INDIAN MEDICAL ASSOCIATION
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 8170 OF 2009)

MAY 12, 2011

[B.SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Constitution of India, 1950:

Article 12 – 'State' – Army Welfare Education Society (AWES) and Army College of Medical Sciences (ACMS) – HELD: High Court has held that AWES and ACMS were neither instrumentalities of State nor could ACMS be held to be an aided educational institution – Such determinations always present issues of fact and of law – The Court is disinclined to over-rule the findings of the High Court in this regard.

Article 15(5) read with Article 162 – Admission to MBBS course – Reservation for Scheduled Castes, Scheduled Tribes and socially and educationally backward classes of citizens – Exemption granted to ACMS by Delhi Government – HELD: The Notification dated 14-08-2008 issued by the Government of National Capital Territory of Delhi permitting the ACMS to allocate hundred percent seats in the said college for admission to the wards of Army personnel is ultra vires the provisions of Delhi Act 80 of 2007 and also unconstitutional and, as such, is set aside – The power under Article 162 can not be claimed to set at nought a declared, specified and mandated policy enacted by the legislature – Delhi Act 80 of 2007, and s.12, including both sub-s. (1) and (2) are clearly applicable, with respect to admission of students to ACMS – The admission procedures devised by Army College of Medical Sciences for admitting the students

in the first year MBBS course from a pre-defined source, carved out by itself and its parent society, are illegal and ultra vires the provisions of the Delhi Act 80 of 2007 – Respondents directed to admit the writ petitioners into the First Year of MBBS Course in ACMS, in the ensuing academic year, notwithstanding the rank secured by them in the CET, by creating supernumerary seats if the writ petitioners still so desire, for they have been deprived of their legitimate right of admission to the course, for no fault of theirs – Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and Other Measures to Ensure Equity and Excellence) Act, 2007 – s.12 – Doctrine of occupied field.

Article 15(5) and 19(6) – Unaided non-minority educational institution – HELD: In view of Clause (5) of Article 15 of the Constitution, the unaided non-minority educational institutions would have to comply with the State mandated reservations, selecting students within the specified reservation categories on the basis of inter-se merit – With respect to the remaining seats, the state insist that non-minority private unaided institutions select the most meritorious students, as determined by the marks secured in the qualifying test – Both minority and non-minority unaided institutions have the right to admit students who have secured higher marks in the entrance test, and not an equivalence between minority and non-minority institutions to engraft their own "sources" or "classes" of students from within the general pool – Non-minority private unaided professional colleges do not have the right to choose their own "source" from within the general pool – All of the permissible restrictions and regulations under Clause (6) of Article 19 that non-minority institutions would be subject to, would also be applicable with respect to ACMS – It may indeed be the case that army personnel, particularly, those at the lower end of the hierarchy in the army, and their families, may be suffering from great hardships – It would indeed be, and ought to be a matter of

considerable national distress if persons who have agreed to lay down their lives, for the sake of national security, are not extended an empathetic understanding of their needs and aspirations – If any special provisions need to be made to protect the wards of Army personnel, this may possibly be done by the State, by laws protected by Clause (5) of Article 15 – The private society, of former and current army personnel by themselves cannot unilaterally choose to do the same.

Article 15(5), 14 and 38 read with Articles 32 and 226 – Reservation policy of State – Judicial review of – HELD: provisions of new clause (5) of Article 15 do not purport to take away the power of judicial review, or even access to courts through Articles 32 or 226.

Article 15(5) – HELD: Clause (5) of Article 15 does not violate the basic structure of the Constitution – Given the absolute necessity of achieving the egalitarian and social justice goals that are implied by provisions of clause (5) of Article 15, and the urgency of such a requirement, Article 15(5) is not a violation of the basic structure, but in fact strengthen the basic structure of our constitution – Constitutional law – Theory of basic structure.

Education/Educational Institutions:

Higher education – Participation of private sector – HELD: Participation of the private sector to function in the field of higher education, to supplement the role of the State in the field which has been recognized even in TMA Pai could only have existed if the State had the power to devise policies based on circumstances to promote general welfare of the country, and the larger public interest – The same cannot be taken to mean that a constitutional amendment has occurred, in a manner that fundamental alteration has occurred in the basic structure itself, whereby the State is now denuded of its obligations to pursue social justice and egalitarian ideals,

inscribed as an essential part of our constitutional identity, in those areas which the State feels that even resources in the private sector would need to be used to achieve those goals – Clause (5) of Article 15 strengthens the social fabric in which the Constitutional vision, goals and values could be better achieved and served.

DELHI PROFESSIONAL COLLEGES OR INSTITUTIONS (PROHIBITION OF CAPITATION FEE, REGULATION OF ADMISSION, FIXATION OF NON-EXPLOITATIVE FEE AND OTHER MEASURES TO ENSURE EQUITY AND EXCELLENCE) ACT, 2007:

s.12 – Interpretation of – HELD: The provisions of the Act do not suffer from any constitutional infirmities and constitutional validity of the same is upheld.

Interpretation of Statutes:

Unrepealed sections of a previous statute – If in conflict with the provisions of the later statute – Relevance and interpretation of – HELD: In the instant case, the High Court was right in holding that Ordinance 30 of GGSIU would be inapplicable in the case on account of enactment of Delhi Act 80 of 2007 – However, the expression used by the High Court that Ordinance 30 has "lost its relevance" to the extent that it may suggest a loss of general relevance, is not correct – Reservation Policy for Self-Financing Private Institutions Affiliated with the Guru Govind Singh Indraprastha University, 2006 (Ordinance 30) – Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and Other Measures to Ensure Equity and Excellence) Act, 2007 – s.12.

Army College of Medical Sciences (ACMS), managed and run by Army Welfare Education Society (AWES), located in the National Capital Territory of Delhi (NCT of Delhi) and affiliated with the Guru Gobind Singh

Indraprastha University (GGSIU), was granted certain exemptions by the Government of NCT of Delhi from operation of the provisions of the Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and Other Measures to Ensure Equity and Excellence) Act, 2007 (Delhi Act 80 of 2007) with respect to allocations as between Delhi and non-Delhi students, reservations as mandated in sub-s. (2) of s.12 of Delhi Act 80 of 2007, and the requirement that all admissions in such reserved categories and with respect to remaining seats be based on inter-se merit as determined by marks secured in common entrance test; and allowing ACMS to admit only wards of army personnel (both serving and former) in accordance with ACMS's admission policy. Writ petitions were filed by the Indian Medical Association and the candidates who otherwise would be eligible to be considered for admission to ACMS, challenging the admission policy of ACMS. The Single Judge of the High Court held that 79% of the seats could be filled by wards of Army personnel and the remaining 21% by students belonging to the general category. The legislatively mandated allotment of seats for various reserved categories including Scheduled Castes and Scheduled Tribes was ignored. The Division Bench of the High Court upheld the admission policy of the ACMS.

In the instant appeals and the writ petitions, the contention of the parties boiled down to the questions: (i) "Is ACMS an instrumentality of the State or an aided institution?"; (ii) Whether the exemptions granted to ACMS by the Delhi Government were valid? and (iii) Whether ACMS can admit only wards of Army personnel to the seats not covered by reservations mandated by Delhi Act 80 of 2007, without any regard to the merit of other Delhi or non-Delhi students who may have secured higher marks in common entrance test?"

Disposing of the matters, the Court

HELD: 1.1. At both stages of proceedings in the High Court the conclusion reached was that the respondents were neither instrumentalities of State nor could ACMS be held to be an aided educational institution. Such determinations always present issues of fact and of law. This Court is disinclined to over-rule the findings of the High Court in this regard. [Para 32] [647-D-E]

1.2. The Division Bench of the High Court was correct in holding that Ordinance 30 of GGSIU, entitled Reservation Policy for Self-Financing Private Institutions Affiliated with the Guru Govind Singh Indraprastha University, 2006 (Ordinance 30), making special provisions for advancement of the weaker sections of the society and in particular of persons belonging to Scheduled Castes and Scheduled Tribes, would be inapplicable in the case on account of enactment of Delhi Act 80 of 2007. This is so, because Delhi Act 80 of 2007 is a later enactment, much more general, containing a complete code covering the entire terrain of admissions of students to professional unaided non-minority institutions affiliated to all universities in NCT of Delhi, including GGSIU, with specific provisions therein regarding allocation of seats between Delhi and non-Delhi students, and reservations applicable in terms of those students falling within constitutionally permissible classes. However, the expression used by the Division Bench, that Ordinance 30 has "lost its relevance" to the extent that it may suggest a loss of general relevance is not correct. Considerable care ought to be exercised in delineating the applicability of unrepealed sections of a previous statute, even if they conflict with the provisions of a later statute with respect to some specific terrain of activities. After all, Ordinance 30 of GGSIU may be applicable with respect to many other situations, not

involving the terrain covered by Delhi Act 80 of 2007. [para 33] [647-G-H; 648-A-C]

Municipal Council, Palai v. T.J. Joseph **(1964) 2 SCR 87=1963 AIR 1561 – relied on.**

2.1. The Notification dated 14-08-2008 issued by the Government of National Capital Territory of Delhi permitting the ACMS to allocate hundred percent seats in the said college for admission to the wards of Army personnel is ultra vires the provisions of Delhi Act 80 of 2007 and also unconstitutional. [para 148] [648-C-D]

2.2. At no stage of the proceedings either before the High Court or in this court, have the respondents challenged the constitutional validity of Delhi Act 80 of 2007, and specifically the allocations and reservations as mandated by s.12 therein. Delhi Act 80 of 2007 or any provisions thereof do not suffer from any constitutional infirmities. The validity of the Delhi Act 80 of 2007, and its provisions, are accordingly upheld. [Para 29 and 148] [742-E-F; 645-B-D]

2.3. Both the title and the Preamble of Delhi Act 80 of 2007 specifically state that it was an Act to ensure equity for Scheduled Castes, Scheduled Tribes and other weaker segments of the population. Consequently, the enabling provisions clause (5) of Article 15 with respect to making "special provisions" in regard to admission of Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes to private unaided non-minority educational institutions would extend a protective umbrella with regard to allocations and reservations in s. 12 of Delhi Act 80 of 2007. Provisions of the said Act with respect to reservations would have to apply with the full force that they were intended to be. [para 29] [645-C-E]

2.4. It is to be noted that Delhi Act 80 of 2007 specifically mandates that all admissions to ACMS would have to be made in accordance with merit of students, based on marks secured in the common entrance test. With respect to those students covered by various categories such as Scheduled Castes, Scheduled Tribes and other constitutionally permissible classes, as delineated in sub-s.(2) of s.12, and as applicable with respect to categories described in sub-s.(1) of s.12, the rule of inter-se merit, based on marks secured in common entrance test by students falling into each category, would apply. That would also mean, then, that with respect to seats not covered by provisions of sub-s. (2) of s.12, they would have to be filled in accordance with rule of merit based on marks secured by general category of students not covered by sub-s. (2) of s.12. [para 30] [645-G-H; 646-A-C]

2.5. A reading s.12 of Delhi Act of 2007 synoptically, makes it clear that sub-s. (2) of s.12 pervades the entire space of how seats are to be allocated. In fact, the preamble to the Act, states that it is being enacted to provide for "allotment" of seats to *"Scheduled Castes, Scheduled Tribes …….. and other measures to ensure equity and excellence in professional education in the National Capital Territory of Delhi"* **Consequently, it must be read that sub-s. (2) of s.12 is one of the primary sections of the Act and that it would act upon the provisions of sub-s. (1) of s.12. Sub-s. (2) of s.12 provides that with respect to seats in sub-s. (1) of s.12, an institution shall reserve as provided for in clauses (a), (b) and (c) of sub-s. (2) of s.12 that follow. Clearly, the phrase "[I]n the seats mentioned in sub-s. (1)" at the beginning of sub-s. (2) of s.12 reveals the intent of the legislature that the specific reservations provided for Scheduled Castes and Scheduled Tribes and other provisions that may be made with respect to other weaker segments and other**

permissible categories of classes, shall be applied with respect to each and every category of seats identified in sub-s. (1) of s.12. Looking at sub-s. (2) of s.12 closely, this would mean that not only are reservation of seats, for instance with respect to Scheduled Castes and Scheduled Tribes, to be made with respect to Delhi students, non-Delhi students, and also with respect to all students admitted under the management quota. [para 37] [650-B-F]

2.6. Furthermore, by permitting ACMS to admit only students of wards of army personnel, notwithstanding the fact that there could be others who have taken the common entrance test, and have secured more marks than the wards of Army personnel, the exemptions granted by Delhi Government also set at naught the legislative intent to ensure excellence by mandating that all admissions be made on the basis of inter-se merit within each of the categories of students. The general category would comprise of all students who have taken the common entrance test, and otherwise satisfy the conditions of sub-s. (1) of s.12 of the Delhi Act 80 of 2007, after the seats pursuant to sub-s. (2) of s.12 are reserved i.e., allocated for the described constitutionally permissible categories therein. The said Act clearly specifies that its objective is to achieve excellence, and one of the methods specified to achieve the same is of admitting students on the basis of inter-se merit in each of the categories specified in s.12. The grant of permission to ACMS to admit students who may have scored lower marks than others, both within the general category and also in the reserved categories, results in defeat of the aims, objects and purposes of the Act, and the entire fabric and scheme of the Act gets frustrated. There is no power conferred on Government of Delhi to grant any exemption in favour of any institution from the

operation of any of the provisions of the Act. [para 39] [651-D-H; 652-A-B]

2.7. The claim of the Government of Delhi in its affidavit that its powers to provide such exemptions also flow from Article 162 of the Constitution can not be accepted. Article 162 states, "[S]ubject to the provisions of this Constitution the executive power of a State shall extend to the matters to which the Legislature of the State has power to make law." The power under Article 162 can not be claimed to set at nought a declared, specified and mandated policy legislated by the legislature. Further, the cited portion of Article 162 has been interpreted by this Court to mean that the State Executive has the power to make any regulation or order which shall have the effect of law so long as it does not contravene any legislation by the State Legislature already covering the field. In the instant case, the legislature of NCT of Delhi has specifically set out a clear policy with respect to reservations for Scheduled Castes and Scheduled Tribes and other weaker sections of the population. The duty of the executive is to implement that policy, and not to abrogate it. [para 40] [652-D-H; 653-A-B]

Ram Jawaya Kapur v. State of Punjab **(1955) 2 SCR 225= AIR 1955 SC 549; and** *State of A.P. v. Lavu* **(1971) 1 SCC 607 – relied on.**

2.8. The correct interpretation of sub-s. (b) of s.12(1) is as follows: first part - "Eighty five percent of the total seats except the management seats, shall be allocated for Delhi students" followed by the conjunction "and" and then the second part - "the remaining fifteen percent seats for outside Delhi students or such other allocation as the Government may by notification in Official Gazette direct." Therefore, it can only mean that the powers of Delhi Government are limited to the extent of varying the percentage of seats reserved for non-Delhi students, up

to a maximum of 15%. Further, this is the legislature of Delhi, that is legislating for the denizens of NCT of Delhi, with a primary responsibility for their welfare. Further, in as much as clause (a) of sub-s. (2) of s.12 provides that 17% of seats be reserved for Scheduled Castes, 1% of seats be reserved for Scheduled Tribes, and an unspecified percentage of seats be reserved for other Backward classes who are also denizens of Delhi, the legislature of Delhi would have taken into account the needs of Scheduled Castes and Scheduled Tribes in Delhi. The discretion to vary the 15% reserved for non-Delhi citizens was in all likelihood to enable the Government of Delhi to increase the percentage of seats allocated to denizens of Delhi, in the event a sizeable number of other backward classes of students also need to be accommodated in the professional colleges of Delhi. By fixing a number, 15%, for non-Delhi students, the legislature intended to set a maximal limit on the number of non-Delhi students who could be admitted, and specified the percentage of seats that could be allocated to Scheduled Castes, Scheduled Tribes and other weaker sections which could be reduced in the event that Government of Delhi needed to accommodate the special exigencies of the needs of denizens of Delhi, including but not limited to its backward classes. [para 43] [654-B-D; 655-A-B]

2.9. Thus, the exemption granted by the Government of Delhi allowing ACMS to fill 100% of its seats by wards of army personnel violates the basic principles of democratic governance, of the constitutional requirement that executive implement the specific and mandatory policy legislated by the legislature, and violates the provisions of Delhi Act 80 of 2007. In fact, the actions of the Government of Delhi, are wholly arbitrary, without any basis in law, and *ultra vires*. s.14 of the said Act specifies that any admission made in contravention of the

provisions of the Act or the rules made thereunder, shall be void, and further s.18 provides that those making admissions in contravention of the provisions of Delhi Act 80 of 2007 may be punished by imprisonment up to three years or a fine up to Rupees one Crore or both. Such provisions clearly demonstrate the intent of the legislature that its policy, as specified in the Act, and the purposes of the Act, not be derogated from in any manner. The said provisions of the Act are mandatory in nature. The Government of Delhi has clearly acted on the basis of a misplaced belief of its powers, under the Act, a misunderstanding of the statutory language of the Act, and its relevant provisions, and also in complete contravention of constitutional principles. [para 45] [656-E-H; 657-A-B]

2.10. Therefore, it is held Delhi Act 80 of 2007, and s.12, including both sub-s. (1) and (2) are clearly applicable, with respect to admission of students to ACMS. [para 46] [657-C]

3.1. The admission procedures devised by Army College of Medical Sciences for admitting the students in the first year MBBS course from a pre-defined source, carved out by itself and its parent society, are illegal and ultra vires the provisions of the Delhi Act 80 of 2007. [para 148] [657-F]

3.2. In *P.A. Inamdar**, **this Court's emphasis was on the right of private educational institutions to admit students on the basis of "merit" as determined by marks secured in an entrance test. To this extent, the quoted paragraphs would stand for the proposition that both minority and non-minority unaided institutions have the right to admit students who have secured higher marks in the entrance test, and not an equivalence between minority and non-minority institutions to engraft their own "sources" or "classes" of students from within the**

general pool. The rights of minority unaided educational institutions to select students, based on merit, is with respect to students who belong to that same minority. It is not a right to define a source as such. Minority institutions have to choose from their own minority group who are otherwise qualified, and non-minority institutions have to choose from the entire group who are otherwise qualified. The modality of choosing within those groups has to be on the basis of inter-se ranking determined in accordance with marks secured in the common entrance test. [paras 54 and 55] [662-D-H; 663-G-H; 664-A]

*** *P.A. Inamdar v. State of Maharashtra* 2005 (2) Suppl. SCR 603 = 2005 (6) SCC 537 - referred to.**

3.3. In view of Clause (5) of Article 15 of the Constitution, the unaided non-minority educational institutions would have to comply with the State mandated reservations, selecting students within the specified reservation categories on the basis of inter-se merit. With respect to the remaining seats, the state insist that non-minority private unaided institutions select the most meritorious students, as determined by the marks secured in the qualifying test. In the post clause (5) Article 15 scenario, all the seats that are available in the non-reserved category have to be filled by non-minority institutions on the basis of merit of students, i.e., ranking determined in accordance with marks secured, in the general category, comprising of the entire set of students who have taken the qualifying examination. [paras 56 and 57] [664-G-H; 665-D-E; 666-A-C]

3.4. Neither AWES nor ACMS, are protected by any constitutional provision that allows it to choose to be an educational institution serving only a small class of students from within the general pool. Consequently, all of the permissible restrictions and regulations under

Clause (6) of Article 19 that non-minority institutions would be subject to, would also be applicable with respect to ACMS. These regulations would also include a determination of how students in the non-reserved category of seats, in the post 93rd Amendment scenario, be admitted: on the basis of merit, determined by marks secured on the common entrance test. Maintenance of overall academic standards, which apparently can be properly achieved only if high importance is placed on admitting students on the basis of ranking determined by marks secured in entrance tests, is necessarily a State concern, which it may relax only in respect of those groups that it is constitutionally permitted to relax for. In the case of minority educational institutions, that relaxation is on account of Clause (1) of Article 30 provided minority educational institutions are maintaining their minority status by admitting mostly minority students except for a sprinkling of non-minorities; and with respect to non-minority educational institutions, only with respect to statutorily determined percentage of seats for Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes as enabled by Clause (5) of Article 15 and other constitutionally permissible classes. With respect to socially and educationally backward classes, such classes can be determined only after excluding the creamy layer, as held by this Court in *Ashoka Kumar Thakur. [para 61] [671-A-H; 672-A]**

****Ashoka Kumar Thakur v. Union of India* 2008 (4) SCR 1 = (2008) 6 SCC 1 – relied on.**

3.5. Non-minority private unaided professional colleges do not have the right to choose their own "source" from within the general pool. The equivalence between minority and non-minority unaided institutions, apart from that distinction because of clause (1) of Article 30, was to be on the basis that both are subject to

reasonable restrictions pursuant to clause (6) of Article 19, that neither minority nor non-minority institutions could maladminister their educational institutions, especially professional institutions, that affect the quality of education, and by choosing students arbitrarily from within the sources that they are entitled to choose from. In the case of non-minority institution, especially professional institutions, the "source" can only be the general pool, and selection has to be based on inter-se ranking of students who have qualified and applying or opting to choose to be admitted to such non-minority educational institutions. In the case of minority educational institutions, the "source" can be delimited to the particular minority the institution belongs to. The protection under clause (1) of Article 30 is granted to minority institution so long as they maintain their minority status. The added protections to minority educational institutions makes sense only in the event that non-minorities are restricted to choosing from the general pool, and minorities from the delimited source of their own minority. Otherwise, Clause (1) of Article 30 would become meaningless. [para 64] [674-F-H; 675-A-B]

3.6. Consequently, it cannot be said that ACMS as a non-minority professional institution has the right to delimit a source of students. ACMS has only the right to choose students from within the general pool. [para 65] [675-B-C]

3.7. The relief of exemptions granted to ACMS to fill up all of its seats only with wards of army personnel on account of national interest, given the ratio of *P.A. Inamdar,* can not be granted on that count. It may indeed be the case that army personnel, particularly, those at the lower end of the hierarchy in the army, and their families, may be suffering from great hardships. It would indeed be, and ought to be a matter of considerable national

distress if persons who have agreed to lay down their lives, for the sake of national security, are not extended an empathetic understanding of their needs and aspirations. However, the ratio of the judgments in *TMA Pai, Islamic Academy* and *P.A. Inamdar*, by larger benches of this Court, leaves this Court with no options with respect to holding that ACMS may select only those students who have scored higher marks in the common entrance test with respect to seats remaining after taking into account reserved seats. If any special provisions need to be made to protect the wards of Army personnel, this may possibly be done by the State, by laws protected by Clause (5) of Article 15. The private society, of former and current army personnel by themselves cannot unilaterally choose to do the same. [para 66] [675-E-H; 676-A-B]

TMA Pai Foundation v. State of Karnataka **2002 (3) Suppl. SCR 587 = (2002) 8 SCC 481;***Islamic Academy of Education v State of Karnataka* **2003 (2) Suppl. SCR 474 = (2003) 6 SCC 697; and** *P.A. Inamdar v. State of Maharashtra* **2005 (2) Suppl. SCR 603 = 2005 (6) SCC 537 - followed.**

4.1. Clause (5) of Article 15 does not violate the basic structure of the Constitution. [para 148] [742-F-G]

4.2. It would be pertinent to note that the provisions of new clause (5) of Article 15 do not purport to take away the power of judicial review, or even access to courts through Articles 32 or 226. Neither do the provisions of clause (5) of Article 15 mandate that the field of higher education be taken over by the State itself, either to the partial or total exclusion, of any private non-minority unaided educational institutions, a power that was most certainly granted under clause (6) of Article 19, which had been inserted by the 1st Constitutional Amendment in 1951. The purport of its provisions is that sub-clause (g) clause (1) of Article 19 should not be read to mean that if

the State were to make "special provisions" with respect to admission of Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes to non-minority unaided educational institutions the same should not be deemed to be unreasonable. [para 78] [686-E-H; 687-A]

I.R. Coelho v. State of Tamil Nadu **2007 (1) SCR 706 = (2007) 2 SCC 1;** I.C. *Golaknath v. State of Punjab* **(1967) 2 SCR 762;** *Keshavananda Bharati v. State of Kerala.* **1973 Suppl. SCR 1 = (1973) 4 SCC 225;** *Waman Rao v. Union of India,* **1981 (2) SCR 1 = (1981) 2 SCC 362;** *M. Nagaraj v Union of India* **(2006) 8 SCC 202;** ***A.K. Gopalan v State of Madras*** **1950 SCR 88;** *S.R. Bommai v. Union of India* **1994 (2) SCR 644 = (1994) 3 SCC 1; and** *GVK Industries Ltd. Vs, ITO* **(2011) 4 SCC 36 - referred to.**

4.3. It is now a well settled principle of our constitutional jurisprudence that Article 14 does not merely aspire to provide for our citizens mere formal equality, but also equality of status and of opportunity. The goals of the nation-state are the securing for all of its citizens a fraternity assuring the dignity of the individual and the unity of the nation. While Justice – social, economic and political is mentioned in only Article 38, it was also recognized that there can be no justice without equality of status and of opportunity. [para 99] [702-A-B]

4.4. The placement of clause (5) of Article 15 in the equality code, by the 93rd Constitutional Amendment is of great significance. It clearly situates itself within the broad egalitarian objectives of the Constitution. In this sense, what it does is that it enlarges as opposed to truncating, an essential and indeed a primordial feature of the equality code. Furthermore, both *M. Nagaraj* and *Ashoka Kumar Thakur* stand for the proposition that enlargement of the egalitarian content of the equality code

ought not to necessarily be deemed as a derogation from the formal equality guaranteed by Article 14, 15(1) or 16(1). Achievement of such egalitarian objectives within the context of employment or of education, in the public sector, as long as the measures do not truncate elements of formal equality disproportionately, were deemed to be inherent parts of the promise of real equality for all citizens. As stated succinctly in *M. Nagaraj*, it is an issue of proportionality. "Concept of proportional equality expects the State to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy" and further that "[U]nder the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and *no person suffers because of drawbacks which is not of his but social***." [para 105] [706-H; 707-A-D]**

M. Nagaraj v Union of India **(2006) 8 SCC 202 – relied on.**

M.R. Balaji v State of Mysore **1963 Suppl. SCR 439 = AIR 1963 SC 649;** *Devadasan v. Union of India* **1964 SCR 680 = AIR 1964 SC 179;** *State of Kerala v. N.M. Thomas* **1976 (1) SCR 906 = AIR 1976 SC 490 and** *Indra Sawhney v Union of India* **1992 (2) Suppl. SCR 454 = (1992) Supp (3) SCC 217;** *State of Karnataka v Ranganatha Reddy* **(1977) 4 SCC 471 – referred to.**

