newly declared rule of law, which now coincided with true meaning, was directly involved, the Court had discretion to make the new rule effective at what it considered the appropriate time. Thus, it is arguable that the Court in *Colpoys* was free to apply the new rule only prospectively, if that seemed to be the most appropriate action."

148. Furthermore, if a rigid and strict literal interpretation is given to Order 47, Rule 5 of the Code of Civil Procedure the same may border on unconstitutionality. If two views are possible the Court will uphold such view which will preserve the constitutionality and for the said purpose, the provision of a statute can also be read up or read down.

149. However, we agree with the suggestion of Mr. Panja that with a view to remove all uncertainties, the Full Court may take appropriate steps for amending the High Court Rules.

150. Before parting with this case, however, we may place on record that we have come across an order dated 26th November, 1993 passed by the Supreme Court of India in Civil Appeal No. 7597/93 (*K. Saroja Nakshatri v. Sadasukh Kabra & Co.*) wherein the Apex Court directed hearing of review application by a single Judge keeping in view the fact that the other Judge forming the Division Bench has become non-attached.

151. It appears that the Apex Court has passed the said order on the premises that according to the Rules of the Calcutta High Court if one of the Judges retired,

the review application is heard by a single Judge who is still on the Bench. Such an observation was made on concession of the counsel of the parties. However, we have noticed hereinbefore that there does not exist any such review. Furthermore, as indicated hereinbefore, all the points raised before this bench were not argued nor canvassed before the Apex Court. Such an order on a wrong concession cannot, in our considered opinion, be a binding precedent.

152. In view of our foregoing discussions we hold—

1. Order 47, Rule 5 of the Code of Civil Procedure although ipso facto has no application in relation to a writ proceeding or a proceeding on the Original Side or the Appellate Side of this Court, the principles laid down therein may be applied.
2. In a case where merely one of the learned Judges attached to the Bench is available he may issue the rule but the matter on merit must be heard by a Division Bench of two Judges or such number of Judges as the Hon'ble the Chief Justice may constitute.
3. The Hon'ble the Chief Justice has an unfettered jurisdiction in the matter of constitution of Benches in all matters including a review application.
4. As a matter of propriety, a Judge who is still attached to the Court should be made a party to hear the review application unless exceptional situation arises which may in the opinion of the Hon'ble the Chief Justice would be subversive to imparting justice to a litigation keeping in view the principle that justice is not only to be done but manifestly seem to be done.

153. These references are answered accordingly. The records may now be placed before Hon'ble the Chief Justice for placing the matter before appropriate Bench on the administrative side.

Order accordingly.

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* The judgments are printed in the order in which they are given in the certified copy—Ed.