4.4. The same principles which this Court found to be applicable in finding egalitarianism to be a part of the equality code, at the level of being essential features informing the entire equality code, per force have to also be applied to the context of private sector unaided educational institutions. It is indeed true that the extent of State involvement in the field of higher education has dramatically declined on account of its own financial

position. An essential understanding was that because the private sector would expand even in areas such as higher education, the burden on the State of providing such services would decline. The burden of the State does not comprise merely of the burden of its financial outlays. The burden of the State obviously also comprises of the positive obligations imposed on it, on account of the egalitarian component of the equality code, the directive principles of State policy, and the national goals of achievement of an egalitarian order and social justice for individuals and amongst groups that those individuals are located in. [para 108] [709-G-H; 710-A-F]

Indra Sawhney v Union of India **1992 (2) Suppl. SCR 454 = (1992) Supp (3) SCC 217 –** *M. Nagaraj v Union of India* **(2006) 8 SCC 202** *Ashoka Kumar Thakur v. Union of India* **2008 (4) SCR 1 = (2008) 6 SCC 1 – relied on.**

4.5. The power of the State to allow participation of the private sector to function in the field of higher education could only have existed if the State had the power to devise policies based on circumstances to promote general welfare of the country, and the larger public interest. The same cannot be taken to mean that a constitutional amendment has occurred, in a manner that fundamental alteration has occurred in the basic structure itself, whereby the State is now denuded of its obligations to pursue social justice and egalitarian ideals, inscribed as an essential part of our constitutional identity, in those areas which the State feels that even resources in the private sector would need to be used to achieve those goals. [para 109] [711-D-F]

4.6. The conception of social justice is to be found not just in Article 38, in part IV of our Constitution. The same concern for social justice is also reflected in Clause (2) of Article 15. Further, Clause 4 of Article 15 specifies

that "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes". [para 112] [714-D-F]

4.7. The nature of judicial review of a constitutional amendment, in which over-arching principles informing all of the fundamental rights have to be gleaned and subjected to the test of abrogation of basic structure, comprises a particular form of constitutional interpretation in which the essences of each of those over-arching principles has to be gleaned and an amendment to the constitution has to be evaluated as being lawful or unlawful, in terms of implied limitations of power, as it effects those essences. [para 121] [722-G-H; 723-A-B]

4.8. By the insertion of Clause (5) of Article 15, the 93rd Constitutional Amendment has empowered the State to enact legislations that may have very far reaching beneficial consequences for the nation. In point of fact, each and every one of the beneficial consequences discussed in this judgment as being possible, would enhance the social justice content of the equality code, provide for enhancements of social and economic welfare at the lower end of the social and economic spectrum which can only behoove to the benefit of all the citizens thereby promoting the values inherent in Article 21, promote more informed, reasoned and reasonable debate by individuals belonging to various deprived segments of the population in the debates and formation of public opinion about choices being made, and the course that political and institutional constructs are taking in this country. Consequently, clause (5) of Article 15 strengthens the social fabric in which the Constitutional vision, goals and values could be better achieved and served. [para 122] [723-B-E]

4.9. It cannot be said that *TMA Pai*, as explained by *P.A. Inamdar* also provide the appropriate content for undertaking an "essences of rights test" i.e., an "over-arching principles" test, as enunciated by *M. Nagaraj*, to assess whether a Constitutional amendment, such as the 93rd Constitutional Amendment, violates the basic structure. Indeed TMA Pai, is an eleven judge bench judgment, and *P.A. Inamdar* a seven judge bench judgment. However, the very eloquent silence of the two benches as to whether the contents they have read into sub-clause (g) of clause (1) of Article 19 to constitute a basic feature of the Constitution, is itself a clear indication that this Court, in those judgments was not engaging in that type of analysis. This Court, through another constitutional bench, *Islamic Academy*, had also exhaustively examined the ratio in TMA Pai, and there is not even a whisper therein that there is any indication in TMA Pai, that the right of private unaided educational institutions to be free from reservations would constitute a right of such magnitude that its partial truncation would abrogate the basic structure of our Constitution and change its very identity. What TMA Pai did was essentially to engage in a "reasonableness standard" test based on the text of Article 19(1)(g). Nothing more. [para 130] [728-B-F]

4.10. Therefore, the unexamined aspects, including the contents of the very occupation that is guaranteed by sub-clause (g) of clause (1) of Article 19 have to be looked at. This is imperative because a test of a constitutional amendment on the anvil of the basic structure doctrine using the "essences of rights" test i.e., the "over-arching principles test" is an entirely different exercise from a mere "unreasonableness test" undertaken by this Court in TMA Pai. [para 132] [729-D]

4.11. Reservations, for socially and educationally backward classes and Scheduled Castes and Scheduled

Tribes, would ensure that students from different social, educational, economic and cultural backgrounds get together to study, and learn about each other, and critically assess the relevance, in the manner in which knowledge is generated, disseminated, and applied. This necessarily relates to the standards and purposes for which higher education, including professional education, is imparted. [para 142] [736-D-F]

4.12. Education is one of the principal human activities to establish a humanized order in our country. Its ontological specification is simple: every individual, in every group, is worthy of being educated. In as much as certain resources, such as seats in institutions of higher education, including professional education, are scarce, then they have to be allocated. The allocation can only be based on the fundamental ontological assumption that those who excel, within equal social circumstances, should be rewarded with access to higher education. Any other formula of distribution of such access, would be fundamentally inhuman, and violate Article 14 of our Constitution. The fact that non-minority unaided educational institutions insist on "social disadvantages blind" admission policies is proof that they are not recognizing the true purpose of education as an occupation.Therefore, State intervention is a categorical imperative, both morally and within our constitutional logic. [para 146] [740-G-H; 741-A-C]

4.13. Consequently, given the absolute necessity of achieving the egalitarian and social justice goals that are implied by provisions of clause (5) of Article 15, and the urgency of such a requirement, this Court holds that they are not a violation of the basic structure, but in fact strengthen the basic structure of our constitution. Consequently, the provisions of Delhi Act 80 of 2007, with respect to various categories of reservations provided therein are constitutionally valid. [para 148] [741-G-H]

5. The impugned judgment of the Delhi High Court is set aside. Consequently, the respondents are directed to admit the writ petitioners into the First Year of MBBS Course in Army College of Medical Sciences, if the writ petitioners still so desire, for they have been deprived of their legitimate right of admission to the course, for no fault of theirs, notwithstanding the rank secured by them in the CET. It is true that they have appeared at the common entrance examination held long ago and qualified themselves to get admitted but were deprived of the same on account of the illegal admission policy of Army College of Medical Sciences permitted by the Government of Delhi. In the circumstances, all the respondents are accordingly directed to ensure that the writ petitioners are admitted into the First Year MBBS Course in the ensuing academic year by creating supernumerary seats. However, it is made clear that the admissions already made by Army College of Medical Sciences are saved and shall not be affected in any manner whatsoever. [para 148] [742-G-H; 743-A-C]

D.N. Chanchala v. State of Mysore **(1971) 2 SCC 293;** *Unnikrishnan J.P. v. State of A.P.* **1993 (1) SCR 594 =1993 (1) SCC 645;** *Rev. Sidhajbhai Sabhai v. State of Gujarat* **(1963) 3 SCR 837;** *Ahemdabad St. Xavier's College Society v. State of Gujarat* **1975 (1) SCR 173 = (1974) 1 SCC 717;** *Minerva Mills Ltd. V Union of India* **1981 (1) SCR 206 = (1980) 3 SCC 625;** *I.R. Coelho v. State of Tamil Nadu* **2007 (1) SCR 706 = (2007) 2 SCC 1;** *I.C. Golaknath v. State of Punjab* **(1967) 2 SCR 762;** *Indira Nehru Gandhi v Raj Narain,* **1976 SCR 347 =1975 Supp SCC 1;** *Devadasan v. Union of India* **1964 SCR 680 = AIR 1964 SC 179;** *State of Kerala v. N.M. Thomas* **1976 (1) SCR 906 = AIR 1976 SC 490;** *State of Karnataka v Ranganatha Reddy* **(1977) 4 SCC 471 – referred to.**

The Argumentative Indian – Writings on Indian History, Culture and Identity, *Picador* **(2006); Seamus Heaney,** *The*

Cure at Troy: **A Version of Sophocles' Philoctetes, (London Faber and Faber, 1991); cited in Sen, Amartya,** *The Idea of Justice* **(Allen Lane, 2009); Eight Edition,** *Oxford University Press* ***(1990);*** **Plutarch:** *Theseus, trans.* **John Dryden.; W.W. Norton and Company (2002);** *Meritocracy and Economic Inequality, Oxford University Press; Oxford University Press* **(1997);** *Rawat Publications* **(2005)** *Constituent Assembly Debates* **– Vol. VII.** *Mahendra P. Singh, "V.N. Shukla's Constitution of India"***, 11th Ed. (Eastern Book Company, 2008);** *Introduction in Meritocracy and Economic Inequality,* **ed by Arrow, Samuel Bowles and Steven Durlauf;** *`Sukhadeo Thorat, Aryama and Prasant Negi (Eds.) Quest for Equal Opportunity and Growth* **(2007);** *Capitalism, Socialism and Democracy, Martino Fine Books* **(2010); MIT Press (2006);** *Devesh Kapur & Pratap Bhanu Mehta, Mortgaging the Future? Indian Higher Education* **(2007);** *The Concise Oxford Dictionary* **(1990); Learning To Be:** *The World of Education Today and Tomorrow* **–** *Unesco Paris* ***1972;*** **Jossey Bass, 1st Ed (2004)** *Harvard Educational Review* **(2000); Continuum, New York (30th Anniversary Edition, 2005) – referred to.**

Case Law Reference:

2002 (3) Suppl. SCR 587	**followed**	**para 17**
2005 (2) Suppl. SCR 603	**followed**	**para 17**
2003 (2) Suppl. SCR 474	**followed**	**para 19**
(1971) 2 SCC 293	**referred to**	**para 24**
1993 (1) SCR 594	**referred to**	**para 26**
2008 (4) SCR 1	**relied on**	**Para 27**
(1964) 2 SCR 87	**relied on**	**Para 33**
(1955) 2 SCR 225	**relied on**	**para 40**
(1971) 1 SCC 607	**relied on**	**Para 40**

(1963) 3 SCR 837	**referred to**	**para 60**
1975 (1) SCR 173	**referred to**	**para 60**
1981 (1) SCR 206	**referred to**	**para 70**
2007 (1) SCR 706	**referred to**	**para 71**
(1967) 2 SCR 762	**referred to**	**para 73**
1973 Suppl. SCR 1	**referred to**	**para 73 and 88**
1976 SCR 347	**referred to**	**para 75**
1981 (2) SCR 1	**referred to**	**para 80**
(2006) 8 SCC 202	**referred to**	**para 80**
1950 SCR 88	**referred to**	**para 86**
1994 (2) SCR 644	**referred to**	**para 86**
(2011) 4 SCC 36	**referred to**	**para 103**
1963 Suppl. SCR 439	**referred to**	**para 106**
1964 SCR 680	**referred to**	**para 106**
1976 (1) SCR 906	**referred to**	**para 106**
1992 (2) Suppl. SCR 454	**relied on**	**para 106**
(1977) 4 SCC 471	**referred to**	**para 107**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8170 of 2009.

From the Judgment & Order dated 25.2.2009 of the High Court of Delhi at New Delhi in LPA No. 756 of 2008.

WITH

W.P. (c) Nos. 192 of 2010, 320 & 528 of 2009 & C.A. No. 8171 of 2009.

Gaurab Banerjee, ASG, K.K. Venugopal, Jaideep Gupta, T.S. Doabia, A. Sharan, J.S. Attri, Dr. Aman Hingorani, Priya Hingorani, Reema Bhandri, Swati Sumbly (for Hingorani & Assciates), Dipak Kumar Jena, Minakshi Ghosh Jena, Shyam Mohan, Man Mohan, Dharam Das, Sadhna Sandhu, Shailender Saini, D.S. Mahra, Gautam Jha, Anil Katiyar, Amit Kumar, Somesh Chandra Jha, A.K. Singh, Devashish Bharuka, Ajay Pal, Prashant Shukla, Anita Sahani, Purnima Bhat Kak for the appearing parties.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J.

Where the mind is without fear and the head is held high
Where knowledge is free
Where the world has not broken up into fragments
By narrow domestic walls
Where words come out from the depth of truth
Where tireless striving stretches its arms towards perfection
Where the clear stream of reason has not lost its way
Onto the dreary desert sand of dead habit
Where the mind is led forward by thee
Into ever-widening thought and action
Into that heaven of freedom, my Father, let my country awake.

- Poet Laureate, Rabindranath Tagore

I.

2. The vexed question of access to education has hounded India from times immemorial. The futile pleadings of an Ekalavya for a teacher, that could not even be suppressed in the recesses of our cultural consciousness, to the modern day demands for exclusion from portals of knowledge of the "others", deemed to be unfit even if lip service of

acknowledgement is paid that such "unfitness" may be due to no fault of theirs but is rather on account of their social, economic and cultural circumstances, gouges our very national soul. Even as higher levels of knowledge becomes vital for survival, and its technologies become capable of empowering those who belong to groups, that historically and in the present have been excluded from the liberating prowess of knowledge, this country seems to witness, as in the past, a resurgence in demands that knowledge be parceled out, through tight fisted notions of excellence, and concepts of merit that pander to the early advantages of already empowered groups.

3. For much of our history, most of our people were told that they were excluded, for no fault of theirs in this and here, but on account of some past mistakes. Hope was restricted to the duty that was supposed to attach itself to station ascribed by a cruel fate, cast as cosmic justice. This order that parceled knowledge, by grades of ascribed status, chiefly of birth and of circumstances beyond the control of the young, weakened this country. It weakened our country because it reduced the pool of those who were to receive higher levels of knowledge to only a small portion of the upper crust. This in turn weakened our method of knowing and creating new knowledge - knowledge of the deductive kind was extolled primarily for its elegance, and its practical significance derided, and soon enough turned into metaphysics of mysticism that palliated the deprived with paens of a next life. This weakened our ability to apply knowledge to practical affairs of all segments of population, and effectively shut off the feed back loop that practice by users could have provided, so that new knowledge could be generated. Our practical knowledge ossified, and deductive knowledge became ever more ready to justify the worth of the high and the mighty, for such justification brought status to the peddlers of mysticism and enabled the high and the mighty to evade questions of accountability to the masses.

4. It was that truth that our national poet spoke about when he prayed that knowledge would be free. It was that truth that

the makers of modern India, those great souls, who could see the causes for past events, and foresee the needs of the future, tried to inscribe in our Constitution. It is not any wonder that our first Prime Minister in the excitement of the first seconds of freedom from foreign rule spoke about our "tryst with destiny" to the Constituent Assembly, and yet in the same breath also added "now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially." As Amartya Sen points out those were heady times, of promises made and of hope kindled[1]. And we, as a nation, promised ourselves that our huddled masses, condemned to rot in squalor, ignorance and powerlessness on account of the incessant exploitation by the elites, and on account of enforced hierarchies of social stature and worth, will never again acknowledge as a teacher, a person who will say that he will teach only members of this group, and not that group. To each and every group, and to each and every individual in those groups, we promised that never again would we allow social circumstances of the groups they belonged to be a factor in our assessment of their social worth. We gave our people the hope that we, the upper crust of India will change, and that their patience and tolerance of our inhumanity, over many millennia in the past and for a few decades more into the future, will soon be rewarded by our humanization.

> History says, Don't hope
> On this side of the grave,
> But then, once in a lifetime
> The longed-for tidal wave
> Of justice can rise up,
> *And hope and history rhyme.*[2]

5. We formed our nation-state to make sure that hope and

1. The Argumentative Indian—Writings on Indian History, Culture and Identity, Picador (2006).

2. Seamus Heaney, The Cure at Troy: A Verson of Sophocles' Philoctetes, (London Faber, 1991); cited in Sen, Amartya, The Idea of Justice (Allen Lane, 2009)

history, as an actuality of experience of our people – all of our people, belonging to all of the groups into which they belonged to – would indeed rhyme. That is what our Constitution promises. And that is the motive force that informs the basic structure of our Constitution. Our fealty to that motive force is as sacred a promise that we as a nation have ever made to ourselves. Every other commitment can be assessed only on the touchstone of that motive force that balances hope and actuality of history, with hope progressively, and rapidly, being transcribed into actuality of real equality.

6. In contrast to the above, a strange interpretation has been pressed upon us in this instant matter. On the one hand it is contended that the State has to be denied the power to achieve an egalitarian social order and promote social justice with respect to deprived segments of the population, by imposing reservations on private unaided educational institutions, on the ground that this Court has held that private non-minority unaided educational institutions cannot be compelled to select students of lower merit as defined by marks secured in an entrance test, notwithstanding the fact that the State may have come to a rational conclusion that such underachievement is on account of social, economic or cultural deprivations and consequent denial of admissions to institutions of higher education deleterious to national interest and welfare. On the other hand it is contended that private unaided non-minority educational institutions, established by virtue of citizens claimed right to the charitable occupation, "education", an essential ingredient of which is the unfettered right to choose who to admit, may define their own classes of students to select, notwithstanding the fact that there may be other students who have taken the same entrance test and scored more marks. It would appear that we have now entered a strange terrain of twilight constitutionalism, wherein constitutionally mandated goals of egalitarianism and social justice are set aside, the State is eviscerated of its powers to effectuate social transformation, even though inequality is

endemic and human suffering is widely extant particularly amongst traditionally deprived segments of the population, and yet private educational institutions can form their own exclusive communes for the imparting of knowledge to youngsters, and exclude all others, despite the recognized historical truth that it is such rules of exclusion have undermined our national capacity in the past.

7. The main issues that present themselves to us in these matters before us relate to the following:

(1) Can the executive abrogate a legislatively mandated and specified social justice program in the field of education?

(2) Do private non-minority unaided professional educational institutions have the right to pre define a social group and admit into their institutions from only those social groups and exclude all other students the opportunity of being considered for admission into such educational institutions?

It is against the background of the ark of hope that our Constitution is, that we have to answer the above questions.

II

Facts of the Case:

The Private Non-Minority Unaided Professional Educational Institution

8. The private educational institution, started and managed by the Army Welfare Education Society ("AWES"), named Army College of Medical Sciences ("ACMS"), located in the National Capital Territory of Delhi ("NCT of Delhi"), seeks to admit only students who are wards or children of current and former army personnel and widows of army personnel (henceforth, we will be referring this entire group as "wards of

army personnel" for ease of use).

9. AWES, it is stated, is a charitable trust that has been set up to cater to the educational needs of wards of Army personnel, both current and former, and widows of Army personnel. It is stated that the operation of its educational institutions is funded purely from regimental funds, which have been recognized to be private funds and not that of the Indian Army. AWES was given on lease, an extent of a little over 25 acres of land in the NCT of Delhi under the control and possession of Ministry of Defence in order to enable it to start ACMS, and meet the regulatory requirement regarding extent of land that a private medical college ought to have for its college campus. In addition, ACMS has also been provided the facility of using the Army Hospital in NCT of Delhi, both for its scholars to fulfill the necessary clinical training at such an hospital, and also to fulfill the regulatory requirement that a medical college possess access to a general hospital of sufficient number of beds as assurance of availability of facilities to meet the curricular requirements.

10. It is also stated that the wards of army personnel suffer from extensive disadvantages that children of the regular civilian population do not face. It is of course well recognized that army personnel are, by the very nature of their job, deputed to serve in various inhospitable terrains, or in regions with scant facilities. Such assignments imply non-availability of proper educational facilities for their wards in large periods of the critical growing periods of the children. Further, in order to facilitate the education of the children, personnel of army are also compelled to maintain dual homes, where the member of the army personnel is in one place, and his family resides in another place. This places tremendous economic hardships, which could be conceived as also imposing hardships in being able to secure any special coaching or training for the children. Further, the absence of the father figure could also imply a certain imbalance in family lives. All these contribute to lowered educational attainments of wards of army personnel, relative to

the civilian population, and hence lowered performance in qualifying examinations for various educational institutes at the college level, particularly the professional colleges. It is also contended that the seats reserved for Defence personnel, at college level, also do not satisfy the needs of children and army wards because of paucity of total seats and stringent domicile requirements enacted by State legislatures.

The admission policy of the private non-minority unaided professional educational institution.

11. ACMS, in the year 2008, began to admit students. It sought to do this by a set of rules framed by itself, and which may be briefly stated as follows:

(a) That only those students who have the relevant qualifying high school education and who have taken the common entrance test conducted by appropriate authorities for admission to medical colleges in the NCT of Delhi, and have secured the minimal qualifying marks in such a test, shall be eligible to apply to ACMS;

(b) Of the students satisfying (a) above, only those who are wards or children of former and current army personnel and widows of army personnel (including those who have died in service) shall be eligible for admission;

(c) that within the group of students satisfying conditions (a) and (b) above, admission based on strict inter-se ranking, based on marks secured in the common entrance test shall be followed for admitting students; and

(d) there shall not be any distinction whatsoever, on the basis of social, economic or cultural background amongst the group comprising the wards of army personnel.

The relevant laws of the affiliating university and the State Government applicable to private unaided non-minority professional educational institutions.

12. At this preliminary stage it would appear that the admission policy of ACMS to have been undertaken in the teeth of two different sets of laws which are applicable: (a) the State act, "Guru Gobind Singh Indraprastha University Act, 1998" ("GGSIU Act 1998") that led to the establishment of the university granting affiliation to ACMS, the Guru Gobind Singh Indraprastha University ("GGSIU"), and the various ordinances promulgated by the Board of Management ("BoM") of GGSIU; and (b) the "The Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee And Other Measures to Ensure Equity And Excellence) Act, 2007 ("Delhi Act 80 of 2007"). The relevant portions of the applicable laws are reproduced below.

Section 6 of GGSIU Act, 1998 provides as follows:

> "(1) The University shall be open to persons of either sex and of whatever race, creed, caste or class, and it shall not be lawful for the University to adopt or impose on any person any test whatsoever of religious belief or profession or political opinion in order to entitle him to be appointed as a teacher of the University or to hold any office therein or to be admitted as a student of the University, or to graduate thereat, or to enjoy or exercise any privilege thereof;
>
> (2) Nothing in this section shall be deemed to prevent the University from making any special provision for the appointment or admission of women or of persons belonging to the weaker sections of the society, and in particular, of persons belonging to the Scheduled Castes and the Scheduled Tribes."

13. The Board of Management of GGSIU, pursuant to Sections 27 and 6(2) of GGSIU Act, 1998, enacted Ordinance 30; vide Board of Management Resolution No. 31.5 dated August 25, 2006, entitled Reservation Policy for the Self-Financing Private Institutions affiliated with the Guru Gobind

Singh Indraprastha University. The said Ordinance 30 states that "for making special provisions for the advancement of weaker sections of the society, and in particular of persons belonging to the Scheduled Castes and Scheduled Tribes" certain percentage of seats shall be reserved by every affiliated college. The reservations were as follows: (i) Scheduled Castes (15%); (ii) Scheduled Tribes (0.5%); (iii) Defence Category (5%); (iv) Physically Handicapped (3%); and (v) Supernumerary Seats for Kashmiri Migrants (one seat). The said reservations, it is explicitly acknowledged were being provided for pursuant to Clause 5 of Article 15 of the Constitution, which was inserted by Constitution (Ninety Third Amendment) Act, 2005, which became effective on 20-1-2006. Ordinance 30 of GGSIU also specifically left out educational institutions that are owned by minorities from being subject to the reservations policy enunciated by it.

14. In addition to the above, as is the norm in rest of the Country wherein educational institutions are subjected to the laws of the legislature with territorial jurisdiction in which such educational institutions are located, ACMS is also subject to the laws of the NCT of Delhi, the territorial jurisdiction in which ACMS is located. In particular the applicable laws would be as cited below.

The preamble of Delhi Act 80 of 2007 states that it is:

> "An Act to provide for prohibition of capitation fee, regulation of Admission, fixation of non-exploitative fee, allotment of seats to Scheduled Castes, Scheduled Tribes and other socially and economically backward classes and other measures to ensure equity and excellence in professional education in the National Capital Territory of Delhi and for matters connected therewith or incidental thereto".

Section 2 of Delhi Act 80 of 2007 provides that:

"The provisions of this Act shall apply to – (a) Unaided institutions affiliated to a University imparting education in degree, diploma and certificate courses."

Section 12 of Delhi Act 80 of 2007 provides that:

"Allocation and Reservation of Seats:

(1) *In every institution, except the minority institution -*

(a) subject to the provisions of this Act; ten percent of the total seats in an unaided institution shall be allocated as management seats;

(b) eighty five percent of the total seats, except the management seats, shall be allocated for Delhi students and the remaining fifteen percent seats for the outside Delhi students or such other allocation as the Government may make by notification in the official Gazette, direct;

(c) supernumerary seats for non-resident Indians and any other category shall be as may be prescribed.

(2) In the seats mentioned in sub-section (1), an institution shall reserve-

(d) seventeen percent seats for the candidate belonging to the Scheduled Castes category, one percent seats for the candidates belonging to the Scheduled Tribes category and such percentage of seats, for any other category including other Backward Classes as may be prescribed;

(e) for seats not mentioned as allocated for Delhi students in sub-section (1), fifteen percent seats for candidates belonging to the Scheduled Caste category, seven and a half percent seats for the

candidates belonging to the Scheduled Tribes category and such percentage of seats, for any other category as may be prescribed.

(f) Subject to clause (a) and clause (b) above, three percent seats for persons with disabilities as provided in the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995 (1 of 1996) and such percentage of seats for the wards of defence personnel an any other category, as may be prescribed."

15. Further, Delhi Act 80 of 2007 also provides in Section 13 that all institutions "*shall, subject to the provisions of this Act, make admission through a common entrance test to be conducted by the designated agency, in such manner, as may be prescribed", and in Section 14 that any "admission made in contravention of the provisions of this Act, or the rules made thereunder, shall be void*."

16. However, ACMS based its admission policy on certain exemptions granted by the Government of Delhi exempting ACMS' admissions from the operation of provisions of Delhi Act 80 of 2007 with respect to allocations, as between Delhi and non-Delhi students, reservations as mandated in Sub-section (2) of Section 12, and the requirement that all admissions, in such reserved categories and with respect to remaining seats, be based on inter-se merit as determined by marks secured in the common entrance test. Such exemptions it is claimed have been granted in exercise of powers allegedly provided in Clause (b) of Sub-section (1) of Section 12 of the Delhi Act 80 of 2007. The said exemption specifically allowed ACMS to admit only wards of army personnel in accordance with ACMS's admission policy earlier noted herein. One of the peculiar aspects of the granted exemption seems to be that ACMS is mentioned to be the "Army" in the notification.

1. (1994) 4 SCC 138.

17. The admission policy of ACMS was challenged in a slew of writ petitions. The writ petitioners, students who otherwise would be eligible to be considered for admission to ACMS, and Indian Medical Association, challenged the above admission policy in writ petitions filed in the Delhi High Court inter-alia contending that: (1) *TMA Pai Foundation v. State of Karnataka*[3], as further explained in *P.A. Inamdar v. State of Maharashtra*[4], specifically mandated that all admissions to private unaided non-minority professional institutions be only based on merit, which is to be taken as inter-se ranking of all the students who have taken the common entrance test; (2) even according to the rules and regulations of GGSIU or the Delhi Act 80 of 2007, they would have secured an admission in ACMS if it had followed the principle of inter-se ranking, based on marks secured in the common entrance test, of all the students applying to ACMS if ACMS had not proscribed all non-wards of army personnel from applying; and (3) in fact ACMS is an aided educational institution, in as much as it has received massive aid from the State, in the form of expensive land and access to Army Base Hospital in Delhi to meet the curricular requirements of clinical training in a general hospital that is required by every medical college, per regulations of the Medical Council of India.

18. In this regard, the defence of ACMS, and its parent society, AWES, in the High Court has been that the exemptions granted to it by the Government of Delhi were lawful, and hence they were well within the law in admitting students only from the wards of army personnel as identified by its admission policy. Further ACMS, and AWES, also claim that in any event the ratio of TMA Pai, as further explained by P.A. Inamdar, is that, contrary to what the writ petitioners were claiming, they have an unfettered right, under Article 19(1)(g), to choose its own pre-defined "source" of students. Further, ACMS and AWES claim that in as much as such a choice is not a "reservation" per se,

3. (2002) 8 SCC 481.

4. (2005) 6 SCC 537.

but only choice of "source" as rightly recognized by TMA Pai (supra), and P.A. Inamdar (supra), and further because such a source is only being delineated on the basis of occupation and not on the basis of religion, race, caste, sex or place of birth or any of them, and inter-se ranking within the "source" is based on qualifying marks in the common entrance test, and the admission policy is otherwise transparent, fair and non-exploitative the admission policy of ACMS ought to be upheld. In addition, it is also submitted that in as much as wards of army personnel suffer educational disadvantages, in comparison with the civilian population, and this affects the morale of army personnel, it would be in the national interest to allow ACMS and AWES to effectuate such admissions. Further, it is also claimed that such a right has been recognized previously by the courts in India. Further, with respect to it being an unaided educational institution, it was argued that ACMS is run purely out of regimental funds that have been held to be private funds, and not belonging to the Indian Army. Moreover, it is also claimed that the lease granted to it by the Army and the Ministry of Defense, in whose possession the public land, was for an initial period of thirty years, extendable to ninety nine years, to which effect the Ministry of Defense has "in principle" agreed to. Moreover, the access to Base Hospital of the Army in NCT of Delhi was only for a temporary period, and that an exclusive hospital for ACMS would soon be built. To this extent it was submitted that ACMS is not an "aided institution" under Delhi Act 80 of 2007 as its day to day funds are met through fees and regimental funds. Further, it was also submitted that MCI has accepted the temporary arrangements with respect to hospital facilities, and has granted a conditional permission, which could be revoked if ACMS fails to meet the requirement of having its own hospital as required by regulations.

19. It appears that neither the writ petitioners nor ACMS and AWES sought to challenge the Constitutional validity of Delhi Act 80 of 2007 or of Ordinance 30 of GGSIU. It would appear that both parties proceeded under the assumption that

Delhi Act 80 of 2007 and Ordinance 30 of GGSIU would be applicable but for exemptions granted by Government of Delhi. This train of thought seems to have also affected the decisions of the learned Single Judge and the Division Bench of the High Court of Delhi, which decisions we broadly summarise below.

The learned single judge found that the claimed power to exempt, by the Government of Delhi, under clause (b) of Sub-section (1) of Section 12 of Delhi Act 80 of 2007 to be applicable as regards only the 15% of seats remaining after the seats allocated to management quota. Thereupon, using various rationale, including the judgments of this Court in TMA Pai, P.A. Inamdar, and *Islamic Academy of Education v State of Karnataka*[5], engaged in an astonishing sequence of logic that twisted and turned, and finally found that 79% of the seats could be filled by wards of Army personnel, and the remaining 21% by students belonging to the general category. The legislatively mandated allotment of seats for various reserved categories, including but not limited to Scheduled Castes and Scheduled Tribes, was completely ignored.

On appeal by both sides, the Division Bench embarked upon a different mode of reasoning. In the first instance it held that the enactment of Delhi Act 80 of 2007, implies that Ordinance 30 of GGSIU has lost its relevance. Further, analyzing Section 12 of Delhi Act 80 of 2007, the Division Bench found that there is nothing in it that prohibits ACMS and AWES to admit only wards of army personnel in all its seats, the Division Bench upheld the admission policy of ACMS. In this regard, the Division Bench also over-ruled the finding of learned Single Judge that the ratio of TMA Pai (supra)as explained in P.A. Inamdar(supra), implied that ACMS needs to admit a "sprinkling" of students from the general category.

It is against the judgment of the Division Bench that appeals by way of special leave petitions have been filed.

5. (2003) 6 SCC 697.

III

The Submissions of the Appellants:

20. The learned Counsel for Appellants, Dr. Aman Hingorani, submitted that ACMS is not an unaided institution, and further it is also posited that ACMS and its parent society be construed to be an "instrumentality of the State" under Article 12. To this effect the following facts were pointed out: (i) that a little over 25 acres extent of expensive land has been given on lease by Ministry of Defence, Union of India, in the Cantonment of Delhi; access has been provided to the Base Hospital; and further that affairs of AWES and of ACMS are substantially and wholly managed by regular officers of the Indian Army and headed by the Chief of Army Staff; and (ii) that regulations of Medical Council of India ("MCI") do not permit grant of permission for setting up of medical colleges unless the Society setting up such a college owns such land and has its own hospital of requisite number of beds, and further that the permission was granted by MCI on the ground that ACMS was in fact a governmental entity. It was contended that in such an event, the admissions to ACMS ought to be on the same principles followed by the Armed Forces Medical College, Pune. It is also contended that even if ACMS be deemed to not be an instrumentality of the State, it could not be construed as an unaided institution, on account of the massive aid by Ministry of Defence, merely because its day to day expenses are taken care of by fees from students and regimental funds. The implication pressed by Dr. Hingorani was that, in such a case Delhi Act 80 of 2007 would not be applicable at all, as it is intended to be applicable to unaided private professional institutions, and furthermore the exemptions granted by the Government of Delhi from the operation of Delhi Act 80 of 2007, and relied on by ACMS and AWES, in making the admissions in the manner it has would also not be applicable. The applicable law, consequently, would be Ordinance 30 of GGSIU, which provides that an upper limit on reservations to be 5% for

wards of defense personnel.

21. The learned Counsel for the Appellants also contended that, even if ACMS were deemed to be both a private and an unaided professional institution, the exemption granted by Delhi Government in allowing ACMS to admit only wards of Army personnel to 100% of its seats is ultra vires. In this regard it was pointed out that sub-section (2) of Section 12 of Delhi Act 80 of 2007 vide clause (a) provides for specified reservations for Scheduled Castes and Scheduled Tribes, and further, through rules enacted pursuant to Section 23(g), the Government of Delhi has fixed the percentage of reservations for wards of Defence personnel, as enabled by clause (c) of Sub-section (2) of Section 12, at 5%. It was contended that there is no provision in Delhi Act 80 of 2007 that allows Government of Delhi to grant the exemption from the operation of the requirement of merit based admissions, i.e., ranking based on marks secured in the common entrance test, from within the entire class of students who have qualified in the common entrance test and from the operation of the reservations as provided therein. Further, it was also pointed out that the power being claimed, vide clause (b) of Sub-section 1 of Section 12 of Delhi Act 80 of 2007, by Government of Delhi to grant such an exemption is only the power to vary the percentage of allocable seats as between Delhi and non-Delhi students, and not to allocate all the seats in ACMS to wards of Army personnel. Moreover, it was also contended that in as much as private unaided educational institutions are essentially rendering services that the State ought to be rendering, and wherein such services are "public services," admitting only wards of Army personnel in all the seats in ACMS would be a violation of Article 14 and Article 15.

22. In this regard, it was also argued by Dr. Hingorani that even reservations cannot be to the extent of 100%, in as much as such reservations would amount to a violation of Article 14, and in any event any reservations with respect of constitutionally

permissible classes would need statutory or executive provision. In the event, the permission granted by Government of Delhi to allow ACMS to admit only wards of Army personnel amounts to a super-reservation and violates Article 14.

23. It was also argued by the learned Counsel that the grant of permission to ACMS, to admit only wards of Army personnel, without regard to the claim of those students who have secured more marks would be a violation of the ratio of TMA Pai, as explained in Islamic Academy, and P.A. Inamdar. The learned counsel submitted that the Constitution Bench in Islamic Academy, in the course of interpreting Para 68 of the TMA Pai judgment, held that the percentage of seats that the management of an educational institution can fill up, could never be 100%. In this regard, it was also contended that this Court, in P.A. Inamdar, was only trying to ascertain whether, after TMA Pai, the State could impose its own reservation policy on private unaided professional colleges. It was submitted by the learned Counsel, that while P.A. Inamdar has held that imposition of reservations by the State would be an unreasonable restriction when imposed on non-minority private unaided educational institutions, it cannot be said that P.A. Inamdar stands for the proposition that private non-minority private unaided professional educational institutions could select students from a pre-defined group from within the entire general category, thereby disregarding the students in the general category who have received higher marks. Apart from that, the holding in Islamic Academy that a quota that can be filled up by the management at its sole discretion could never be to the extent of 100%, has not been overruled by P.A. Inamdar. Consequently, it must be taken that the ratio in Islamic Academy holds the field with regard to such questions. It was also further contended that this Court in P.A. Inamdar has held that professional colleges stand on an entirely different footing, and that the requirement that admissions strictly be on the basis of merit, as determined by marks in a common entrance test, in fact takes precedence over other considerations including

the rights of managements of professional unaided non-minority colleges to select students according to their choice.

24. The learned Counsel while conceding that wards of Army personnel may form a constitutionally permissible class entitled to horizontal reservations under Article 15(1); nevertheless, relying on D.N. Chanchala v. State of Mysore[6] it was argued that such a horizontal reservation ought to be kept at the least level possible, so that it does not whittle competitive selection in the general category completely. In this regard it was pointed out that horizontal reservations, even for 18.49 million disabled, forming 1.8% of India's population, is only 3%. In any event, wards of Army personnel already enjoy a wide variety of preferential treatments, including reservations across the country, as a part of reservations provided to wards of all Defence personnel. In the instant case 5% reservations are provided for wards of Defence personnel, under Ordinance 30 of GGSIU, and also pursuant to the rules of Delhi Government, pursuant to Section 23(g) of Delhi Act 80 of 2007 and the power granted by the enabling provisions in clause (c) of Sub-section (2) of Section 12. To grant an exemption in favour of ACMS, in contravention of specific statutory provisions, and to the exclusion of all other constitutional claimants to special treatment, as also the claim of general students to equality, would violate the discipline imposed by Articles 14 and 15 of the Constitution.

The Submissions of the Respondents:

25. Learned Senior Counsel, Mr. K.K. Venugopal, and Mr. Jaideep Gupta, appearing for the Respondents, dispute the contentions of the Appellants that ACMS is an instrumentality of the State, and also further dispute that ACMS is an aided institution. Pointing to the fact that AWES is a charitable trust, set up purely with the object of promoting the welfare of wards of Army personnel, and the fact that only regimental funds are

6. (1971) 2 SCC 293.

used in day to day affairs of ACMS, it was contended that AWES and ACMS ought not to be treated as an instrumentality of the State. It was also further contended that in both the decisions of the High Courts, by the learned Single Judge and the Division Bench, ACMS has been found to be an unaided educational institution, per the definition of such institutions in Delhi Act 80 of 2007, and hence ought not to be disturbed. Further, it was also submitted that ACMS conducted its admissions on the basis of exemptions granted by Government of Delhi, and as such meet the statutory requirements also.

26. Learned Senior Counsel, Mr. K.K. Venugopal submitted that admissions being effectuated by ACMS ought to be recognized as being based purely on inter-se merit i.e., marks received in common entrance test by wards of Army personnel and that no reservations of seats were being made on the basis of caste, race, religion, residence/domicile, backwardness or any such criteria. Tracing the history of the law as applicable to reservations and admissions to colleges, in case law from *Unnikrishnan J.P. v. State of A.P.*[7], through TMA Pai, Islamic Academy, to finally P.A. Inamdar, he submitted that P.A. Inamdar holds the field, in as much as it over-ruled parts of Islamic Academy, and explained the eleven judge bench decision of this court in TMA Pai. His main contention was that this court in P.A. Inamdar has found that a private unaided non-minority educational institution is entitled, under sub-clause (g) of clause (1) of Article 19, to the same rights as a private unaided minority institution under Clause (1) of Article 30: i.e., in as much as minorities have the right to choose students entirely from a "source" of their choice, non-minorities should also have the same right to be able to pre-define a source from the general pool and admit qualified students only from such a pre-defined source. In particular he relied on paras 127 and 137 of P.A. Inamdar. Specifically he relied on the following observation in para 127: "*Nowhere in Pai Foundation either in the majority or in the minority opinion, have we found*

7. (1993) 1 SCC 645.

any justification for imposing seat-sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota or management seats." The learned Senior Counsel submitted that according to P.A. Inamdar only a consensual agreement can be arrived at between private unaided professional institutions regarding seat sharing, and the State could not unilaterally demand any such sharing. In this regard, the learned Senior Counsel was equating the demand by the Appellants that the State should permit admissions to professional unaided non-minority professional colleges only on the basis of marks secured in the common entrance test to a demand by the State of a "quota" of seats by the State for imposition of reservations or for that matter any other purpose. Further, given the issues faced by Army personnel, it was submitted that a larger public interest is involved in the armed forces personnel having comfort and security that their wards can get a fair opportunity for securing admissions into professional colleges.

27. The learned Senior Counsel, Mr. Jaideep Gupta contended that the right to set up educational institutions, whether minority or non-minority, pursuant to sub-clause (g) of clause (1) of Article 19, includes the right to admit students of their choice from a "source" within the general pool, so long as the procedure adopted is transparent, fair and non-exploitative. As far as merit is concerned, it would then be that so long as inter se merit within that "source" is concerned, the State ought not to have the power to insist that as far as non-minority educational institutions only select students from the entire general pool on the basis of marks secured on the common entrance test. He also contended that the admission policy of ACMS, in choosing to admit eligible wards of Army personnel in all of its seats, is an instance of selecting a "source" and not a reservation at all. To this extent he also submitted that where a particular class is a source of admission, the principles relating to reservations would not apply to the same where, the class itself is well defined and

rational. The learned Senior Counsel, Mr. Jaideep Gupta submitted that this Court in P.A. Inamdar, interpreting TMA Pai, has held that the essential ingredients of freedom of management of private non-minority unaided educational institutions include the right to admit students and recruit staff, and determine the quantum of fee to be charged, and that they cannot be regulated, either with respect to minority or non-minority educational institutions. In addition he also submitted that Clause (5) of Article 15, inserted by the 93rd Constitutional (Amendment) Act, 2005, in so far that it enables special provisions by the State with respect to admission of Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes in private non-minority unaided institutions, would be unconstitutional and violative of the basic structure of the Constitution. In particular he relied on the sole opinion of Bhandari J., in *Ashoka Kumar Thakur v. Union of India*[8] that enabling provisions of clause (5) of Article 15, in so far as they relate to private non-minority unaided educational institutions, to be violative of basic structure of the Constitution, and argued that we adopt the same rationale and conclusions.

IV

28. Based on the facts, the decision of the High Court, the applicable laws, the affidavits of the Medical Council of India & Government of Delhi and the submissions made before us by the Counsel appearing for the parties, we now turn to frame the questions to be answered. It would appear that there are two sets of issues that need to be addressed. The first would be a preliminary set of issues, wherein the question of whether ACMS is an instrumentality of the State or an aided institution or an unaided institution would have to be answered, so that we could then determine which laws would be applicable. As argued by the learned Counsel for Appellants, the Delhi Act 80 of 2007 would be applicable with respect to the matters on hand, if ACMS is an unaided non-minority educational

8. (2008) 6 SCC 1.

institution. If that be the status of ACMS, then we'd have to next consider whether the exemptions granted by the Delhi Government are valid.

29. It is also noted that at no stage of the proceedings, whether before the High Court or in this court, have the Respondents challenged the constitutional validity of Delhi Act 80 of 2007, and specifically the allocations and reservations as mandated by Section 12 therein. The said Act was enacted, after the 93rd Constitutional (Amendment) Act, 2005 inserted clause (5) of Article 15 into the Constitution. Both the Title and the Preamble of Delhi Act 80 of 2007 specifically state that it was an Act to ensure equity for Scheduled Caste, Scheduled Tribes and other weaker segments of the population. Consequently, clause (5) of Article 15's enabling provisions with respect to making "special provisions" in regard to admission of Scheduled Castes, Scheduled Tribes, and Socially and Educationally Backward Classes to private unaided non-minority educational institutions would extend a protective umbrella with regard to allocations and reservations in Section 12 of Delhi Act 80 of 2007. If we find below that it is Delhi Act 80 of 2007 which is applicable, and further find that the exemptions granted by Delhi Government to be invalid, then provisions of Delhi Act 80 of 2007 with respect to reservations would have to apply with the full force that they were intended to be.

30. Only thereafter, would it be logical to proceed to examine whether the interpretations urged by the Appellants, or the Respondents, with regard to decisions of this Court in TMA Pai, P.A. Inamdar, and Islamic Academy, that would apply with respect to seats that are unaffected by reservations specified in sub-section (2) of Section 12 and allocation of seats, as between Delhi and non-Delhi students, specified in sub-section (1) of Section 12 of the said Act. It is to be noted that the said Act specifically mandates that all admissions to ACMS would have to be made in accordance with merit of

students, based on marks secured in the common entrance test. With respect to those students covered by various categories such as Scheduled Castes, Scheduled Tribes and other constitutionally permissible classes, as delineated in Sub-section (2) of Section 12, and as applicable with respect to categories described in Sub-section (1) of Section 12, the rule of inter-se merit, based on marks secured in common entrance test by students falling into each category, would apply. That would also mean, then, that with respect to seats not covered by provisions of Sub-section (2) of Section 12, they would have to be filled in accordance with rule of merit based on marks secured by general category of students not covered by Sub-section (2) of Section 12. If however, the interpretation of the ratio of decision by this Court in TMA Pai, as further explained in P.A. Inamdar pressed by the learned Senior Counsel appearing for the Respondents turns out to be the correct one, then we would have to hold that ACMS has the right to fill all of the seats in ACMS not covered by sub-section (2) of Section 12 with wards of Army personnel who have qualified in the appropriate common entrance test.

31. In light of the above, we frame the following specific questions:

Preliminary:

1. Is ACMS an instrumentality of the State or an aided institution?

2. If the answer to Question 1 above is no, then whether the exemptions granted by Delhi Government are valid?

Substantial:

3. If the answers to both questions 1 and 2 above are no, whether ACMS can admit only wards of Army personnel to the seats not covered by reservations mandated by Delhi Act 80 of 2007, without any

regard to the merit of other Delhi or non-Delhi students who may have secured higher marks in the appropriate common entrance test?

V

Analysis

Preliminary Questions:

Question 1:

32. Is ACMS an instrumentality of the State or an aided institution?

We note that with respect to the issues of whether ACMS is an instrumentality of the State, and whether ACMS is an aided or unaided institution, that at both stages of proceedings in the High Court, the conclusion reached was that Respondents were neither an instrumentality of the State, nor could ACMS be held to be an aided educational institution. Such determinations always present issues of fact and of law. We are disinclined to over-rule the findings of the High Court in this regard, which also corresponds to the decisions of the learned Single Judge. We are also disinclined to go into the said issues primarily because we do not believe that the fact that ACMS is deemed to be an unaided non-minority educational institution would have a bearing on the relief being sought by the Appellants.

33. In this light, we also opine that the Division Bench was correct in holding that Ordinance 30 of GGSIU to be inapplicable in this case on account of enactment of Delhi Act 80 of 2007. This is so, because Delhi Act 80 of 2007 is a later enactment, much more general, containing a complete code covering the entire terrain of admissions of students to professional unaided non-minority institutions affiliated to all universities in NCT of Delhi, including GGSIU, with specific provisions therein regarding allocation of seats between Delhi

and non-Delhi students, and reservations applicable in terms of those students falling within constitutionally permissible classes. However, the expression used by the Division Bench, that Ordinance 30 has "lost its relevance": to the extent that it may suggest a loss of general relevance is not correct. Considerable care ought to be exercised in delineating the applicability of unrepealed sections of a previous statute, even if they conflict with the provisions of a later statute with respect to some specific terrain of activities. After all, Ordinance 30 of GGSIU may be applicable with respect to many other situations, not involving the terrain covered by Delhi Act 80 of 2007. In this regard it would be appropriate to cite the words of Mudholkar J., judgment in Municipal Council, Palai v. T.J. Joseph[9]:

> *"It is undoubtedly true that the legislature can exercise the power of repeal by implication. But it is equally well-settled that there is a presumption against an implied repeal. Upon the assumption that the legislation enacts laws with complete knowledge of all existing laws pertaining to the same subject the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. This presumption will be rebutted if the provisions of the new Act are so inconsistent with the old ones that the two cannot stand together*."

Question 2:

34. In light of the fact that we have decided to proceed on the basis that ACMS is a private non-minority unaided professional institution, we now turn to the issue of the validity of the exemptions granted by Delhi Government from the operation of Delhi Act 80 of 2007. By permitting ACMS to allocate all its seats to wards of Army personnel, albeit ones who had taken and qualified the common entrance test, the Delhi Government effectively suspended the operation of the

9. 1963 AIR 1561 = (1964) 2 SCR 87.

provisions of the Act with regard to selection of students solely on merit from the general category, and also the provisions that mandated allotment and reservation of seats to various constitutionally permissible classes, including but not limited to Scheduled Classes and Scheduled Tribes.

35. At the very beginning of this portion of this judgment, we wish to make an observation based on the text of both the Cabinet Decision, and the Notification of Government of Delhi, on which reliance is placed by ACMS and AWES to admit only students of Army personnel. The texts state that an approval was being granted, in the case of Cabinet Decision, and that permission was being granted, in the case of the Notifications, that hundred percent seats in ACMS may be allocated for "admission towards of Army personnel" as per the policy "followed by" the Indian Army. First question that arises is as to how wards of Army personnel could be deemed to be "Army personnel"? Did ACMS and AWES apply for permission of admittance of personnel of the Indian Army and then turn around and use the exemption granted to admit "wards of Army personnel"? Or is it the case that the Government of Delhi did not apply its mind at all, or that applied its mind in the absence of relevant facts? We are perturbed by the degree of casualness, evident from above, with which exemptions from the operation of vital aspects of a law enacted by the legislature seemed to have been undertaken. In any event, we will proceed on the assumption that the Government of Delhi intended that the exemption be granted with respect to "wards of Army personnel" as opposed to "Army personnel" and examine whether the exemptions granted are valid or not.

36. We find that the High Court has erred in its interpretation of Sub-section (1) of Section 12, and indeed the very thrust of Delhi Act 80 of 2007. One of the cardinal principles of interpretation is to look for the purpose that the Act seeks to achieve, and in this regard what is also crucial is the relationship of each clause or sub-clause to the other. The

strict lexicographical arrangement of sub-clauses, one after the other, ought not to be taken to mean that the one following is of lesser importance.

37. Reading Section 12 of Delhi Act of 2007 synoptically, we find that Sub-section (2) of Section 12 pervades the entire space of how seats are to be allocated. In fact, the preamble to the Act, states that it is being enacted to provide for "allotment" of seats to *"Scheduled Castes, Scheduled Tribes …….. and other measures to ensure equity and excellence in professional education in the National Capital Territory of Delhi"* (emph. Supp.). Consequently, it must be read that sub-section (2) of Section 12 is one of the primary sections of the Act and that it would act upon the provisions of Sub-section (1) of Section 12. Sub-section (2) of Section 12 provides that with respect to seats in sub-section (1) of Section 12, an institution shall reserve as provided for in sub-sections (a), (b) and (c) of sub-section (2) of Section 12 that follow. Clearly the phrase "[I]n the seats mentioned in sub-section (1)" at the beginning of sub-section (2) of Section 12 reveals the intent of the legislature that the specific reservations provided for Scheduled Castes and Scheduled Tribes and other provisions that may be made with respect to other weaker segments and other permissible categories of classes, shall be applied with respect to each and every category of seats identified in sub-section (1) of Section 12. Looking at sub-section (2) of Section 12 closely, this would mean that not only are reservation of seats, for instance with respect to Scheduled Castes and Scheduled Tribes, to be made with respect to Delhi students, non-Delhi students, and also with respect to all students admitted under the management quota.

38. Instead of appreciating the primordial importance of sub-section (2) of Section 12 of the Delhi Act 80 of 2007, the Division Bench finds that there is *"nothing in Section 12 of the Delhi Act 80 of 2007 which prohibits the appellants from making 100% allocation in favour of army/ex-army personnel*

and war widows". If indeed that be so, and ACMS admits all wards of army personnel from outside Delhi, then what exactly is the status of reservations that have been specifically mandated in sub-section (2) of Section 12 of the Act by the legislature of NCT of Delhi with respect to Scheduled Castes and Scheduled Tribes and any other Backward Classes and other constitutionally permissible classes? Logically in accordance with the interpretation of the Division Bench, the benefits intended to be provided to students belonging to various weaker segments and thereby achieve greater social welfare through achievement of broader goals of social justice by the legislature would be obliterated. This would be tantamount to grant of powers to set at nought a policy specifically enacted by the legislature, thereby turning on its head, as it were, every known principle of our constitutional law.

39. Furthermore, by permitting ACMS to admit only students of wards of army personnel, notwithstanding the fact there could be others who have taken the common entrance test, and have secured more marks than the wards of Army personnel, the exemptions granted by Delhi Government also set at naught the legislative intent to ensure excellence by mandating that all admissions be made on the basis of inter-se merit within each of the categories of students. The general category would comprise of all students who have taken the common entrance test, and other wise satisfy the conditions of sub-section (1) of Section 12 of the Delhi Act 80 of 2007, after the seats reserved pursuant to sub-section (2) of Section 12 are reserved i.e., allocated for the described constitutionally permissible categories therein. The said Act clearly specifies that its objective is to achieve excellence, and one of the methods specified to achieve the same is of admitting students on the basis of inter-se merit in each of the categories specified in Section 12. The grant of permission to ACMS to admit students who may have scored lower marks than others, both within the general category and also in the reserved categories, results in defeat of the aims, objects and purposes of the Act,

and the entire fabric and scheme of the Act gets frustrated. Nowhere in the Act do we find any powers granted to the government to not implement the Act. Nor does the Act state anywhere that the Government of Delhi could suspend the implementation of the provisions with respect to reservations for weaker segments, and also simultaneously give the merit of the students scoring higher marks than wards of Army personnel a go by. To put it pithily, there is no power conferred on Government of Delhi to grant any exemption in favour of any institution from the operation of any of the provisions of the Act.

40. The Government of Delhi in its affidavit claims that its powers to provide such exemptions also flow from Article 162 of the Constitution. In relevant part Article 162 states "[S]ubject to the provisions of this Constitution the executive power of a State shall extend to the matters to which the Legislature of the State has power to make law." We simply fail to see how a Government that claims to be functioning in accordance with the Constitution of India, in which democracy has been deemed to be a basic feature of the Constitution, can claim the power under Article 162 to set at nought a declared, specified and mandated policy legislated by the legislature. In a constitutional democracy, with a parliamentary form of government, the executive may initiate a policy in a legislative bill to be enacted by the legislature or in the absence of legislative action in a particular field, enact policy that may be akin to law. However, the executive has to be answerable to the legislature. That is why it has been stated in no uncertain terms, that while we do not follow a strict separation of powers as in the United States, executive functions have been deemed to be what remain after legislative and judicial function have been taken away. (See *Ram Jawaya Kapur v. State of Punjab*[10]) Further, the cited portion of Article 162 has been interpreted by this Court to mean that the State Executive has the power to make any regulation or order which shall have the effect of law so long as it does not contravene any legislation by the State

10. AIR 1955 SC 549: (1955) 2 SCR 225.

Legislature already covering the field. (See *State of A.P. v. Lavu*[11]) In the instant case, the legislature of NCT of Delhi has specifically set out a clear policy with respect to reservations for Scheduled Castes and Scheduled Tribes and other weaker sections of the population. The duty of the executive is to implement that policy, and not to abrogate it.

41. The Government of Delhi also seeks to claim legitimacy of the decision by the Cabinet of Delhi and the Notification by Lieutenant Governor granting ACMS permission to admit 100% of the seats to wards of army personnel to the text of sub-section (b) of sub-section (1) of Section 12. The interpretation of the said sub-section sought to be pressed upon us is as follows: That the first part of said sub-section ought to be read as "eighty five percent of the total seats except the management seats, shall be allocated for Delhi students and the remaining 15% percent of seats for outside Delhi students", followed by an "or", and then the second part "such other allocation as the Government by notification in the Official Gazette Direct". Such an interpretation it is claimed gives the government the power to vary the entire allocation of seats, and therefore the exemption granted by it to ACMS to admit only wards of Army personnel ought to be upheld.

42. We simply fail to see how. At best, even if we were to accept, *arguendo*, the interpretation pressed into service by the Government of Delhi, the best result that would follow would be that Government of Delhi has been given the power to vary the allocation of seats between Delhi and non-Delhi students, belonging to all sections and within the broadest class of those who have taken the common entrance test and qualified. It cannot be read to mean that a power has been granted to Government of Delhi to create entire new classes of students from within those eligible for admission to professional institutions by itself, and exclude all those students who are not members of such classes, notwithstanding that they may fall in the categories of Delhi or non- Delhi students.

43. Further, we also hold that such an interpretation to be strained. This is so for two reasons. One, the fact that the word "and" is always used as a conjunction between the first part of a sentence and the second part of a sentence, and the word "or" is used to denote an alternative in a series of exclusive arrangements. Consequently, we hold that the correct interpretation of sub-section (b) of Section 12(1) is as follows: first part - "Eighty five percent of the total seats except the management seats, shall be allocated for Delhi students" followed by the conjunction "and" and then the second part - "the remaining fifteen percent seats for outside Delhi students or such other allocation as the Government may by notification in Official Gazette direct." Therefore, it can only mean that the powers of Delhi Government are limited to the extent of varying the percentage of seats reserved for non-Delhi students, up to a maximum of 15%. Apart from the above grammatical construction, we are led to such an understanding for additional reasons. This is the legislature of Delhi, that is legislating for the denizens of NCT of Delhi, with a primary responsibility for their welfare. Further, in as much as clause (a) of sub-section (2) of Section 12 provides that 17% of seats be reserved for Scheduled Castes, 1% of seats be reserved for Scheduled Tribes, and an unspecified percentage of seats be reserved for other Backward classes who are also denizens of Delhi, the legislature of Delhi would have taken into account the needs of Scheduled Castes and Scheduled Tribes in Delhi. The discretion to vary the 15% reserved for non-Delhi citizens was in all likelihood to enable the Government of Delhi to increase the percentage of seats allocated to denizens of Delhi, in the event a sizeable number of other backward classes of students also need to be accommodated in the professional colleges of Delhi. By fixing a number, 15%, for non-Delhi students, the legislature intended to set a maximal limit on the number of non-Delhi students who could be admitted, and specified the

11. (1971) 1 SCC 607.

percentage of seats that could be allocated to Scheduled Castes, Scheduled Tribes and other weaker sections which could be reduced in the event that Government of Delhi needed to accommodate the special exigencies of the needs of denizens of Delhi, including but not limited to its backward classes.

44. The Government of Delhi has also claimed that a distinction needs to be drawn between "allocation" as used in sub-section (1) of Section 12 and "reservation" as used in sub-section (2) of Section 12. The claim of Government of Delhi is that the power to "allocate" between Delhi and non-Delhi students or some other classes is prior to "reservation" of seats as between general category of students, and moreover that such an allocation would mean a power to allocate all the seats not just to non-Delhi students, but even an entirely new class. This plea of Government of Delhi is untenable and unsustainable as the same is not supported by any of the provisions of the Delhi Act 80 of 2007 and in fact runs counter to them. One of primary purposes of the act, the goal that it seeks to achieve, is described in terms of "allotment" of seats to Scheduled Castes, Scheduled Tribes and other weaker segments. The word allot, in its verb form, is defined by the Concise Oxford Dictionary[12] to include the meaning of the act to give or apportion to, distribute officially to. Allotment is what results from such an act i.e., an apportionment. The word "reserve" is defined to also include the meaning of "order to be specifically retained or allocated for a particular person", and the word "reservation" is the act or an instance of reserving or being reserved. The word "allocate" is defined to include the meanings of an act to assign or devote something for a purpose or to a person. Consequently, it can only be surmised that while the words allocation was used in the said Act in the context of apportionment of seats between Delhi and non-Delhi students, the word "reservation" was used to mean to allocate a certain percentage of seats, in both groups formed by eligible Delhi

12. Eight Edition, Oxford University Press (1990).

and non-Delhi students, for Scheduled Castes, and Scheduled Tribes and other weaker sections of the population and other constitutionally permissible classes. The use of those two words, allocation and reservation in Section 12, in as much as they overlap in their meaning, and the fact that they together delineate the seats to be allotted to Scheduled Castes and Scheduled Tribes and other weaker sections and constitutionally permissible classes, implies that we cannot infer from the use of the word "allotment" in sub-section (1) of Section 12, the kind of power claimed to vary allotment in clause (b) of sub-section (1) of Section 12 as provided therein and thereby also set at naught the intent of legislature of Delhi to allot seats for Scheduled Castes, Scheduled tribes, and other weaker sections, and further, also set at naught its intent that at least 85% of seats that remain after 10% of management seats are set aside, be allocated to students of Delhi, also be set at naught. Consequently, the defense by Government of Delhi of the exemptions it granted to ACMS, on the use of different words, allotment in sub-section (1) of Section 12, and reservations in sub-section (2) of Section 12, also fails.

45. Thus we find that the exemption granted by the Government of Delhi allowing ACMS to fill 100% of its seats by wards of army personnel violates the basic principles of democratic governance, of the constitutional requirement that executive implement the specific and mandatory policy legislated by the legislature, and violates the provisions of Delhi Act 80 of 2007. In fact, the actions of the Government of Delhi, for the aforesaid reasons are wholly arbitrary, without any basis in law, and ultra vires. Section 14 of the said Act specifies that any admission made in contravention of the provisions of the Act or the rules made thereunder, shall be void, and further Section 18 provides that those making admissions in contravention of the provisions of Delhi Act 80 of 2007 may be punished by imprisonment up to three years or a fine up to Rupees one Crore or both. Such provisions clearly demonstrate the intent of the legislature that its policy, as specified in the

Act, and the purposes of the Act, not be derogated from in any manner. The said provisions of the Act are mandatory in nature. The Government of Delhi has clearly acted on the basis of a misplaced belief of its powers, under the Act, a misunderstanding of the statutory language of the Act, and its relevant provisions, and also in complete contravention of constitutional principles.

46. In light of the above, we have to hold that Delhi Act 80 of 2007, and Section 12, including both sub-sections (1) and (2) are clearly applicable, with respect to admission of students to ACMS.

VI

Substantive Questions:

Question 3:

47. Whether ACMS can admit only wards of Army personnel to the seats not covered by reservations mandated by Delhi Act 80 of 2007, without any regard to the merit of other Delhi or non-Delhi students who may have secured higher marks in common entrance test?

48. Having resolved the preliminary issues in Part V above, we now turn our attention to the issue of whether ACMS has an unfettered right to define its own source of students with respect to all the seats remaining after setting aside the seats for categories of students covered by sub-section (2) of Section 12, read with sub-section (1) of Section 12 of the Act.

49. The main contentions of learned Senior Counsel, Mr. K.K. Venugopal and Mr. Jaideep Gupta, have been that the ratio of TMA Pai, as explained in P.A. Inamdar, stands for the propositions that (a) the rights of non-minority unaided educational institutions under sub-clause (g) of Clause (1) of Article 19 are exactly the same as the rights of minority unaided educational institutions under Clause (1) of Article 30; and

hence (b) non-minority professional educational institutions, such as ACMS, should be deemed to have the right to define their own "source" from within the general pool of students taking the common entrance test, so long as the classification is not based on any of the constitutionally impermissible basis' such as religion, race, caste, place of birth or sex. Further, it was also contended that in as much as the admission policy thereafter proceeds in a transparent, fair and non-exploitative manner, the admission policy of ACMS should be upheld. Additionally it was also submitted by the learned Senior Counsel that allowing ACMS to pursue such an admission policy would be in the national interest.

50. At this stage we wish to make a necessary and a primordially important observation that has troubled us right throughout this case. The primordial premise of the arguments by unaided educational institutions in claiming an ability to choose students of their own choice, in case after case before this court, was on the ground that imposition of reservations by the State would impede their right to choose the most meritorious on the basis of marks secured in an objective test. It would appear that, having unhorsed the right of the State to impose reservations in favor of deprived segments of the population, even though such reservations would be necessary to achieve the Constitutionally mandated goals of social justice and an egalitarian order, unaided institutions are now seeking to determine their own delimited "sources" of students to the exclusion of everybody else. The fine distinctions made by learned Senior Counsel, Mr. Jaideep Gupta, that an allocation when made by the State is reservation, as opposed to allocations made by private educational institutions in selecting a source do not relate to the fundamental issue here: when the state delimits, and excludes some students who have secured more marks, to achieve goals of national importance, is sought to be projected as contrary to Constitutional values, and impermissibly reducing national welfare by allowing those with lesser marks to be selected into professional colleges; and at

the same time, such a delimitation by a private educational institution, is supposedly permissible under our Constitution, and we are not then to ask what happens to that very same national interest and welfare in selecting only those students who have secured the highest marks in a common entrance test. We are reminded of the story of the camel that sought to protect itself from the desert cold, and just wanted to poke its head into the tent. It appears that the camel is now ready to fully enter the tent, in the desert, and kick the original inhabitant out altogether.

51. In any case we examine these propositions below, as we are unable to convince ourselves that this Court would have advocated such an illogical position, particularly given our history of exclusion of people, on various invidious grounds, from portals of education and knowledge. Surely, in as much as this Constitution has been brought into force, as a constitutive document of this nation, on the promise of justice – social, economic and political, and equality – of status and opportunity, for all citizens so that they could live with dignity and fraternal relations amongst groups of them, it would be surprising that this Court would have unhorsed the State to exclude anyone even though it would lead to greater social good, because marks secured in an entrance test were sacrosanct, and yet give the right to non-minority private educational institutions to do the same. The knots of legal formalism, and abandonment of the values that the Constitution seeks to protect, may lead to such a result. We cannot believe that this Court would have arrived at such an interpretation of our Constitution, and in fact below we find that it has not.

52. It would appear that both learned Senior Counsel, Mr. K.K. Venugopal and Mr. Jaideep Gupta are relying on paragraphs 127 and 137 in P.A. Inamdar to substantiate their claim that all that is needed by ACMS is to ensure that their admission procedures are fair, transparent and non-exploitative. Mr. K.K. Venugopal submits that there can be a

consensual agreement between the State and the private unaided institution, regarding seat sharing, but the State cannot unilaterally demand any such share. Further, Mr. Jaideep Gupta claims that by admitting only students who are wards of army personnel, on an all India basis, what ACMS is actually doing is only defining a "source" of students and not reserving any seats.

53. We cite some additional paragraphs, including the paragraphs relied on by learned Senior Counsel from the judgment of this Court in P.A. Inamdar to test the above propositions. In particular we cite below paras 127, 136, 137 and 138: in extenso (and emph. supp in cited paragraphs):

> "127. Nowhere in Pai Foundation either in the majority or the minority opinion, have we found any justification for imposing seat sharing quota by the State on unaided private professional educational institutions and reservation of the State, or State quota seats or management seats.
>
> 136. "Whether minority or non-minority institutions, there may be more than one similarly situated institution imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on the same or different dates and ther may be clash of dates, If the same candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience. There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such

test. Out of such common merit list the successful candidates can be identified and chosen for being allotted to different institutions depending on the courses of study offered, and number of seats, the kind of minority to which the institution belongs and other relevant factors. Such an agency conducting the common entrance test ("CET" for short) must be one enjoying utmost credibility and expertise in the matter. *This would better ensure the fulfillment of twin objects of transparency and merit.* CET is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test followed by centralized counseling or, in other words, single window system regulating admissions does not cause any dent in the right of the minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of the list of successful candidates prepared at CET without altering the order of merit inter-se of the students so chosen."

137. Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefore subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions. There may be a single institution imparting a particular type of education which is not being imparted by any other institutions and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the above said triple tests. The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit based admissions and preventing maladministration. The admission procedure so adopted by a private institution or group of institutions, if it fails to

satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure. The second question is answered accordingly.

138. It needs to be specifically stated that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb malpractices, it would be permissible to regulate admissions by providing a centralized and single-window procedure. *Such a procedure to a large extent, can secure grant of merit based admissions on a transparent basis.* Till regulations are framed, the Admission Committee can oversee admissions so as to ensure that merit is not the casualty."

54. By examining paragraphs 127 and 137 in the larger context of paragraphs 135, 137 and 138, it would appear that this Court's emphasis was on the right of private educational institutions to admit students on the basis of "merit" as determined by marks secured in an entrance test. To this extent, the above paragraphs would stand for the proposition that both minority and non-minority unaided institutions have the right to admit students who have secured higher marks in the entrance test, and not an equivalence between minority and non-minority institutions to engraft their own "sources" or "classes" of students from within the general pool. The rights of minority unaided educational institutions to select students, based on merit, is with respect to students who belong to that same minority. It is not a right to define a source as such. We turn to excavate the rights of minority unaided educational institutions, and non-minority unaided educational institutions in the larger body of judgment P.A. Inamdar to get a more synoptic understanding of the ratio in that judgment.

55. In paragraph 124 of P.A. Inamdar it is stated that the majority did not "see much of a difference between non-minority and minority unaided educational institutions". That expression "much of a difference" gives the clue that there is an actual

difference between the rights of minority unaided institutions under clause (1) of Article 30, and the rights of non-minority unaided institutions under sub-clause (g) of Clause (1) of Article 19. We will address that issue a little later by gleaning the differences between minority and non-minority institutions enunciated in P.A. Inamdar. By using the expression "much of a difference" the Court did not mean a complete absence of difference. If the expression, by itself, were taken out of context, it could be understood in two ways: (i) that there is not much of a difference in terms, between the two kinds of institutions under consideration, based on an overall quantitative assessment of all the rights put together, with a few differences that would still have operational significance; or that (ii) in all respects the two classes of educational institutions are more or less the same, with the differences being minor and not leading to any operational significance. We hold that it is in the former sense that the said expression was used. By noticing the phrase "much of a difference" out of context it might appear that this Court surmised that there were no substantive differences as such, in terms of operational significance as to the groups from which the non-minority and minority unaided educational institutions could select students from, notice of the context, the specific issue that the Court was dealing at that point in the judgment, leads to a different conclusion. The issue that the Court was dealing with was with respect to whether the State could compel unaided educational institutions to choose students with lesser percentage of marks in order to implement its reservation policies. The last sentence of para 124 clarifies this: "The State cannot insist on private educational institutions which receive no aid from the State to implement the State's policy on reservation for granting admission on lesser percentage of marks i.e., on any criterion except merit." Minority institutions have to choose from their own minority group who are otherwise qualified, and non-minority institutions have to choose from the entire group who are otherwise qualified. The modality of choosing within those groups has to be on the basis of inter-se ranking determined in accordance with marks

secured in the common entrance test. When we look at the following paragraph, no. 125 in P.A. Inamdar, it might also appear that the State is not entitled to impose a state quota, whereby the private unaided institutions are compelled to give up a share of available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This Court made the observation that such an act, of imposition of a quota, would be an encroachment on the freedoms granted pursuant to Article 30(1) to minority institutions, and an unreasonable restriction under Article 19(1)(g) read with Article 19(6) when imposed on non-minority educational institutions. The Court was not suggesting that insistence, by the State, on making merit based selections within the groups, general category for the non-minority institutions, and the specific minority group to which the minority educational institution belonged, from which the two kinds of institutions were expected to select students from, amounts to an imposition of a State quota. The context of the discussion was of imposition of reservations on private unaided non-minority educational institutions. This is borne out by the last sentence in paragraph 125, where it is stated "*[M]erely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates.*"

56. The jurisprudence of TMA Pai with respect to unaided non-minority educational institutions, as explained by P.A. Inamdar, clearly seems to be that private unaided educational institutions seek to provide better professional education, and hence they should not be saddled with less meritorious students, i.e., those who get lesser marks in a qualifying examination such as a common entrance test, by imposition of reservations. With respect to minority educational institutions, the imposition of reservations or the imposition of the duty to

select non-minorities beyond a sprinkling would be an encroachment of freedom guaranteed by clause (1) of Article 30. With respect to non-minority unaided institutions, imposition of reservations was deemed to be an unreasonable restriction on the freedom to engage in the occupation of "education" pursuant to sub-clause (g) of clause (1) of Article 19. In as much as Clause (5) of Article 15 is now part of the Constitution, reservations by the State for "socially and educationally backward classes" without the creamy layer, and for Scheduled Castes and Scheduled Tribes are now constitutionally permissible categories of state imposition on non-minority educational institutions. The status of constitutional permissibility removes the basis for finding reservations to be an unreasonable restriction in the freedom to select students only on the basis of merit with respect to all the seats in a non-minority unaided educational institution. Consequently, the unaided non-minority educational institutions would have to comply with the State mandated reservations, selecting students within the specified reservation categories on the basis of inter-se merit. The question then is whether with respect to the remaining seats, can the state insist that non-minority private unaided institutions select the most meritorious students, as determined by the marks secured in the qualifying test? The answer to that question is in the affirmative. As we have seen above that in paragraph 136 in P.A. Inamdar it was held that a Common Entrance Test *"would better ensure the fulfillment of twin objectives of transparency and merit" and further on in para 138, it stated again "[I]t needs to be specifically stated that having regard to the larger interests and welfare of the student community to promote merit, achieve excellence and curb malpractices, it would be permissible to regulate admission by providing a centralized and single window procedure. Such a procedure, can secure grant of merit-based admissions on a transparent basis."*

57. Clearly, the continuing concern expressed by the Seven Judge Bench in Inamdar, echoes the concern of this

Court in TMA Pai: the need to ensure merit, as determined by the marks secured on the qualifying exam, is taken care of and thereby achieve academic excellence. In the post clause (5) Article 15 scenario, we are looking at all the seats that are available in the non-reserved category. Those seats have to be filled by non-minority institutions on the basis of merit of students, i.e., ranking determined in accordance with marks secured, in the general category, comprising of the entire set of students who have taken the qualifying examination and secured the minimal marks.

58. It should be clear from the above that simply taking a few stray sentences from here and there in P.A. Inamdar and asserting from those sentences a ratio or a categorical holding would be an incorrect appreciation and leads to an inaccurate assessment of what this Court actually said and meant. The judgments of this Court in TMA Pai, Islamic Academy and in P.A. Inamdar are long, dealing with extremely complex issues of law and fact, and diverse zones of similarities and dissimilarities between the various types of educational institutions being considered, both by the ownership structure – such as minority or non-minority, and aided or unaided -, as well as by the level of education being sought to be imparted. On top of that the issues related to whether recognition and affiliation was being sought or not. So, before arriving at an applicable principle from within those huge judgments, for particular cases that courts deal with, it is imperative that context of observations be closely scrutinized, and also follow the many lines of delineation of many different ratios and principles. To this extent the structure that this Court in P.A. Inamdar gleaned from the judgment of this Court in TMA Pai provides some pathways for these complex interpretational tasks that are imposed on courts dealing with many specific aspects of the wider universe of facts and law considered by this Court. And depending on the level of judicial review, the nature of judicial review, the courts may also have to take a look at the wider universe of facts and laws not taken into account

by this Court in TMA Pai, Islamic Academy and P.A. Inamdar. The majority of the questions dealt with in TMA Pai related to minority institutions. In this regard, P.A. Inamdar, gleans three kinds of minority institutions that were dealt with in TMA Pai: (a) minority educational institutions, unaided nor seeking recognition or affiliation; (b) minority educational institution asking for affiliation or recognition; and (c) minority educational institutions receiving State aid, whether seeking recognition and affiliation or not. To this broad classification, P.A. Inamdar finds that TMA Pai has considered three parallel non-minority educational institutions also: (a1) non-minority educational institutions, neither seeking aid nor recognition or affiliation; (b1) non-minority educational institutions, seeking recognition or affiliation but no aid; and (c1) non-minority educational institutions receiving State aid, whether seeking recognition or affiliation or not. To the matrix of parallel institutions, P.A. Inamdar also gleans from TMA Pai, another dimension on which to differentiate educational institutions: by level of education, general collegiate education, professional graduate level education and post-graduate level of education. It is within this labyrinthine maze that this court sought to find similarities and differences between minority educational institutions and non-minority educational institutions. Consequently, care must be taken in interpreting P.A. Inamdar, and a few stray sentences here and there ought not to be taken to indicate an actual holding or ratio. In P.A. Inamdar itself, the seven judge bench cautioned that such dependence on stray sentences would lead us astray. We have to delve into the foundations and the architectural super-structure erected by P.A. Inamdar to eke out the correct ratio applicable to the facts of the instant case.

59. In paragraph 91, of P.A. Inamdar, this Court enunciated one of the main holdings of TMA Pai as: "the right to establish an educational institution, for charity or for profit, being an occupation is protected by Article 19(1)(g)". In this regard, in as much as the majority in the 11 judge bench in TMA Pai, along with those who partly dissented and partly concurred,

clearly held that education could be an occupation under Article 19(1)(g) only when charitable in nature, we are of the opinion, and hold, that the observation in para 91 in P.A. Inamdar that education can be an occupation imbued with profit motive is not the ratio of the decision. One sentence or a phrase or an expression cannot be torn out of context and be characterized as the ratio decidendi.

60. That apart, a question is raised in para 91 of P.A. Inamdar. If the right to start and operate educational institutions is a general right for all citizens, why did the framers of the Constitution have to enact Article 30(1)? It is observed in para 91 that the "reasons are too obvious to require elaboration……" and that it was "intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institutions of their choice". It is also further noted in para 91 that though Article 30(1) is styled as a right, it is more in the nature of protection for minorities. The following cited text of the opinion in paras 91, 92 and 93 from P.A. Inamdar are critical:

> "91. ……. But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious minorities are concerned, educational institutions of their choice will enjoy protection from such legislation….. The minorities being numerically less qua non-minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30 at the stage of law making. However, merely because Article 30(1) has been enacted minority educational institutions do not become immune from the operation of regulatory measures because the right to administer does not include the right to maladminister.

92. As an occupation, right to impart education is a fundamental right under Article 19(1)(g), and therefore, subject to control by clause (6) of Article 19. This right is available to all citizens without drawing a distinction between minority and non-minority. Such a right is, generally speaking subject to laws imposing reasonable restrictions in the interest of general public. In particular laws may be enacted on the following subjects: (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business; (ii) the carrying on by State of any trade, business, industry or service whether to the exclusion, complete or practical of citizens or otherwise. Care is taken of minorities, religious or linguistic, by protecting their right to establish and administer educational institutions of their choice under Article 30. *To some extent, what may be permissible by way of restriction under Article 19(6) may fall foul of Article 30. This is the additional protection which Article 30(1) grants to the minorities.*

93. The employment of expressions "right to establish and administer" and "educational institutions of their choice" in Article 30(1) gives the right a very wide amplitude. *Therefore, a minority educational institution has a right to admit students of its own choice, it can as a matter of its own free will admit students of non-minority community.* However, non-minority students cannot be forced upon it. The only restriction on the free will of the minority educational institutions admitting students belonging to a non-minority community is, as spelt out by Article 30 itself, that the manner and number of such admission should not be violative of the minority character of the institution.

94. Aid and affiliation or recognition, both by the State, bring in some amount of regulation as a condition of receiving grant or recognition. The scope of such

regulations, as spelt out by a six-Judge Bench decision in Rev. Sidhajbhai case[13] and a nine-Judge Bench case in St. Xavier's[14] must satisfy the following tests: (a) regulation is reasonable and rational; (b) it is regulative of the essential character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it; (c) it is directed towards maintaining excellence of education and efficiency of administration so as to prevent it from falling in standards. These tests have met the approval of Pai Foundation."

61. A clear set of distinctions emerge between educational institutions that are started and operated by minorities and non-minorities. The level of regulation that the State can impose under Clause (6) of Article 19 on the freedoms enjoyed pursuant to sub-clause (g) of Clause (1) of Article 19 by non-minority educational institutions would be greater than what could be imposed on minority institutions under Article 30(1) continuing to maintain minority status by admitting mostly students of the minority to which the minority institution claims it belongs to, except for a sprinkling of non-minority students. The critical difference in regulation that would be higher in the case of non-minority educational institutions is that they only select students from the general pool, and based on merit as determined by marks secured in qualifying examinations. The ability to choose from a smaller group within the general pool, becomes available only to those who are constitutionally protected under Clause (1) of Article 30. Even that ability to choose from within the smaller group is not really a right to choose a "source". The source is given. The source can only be the minority to which the minority educational institution claims it belongs to. Once the choice is exercised to be an educational institution that serves a minority, the source itself

13. Rev. Sidhajbhai Sabhai v. State of Gujarat (1963) 3 SCR 837.

14. Ahmemdabad St. Xavier's College Society v. State of Gujarat (1974) 1 SCC 717.

is given by Clause (1) of Article 30 and depends on whether the group claiming to be a minority is actually a minority or not, as determined at the State level. Neither AWES nor ACMS, are protected by any constitutional provision that allows it to choose to be an educational institution serving only a small class of students from within the general pool. If indeed Army personnel now constitute a "Socially and Educationally Backward Class", then under Clause (5) of Article 15, it is for the State to determine the same, and provide by law, for reservations of wards of Army personnel, in consonance with the constitutional jurisprudence extant with regard to how a Socially and Educationally Backward Class is to be delineated, for instance by removal of the creamy layer, and that the extent of reservations to be provided ought not to exceed certain levels etc. That has not happened in this instant matter. Consequently, all of the permissible restrictions and regulations under Clause (6) of Article 19 that non-minority institutions would be subject to would also be applicable with respect to ACMS. These regulations would also include a determination of how students in the non-reserved category of seats, in the post 93rd Amendment scenario, be admitted: on the basis of merit, determined by marks secured on the common entrance test. Maintenance of overall academic standards, which apparently can be properly achieved only if high importance is placed on admitting students on the basis of ranking determined by marks secured in entrance tests, is necessarily a State concern, which it may relax only in respect of those groups that it is constitutionally permitted to relax for. In the case of minority educational institutions, that relaxation is on account of Clause (1) of Article 30 provided minority educational institutions are maintaining their minority status by admitting mostly minority students except for a sprinkling of non-minorities; and with respect to non-minority educational institutions, only with respect to statutorily determined percentage of seats for Scheduled Caste, Scheduled Tribes, and Socially and Educationally Backward Classes as enabled by Clause (5) of Article 15 and other constitutionally permissible classes. With

respect to Socially and Educationally Backward Classes, such classes can be determined only after excluding the creamy layer, as held by this Court in Ashoka Kumar Thakur.

62. To the above we need to add another dimension. In P.A. Inamdar, another fine distinction is drawn between professional and non-professional educational institutions. We now turn to paragraphs 104 and 105 of P.A. Inamdar below:

> "104 Article 30(1) speaks of "educational institutions" generally and so does Article 29(2). These articles do not draw any distinction between an educational institution dispensing theological education or professional or non-professional education. However, the terrain of thought as has developed through successive judicial pronouncements, culminating in Pai Foundation is that looking at the concept of education, in the backdrop of the constitutional provisions, professional educational institutions constitute a class by themselves as distinguished from educational institutions imparting non-professional education. It is not necessary for us to go deep into this aspect of the issue posed before us in as much as Pai Foundation has classified that merit and excellence assume special significance in the context of professional studies. Though merit and excellence are not anathema to non-professional education, the need for merit and excellence therein is not of the degree as is called for in the context of professional education.
>
> 105. Dealing with unaided minority educational institutions, Pai Foundation holds that Article 30 does not come in the way of the State stepping in for the purpose of securing transparency and recognition of merit in the matter of admissions……. However, a distinction is to be drawn between unaided minority educational institution at the level of schools and undergraduate colleges on the one side and institutions of higher education, in particular those

imparting professional education, on the other side. In the former, the scope of merit-based selection is practically nil and hence may not call for regulation. But in the case of the latter, transparency, and merit have to be unavoidably taken care of and cannot be compromised. Those could be regulatory measures for ensuring educational standards …….. The source of this distinction between two types of educational institutions referred to hereinabove is to be found in the principle that right to administer does not include a right to maladminister."

63. What stands out therefore, is that even though it is quite clearly and explicitly stated that maintenance of merit as determined by marks secured in qualifying examinations is an absolute necessity under Clause (6) of Article 19 for those enjoying the freedoms only under sub-clause (g) of Clause (1) of Article 19, the protection of clause (1) of Article 30 to minorities is extended to choosing those with merit, based on marks on the qualifying examinations, amongst their own minority group. There is no choice of "source" here. The choice is only with respect to being a minority or a non-minority educational institution. If the choice is exercised that the promoters wish to start a minority educational institution, the source immediately gets affixed, by clause (1) of Article 30 and a determination of who falls within that minority group. The educational institution does not do that. The State does that, following a constitutionally mandated and permissible process. In that sense, even there it is the State which delineates the "source" so that the protections of Clause (1) of Article 30 indeed flow to the minorities that the State was expected to protect. Consequently, this attempt to define an equivalence between non-minorities and minorities, and then come up with the idea that minorities can choose or create a "source" from within the general pool, and hence the non-minorities should be free to also create their own "sources" has to be deemed to be illogical, and based on a weird interpretation of the Constitution and the reality on the ground. The non-minority

educational institutions have the basic freedom to choose: those students who are the most meritorious as determined on the basis of marks secured in a common entrance test with respect to filling up the seats that are not covered by reservations for Scheduled Castes, Scheduled Tribes, and "Socially and Educationally Backward Classes" pursuant to clause (5) of Article 15. Consequently choice of students by non-minority educational institutions can only be from the general pool with respect to non-reserved seats. They cannot make further distinctions of their own accord.

64. In light of the above we have to conclude that non-minority private unaided professional colleges do not have the right to choose their own "source" from within the general pool. The equivalence between minority and non-minority unaided institutions, apart from that distinction because of clause (1) of Article 30, was to be on the basis that both are subject to reasonable restrictions pursuant to clause (6) of Article 19, that neither minority nor non-minority institutions could maladminister their educational institutions, especially professional institutions, that affect the quality of education, and by choosing students arbitrarily from within the sources that they are entitled to choose from. In the case of non-minority institutions, especially professional institutions, the "source" can only be the general pool, and selection has to be based on inter-se ranking of students who have qualified and applying or opting to choose to be admitted to such non-minority educational institutions. In the case of minority educational institutions, the "source" can be delimited to the particular minority the institution belongs to. To hold otherwise would be illogical, even if one were to assume that what is afforded to minority institutions is only a protection rather than a full fledged right. The protection under clause (1) of Article 30 is granted to minority institutions so long as they maintain their minority status. If the non-minority educational institutions could choose their own sources, minorities which are assured equal protections as non-minorities should certainly have that right

too. The added protections to minority educational institutions makes sense only in the event that non-minorities are restricted to choosing from the general pool, and minorities from the delimited source of their own minority. Otherwise Clause (1) of Article 30 would become meaningless.

65. Consequently, we hold that the arguments of learned Senior Counsels, Mr. K.K. Venugopal and Mr. Jaideep Gupta that ACMS as a non-minority professional institution has the right to delimit a source of students are unpersuasive. ACMS has only the right to choose students from within the general pool. Further, in as much as this court in P.A. Inamdar found the judgment in Islamic Academy to be incorrect in presuming that there could state quotas and management quotas, we would also have to find that the 10% management quota described in clause (a) of sub-section (1) of Section 12 to be suspect.

66. With regard to the proposition that the exemptions granted to ACMS to fill up all of its seats only with wards of army personnel on account of national interest has also been noted by us. However, given the ratio of P.A. Inamdar, we are unable to grant any relief on that count. We do recognize that it may indeed be the case that army personnel, particularly those at the lower end of the hierarchy in the army, and their families, may be suffering from great hardships. It would indeed be, and ought to be a matter of considerable national distress if persons who have agreed to lay down their lives, for the sake of national security, are not extended an empathetic understanding of their needs and aspirations. However, the ratio of the judgments in TMA Pai, Islamic Academy and P.A. Inamdar, by larger benches of this Court, leaves us with no options with respect to holding that ACMS may select only those students who have scored higher marks in the common entrance test with respect to seats remaining after taking into account reserved seats. This is notwithstanding what we may perceive to be an odious and an inherently unjust situation. If any special provisions need to

be made to protect the wards of Army personnel, this may possibly be done by the State, by laws protected by Clause (5) of Article 15. The private society, of former and current army personnel by themselves cannot unilaterally choose to do the same.

67. Prior to the enactment of 93rd Constitutional (Amendment) Act 2005, whereby Clause (5) was inserted into Article 15 of our Constitution, the ratio in TMA Pai, as further explained by P.A. Inamdar, would have foreclosed any options for the society and this country to relax the strict requirement that all admissions be on the basis of "merit based on marks secured in qualifying examinations." The other option would have been for Courts to find, in the interests of justice, to expand the "doing complete justice" jurisprudence under Article 142 to correct such instances of injustice, which raises its own problems. If we find that every unaided educational institution can define its own source, then we run head long into a situation wherein the entire field of higher education is carved up into "gated communities", with each new educational institution defining its own source in whichever manner it may choose to, as long as overt and invidious constitutional grounds of classification are not resorted to. How will the scholars in those colleges interact with people from other communities, other social backgrounds, so that they can perceive and conceive the manner in which they may have to apply what they are learning to solve the problems in the wider social context of India? Where would such classifications stop? Would members of the judiciary, both higher and lower, then determine that they will start many law colleges which will only admit wards of such members of the judiciary? Would Indian Administrative Officers, along with some slightly lower level in the administrative rung then have a similar right? Would the members of the police force also then get such rights? Would NASSCOM or a group of software companies say that they want to start software engineering colleges that will open their portals only to those

who belong to NASSCOM? Where will this stop? How will this nation take the burden of such walled and divided portals of knowledge? What will become of the prayer of our national poet laureate, that knowledge be free and where the world is not broken up into fragments of narrow domestic walls? Have we set ourselves on the path to such divisiveness, at the very source of the one force that could liberate us and unite us, and make us a more egalitarian society? If we were to uphold the logic of the learned Senior Counsel appearing for the Respondents, which we cannot under the ratio of TMA Pai, and P.A. Inamdar, but under "complete justice jurisprudence" of Article 142, then we would have set ourselves on a slippery slope, whereby the entire field of higher education would comprise of "gated communes" or some new and perverse form of caste system, where existing advantages, of occupations, social and economic stature, would get ossified only within a small segment of the population. Surely, fundamental rights have been granted to the citizens, to be free and build a better society or at least refrain from actions that would create further walls of social division.

VII

68. One last thing remains.

69. As we had noted earlier, the Constitutional validity of Delhi Act 80 of 2007 was never raised, either by the Appellants or the Respondents, in any of the proceedings earlier. For the first time, before us, the learned Senior Counsel, Mr. Jaideep Gupta has raised the question of whether the provisions of clause (5) of Article 15 violate the basic structure of the Constitution in so far as they relate to enablement of the making of "special provisions", by law, with respect to admissions of Scheduled Castes, Scheduled Tribes, and Socially and Educationally Backward Classes into private unaided non-minority educational institutions. This would obviously raise an issue regarding applicability of Delhi Act 80 of 2007 in the instant matter. We are hence, required to look at this issue too.

In pressing the challenge of basic structure doctrine against clause (5) of Article 15, the learned Senior Counsel relied on the opinion of our learned brother Justice Dalveer Bhandari in Ashoka Kumar Thakur, on the provisions of clause (5) of Article 15 that are applicable with respect to private unaided non-minority educational institutions. We note the specific text of the constitutional provisions below, and thereafter briefly summarise the opinion of Bhandari J, which learned Senior Counsel adopts wholesale as his submissions.

Clause (5) of Article 15 states as follows:

> "Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provisions, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30."

70. In Ashoka Kumar Thakur, apart from Bhandari J., the other four learned judges did not evaluate the issue of whether the provisions in clause (5) of Article 15, as applicable to unaided non-minority educational institutions, violate the basic structure of the Constitution. This was on the grounds that no unaided educational institutions were before this Court. The majority, including Bhandari J., held that the same provisions in so far as they relate to governmental and private aided institutions to be valid and not in violation of the basic structure. However, Bhandari J., opined that in as much as reservations would be imminent, pursuant to clause (5) of Article 15, the same ought to be tested because the content of freedoms enunciated by this Court, in TMA Pai, and P.A. Inamdar, were likely to be destroyed. It was granted that, even though this Court had held in TMA Pai, as explained in P.A. Inamdar, that

imposition of reservations on non-minority unaided educational institutions to be unreasonable restrictions under clause (6) of Article 19 on the freedoms granted by sub-clause (g) of clause (1) of Article 19 to pursue the charitable occupation of starting, operating, financing, working and teaching in non-minority unaided educational institutions, the same could be subjected, by a constitutional amendment, to the provisions of clause (5) of Article 15. Nevertheless, it was reasoned that in as much as the freedoms of citizens to engage in the occupation of education was under potential threat, and further because the occupation of education was one of the activities covered by freedoms that were part of the "Golden Triangle", as enunciated in *Minerva Mills Ltd. V Union of India*[15], it was posited that the details be examined as to the degree of abridgment of the freedom of the "educators" to start, operate, manage, finance, work in and teach in non-minority educational institutions.

71. The main conclusion reached was that "educators" who do not take a "paisa of public money" ought to be free from restrictions of State imposed reservations. Further, it was also opined that even though non-minority unaided educational institutions would continue to exist, and educators would have their occupation, the *"greatest impact on the educator is that neither he nor his institution will choose whom to teach",* in as much as in "49.5%" of the time the State would determine, through a policy of reservations, who the educators would teach. In this regard, the test for violation of basic structure doctrine was conducted by an impact and effects test (or what is called as a "rights test"), claiming that the observations of *I.R. Coelho v. State of Tamil Nadu*[16] in para 151 (ii) mandated such a test. In the first phase, the so called impact stage, it was determined that clause (5) of Article 15 would indeed affect the "identity" of the freedom of private citizens to engage in the charitable occupation of starting, operating, managing, working

15. (1980) 3 SCC 625.

16. (2007) 2 SCC 1.

in, financing and teaching in non-minority unaided educational institutions. To this extent, the observations in TMA Pai were relied on to trace the contours of the outline of the "identity" of the freedom under sub-clause (g) of clause (1) of Article 19. The test of violation of basic structure doctrine was further stated to be whether the identity of the freedom of educators in non-minority unaided educational institutions under sub-clause (g) of clause (1) of Article 19 was "compromised" by clause (5) of Article 15. It was also held that even if the freedom to choose students of one educator was affected, then the identity of the freedom to engage in the said occupation guaranteed by sub-clause (g) of clause (1) of Article 19 itself would have been compromised, and consequently the provisions in clause (5) of Article 15 in as much as they affect non-minority unaided educational institutions would have to be deemed to be unconstitutional and violative of the basic structure. Thereafter an "effect" test was conducted, and by noting that imposition of reservations would immediately (1) make academic standards suffer; (2) affect the ability of attracting and retaining good quality faculty; (3) the incentive to establish a first-rate unaided educational institution is made difficult; and (4) ultimately the global reputation of educational institutions would be damaged, it was held that freedom of "educators" in non-minority unaided educational institutions would have been compromised and hence abrogated. Further, it is determined that sub-clause (g) of clause (1) of Article 19 to itself be a basic feature of the Constitution, and it is further observed that:

> "Given the dramatic effect that reservations would have on educators, the unaided institutions in which they teach, and consequently society as a whole, Article 19(1)(g) has been more than abridged….. The identity of the Constitution is altered when unreasonable restrictions make a fundamental right meaningless…. Imposition of reservations on unaided institutions has abrogated Article 19(1)(g), a basic feature of the Constitution."

72. The learned Senior Counsel, Mr. Jaideep Gupta, has pressed upon us to follow the same methodology and find that clause (5) of Article 15 abrogates the basic structure of the constitution, and consequently declare those aspects of Delhi Act 80 of 2007 that impose reservations to be unconstitutional. We state our response very simply: we are not persuaded by the same, and for the reasons discussed hereafter with humility and utmost respect beg to differ from the view taken by our esteemed brother Bhandari J.

73. Clause (5) of Article 15 is an enabling provision and inserted by the 93rd Constitutional (Amendment) Act, 2005 by use of powers of amendment in Article 368. The 93rd Constitutional (Amendment) Act, 2005 was in response to this Court's explanation, in P.A. Inamdar, of the ratio in TMA Pai, that imposition of reservations on non-minority unaided educational institutions, covered by sub-clause (g) of clause (1) of Article 19, to be unreasonable restrictions and not covered by clause (6) of Article 19. The purpose of the Amendment was to clarify or amend the constitution in a manner that what was held to be unreasonable would now be reasonable by virtue of the Constitutional status given to such measures. The correct approach would then be to test whether powers of amendment in Article 368 do extend to imposing restrictions on a right, which otherwise would have been held to be "unreasonable" on account of a judgment of this Court. Once that test is conducted and found to be not violating the basic structure of the Constitution, the grounds on which this Court had previously found the reservations to be unreasonable would vanish. This is even more so, when the amendment, and the consequent legislation, cannot and do not seem to be directed at completely eliminating the possibility of private citizens engaging in that activity, the right to charge appropriate fees is protected, and moreover the existing jurisprudence does not allow, normally an imposition of reservations above 50%. If we were to be guided by the submissions in this regard by the learned Senior Counsel we find that we would have to invert the logic of the

basic structure doctrine, state the propositions of the test in a tautological manner and consequently convince ourselves that there is great danger to constitutional identity by virtue of legislations that could plausibly be enacted by the State by virtue of the enabling provisions of clause (5) of Article 15 with respect to non-minority unaided educational institutions. We find that if we were to do that, we would have set ourselves on the path to ineradicably alter the identity of our Constitution, damage its very purposes and the national project, and wipe out decades worth of jurisprudence with regard to the importance of Directive principles of State Policy, thereby bringing back the principles enunciated in the case of *I.C. Golaknath v. State of Punjab*[17], that none of the fundamental rights can be abridged or affected in any manner, which was set aside by this Court in *Keshavananda Bharati v. State of Kerala*[18].

74. In this regard we also opine that if we adopt the interpretation of para 151(ii) of I.R. Coelho that it mandates a "rights test" we would end up misinterpreting the modality of testing a Constitutional amendment on the anvil of the basic structure doctrine as enunciated by this Court in that case itself. In this regard, a basic distinction was drawn by this Court, in I.R. Coelho, as between "rights test" and "essence of rights" test, and it was stated in para 142 that:

> *"There is also a difference between the "rights test" and the "essence of rights" test. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire chapter is made inapplicable,* the "essence of right" test as applied in M. Nagaraj Case will have no applicability. In such a situation, to judge the validity of law, it is the "right test" which is more appropriate."

17. (1967) 2 SCR 762.

18. (1973) 4 SCC 225.

75. Paragraph 151(ii) in I.R. Coelho, when read by itself, may suggest that an effect and impact test be used; however we are unable to do so because of what was stated in para 142 of I.R. Coelho stated above. This is on account of the fact that if we were to take the concluding answer given to a specific question, and conflating the same to the status of a ratio applicable to all other general or specific facts, we run the risk of not recognizing the rationale by which the Court had arrived at the final answers. This has a deleterious effect on law. The broader principles that are applied, in a specific manner to particular fact patterns located in the specific questions that the courts set out to answer, would then be obliterated, and the narrow application that the Court finds for a specific situation, which is but an instance of the broader principle, the genus, would have taken over. Moreover, in the preceding paragraph 150, this Court enunciated that it is the constitutional validity of the Ninth Schedule laws which have to be adjudged by applying the "direct impact and effect test i.e. rights test." Consequently, if we were to just take the text of para 151 (ii) by itself as the ratio, then we would also run the risk of not recognizing the multiple principles enunciated in the conclusion itself. Hence, we find it necessary to cite below sub-paras (i), (ii), (iii), (iv) and (v) of Para 151 of I.R. Coelho below (emph. supplied), and thereafter derive the principle that is applicable in the instant matter:

> "(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure or it may not. If former is the consequence of the law, whether by amendment of any article or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.
>
> (ii) The majority judgment in Keshavananda Bharati case

> read with *Indira Gandhi* case[19] requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure, The impact test would determine the validity of the challenge.
>
> (iii) All amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains to or pertain to the basic structure.
>
> (iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by constitutional amendments shall be a matter of constitutional adjudication by examining the nature and extent of infraction of a fundamental right by a statute, sought to be constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and "essence of the right" test taking the synoptic view of the Articles in Part III as held in *Indira Gandhi* case[20]. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such law(s) will not get the protection of the Ninth Schedule.
>
> (v) This is our answer to the question referred to us vide

19. Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1.

20. 1975 Supp SCC 1.

order dated 14-9-1999 in *I.R. Coelho v. State of T.N"*

76. It should be pointed out that I.R. Coelho judgment was delivered to answer the question, as pointed out in para 5, as to whether it is "*permissible for the Parliament under Article 31-B to immunize legislation from fundamental rights by inserting them into the Ninth Schedule, and if so, what is its effect on the power of judicial review of the Court*". In para 78 of I.R. Coelho it was noted that the "*real crux of the problem is to the extent and nature of immunity under Article 31-B can validly provide*". The question of immediate purport was whether Article 31-B provided a blanket protection such that legislative enactments which destroy the basic structure could be included in the Ninth Schedule, and thereby become immune from the test of basic structure itself.

77. One of the incidental questions that this Court in I.R. Coelho sought to answer was whether, pursuant to Keshavananda, none of the fundamental rights were to be considered to be a part of the basic structure. This was so, in the light of the opinion of Khanna, J., in Keshavananda, which seemed to suggest that fundamental rights were not to be treated as a part of the basic structure. However, in light of Khanna J's, clarification in the *Indira Nehru Gandhi v Raj Narain* case[21], that his opinion in Keshavananda could not be read to mean that none of the fundamental rights could be treated as a part of basic structure, this Court in I.R. Coelho in para 97, held that "*the rights and freedoms created by the fundamental rights chapter can be taken away or destroyed by amendment of the relevant article, but subject to the limitation of the basic structure doctrine*". In para 98 it was observed by this Court that "*the first aspect to be borne in mind is that each exercise of the amending power inserting laws into the Ninth Schedule entails a complete removal of the fundamental rights chapter vis-à-vis the laws that are added to the Ninth Schedule. Secondly, insertion in the Ninth*

21. 1975 Supp SCC 1.

Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. The consequence of insertion is that it nullifies entire Part III of the Constitution. There is no constitutional control on such nullification…….. The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent organ viz. the judiciary." Thus, it appears that what was exercising the collective mind of the Nine Judge Bench in I.R. Coelho was the breadth of protections that were being sought and placed on laws included in the Ninth Schedule: from any standards or values of the Constitution itself, including complete evisceration of Part III and judicial review. In fact this is borne out by para 103 wherein it was observed that *"[T]he absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise.*"

78. It would be pertinent to note that the provisions of new clause (5) of Article 15 do not purport to take away the power of judicial review, or even access to courts through Articles 32 or 226. Neither do the provisions of clause (5) of Article 15 mandate that the field of higher education be taken over by the State itself, either to the partial or total exclusion, of any private non-minority unaided educational institutions, a power that was most certainly granted under clause (6) of Article 19, which had been inserted by the 1st Constitutional Amendment in 1951. The purport of its provisions is that sub-clause (g) clause (1) of Article 19 should not be read to mean that if the State were to make "special provisions" with respect to admission of Scheduled Castes, Scheduled Tribes, and Socially and Educationally Backward Classes to non-minority unaided educational institutions the same should not be deemed to be

unreasonable. A small portion, of one of the activities of one particular occupation in the entire field of occupations that are a part of the guaranteed freedoms by sub-clause (g) of clause (1) of Article 19, is to be restricted. Further, such an amendment was necessary, as stated in the Statement of Objects and Reasons of the Constitution (one Hundred and Fourth Amendment) Bill 2005 (which became the 93rd Constitutional (Amendment) Act, 2005), to promote the "educational advancement of the socially and educationally backward classes of citizens….The Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions other than minority educational institutions." It was also stated that greater access to higher education, including professional education to students belonging to weaker segments is a matter of major concern, and that the number of seats available in aided or State maintained institutions, particularly in respect of professional education, was limited in comparison to those in private unaided institutions. Furthermore, in as much as Article 46, a Directive Principle of State Policy, commands that the State promote with special care the educational and economic interests of the weaker sections of the population and protect them from social injustice, it was stated that access to education to be important to ensure advancement of persons belonging to Scheduled Castes, Scheduled Tribes and the Socially and Educationally Backward Classes.

79. In this regard, I.R. Coelho makes some very important observations, about the equality code and egalitarian content of fundamental rights that we opine have a direct bearing on the issues of basic structure review of clause (5) Article 15. In particular after noting that Part III "has a key role to play in the application" of the basic structure doctrine (para 100), the Court went on to state para 101:

Regarding the status and stature in respect of fundamental

rights in constitutional scheme, it is to be remembered that fundamental rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The state is to deny no one equality before the law. The object of fundamental rights is to foster the social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State. *By enacting fundamental rights and directive principles which are negative and positive obligations of the State, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental rights and directive principles have to be balanced. The balance can be tilted in favour of the public good. The balance however cannot be over-turned by completely overriding individual liberty. This balance is an essential feature of the Constitution."* (emph. Supp.)

80. Further, it was also stated in, in para 102, that in evaluating the permissibility of an amendment, one needs to look at, as done in *Waman Rao v. Union of India*[22], how far the amendment is "consistent with the original; you cannot by an amendment transform the original into the opposite of what it is. For that purpose, a comparison is undertaken to match the amendment with the original. Such a comparison can yield fruitful results even in the rarefied sphere of constitutional law." In other places, as in para 105, it is noted that "*Economic growth and social equity are two pillars of our Constitution, which are linked to the rights of an individual (right to equal opportunity), rather than in the abstract. Some of the rights in Part III constitute fundamentals of the Constitution like Article 21 read with Articles 14 and 15 which represent secularism etc., As held in Nagaraj*[23] *egalitarian equality exists in Article 14 read with Articles 16(4), (4-A), (4-B) and, therefore, its*

22. (1981) 2 SCC 362.

23. M. Nagaraj v. Union of India (2006) 8 SCC 202.

wrong to suggest that equity and justice finds place only in the directive principles." (emph. supp'd). Upon discussing various aspects such as the fact that extensive discussions were held in Keshavananda with respect to status of property as a fundamental right, that in the Indira Gandhi case Chandrachud, J., posits that equality embodied in Article 14 is part of the basic structure of the Constitution, that in Minerva Mills it was held that Articles 14, 19 and 21 clearly form part of the basic structure of the Constitution and cannot be abrogated, it is concluded in para 114 that "the result of the aforesaid discussion is that since basic structure of the constitution includes some of the fundamental rights, *any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any fundamental rights, or any other aspect of the basic structure* then it will be struck down. The extent of abrogation and limit of abridgment shall have has to be examined in each case." (emph. supp.)

81. Consequently, it appears that in I.R. Coelho this Court recognized that there are different kinds of constitutional amendments. The kinds of amendments whereby laws are placed in the Ninth Schedule only enjoy a "fictional immunity" and they would have to be tested by using the direct impact and effect test i.e., "rights test" or even the essence of each fundamental right that has been deemed to be a part of the basic structure. The laws placed in the Ninth Schedule are ordinarily enacted, and then placed in Ninth Schedule by a constitutional amendment, simpliciter, and enjoy only a "fictional immunity" pursuant to Article 31-B. This is in contrast to the situation where a Constitutional amendment effectuates changes in the main provisions of the Constitution, particularly in Part III. In such a constitutional amendment, the "essences of rights" test used in M. Nagaraj, wherein the essences of the rights are identified across entire equality, freedom and judicial review codes, i.e., "over-arching principles" of such codes, and then the particular Constitutional amendment is evaluated as to whether it completely changes the very "identity" of the entire

Constitution itself. Those "over-arching principles" are what gives the Constitution its identity, and when they are destroyed would the identity of the Constitution have been changed completely.

82. This is made very clear by what this Court in I.R. Coelho perceived to be the status of the nature of immunity granted by Article 31-B: *"Article 31-B gives validation based on fictional immunity. In judging the validity of constitutional amendment*" i.e., the amendment that places a state law in the Ninth Schedule "*we have to be guided by the impact test*." (see para 149) "*The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights…*" Further on in para 150 the Court concludes "*The result of the aforesaid discussion is that the constitutional validity of the Ninth Schedule laws can be adjudged by applying the direct impact and effect test i.e., rights test, which means the form of an amendment is not the relevant factor, but the consequences thereof*."

83. The above cited paragraph lends further support to our earlier observation that this Court in I.R. Coelho has made an essential distinction between the kinds of constitutional amendments that are effected by placement of State laws in the Ninth Schedule versus the kinds of constitutional amendments that change aspects of the Constitution itself. This is further supported by the fact that in para 133 the Court recognized that the laws placed in the Ninth Schedule do not become a part of the main body of the Constitution, and that they become a part of Ninth Schedule and "derive validity on account of the exercise undertaken by Parliament to include them… This exercise has to be tested every time it is undertaken". Secondly, it must also be noticed, that state legislatures cannot amend the constitution. It was conclusively held in I.R. Coelho, in para 148, that "*fictional validation based on the power of immunity exercised by Parliament under*

Article 368 is not compatible with basic structure doctrine and, therefore, the laws that are included in the Ninth Schedule have to be examined individually for determining whether the constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution." This was so because post Keshavananda decision, this Court had specified that some of the fundamental rights are also a part of the basic structure because of their importance. Consequently, a direct impact and effect test i.e., "rights test" and "essence of right" i.e., the essence of the fundamental right that has been affected has to be conducted in the case of laws included in the Ninth Schedule by virtue of the constitutional amendments, simpliciter, whereas with respect to constitutional amendments of an article in the Constitution itself had to be tested in accordance with the essences of rights i.e., "over-arching principles" test as enunciated in M. Nagaraj. This is further borne out by sub-para (i) of paragraph 151 cited earlier when read with para 142, and taking the entire judgment in I.R. Coelho into account.

84. A few observations are merited with regard to the very carefully crafted principles laid down in the sub-para (i) of para 151 in I.R. Coelho. The first point is that a law that abrogates or abridges rights guaranteed by Part III may or may not violate the basic structure. This means that there could be laws that could abrogate some fundamental rights in Part III, and yet may not lead to a violation of the basic structure doctrine. The second sentence in sub-para (i) states emphatically that if a law abrogates or abridges a fundamental right and also violates the basic structure then it must be set aside. At this stage it is not yet clear whether the law is a constitutional amendment exercised under Article 368 to make an amendment to the main body of the constitutional text, or the law is an amendment that places laws in the Ninth Schedule, whereby such laws in the Ninth Schedule do not become a part of the Constitution as such. That clarification comes from the next sentence: "The validity or invalidity would be tested on the principles laid down

in this judgment". That sentence clearly indicates that the same has to be determined in accordance with the principles laid down in the entire judgment and not just in the conclusion. That principle was unequivocally laid down in para 142 that had been cited earlier, which recognizes that the test of Constitutional amendments on the anvil of the basic structure doctrine would have to be in accordance with the test delineated in M. Nagaraj.

85. In light of the above discussion, we are of the opinion that it is impermissible for us to apply the direct impact and effects test to evaluate whether clause (5) of Article 15 provisions with respect to admissions to unaided non-minority educational institutions violate the basic structure. By no stretch of imagination could the provisions of Clause (5) of Article 15 be deemed to be so wide as to eliminate an entire chapter of fundamental rights, or permit complete evisceration of even the freedom to engage in one of the occupations of the many occupations guaranteed by clause (g) of clause (1) of Article 19. The correct test would be the "essences of rights" test, i.e., the "over-arching principles" test as enunciated in M. Nagaraj[24], to which we turn below.

86. In M. Nagaraj, Kapadia J., (as he then was) speaking for the Court, recognized that one of the cardinal principles of constitutional adjudication is that the mode of interpretation ought to be the one that is purposive and conducive to ensure that the constitution endures for ages to come. Eloquently, it was stated that the *"Constitution is not an ephemeral legal document embodying a set of rules for the passing hour"*. In M. Nagaraj this Court recognized that fundamental rights are not those which exist only by virtue of the State recognizing them to be so, but rather that the Constitution transcribes them as limitations on the power of the State. This would mean that not merely or solely are the negative rights to be conceived as natural, given and pre-existing, but the positive rights, which cast an obligation on the State to achieve egalitarian and social

24. (2006) 8 SCC 212.

justice objectives, that behoove to the benefit of individuals and groups would also have to be recognized as natural, given and pre-existing. It is also recognized that the content of the fundamental right granted to a citizen has to be determined by the judiciary; and variations effectuated by the State have to meet the test of reasonableness as enunciated by this Court in Minerva Mills, which effectively set aside the narrow construction of *A.K. Gopalan v State of Madras*[25] that as long as the variation and the extent of such variation of a granted fundamental right is effectuated by "law" it could not be questioned. However, it was also recognized that the judiciary cannot use a narrow and pedantic exposition of the text of the fundamental right to determine the contents thereof. Further, the Court in M. Nagaraj recognized that the standard of judicial review of a constitutional amendment, on the touchstone of the doctrine of the basic structure, is an entirely different exercise than review of state legislation with respect to its impact on a specific fundamental right. Analysing the rationale and mode of analysis of the Court in S.R. Bommai v. Union of India[26], it was stated, in para 23, that "*it is important to note that the recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole…. These principles are part of constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Article 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as "essential features" or part of the "basic structure" of the Constitution, that is to say, they are not open to amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution*." (emphasis added). It was further

25. 1950 SCR 88.

26. (1994) 3 SCC 1.

specified that certain principles, such as federalism, socialism, secularism and reasonableness *"are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution."*

87. The modality of the "essences of rights test" was enunciated in para 25 of M. Nagaraj as follows: " *In order to qualify as an essential feature, it must be first established that the said principle is a part of constitutional law binding on the legislature. Only, thereafter, is the second step to be taken, namely whether, whether the principle is so fundamental as to bind even the amending power of Parliament i.e., to form a part of the basic structure….. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending powers of Parliament i.e., to form part of the basic structure of the Constitution. This is the standard of review of constitutional amendments in the context of the doctrine of the basic structure*." And further on, in para 26, the Court also recognized that the doctrine of basic structure has emanated from the German Constitution and notes that in that jurisprudence the overarching principle that connects, and informs all other values is the principle of human dignity. With respect to our Constitution it was noted that "*axioms like secularism, democracy, reasonableness, social justice, etc., are over-arching principles which provide linking factor for the principle of fundamental rights like Article 14, 19 and 21. These principles" i.e., the over-arching principles, "are beyond the amending power of Parliament*." (emph. suppd.)

88. From the above we can glean that evaluation of whether a particular amendment has amended those "over-arching principles" is the test for basic structure. It is not the

specific instances of expression of contents of a fundamental right, as stated by the courts prior to an amendment which are to become the anvil of the test of basic structure when the amending power is exercised and a main element of the provisions of the Constitution is altered. Rather, the courts have to be careful in assessing whether those over-arching principles themselves are abrogated. By no stretch of imagination could one claim that truncation of one of the activities that were deemed to have been one of the many essential features of one of the occupations of the many occupations that are guaranteed by one of clauses of the freedom code, by itself could constitute an over-arching principle, and further that such a principle has been abrogated. It is not the change in the identity of any one element of the conspectus of activities of one occupation in a plethora of occupations that itself forms a part of the many different kinds of freedoms that leads to the violation of the basic structure doctrine; but rather whether the over-arching principles, that connect one fundamental right to the other that are so abrogated as to change the very identity of the Constitution which is the true test to evaluate whether a constitutional amendment has violated the basic structure doctrine. In this regard, the Court in M. Nagaraj further goes on to pithily state that the standard to be applied in evaluating whether an amendment has also modified the over-arching principles, that inform each and every fundamental right and link them, is to find whether because of such a change we have a completely different constitution. In particular, summarizing the various opinions in Keshavananda Bharati[27], it was stated:

> *"To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity…. The word "amendment" postulates that the old Constitution survives without a loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of*

27. (1973) 4 SCC 225.

> *opinions in the majority decision in Keshavananda Bharati. To destroy its identity is to abrogate the basic structure of the Constitution…….. The main object behind the theory of constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day.*" (emphasis added, para 28).

89.The prevention of destruction of the "constitutional identity" is the chief rationale in using the basic structure doctrine in instances of constitutional amendment such as the one we are concerned with in the instant matter. Constitutional identity, and continuance of such an identity are the primordial issues, and the identity ought not to be destroyed. Often a problem is encountered with issues of identity. The issue of change in identity, and debates about it can take extremely abstract and metaphysical form as with regards to the Ship of Theseus[28] or the Theseus' Paradox. In the classical narrative, in the metaphysical speculations about the paradox, reference is with respect to the ship in which Theseus, and other youth of Athens, returned from Crete having killed a minotaur that demanded sacrifice of Greek youth every year. Because the ship was of such importance, Athenians preserved it in the harbor for generations, replacing its boards that had become dilapidated by new ones, where at one point all the boards had been replaced. This apparently led to the fertile Greek minds, prone as they were to metaphysical speculation, to ask whether the ship, after every part had been replaced by another newer part, was indeed the same ship or not. For the formalists, the identity had changed because none of the original parts were there; and in fact the extreme amongst them claimed that the identity had changed when the first part was itself changed. For the functionalists, the ship was identically the same because the parts that replaced the worn out parts were of the same quality, shape and size and performed exactly the same functions as previously specified. In either case, both the

28. Plutarch: Theseus, trans. John Dryden.

puritanical originalists delighted in the squabble without there being any pragmatic resolution.

90. Unfortunately, we as constitutional adjudicators do not have the luxury of facile metaphysical speculations, and imposing conclusions arrived thereupon on this country, by ignoring the practical impact of the ship and the larger purposes that it is supposed to serve. Indeed our ship, the Constitution, was never intended to remain in the harbour and was intended to set sail. The narrative of our Ship of Theseus takes a different form for us.

91. We liken our Constitution to the Ship of Theseus, with the difference that the ship itself has been provided with sufficient wood, and tools to fashion new boards, and it was to actually set sail. The Ship of our Nation, the Constitution, set sail on its journey in 1950, on uncharted oceans of time, circumstances and challenges. We set sail with a ship as it was then designed, nevertheless knowing that certain features were quintessential to being a ship that could sail such oceans; and we set sail towards a target, almost like Columbus, with the understanding that sailing in a particular direction would get us to a particular destination. We even promised ourselves, that notwithstanding our prior history of bickering, of degradation of humans amongst us by ascribed status, and of economic poverty, we would have, by the time of reaching our goal, ensured that certain invaluable qualities, such as dignity, fraternity, security and integrity of our nation-state, inform all aspects of social order. In fact the achievement of those qualities was to be the goal. The directions we were given were that if we strive to achieve, in actual fact, JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; and EQUALITY of status and opportunity; within the context of organizing our polity as a secular, socialist and a democratic republic, and the State itself, necessarily follows certain principles of policy, we would achieve those goals. We were enjoined to roam the high seas until we

achieved a state of acceptable achievement of those goals, neither knowing the length of time nor the length of that journey. In fact we also knew, that achievement of those goals was never going to be a matter of some quantitative assessment of those goals, but always a maintenance of the path towards, and sustaining what we may have already achieved. We also knew that along that journey, many of the boards, and indeed even certain parts of the main structure may appear to be or actually become a detriment to our progress. Hence, we were also given liberty to change some of those parts, in terms of replacing those parts with exact same ones, or mostly similar ones, or even radically differently designed ones. The caveat was that, if the changes were such that the destination could not be reached, or that the motive force for powering the journey would become truncated, or debates could not be conducted within the settled principles of civility, or that on the course of that journey too many were actually getting pushed off the ship, or that the changes were such that the ship would turn into a tiny raft, in which the people on the margins would necessarily get pushed into the ocean, etc., the ship of our nation, the Constitution, would sink. If inappropriate changes were made, the ship would sink; and if the appropriate changes were to not be made the ship would sink. Neither wrong action, nor abstinence from action was permissible.

92. In this regard, this Court, charged with the responsibility of ultimately interpreting the design of the structure of that ship, stated thus:

> "*[C]onstitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case: the language of the text is not necessarily a controlling factor. Our Constitution works because of its generalities; and because of the good sense of the judges when interpreting it. It is that informed freedom of action of judges that helps to preserve and*

protect our basic document of governance." (para 30 of M. Nagaraj).

93. Proceeding on the rationale as enunciated in the cited paragraphs, this Court in M. Nagaraj, then enunciated that the "*theory of the basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore one has to apply the principle of over-arching principle to be gathered from the scheme and the placement and the structure of an article in the Constitution. For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court*".

94. Yet, the question remains? How do we discern whether a particular aspect is a part of the basic structure or not? In M. Nagaraj, this Court reaffirmed the working test laid down by Chandrachud J., in Indira Nehru Gandhi:

> *"For determining whether a particular feature of the Constitution is a part of the basic structure, one has to perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance."*

95. In this regard, it was noted in M. Nagaraj that concepts like "equality", "representative democracy" etc., are delineated over various articles. "*Basically Part III of the Constitution consists of equality code, the freedom code and the right to move the courts. It is true that equality has several facets. However, each case has to be seen in the context of the placement of an article which embodies the foundational value of equality*."

96. Two consequences follow from the above: our earlier assessment, that the test we are to apply in instances like the

addition of clause (5) to Article 15, is not about truncation of one activity that was previously deemed by this court to be one of the essential features of one of the many occupations that are a part of one of the many freedoms guaranteed in the freedom code; and that we not only have to assess the negative impact, but also the positive impact of an amendment. This follows from the realization that while we may classify aspects important for that ship to sail towards its goals into neat analytical categories, the ship itself, and the nation it carries functions in accordance with the action and reaction of each category upon other categories. Consequently, we must take into account the fact that the changes that are made may while truncating one small element, may also be strengthening many other elements, and thereby strengthening the very basic structure of the Constitution. Thus care needs to be exercised to avoid rhetorical flourishes about the importance of one small activity that may be truncated in order to achieve larger purposes. Obviously, some small activities could be of primordial importance. Some rights may be important, but not of primordial importance, and their importance has to be assessed in terms of their place in the overall context of constitutional values, and goals.

97. If indeed one essential activity of the many essential ones that form the freedom to engage in one of the occupations of the many occupations that are a part of the many freedoms guaranteed by the Constitution, conflicts with an amendment that intends to strengthen the process of achievement of one of the main navigational tools and thereby the goals of the nation-state itself, should such an amendment be declared to be unconstitutional and against the basic structure? Shouldn't one also look at the damage that such a declaration can cause to many of the other basic features of the Constitution, and also the loss of diverse strengths that such an amendment is likely to impart to many other essential or basic features of our Constitution? We opine that by not undertaking an assessment of such factors we would almost certainly lead to erroneous

judgments that would destroy the basic structure of the Constitution. In the present context what is involved is a judicial review of an amendment to the Constitution that seeks to strengthen the egalitarian aspects of our social order. Consequently, the conflict, in the instant case, has to be evaluated in terms of whether disallowing the amendment might damage, significantly, the prospects of promoting intrinsic and inherent parts of our equality code – the egalitarian and social justice components – that are essential elements of our basic structure. Such a test would give us a more nuanced appreciation of how setting aside, as violative of the basic structure, the provisions of clause (5) of Article 15 with respect to admissions to non-minority unaided educational institutions, would impact our Constitution, as a fundamental instrument in country's governance.

98. Consequently, in evaluating whether the provisions of clause (5) of Article 15 with respect to unaided private educational institutions violate the basic structure doctrine the questions to carry out the test would be as follows: (1) the place of clause (5) in Article 15 in the context of the equality code; (2) its importance with respect to the Constitution as an instrument of governance, including the mandatory, though not justiciable, provisions of Directive Principles of State Policy, and the goals of ensuring dignity for all citizens, with fraternity amongst groups of them, thereby ensuring the unity and integrity of the nation; and (3) an assessment of the importance of the right of the educators to only admit students based on their choice, and thereby, also possess, the consequential right to disregard the impact of social, educational, cultural and economic disadvantages suffered by groups and individuals in those groups, in terms of access to higher education, and the damage that such a disregard might do to the very purpose of the occupation, and the broader objectives of the nation that such an occupation is to serve.

99. It is now a well settled principle of our constitutional jurisprudence that Article 14 does not merely aspire to provide for our citizens mere formal equality, but also equality of status and of opportunity. The goals of the nation-state are the securing for all of its citizens a fraternity assuring the dignity of the individual and the unity of the nation. While Justice – social, economic and political is mentioned in only Article 38, it was also recognized that there can be no justice without equality of status and of opportunity (See M. Nagaraj). As recognized by Babasaheb Ambedkar, at the moment that our Constitution just set sail, that while the first rule of the ship, in the form of formal equality, was guaranteed, inequality in terms of access to social and economic resources was rampant and on a massive scale, and that so long as they individually, and the social groups they were a part of, continue to not access to social and economic resources that affords them dignity, they would always be on the margins of the ship, with the ever present danger of falling off that ship and thereby never partaking of the promised goals of that ship. Babasaheb Ambedkar with great foresight remarked that unless such more fundamental inequalities, that foster conditions of injustice, and limit liberty of thought and of conscience, are eradicated at the earliest, the ship itself would be torn apart.

100. In this regard, it was recognized early on as we, as a nation-state, set sail that while revolutionary change, using the force and might of the State, might actually bring about the realization of that state of equality much faster. However, it was also recognized that the violence it would unleash could potentially destroy our nation-state itself, and the end goal may be the creation of a State that would not be conducive for other cherished values of peace, harmony, co-existence, and a democratic set up in which reasoned and reasonable argument and debate would inform our social, political and economic choices. Some may say that this was a compromise, that in fact the framers of our constitution made the wrong choice, and that we should have opted for a revolutionary mode of change,

if necessary by shedding of bloodshed of our own people. Some others argue that we should have opted for a pure market economy, right from the beginning, so that the inefficient governmental regulations would not have hindered our economic progress. However, they seldom have answers as to when, or over what time frame could it be conceived that a state of equality of status and opportunity, and social, economic and political justice would inform all walks of our lives, so that each and every citizen would be enabled to lead a life with dignity, that both promotes fraternity and also is promoted by such a fraternity, and of active participation, to the fullest extent of their natural talents, to participate in full measure in the making of choices, social, political and economic. Nor do the free market proponents answer whether the operation of the laissez-faire free markets would not lead to a perpetuation of ever widening disparities between the haves and the have-nots. Historical human experience militated against a trust in any such answer even if it were given.

101. Consequently, the State was given the responsibility to balance the exigencies of the needs, between social justice and formal equality, between a command and control economy and a private sector with freedom to make its choices within a regulated environment, keeping in mind the larger needs of the nation, between the imperative to promote economic growth, and development in its classical sense, in which the progress of people was measured on all dimensions of human dignity. Indeed, these imperatives of statecraft, of governance of the nation state, were even transcribed into fundamental, though non-justiciable, Directive Principles of State Policy. The fact that they were made non-justiciable was not to deny their absolute essentiality, but rather that the legislatures, and the executive under the supervision of the elected representatives, were best placed to make choices with regard to issues of policy, while the judiciary endowed with the responsibility of interpreting and upholding the Constitution. An important and particular aspect of our Constitution that should always be kept in mind is that

various aspects of social justice, and an egalitarian social order, were also inscribed, not as exceptions to the formal content of equality but as intrinsic, vital and necessary components of the basic equality code itself. To the extent there was to be a conflict, on account of scarcity, it was certainly envisaged that the State would step in to ensure an equitable distribution in a manner that would be conducive to common good; nevertheless, if the state was to transgress beyond a certain limit, whereby the formal content of equality was likely to be drastically abridged or truncated, the power of judicial review was to curtail it. However, as long as the policy initiatives of the State were in consonance with principles of equity and justice inherent within the equality code, and indeed even the freedom code, via Article 21's guarantee of the right to life, and for promotion of freedom of expression and thought, especially to promote excellence in our debates and arguments in the political sphere so that democratic richness could be better served, or were framed in pursuance of the Directive Principles of State Policy, that were based on reasonable and intelligible classifications, the courts were to have no further place in entering the field of policy choices. The courts could of course, also, impose positive constitutional obligations on the State, where the abnegation of those positive and affirmative obligations, encoded within fundamental rights itself, were so gross as to constitute a fraud on the face of the Constitution.

102. Given the magnitude of the task of the State, and immense human tragedies that could continue to occur unabated or even increase, and conditions of inequalities could intensify even further, beyond the unconscionable levels at which they already are, it can only be surmised that the power of the State to frame policies in furtherance of the national goals, including the goals of social justice, achievement of human dignity of all people and groups of people, improved access to better articulation of thoughts and aspirations by individuals and groups of people in the democratic processes and in social

choices made in their communities, and equality of status and opportunity with respect to social, economic and physical resources i.e., all material resources that are useful for productive activities, as granted and used within the limits of the constitutional vision and design, to achieve such tasks to be commensurate, is indeed an essential element of governance. Derogation of such powers, through a whittling down by judicial fiat, below the level at which the Constitutional structure, provisions and vision provides would necessarily be an alteration of the very identity of our Constitution.

103. In a recent decision, *GVK Industries Ltd v. ITO*[29] by a Constitutional Bench, it was held:

> "One of the foundational elements of the concept of basic structure is it would give the stability of purpose, and the machinery of Government to be able to pursue the constitutional vision into indeterminate and unforeseeable future…. Our Constitution charges various organs of the State with affirmative responsibilities of protecting the interests of, the welfare of and security of the nation. Legislative powers are granted to enable the accomplishment of the goals of the nation……. Consequently, it is imperative that the powers so granted to various organs of the State are not restricted impermissibly by judicial fiat such that it leads to inabilities of the organs of the State in discharging their constitutional responsibilities. Powers that have been granted, and implied by, and borne by the constitutional text have to be perforce admitted…"

104. To be sure, powers granted to the State are not unlimited, and indeed our constitutional jurisprudence specifies that Part III is one such zone of limitation. The rigour and discipline of fundamental rights, granted to citizens are to be the checks on the power of the State. Fundamental rights are

29. (2011) 4 SCC 36.

indeed vital for the survival of our society, and provide guarantees that protect our citizens against totalitarianism, are conducive for full expression of human creativity, and in fact foundational for human dignity. Further, the substance of justice is inscribed into such fundamental rights, that are both substantive and procedural and are available to all the citizens, along with powers granted to the State to realize social justice and real and "in fact" equality of status and opportunity for those who are disadvantaged. Consequently, it cannot be taken to mean that the zone of limitation would then operate to frustrate the obligations of the State, to achieve goals of social justice and egalitarian order, by placing primordial importance on formal equality and freedom. Formal rights of some power cannot become the foundation to whittle away powers that are necessarily implied in order to achieve national goals. The question is of balance, and it is the act of balancing between the compulsions cast upon the State by the moral, political and legal imperatives of the status of vast chunks of our people in disadvantaged and deprived positions that could only be deemed to be egregious and unconscionable by any notions of empathetic conscience, and the imperatives that all the rest also be provided meaningful levels of protections guaranteed by fundamental rights. It is not without reason that Fundamental Rights and Directive Principles of State Policy along with the grant of power to the State to achieve intrinsic egalitarian and social justice aspects inscribed on many of the fundamental rights themselves, that have been called the twin wheels of the chariot of national progress. In this regard it has been held in Keshavananda that harmony between Directive Principles of State Policy and Fundamental Rights is one of the most important of elements of the basic features or structures of the Constitution.

105. In this respect, the placement of clause (5) of Article 15 in the equality code, by the 93rd Constitutional Amendment is of great significance. It clearly situates itself within the broad egalitarian objectives of the Constitution. In this sense, what it

does is that it enlarges as opposed to truncating, an essential and indeed a primordial feature of the equality code. Furthermore, both M. Nagaraj and Ashoka Kumar Thakur stand for the proposition that enlargement of the egalitarian content of the equality code ought not to necessarily be deemed as a derogation from the formal equality guaranteed by Article 14, 15(1) or 16(1). Achievement of such egalitarian objectives within the context of employment or of education, in the public sector, as long as the measures do not truncate elements of formal equality disproportionately, were deemed to be inherent parts of the promise of real equality for all citizens. As stated succinctly in M. Nagaraj, it is an issue of proportionality. "Concept of proportional equality expects the State to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy" and further that "[U]nder the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and ***no person suffers because of drawbacks which is not of his but social***." With regard to distribution of social opportunities and social benefits, Kapadia J. (as he then was) notes that some define "social justice in terms of rights", and some others, like Friedrich Hayek in terms of "desert" without any regard to the relative advantages or disadvantages as between individuals, and some others, socialists, on the basis of needs. With regard to these three different rationale, this Court recognized that all three have to be accommodated under the equality code, with those fulfilling the "desert based" criteria located under formal equality zone, and those fulfilling the "need based" or the "disadvantaged based" criteria under the zone covered by proportional equality. To this we need to add another important point. The critical aspect of the authenticity of constitutional claims of the disadvantaged, on whose behalf State exercises its power, is the fact that it is social circumstances which have prevented those individuals from performing to their full potential, and thereby compete on a level playing field with those who might satisfy the "desert

based" criteria. In fact the very notion that unequals ought not to be treated as equals is also founded on the notion that those with lesser or lower background opportunities could not be expected to match the performance of those with much better opportunities. The fact that it is the State that seeks to enhance through its policies, such rights of disadvantaged, because it has the duty to ensure their realization, cannot be taken to mean that every element of every individual right of the less disadvantaged could be used to frustrate the realization of those rights.

106. A brief historical excursus, into our constitutional jurisprudence, would also be necessary at this stage to realize that the egalitarian conception is inbuilt in the equality code. In *M.R. Balaji v State of Mysore*[30], Article 15(4) was treated as an exception to Article 15(1). However, in *Devadasan v. Union of India*[31], decided a year later, the Court found that reservations to appointments and posts would not violate Article 14. Devadasan, followed the ruling of M.R. Balaji and held that excessiveness of reservations under Article 16(4) is an issue to be recognized. Subba Rao, J, in his dissenting opinion opined that Article 16(4) was not an exception but "preserved a power untrammeled by the other provisions of the Article." The decisive break came in *State of Kerala v. N.M. Thomas*[32] in which Article 16(4) was held to not be an exception to Article 16(1), laying down the principle that State action in pursuit of egalitarianism cannot in principle be seen as antithetical to broader codes of equality, but rather a means to realize true equality of status and opportunity amongst hitherto excluded groups. This position found its resounding acceptance in *Indra Sawhney v Union of India*[33], in which it was held in no uncertain terms that egalitarianism is an intrinsic element of conception of equality under Articles 14.

30. AIR 1963 SC 649.

31. AIR 1964 SC 179.

32. AIR 1976 SC 490.

33. (1992) Supp (3) SCC 217.

107. A purely technical argument may be made that this Court in Indra Sawhney had reflected upon egalitarianism in the context of Article 16(4) and public employment, and hence ought not to be seen as a part of our constitutional jurisprudence with respect to admissions to private unaided educational institutions. This may be a case of splitting hairs to deny the validity of an over-arching principle. In countless cases, involving the private sector, this Court has held that legislation to achieve social and economic justice cannot be held to be a violation of fundamental rights. (See: *State of Karnataka v Ranganatha Reddy*[34]) What they could be and ought to be tested on was the anvil of reasonableness of classification, and extent of intrusion, where the Constitution itself did not specifically provide for untrammeled power to completely eliminate the private sector from a particular field of activity. This Court's decisions in M. Nagaraj, and equally importantly, Ashoka Kumar Thakur, have unequivocally held, based on Indra Sawhney, that the concept of egalitarianism is an essential and vital element of the equality code, and in Ashoka Kumar Thakur that principle was applied in the context of education. The Court refused, in Ashoka Kumar Thakur, to look at whether clause (5) of Article 15 as applied to non-minority private unaided colleges would violate the basic structure, on the ground that no private unaided college was before it. However, that does not mean that the principles enunciated in Ashoka Kumar Thakur, that egalitarianism was an intrinsic part of our equality code with respect to the field of education could be limited only with respect to public and aided institutions.

108. We opine that the same principles which this Court found to be applicable in finding egalitarianism to be a part of the equality code, at the level of being essential features informing the entire equality code, per force have to also be applied to the context of private sector unaided educational institutions. When we speak of egalitarianism being an

34. (1977) 4 SCC 471.]

essential and a necessary component of the equality code, which is a finding that this Court arrived at in Indra Sawhney, M. Nagaraj and in Ashoka Kumar Thakur, we cannot in the same breath then turn around and say that the same concerns, of national purpose, goal and objectives that inform the constitutional identity miraculously disappear in the context of the private sector. It is indeed true that the extent of State involvement in the field of higher education has dramatically declined on account of its own financial position. At least a part of the problem of the financial situation of the State could be reasonably linked to increasing privatization and liberalization of the economy, and one of the essential elements of that process of privatization has been the demand of the private sector that the State reduce its deficits, even as tax rates were cut, by reducing its involvement in various social welfare activities. This has had an impact on the ability of the State to invest as much as it could have in education, including higher education. An essential understanding was that because the private sector would expand even in areas such as higher education, the burden on the State of providing such services would decline. The burden of the State does not comprise merely of the burden of its financial outlays. The burden of the State obviously also comprises of the positive obligations imposed on it, on account of the egalitarian component of the equality code, the directive principles of State policy, and the national goals of achievement of an egalitarian order and social justice for individuals and amongst groups that those individuals are located in. If the State had clearly articulated that its goal was to withdraw from such crucial and vital fields, such as higher education, and that it was also not expecting the private sector to carry any of the burdens of ensuring an egalitarian order and realize the goal of social justice in at least some measure, then the dimensions of constitutional litigation on that front could very well have taken a different shape, and questions about whether such actions constitute a fraud on the face of the Constitution could certainly have gained great salience.

109. Certainly, the State has the power under clause (6) of Article 19, to totally or partially exclude the participation of private sector in the field of higher education. As TMA Pai stated, having allowed the private sector into the field of education, including higher education, it would be unreasonable, pursuant to clause (6) of Article 19, for the State to fix the fees and also impose reservations on private unaided educational institutions. Nevertheless, if we take into consideration the width of the original powers under clause (6) of Article 19, one would necessarily have to find that the State would at least have the power to make amendments to the Constitution to partially resurrect some of those powers that it had possessed to control access to higher education, and achieve goals of egalitarianism and social justice. What the State had done was to allow private sector to function in the field of higher education, to supplement the role of the State in the field which has been recognized even in TMA Pai. The power of the State to allow such participation of the private sector could only have existed if the State had the power to devise policies based on circumstances to promote general welfare of the country, and the larger public interest. The same cannot be taken to mean that a constitutional amendment has occurred, in a manner that fundamental alteration has occurred in the basic structure itself, whereby the State is now denuded of its obligations to pursue social justice and egalitarian ideals, inscribed as an essential part of our constitutional identity, in those areas which the State feels that even resources in the private sector would need to be used to achieve those goals. The argument that the policies of liberalization, privatization and globalization (LPG) have now cut off that power of the State are both specious, and fallacious. Such policies are only instances of the broader powers of the State to craft policies that it deems to serve broader public interests. One cannot, and ought not to deem that the ideologies of LPG have now stained the entire Constitutional fabric itself, thereby altering its very identity.

110. In the first place, it is not a completely well accepted

principle that liberalization, privatization and globalization has led to the welfare or that it has been an unalloyed good of everyone. As very prominent thinkers and policy specialists have been arguing for nearly two decades, that the unthinking and extreme beliefs in LPG have led to many deleterious impacts globally, cannot be ignored. (See the work of Nobel Laureate, Joseph Stiglitz: Globalization and its Discontents[35]). Another Nobel Laureate, Kenneth Arrow, and renowned economists such as Samuel Bowles and Steven Durlauf have also posited that the ideological notions that all governmental programs to achieve egalitarian goals are ineffective has fundamentally eroded the very culture of nations, and the moral and constitutional commitments of the policy makers to pursue such goals, with the "dismal prognosis of immutable inequality.[36]" Moreover, it is also very well recognized that markets, instead of eradicating discriminations and disadvantages, may in fact perpetuate the same. (See Cass R. Sunstein, "Free Markets and Social Justice"[37], and also *Reservation and Private Sector: Quest for Equal Opportunity and Growth*, Ed. *Sukhadeo Thorat, Aryama and Prasant Negi*[38]). The falsity of the knee jerk beliefs that markets are necessarily efficient, and will necessarily find optimal and just solutions for all problems, was again provided by the recent global financial crisis. That unregulated laissez faire free markets would only lead to massive market failures, even with respect to those aspects in which markets are supposed to function efficiently, such as wealth generation has to be accepted as a fundamental truth. With respect to other social values and goals, it has also been shown that the complete evisceration of the power of the State to regulate the private sector would lead to massive redistributions of incomes, assets and resources in favour of the few, as against the multitude,

35. W.W. Norton and Company (2002).

36. Meritocracy and Economic Inequality, Oxford University Press.

37. Orford University Press (1997).

38. Rawat Publication (2005).

thereby generating even greater inequalities. This would also suppress the ability of the State to exercise moral authority, and force, to keep competing interests, spread across groups, regions, and classes, from degenerating into a war of all against all. The necessity of such a role for the State should not be doubted, nor its Constitutional duty whittled down. This potential danger, and consequences, of evisceration of the role of the State was anticipated by the farmers of our Constitution. That is the reason why, the Preamble specifically articulates that ensuring the dignity of human beings, and fraternity amongst groups of people, to be vital for the integrity and security of the nation.

111. Article 38 of the Constitution mandates that "the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life." This is a clear transcribing of a promise made in the Preamble, to all the people of our country, and in particular those who were socially disadvantaged, and who continue to be disadvantaged, that justice shall inform all institutions of our national life. What does Article 38 mean, when it talks about "institutions informing our national life"? Clearly higher education, and more particularly professional educational institutions imparting education in the medical, technical & engineering, scientific, managerial and legal fields, are to be recognized as being vital to the national well being, and determine the character of life, and social order throughout the nation. Each and every particular educational institution is a part of a large scale national endeavour to educate our youngsters. The word "institution" is capable of many meanings. It could be used in a narrow sense; however, it is also used, for instance, to refer to a broad class of fields of human and organizational endeavours: we talk about press and the media as an institution, we talk about legislative field as an institution, we talk about the executive as an institution, and indeed we talk about the judiciary, and the organizations engaged in the act

of dispensing justice, collectively as an institution. We talk about universities, and seats of higher learning, collectively as an institution. At this level of generality, certainly the entire field of "higher education" is to be conceived as an institution informing our national life. The educated youngsters coming out of the portals of our each individual college enter into jobs that may require different degrees of discretionary judgment, which in turn may also affect the lives of other people, including those in socially and educationally disadvantaged groups. Consequently, we have to necessarily hold that Article 38 necessarily includes within its conception of "institutions informing our national life", all institutions that perform the role of imparting higher education.

112. However, we must hasten to add that this conception of social justice is to be found not just in Article 38, in part IV of our constitution. The same concern for social justice is also reflected in Clause 2 of Article 15 which states that: "No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subjected to any disability, liability, restriction or condition with regard to – (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds, or dedicated to the use of general public." Further, Clause 4 of Article 15 specifies that "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes".

113. The purport of Article 15 (2) can be gathered from the Constituent Assembly debates. Babasaheb Ambedkar elucidated on the same saying that "To define the word 'shop' in the most generic term one can think of is to state that 'shop' is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service. ….

Certainly it will include anybody who offers his services. I am using it in a generic sense. I should like to point out therefore that the word 'shop' used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to."[39] In as much as education, pursuant to TMA Pai, is an occupation under sub-clause (g) of clause (1) of Article 19, and it is a service that is offered for a fee that takes care of all the expenses of the educational institution in rendering that service, plus a reasonable surplus, and is offered to all those amongst the general public, who are otherwise qualified, then such educational institutions would also be subject to the discipline of clause (2) of Article 15. In this regard, the purport of the above exposition of clause (2) of Article 15, when read in the context of egalitarian jurisprudence inherent in Articles 14, 15, 16 and Article 38, and read with our national aspirations of establishing a society in which Equality of status and opportunity, and Justice, social, economic and political, would imply that the private sector which offers such facilities ought not to be conducting their affairs in a manner which promote existing discriminations and disadvantages.

There are two potential interpretations of the use of the word "only" in clause (2) of Article 15[40]. One could be an interpretation that suggests that the particular private establishment not discriminate on the basis of enumerated grounds and not be worried about the consequences. Another interpretation could be that the private establishment not just refrain from the particular form of overt discrimination but also ensure that the consequences of rules of access to such private establishments do not contribute to the perpetration of the unwarranted social disadvantages associated with the functioning of the social, cultural and economic order. Whether sub-clause (a) of clause (2) of Article 15 is self-executory or

39. Constitutent Assembly Debates - Vol. VII.

40. Mahendra P. Singh, " V.N. Shukla's Constitution of India", 11th Ed. (Eastern Book Company, 2008)

not is irrelevant in the context of reservations. If the State does enact "special provisions" for the advancement of socially and educationally backward classes, it does so in order to prevent the perpetuation of social and educational backwardness in certain classes of people generation after generation.

114. If a publicly offered service follows a particular rule that achieves the same or similar consequences as the proscribed discrimination, and tends to perpetuate the effects of such discrimination, then it would violate the principle of substantive equality. In the case of admissions to colleges, it is an acknowledged fact, in both TMA Pai, and in fact even by Bhandari J., in his opinion in Ashoka Kumar Thakur, that the test of merit, based on some qualifying examinations or a common entrance test, actually is particularly prone to rewarding an individual who has had access to better schools, family lives, social exposure and means to coaching classes. This would mean that many of the youngsters, who hail from disadvantaged backgrounds are severely handicapped in demonstrating their actual talents. This would be even more so in the case of Scheduled Castes and Scheduled Tribes. Given that social and educational, background of the parents, and of general community members, has an important bearing on how well the youngsters learn and advance, it would only mean that complete dependence on such tests which do not discriminate and grade, in terms of real merit relative to peers in similar circumstances, but on the basis of so called absolute abilities, we would end up selecting more students from better social and educational backgrounds, thereby foreclosing or substantially truncating the possibility of individuals in such disadvantaged groups from being able to gain access to a vital element of modern life that grants dignity to the individuals, and thereby to the group as a whole, both in this generation, and in future generations. In light of the specific command of Article 38, of infusing our institutions of national life with social justice, we hold that a proper construction of clause (2) of Article 15 would

in fact be to prohibit a complete dependence on such context (social and educational backwardness) insensitive tests. When viewed against this perspective, it would have to be discerned that reservations based on social and educational backwardness would in fact promote the selection of those who are truly meritorious amongst each group, on account of their demonstrated ability to be in the higher rungs of achievement within comparable situations of life's circumstances and disadvantages. Such systems, with the same normative imperatives are used in other countries, and in fact more economically successful countries, with a demonstrated record of immense scientific and technical achievements over the past hundred years: for example, the United States of America. Peer group norm referenced grading is extensively used there. The idea is simple: that given a minimal level of achievement of competence, grading as between similarly situated and provisioned individuals would reflect both true talents and also individual variations in behaviour such as hard work, diligence, the ability to overcome challenges etc.

115. Even if one were to assume that at some conceivable level, some youngsters from Socially and Educationally Backward Classes or Scheduled castes and Scheduled Tribes are actually relatively less proficient, at the entry point, than those belonging to the upper crust of India, there could be other mitigating factors. It is perfectly plausible to assume that youngsters who were socially deprived of appropriate scholastic content in earlier years, do make it up and narrow the gap over time.[41]

116. In addition, there are many other advantages that one could conceptualise that could emanate from social redistribution, of access to higher education, including professional education, in favour of disadvantaged groups. One talks about a knowledge economy that requires us to

41. Introduction in Meritocracy and Economic Inequality, ed by Arrow, Samuel Bowles and Steven Durlaf.

continuously ensure that we push the brightest amongst all of us to the top or be available in the labour market. However, the supply constraints of skilled labour, including professionals, and college educated graduates is also a major problem. We start with one perfectly reasonable assumption that undergirds all of our equality jurisprudence: that we would find, as a matter of pure genotype, equal levels of talent, and abilities, including those needed for scholastic abilities, in all social groups, and other divisions such as religion or gender. This is not just a scientifically proven fact, notwithstanding the efforts of misguided racist and junk science, but also a veritable ontological and ethical assumption. This would mean that unless this pool is expanded, to identify and provide opportunities for the best performers across all those groups, we would not have exploited our human resources as well as we could. This would in turn mean that the economic gains that were possible if the imperfections in the supply side of the labor market had been overcome, have been lost on account of such imperfections, and also would continue to be lost in the future.[42]

117. In addition to the above, we also need to be very careful about certain arguments that are raised in the context of reservations. These arguments suggest that reservations would weaken India's capacity to innovate, and retain its competitive edge in the high tech industries. It would appear that there are at least two problems associated with this. One problem seems to be the implicit assumption that those who have benefited from reservations have not participated, and that such students in the future will not participate, in innovative contexts. No empirical data, which has been systematically collected, and is free of implicit cognitive biases against reservations, to the best of our knowledge, has ever been placed before any court of law. To the contrary, proponents of reservations point out to the fact that certain regions of the country, which have had reservations for nearly hundred years,

42. Sukhadeo Thorat, Aryama and Prasant Negi (Eds.) Quest for Equal Opportunity and Growth (2007).

in fact have witnessed an explosion of private unaided colleges in technical & engineering, and scientific fields, and also arguably are the regions in which high tech industry is flourishing. The argument that academic standards in our institutions of higher education need to be high may be valid; nevertheless, we would also need to be careful in assessing whether any decline in standards, if any, has been on account of students in reserved categories entering institutions of higher education, or on account much wider systemic weaknesses in the field of higher education, including the way our universities are managed, and the levels of research conducted or not conducted. Without separating such causal factors, it would be constitutionally impermissible, and indeed unethical to lay the blame for any loss of academic standards on students in reserved categories.

118. Setting aside the question of whether candidates who have been enabled to secure admission to professional colleges have participated in innovation in the high tech context, we also address a more fundamental issue. The very notion of innovation implicit in such arguments reveals a fundamental flaw. Innovation occurs across diverse fields, in diverse contexts, and with respect to diverse social needs. Two aspects need to be recognized in this. There is a fundamental distinction between invention and innovation. An invention is a new technical solution to a specific technical problem. Joseph Schumpeter[43] distinguishes this from innovation, which implies productisation of that technical solution, in the form that actually meets the needs of customers or consumers, located across various regions, with varying degrees of specificity. In order to be able to innovate, there is a need to ensure that the innovation process is informed about the social needs, circumstances, and cultural factors that could affect the effectiveness of the innovation in the field. Within the universal class of innovations one would also find need to innovate in a manner that meets the requirements that are specific to

43. Capitalism, Socialism and Democracy, Martino Fine Books (2010).

geographic area, particular social group or even according to the level of prior technological adaptation in particular facet of social or economic life of a community. Some technological inventions, say general technologies, may not need much of user inputs, and a one size fits all solution may be fine for most people. However, some innovations may need to be highly specific, and tailored to specific circumstances. Another layer of complexity could be visualized: innovation, particularly when it is based on specific information, that is more likely to be gained through long years of exposure to specific crafts, problems, social patterns etc. Such information tends to be "sticky" – i.e., it is not easily specifiable and transferable, is specific to people who actually have had the relevant exposure, and may need to be addressed at the location of the problem. Further, it would also mean that unless the putative innovator actually knows what the problems are, in a region, or specifically to a community, he or she would not even know that the problem really exists to begin the process of adapting technical inventions to solve those particular problems. In as much as the innovator does not belong to such communities, even if they are broadly aware of the problem, they may not have sufficient "sticky" knowledge about it to innovate an appropriate product or service or solution to effectively solve such problems. (See: Eric von Hippel, Democratizing Innovation[44])

119. Given above, we address the issue of various innovations that may be required at the lower levels of social strata in India. One may need to apply technology for a particular localized problem, say in remote villages, such as a network or a web interface that allows women to pictorially navigate certain sites to find out the best prices for their produce. To design such a web interface, the designer would need to know the language of the end user, as well as the particular culture, and levels of cultural identification of the end users. Additional factors may also be surmised such as knowledge of cultural variations, particular social mores and problems emanating

44. MIT Press (2006).-

from such mores. Would a person who has a broad exposure to emerging or new technologies, as well as the level of knowledge that is imparted at graduate level engineering courses, and who is also more aware of the local problems, or community specific problems be in a better position to engage in the innovative tasks appropriate for such a situation? It is entirely conceivable that the youngsters who have entered collegiate level courses, based on reservations, may be more adept at adapting existing technical solutions to particular problems because of their background. Most certainly one could conceive of situations in which such youngsters by virtue of their social backgrounds may be the only ones who would have the knowledge that a problem exists, or the cultural and emotional commitment to acknowledge that such problems also need to be addressed and solved, for both personal gain as well as social gain. How do we compare the social value of such activities, which may be getting enhanced on account of youngsters from socially and educationally backward classes and Scheduled Castes and Scheduled Tribes being admitted to colleges, both professional and non-professional, as against the value generated from being employed in some multi-national company? Why should the Constitutional discourse undervalue the importance of the former? Are the lives of people from socially disadvantaged backgrounds to be deemed to be not a constitutional concern? The fact that the former may not be quantifiable, or in popular and elite culture not acknowledged, does not mean that they are less valuable.

120. We can conceive tremendous gains in another respect also. Increasingly, with technological advances, the choices made by societies with respect to which technology is chosen for implementation, which technology is discarded, which technology is promoted and the costs, both direct and indirect, such as environmental externalities, would have a tremendous impact on social and economic aspects, that range from global to local in impact. The implementation of such technologies has an impact on multiple constitutional

rights, from Article 21 to issues of hidden bias against the lower classes. If the people in these socially and educationally backward classes, and in Scheduled Castes and Tribes are to engage in these debates, about the choices being made, assess the impacts on their own lives, and articulate, then surely they would also require youngsters from amongst themselves who could understand the vast changes taking place in the socio-economic organizations, on account of rapid technological changes, and explain to them, or understand them and articulate their hopes, fears and aspirations. This would mean that apart from Article 21 implications for the dignity of lives of other members of such disadvantaged groups, there are also implications about Article 19 freedoms themselves. These rights are extended to all citizens, and one of the fundamental reasons why they are extended is to ensure that every citizen is capable of engaging in a civil, reasoned, and reasonable debate about social, economic and political choices. This would obviously deepen and enrich the democratic processes of this country, and thereby make it more stable.

121. In a recent judgment, this Court, has explicitly recognized that the meaning and purport of each article of the Constitution has to be gleaned from the text of the article, and also the meaning of that text as it may be further informed and transformed by other provisions in the other parts of the Constitution. The meaning and extent of a fundamental right cannot be gleaned only from the specific text of that particular amendment; rather it needs to be gleaned from the matrices of inter-relationships, with other fundamental rights and provisions in other parts of the Constitution, thereby recognizing the transformations effectuated on each other [GVK Industries Limited (supra)]. In that sense, the nature of judicial review of a constitutional amendment, in which over-arching principles informing all of the fundamental rights have to be gleaned and subjected to the test of abrogation of basic structure, comprises a particular form of constitutional interpretation in which the

essences of each of those over-arching principles has to be gleaned and an amendment to the constitution has to be evaluated as being lawful or unlawful, in terms of implied limitations of power, as it effects those essences.

122. In light of the above we find that by the insertion of Clause (5) of Article 15, the 93rd Constitutional Amendment has empowered the State to enact legislations that may have very far reaching beneficial consequences for the nation. In point of fact, each and every one of the beneficial consequences we have discussed as being possible, would enhance the social justice content of the equality code, provide for enhancements of social and economic welfare at the lower end of the social and economic spectrum which can only behoove to the benefit of all the citizens thereby promoting the values inherent in Article 21, promote more informed, reasoned and reasonable debate by individuals belonging to various deprived segments of the population in the debates and formation of public opinion about choices being made, and the course that political and institutional constructs are taking in this country. Consequently we find that clause (5) of Article 15 strengthens the social fabric in which the Constitutional vision, goals and values could be better achieved and served. Or in terms of the analogy to Ship of Theseus, Clause (5) of Article 15 may be likened to a necessary replacement and in fact an enhancement in the equality code, so that it makes our national ship, the Constitution, more robust and stable.

123. At present, statistics[45] reveal that we just about manage to provide access to about 11% or so of the college going age group with access to higher education. Coupled with this, the role of the State, which a lot of the disadvantaged people feel is in the hands of the upper crust (including the creamy layer of such groups), in higher education is increasingly dwindling in terms of seats provided through state

45. Devesh Kapur & Pratap Bhanu Mehta, Morgaging the Furture? Indian Higher Education (2007).

funding or aid. For instance nearly 85% or more of all engineering seats are in the private sector and about 50% in the field of medicine; and the number of aided and government colleges in other fields have just not kept pace. If a vast majority of our youngsters, especially those belonging to disadvantaged groups, are denied access in the higher educational institutions in the private sector, it would mean that a vast majority of youngsters, notwithstanding a naturally equal distribution of talent and ability, belonging to disadvantaged groups would be left without access to higher education at all. That would constitute a state of social emergency with a potential for conflagration that would be on an unimaginable scale.

124. Indeed at one level the recommendation of Bhandari J., in Ashoka Kumar Thakur that high quality institutions catering to the primary and secondary schooling needs of socially and educationally disadvantaged groups, and scheduled castes and scheduled tribes have to be increased on a war footing is a sound one. This need has been felt for a long time and yet the State, which a lot of those youngsters might perceive to be in the hands of the upper crust, has not done enough. However, the argument that access to excellent schooling for all our children, including those from disadvantaged backgrounds, ought to be provided cannot be turned on its head, and then used to deny the necessity of reservations in higher education today. Many youngsters from such disadvantaged backgrounds, who are getting into institutions of higher education today on account of reservations, may at best be characterized as only being insignificantly or at best marginally less proficient than the students in the unreserved categories at the starting point. If their social and educational disadvantages are taken into account, it would not be unreasonable to conclude that they may in fact be more meritorious and deserving of access to higher education. It would be unjust to keep denying their claims for access and justice, on promises made and unkept, and new promises that may take too long to fulfill, even if one were to assume that they

would in fact be fulfilled. Promises are not enough to avert social catastrophes.

125. One of the things that has exercised our minds has been that in the debates in popular discourse of the elite in India it is assumed that imposition of reservations on private unaided educational institutions would have a great and deleterious impact on the freedom of educators, i.e., those who promote, operate, finance and teach in those private unaided educational institutions, to choose their own students. We hold that granting such a freedom would by itself be the actual problem. Our societal hierarchy, and in fact one of the sustaining forces of caste system, and caste like structures in even other religious groups, apart from endogamy, lack of relative vertical and occupational mobility, has been the normative assumption that only some amongst us, belonging to certain social groups, deserve to study and gain the knowledge that truly provides ability to critically evaluate and attempt to change their world. Caste system may have been many things, but it was also about systematic exclusion from portals of knowledge. To allow that to happen again, now, in the garb of a right of the educator to choose his/her own students, and a formal pretense of non-discrimination while turning a blind eye to the discrimination inherent in the system of selection for entry, which does not test real talent or ability would tantamount to a desecration of all constitutional values.

126. The learned Senior Counsel, also seemed to be advocating the position that we ought to assume that TMA Pai, as explained in P.A. Inamdar, is the final word with respect to the content of sub-clause (g) of clause (1) of Article 19 even in the context of a basic structure review. This we hold leads us into a tautological cul de sac. However, we believe the methodology adopted by us, as enunciated in M. Nagaraj case, and as gleaned from our constitutional jurisprudence, would over come such an impasse. A tautology is one in which the assumption contains all the elements of the conclusion in a

logical argument. The tautology in the basic structure review urged upon us is this: Premise 1: Any derogation from any of the essential features of any kind of activity guaranteed freedom under sub-clause (g) of clause (1) of Article 19 would constitute an abrogation of the basic structure of the Constitution; Premise 2: the freedom of unaided educational institutions to not be subject to reservations with respect to admission of students is an essential aspect of the freedom to pursue the occupation of starting, operating, teaching in and managing educational institutions; and ergo, Conclusion: reservations would necessarily destroy the basic structure of the Constitution.

127. The power of tautological arguments is that they sound very reasonable. However, what we should look for is not the reasonableness of the tautological arguments, within the context of the argument itself. Rather, the structure of the tautological arguments have to be examined with respect to the assumptions made, and the world that has been ignored, before accepting such arguments to be valid and persuasive.

128. In the first place, the assumption that sub-clause (g) of clause (1) of Article 19 protections offered to private citizens, as enunciated by TMA Pai, and elaborated by P.A. Inamdar, to be the ultimate word with respect to what the contents of such activities are is inapposite, in the context of a Basic Structure test. Notwithstanding the fact that it is acknowledged that the Constitution can be amended in accordance with Article 368 to take away the basis of a judgment of this Court, the proposed methodology would have us adopting the view that the starting point for the evaluation of impact of clause (5) of Article 15 with respect to the basic structure would also have to accept the views expressed by this court in TMA Pai to be given and deemed to be immutable, as if carved in stone.

129. In the first place, we note that in neither of the two judgments, were features of the protections afforded to private unaided educational institutions evaluated in terms of the basic structure doctrine. Except for two references, in two paragraphs

in a judgment spanning 450 paragraphs in total, TMA Pai does not speak of the basic structure doctrine at all. In paragraph 8, the said expression is mentioned, but it is a recitation of the submissions made by one of the litigants in the case. This shows that in fact the basic structure doctrine was argued by opponents of reservations as one of the grounds to deem reservations to be unconstitutional. The Court obviously did not proceed on that ground. Instead, it chose to do so only on the grounds of the contents of sub-clause (g) of clause (1) of Article 19. In terms of M. Nagaraj's ratio, what we have is a finding of this court in TMA Pai that freedoms of private unaided educational institutions under sub-clause (g) of clause (1) of Article 19 extends to the concept of being free from imposition of reservations, but not an analysis or finding about the status of that specific freedom, i.e., freedom to be free from reservations, within the freedom code itself, much less an analysis of how that freedom to be free from reservations relates to the equality code, and constitutional identity in terms of its institutions of governance. Indeed, we do not even find that this Court has engaged in an analysis of the relationship of that right to be free from reservations in light of the powers granted to the State, under sub-clause (ii) of clause (6) of Article 19 to even abrogate, partially or wholly, the participation of private citizens in any of the activities guaranteed by sub-clause (g) of clause (1) of Article 19. In as much as the issue of the content of the freedoms of non-minority unaided institutions came about collaterally, and were not the main issue under consideration, and notwithstanding the fact that this Court did issue an authoritative ruling with respect to such institutions under sub-clause (g) of clause (1) of Article 19. We also find that this Court did not engage in any discussion with respect to right to life under Article 21, nor to sub-clause (a) of clause (1) of Article 19 and its impact over all on the principles, and the actual processes, of democracy, which would certainly include within itself the rights of people of all segments, regions and groups to possess the appropriate level of knowledge to

be able to debate, discuss and influence social, political and economic choices of institutions. Such choices could have a vast impact on vital aspects that inform right to life under Article 21.

130. In light of the above, we are unimpressed by the arguments that TMA Pai, as explained by P.A. Inamdar also provide the appropriate content for undertaking an "essences of rights test" i.e., an "over-arching principles" test, as enunciated by M. Nagaraj, to assess whether a Constitutional amendment, such as the 93rd Constitutional Amendment, violates the Basic Structure. Indeed we are acutely aware that TMA Pai, is an eleven judge bench judgment, and P.A. Inamdar to be a seven judge bench judgment. However, the very eloquent silence of the two benches as to whether the contents they have read into sub-clause (g) of clause (1) of Article 19 to constitute a basic feature of the Constitution, is itself a clear indication that this Court, in those judgments was not engaging in that type of analysis. This Court, through another constitutional bench, Islamic Academy, had also exhaustively examined the ratio in TMA Pai, and there is not even a whisper therein that there is any indication in TMA Pai, that the right of private unaided educational institutions to be free from reservations would constitute a right of such magnitude that its partial truncation would abrogate the basic structure of our Constitution and change its very identity. What TMA Pai did was essentially to engage in a "reasonableness standard" test based on the text of Article 19(1)(g). Nothing more.

131. This Court, in P.A. Inamdar, warns us that "certain recitals, certain observations and certain findings in" TMA Pai are "contradictory inter se……. There are several questions which have remained unanswered….". Certainly, the issue of whether the State can impose reservations, on private non-minority unaided educational institutions, pursuant to a Constitutional amendment, are not even raised in TMA Pai.

Moreover, while some aspects of the contents of education as an occupation have been noted, many other aspects have not been evaluated, especially in light of the goals of egalitarian social order, and ensuring of social justice, richness of democratic processes and attitudes that inform them, and ultimately dignity of vast swaths of humanity. Hence, to depend on the analysis in TMA Pai, with regard to the constitutional status of the contents of the rights of non-minority unaided educational institutions, in the context of a basic structure review would not only be inapposite, but also lead the Court down the wrong path.

132. In light of the above, we are necessarily compelled to look at those unexamined aspects, including the contents of the very occupation that is guaranteed by sub-clause (g) of clause (1) of Article 19. This is imperative because a test of a constitutional amendment on the anvil of the basic structure doctrine using the "essences of rights" test i.e., the "over-arching principles test" is an entirely different exercise from a mere "unreasonableness test" undertaken by this Court in TMA Pai.

133. This Court, in TMA Pai, declared the establishment of educational institutions by citizens to be an "occupation" as comprehended in the text of sub-clause (g) of clause (1) of Article 19. In doing so, the Court cited approvingly, and extensively, from Corpus Juris Secondum. In particular, the word "occupation" is stated to be a very "comprehensive term, which includes every species of the genus, and encompasses the incidental, as well as the main, requirements of one's vocation, calling, or business." Consequently, it would necessarily mean that in describing "education" as an occupation, the Court, in TMA Pai, certainly meant that it needs to be comprehended in its entirety, even if for the specific purposes of the questions it set out to answer in that particular case, the Court did not deal with all such incidental and other requirements of the calling.

134. The Court also cited approvingly the observations of

the University Education Commission, headed by Dr. Radhakrishnan as its Chairman, and in particular the following is very important: "Liberal Education – All education is expected to be liberal. It should *free us from the shackles of ignorance, prejudice and unfounded belief.* If we are incapable of achieving the good life, it is due to the faults in our inward being, to the darkness in us. The process of education is the slow conquering of this darkness. To lead us from darkness to light, *to free us from every kind of domination except that of reason, is the aim of education.*(emphasis supplied)" This obviously implies that the darkness of ignorance, prejudice and unfounded belief, wherever it may be found, including amongst the socially and educationally disadvantaged classes, and those who have been subjected to grossly inhuman deprivations and unjust discriminations, such as Scheduled Castes and Scheduled Tribes, has to be eliminated. Not just equality, but freedom itself would lose any meaning and content, if such darkness were to pervade amongst large swaths of our people. Certainly, in as much as the word "occupation" comprehends within itself all incidental, as well as the main requirements of the vocation, we ought to reasonably be able to conclude that education as an occupation would certainly have to comprehend as one of its chief goals the tasks to which liberal education, in so far that all education is liberal education, has to necessarily serve.

135. Furthermore, certain other aspects of education as an occupation also have to be taken into account to assess the nature of content of the rights granted to "educators" under sub-clause (g) of clause (1) of Article 19. Note should also be made of the fact that the Court in TMA Pai has specifically characterized the nature of the occupation to be "charitable", and in fact specifically notes that private educational institutions have been started by educationists, philanthropists etc. This was so because "[E]ducation is a recognized head of charity."

136. A charitable activity, is also a philanthropic activity.

Charity, the basis on which the charitable activity is undertaken, such as the setting up of, managing and operating educational institutions, is defined to include the following meanings: giving voluntarily to those in need, an institution or an organization for helping those in need, kindness & benevolence, tolerance in judging others and love of one's fellow men. In a similar vein, philanthropy involves a love of mankind[46]. If one were to take a synoptic view of history of mankind, one would realize that educational institutions, as formal structures for learning, were invariably started by the State, or by citizens who had a great love for their fellow human beings. In societies which were homogenous, and not hierarchically ordered, this love extended to all its members. The idea was that equipping as many youngsters as possible with knowledge would strengthen the society, bring in the benefits of enlightenment that darkness, caused by ignorance, prejudices and unfounded beliefs, denies to the individuals as well as the society. No philanthropist, with love for mankind, would want to educate a person who says that he or she wants to be enlightened only for personal benefit or for using the knowledge gained to perpetuate injustices in the society or strengthen inequality. Of course TMA Pai, by declaring that reasonable fees has to be collected, to cover capital costs, day to day operations etc., has brought in an element of financial viability. However, one should not then view that TMA Pai would have intended, when it accepted that education as an occupation could only be charitable in nature, that it would also be devoid of intrinsic and essential qualities such as love for mankind as the motivating factors in starting educational institutions.

137. However, in hierarchical societies, marked by endemic inequalities, and where hierarchy had ossified, this "love of mankind", which was the primary, and inherent, motive of education as a charitable or a philanthropic occupation, was extended only to individuals who belonged to the communities to which such philanthropists belonged to. Time, knowledge, and

46. The Concise Oxford Dictionary (1990).

philosophical constructs that inform our love for mankind change. Even societies in which race was used to impose horrific economic and social conditions on those who belonged to enslaved races, have changed. Great universities, such as Harvard which many decades ago did not admit students from formerly enslaved races, or women, or those with other disadvantages, have with the march of time recognized that the very notion of education as a philanthropic activity would lose its motive force, and the essentiality of its purpose, of imparting liberal education that leads people from darkness to light and that is inner soul would be derogated from if individuals from other races, or women, or those who face social disadvantages are also not provided access. In this regard, many universities have also come to the view that one of their essential purposes lies in providing higher education to ensure that in every sphere of social action, in which choices are made that impact differentially on different segments of the society, there be diversity of representation from all segments of the society. This is recognized as necessary to enrich and strengthen democratic processes, by bringing diversity of views and ensuring that debate occurs in a reasoned and reasonable manner, which in turn integrates the society and polity. Knowledge has expanded by leaps and bounds, and not all of it can be taught at the stage of secondary school education. The ability to engage with this expanding knowledge, to auto-didactically keep pace with such expanding frontiers, is typically provided only at collegiate level.[47] This implies that unless access is provided on a wide scale, across all swath of the population, the debates about social, political, economic and technological choices would be uninformed, and therefore also likely to be unreasoned and unreasonable, thereby threatening the democratic process and social integration that is vital for fraternity and unity of the nation threatened. Noting the pernicious influence of marketplace throngs that seek to subordinate the higher status of higher education, Frank

47. Learning To Be: The World of Education Today and Tomorrom - Unesco Paris 1972.

Newman, Laura Couturier and Jamie Scurry write that from "the establishment of the first college in America in 1636, there has been an understanding that higher education, though it clearly provides private benefits, also served community needs….. steadily expanded from preparation of young men for leadership…. to preparation of a broad share of population for participation in the workforce and civic life…" (See The Future of Higher Education – Rhetoric, Reality and the Risks of the Market[48]).

138. Moreover, great universities have also begun to recognize that merit cannot be assessed purely on past performance, in exams or as revealed by grades. They recognize that a more composite manner of evaluation ought to be implemented. For these reasons, they look at not merely the marks secured at the qualifying level, or aptitude tests. They also evaluate the desirability of admitting students on the basis of recommendations of their teachers, the statements of purposes written by prospective students, and consider many other factors such as background experiences. For instance a demonstrated desire to undertake social service, or being part of activities that demonstrate an acknowledgement of social responsibility are also taken into account. There are three reasons why they do that.

139. One is that grades and marks, at the secondary level may not necessarily indicate why a youngster has scored a certain level of marks or not, thereby not being a substantially accurate measure of ability to pursue studies at the collegiate level. The second relates to expectations of universities as to how knowledge gained would be used by the wider society and its impact on society. Those multiple other means provides them, obviously not perfectly, but a more granulated and textured view about the background of the youngster, the particular circumstances under which the youngster was expected to study, and yet achieved what he or she achieved.

48. Jossey Bass, 1st Ed (2004)

140. The third is the recognition that knowledge is generated and applied in diverse social contexts. Consequently, from a pedagogic and educational perspective, it is felt that having a diverse student body would enable the scholars to interact, learn about the diversities in life, and social worlds, and appreciate the diverse points of views and needs. This obviously enhances the learning environment for students, and is viewed as an essential component of the environment of the university in which all students from diverse backgrounds would study. It is viewed as a necessary component of the "knowledge inputs" and also an essential aspect of learning to be. We must recognize that many Indians, essentially from the upper crust, would not have had the opportunity to study in such universities, which are centers of great academic excellence, if those universities, educationists, and their philanthropists who had financed such institutions had stuck to archaic notions of inherent inequality amongst human beings, and insisted only on the demonstrated ability to get high marks. Our students were selected because they had demonstrated an ability to excel within the background of our current socio-economic circumstances, and their academic accomplishments may or may not have been equivalent to what youngsters in similar cohorts in those nations, and indeed all across the World, actually accomplished. It was also felt that it was important for other students in such universities to interact with Indians, learn about our ancient culture, our lives and our circumstances, and view the knowledge they were gleaning from text books, whether sciences, social sciences or humanities, from the perspective of entire humanity, including India.

141. Knowledge is the vital force that unites people. Knowledge is generated in diverse circumstances, in the practical arenas that range from a highly technical and clinical laboratory, to the humble farmer, or a hut dweller eking out a bare subsistence. It is an accumulated gift of humanity to itself. The knowledge that non-minority educational institutions seek to impart, is not knowledge that they have created. That

knowledge was shared by people who have generated such knowledge out of love for humanity. Knowledge is shared by human beings all over the world out of love for humanity. Knowledge was passed down from the dark and forgotten past, out of love for humanity. To attempt to convert that knowledge into "gated communities of exclusion" would be to sow the seeds of destruction of humanity. Non-minority educational institutions claim that they ought to have the right to choose only those who have demonstrated a certain level of proficiency in tests, where the differences between those who get selected and those who are discarded may be insignificant, or do not take into account the impact of differences in social and educational backgrounds on the performances in those tests. They also claim the right to be free from any state based imposition of reservations, thereby denying any social responsibility in ensuring that those who are the best within the socially and educationally backward classes, and Scheduled Castes and Scheduled Tribes. To claim a right to distribute it only to a few, who are selected on the basis of tests which do not reveal the true talents spread across diverse groups, and communities in this country, is to destroy the very foundation by which such non-minority educational institutions are given access to knowledge. To partake of knowledge, from the common pool, that is a gift of humanity, including our common ancestors, to all of humanity, and then to deny the responsibility to share it with the best amongst youngsters who are located in diverse groups would be a betrayal of humanity.

142. Knowledge is also power. It empowers the individual. It also empowers the group to which that individual belongs to, and has culturally been induced to show greater affinity for. Consequently, the propagation of knowledge only amongst certain groups, whether done deliberately, or done on supposed objective tests of merit that are context and background insensitive, would lead to massive imbalances in the level of power to understand, and articulate, amongst social groups. Let us not deny the truth. We were a horrifically divided society. We

may have progressed a bit. Yet we remain endemically unequal, as between groups. Caste, gender, and class still are the structural impediments to the realization of a truly egalitarian society. The inherited social, educational, cultural, political and economic disadvantages of vast swaths of humanity in our country are propagated across generations. A system that predominantly results in giving access to only certain groups would necessarily work towards sustenance of those inequalities. This will have an immediate, and necessarily, a deleterious impact on the quality of our social and political discourse, in our assessment of the problems that our society confronts and which of those problems ought to be prioritized for social action. It will also hinder the development of abilities amongst students graduating from those gated institutions of higher education that are vital to be able to interact with other Indians, less fortunate than themselves and treating them with respect, and in the application of their knowledge for the betterment of communities, and larger society around themselves. Reservations, for socially and educationally backward classes and Scheduled Castes and Scheduled Tribes, would ensure that students from different social, educational, economic and cultural backgrounds get together to study, and learn about each other, and critically assess the relevance, in the manner in which knowledge is generated, disseminated, and applied. This necessarily relates to the standards and purposes for which higher education, including professional education, is imparted. We certainly don't expect all of our students, who graduate from our colleges to go and join the "global society," whatever such a construct might mean. We obviously expect most or many of them to live and work in India. To not build the right scholastic environment, in which there is a diversity in the student body, reflecting the diversities of India, would be a fraud that our educational institutions would be perpetrating. Further, if one posits that national barriers are breaking down, and that we are all a part of some amorphous "global village", based on knowledge economy, to deny access to the best amongst various social groups in India, would be

an act that destroys their prospects of living in such a global society. Either way, to allow that to happen by granting access to higher education solely or mostly to the privileged segments of our population would be to invite a cultural genocide.

143. It is not without reason that one of the great educationists of the World, Paulo Freire, characterized education as "Cultural Action For Freedom.[49]" It is an activity that all societies, and human cultures, undertake to enable their children to be free from ignorance, and dehumanization that necessarily inheres in such ignorance and perpetuated in the inegalitarian social order that ignorance creates, nourishes and sustains. Education is expected to free the youngster, from elite backgrounds, that perpetuate the oppression of those from deprived backgrounds, from the dehumanization that is implicit in the very acceptance of a hierarchical order of superior and inferior. One of the great dangers that a highly stratified society faces is that when the oppressed, trained to think that hierarchy, and the power to oppress are the natural order on account of the culture perpetrated by the oppressors, fight for relief from oppression, that they currently face, the cry for liberation might then turn into a liberty and a right to oppress the previous oppressor. That process dehumanizes them too. The task of education, as a cultural action for freedom, is to promote the establishment of a truly humanized society. It pays to quote Paulo Freire extensively from his work "Pedagogy of the Oppressed"[50]:

> "While the problem of humanization has always, from an axiological perspective, been humankind's central problem, it now takes the character of an inescapable concern. Concern for humanization leads at once to the recognition of dehumanization, not only as an ontological possibility but as an historical reality. And as an individual perceives the extent of dehumanization, he or she may ask

49. Harvard Educational Review (2000).

50. Continuum, New York (30th Anniversary Edition, 2005)

> if humanization is a viable possibility. Within history, in concrete, objective contexts, both humanization and dehumanization are possibilities for a person as an uncompleted being conscious of their incompletion….. But while humanization and dehumanization are real alternatives, only the first is the people's vocation. This vocation is constantly negated, yet it is affirmed by that very negation. It is thwarted by injustice, exploitation, oppression, and the violence of the oppressors; it is affirmed by the yearning of the oppressed for freedom and justice, and by their struggle to recover their lost humanity. Dehumanization, which marks not only those whose humanity has been stolen, but also (though in a different way) those who have stolen it, is a distortion of the vocation of becoming more fully human…… This struggle is possible only because dehumanization, although a concrete historical fact, is not a given destiny but the result of an unjust order that engenders violence in the oppressors, which in turn dehumanizes the oppressed."

Elsewhere, that great scholar continues:

> "Because it is a distortion of being more fully human, sooner or later being less human leads the oppressed to struggle against those who made them so. In order for this struggle to have meaning, the oppressed must not, in seeking to regain their humanity (which is a way to create it) become in turn oppressors of the oppressors, but rather restorers of the humanity of both.
>
> "This, then, is the great humanistic and historical task of the oppressed: to liberate themselves and their oppressors as well. The oppressors, who oppress, exploit, and rape by virtue of their power, cannot find in this power the strength to liberate either the oppressed or themselves. Only power that springs from the weakness of the oppressed will sufficiently be strong to free both. Any

attempt to "soften" the power of the oppressor in deference to the weakness of the oppressed almost always manifests itself in the form of false generosity; indeed, the attempt never goes beyond this. In order to have continued opportunity to express their "generosity," the oppressor must perpetuate injustice as well. An unjust social order must perpetuate injustice as well. An unjust social order is the permanent fount of this "generosity," which is nourished by death, despair and poverty. That is why dispensers of false generosity become desperate at the slightest threat to its source…..True generosity consists precisely in fighting to destroy the causes which nourish false charity."

144. Our non-minority unaided educational institutions, including professional educational institutions, in claiming to be engaging in a charitable occupation, and yet claiming the right to ignore the conditions of social injustice and inequality that have a bearing on academic accomplishments of students at a young age, which are the indicia of oppression, would necessarily perpetuate the conditions of lack of access to knowledge that can transform the praxis of socially and educationally disadvantaged groups. The occupation they would be engaging in would be imbued with "false charity." For the past two decades, this country has been in the throes of early "amor" with the false but mesmerizing promises of laissez faire free markets, liberalization, privatization and globalization. The State, in the throes of that false passion, believed that it would lead to generation of such wealth, that it could then take on the task of providing access to higher education to hitherto excluded classes and groups. However, that promise has turned out to be false and a mirage. It is now apparent to the State that denial of access to higher education, to socially and educationally backward classes, and Scheduled Castes and Scheduled Tribes, would potentially be dangerous to the ship of our nation, the Constitution. The 93rd Amendment, by necessitating a wider analysis of different facets of our

constitutional constructs, and the ontology that it is based on, has revealed new dimensions of understanding our past, present, and how we might approach the future. The verities of historical human experience, that passing ideological passions had buried, stand forth now, in their glorious hue of a true path to a humanized destiny. It is imperative, that our institutions of higher learning, which are a part of our national life, be freed from this false charity that can only lead to a dehumanized social order.

145. Our Constitution is based on an ontology of humanism. It is based on the recognition of the dehumanization of vast swaths of our people in a hierarchical society. It is based on the acknowledgment of the truth that as long as endemic inequalities remain entrenched, the cultural constructs of the inherited notions of hierarchy and of social worth based on social status would not disappear, and further intensify the conditions of dehumanized existence of all human beings, irrespective of their stature. The disadvantaged are obviously brutalized and dehumanized, by the very structure in which they are compelled to live in. If the masses of India were to start believing, which thankfully they do not, and hopefully will not in the future, that their dehumanized condition is immutable, then also the ship of our constitution would have lost its way. If they conclude, that dehumanization is the only normal order based on what some keep propagating, and then further conclude that the only way out for them would be to violently revolt and oppress the oppressor, the ship would sink.

146. Education is one of the principal human activities to establish a humanized order in our country. Its ontological specification is simple: every individual, in every group, is worthy of being educated. In as much as certain resources, such as seats in institutions of higher education, including professional education, are scarce, then they have to be allocated. The allocation can only be based on the fundamental ontological assumption that those who excel, within equal social

circumstances, should be rewarded with access to higher education. Any other formula of distribution of such access, would be fundamentally inhuman, and violate Article 14 of our Constitution. Given our past history of caste and gender based discrimination, and the continuation of endemic inequalities, in social, economic and cultural spheres, including education at all levels, giving freedom to an educator to choose who he or she would want to teach, and teach only those who belong to socially and educationally advanced groups, would be a curse on our constitutional project. The fact that non-minority unaided educational institutions insist on "social disadvantages blind" admission policies is proof that they are not recognizing the true purpose of education as an occupation. Hence, State intervention is a categorical imperative, both morally and within our constitutional logic.

147. In light of the above, we hold that the claimed rights of non-minority educational institutions to admit students of their choice, would not only be a minor right, but if that were in fact a right, if exercised in full measure, that would be detrimental to the true nature of education as an occupation, damage the environment in which our students are taught the lessons of life, and imparted knowledge, and further also damage their ability to learn to deal with the diversity of India, and gain access to knowledge of its problems, so that they can appreciate how they can apply their formal knowledge in concrete social realities they will confront.

148. Consequently, given the absolute necessity of achieving the egalitarian and social justice goals that are implied by provisions of clause (5) of Article 15, and the urgency of such a requirement, we hold that they are not a violation of the basic structure, but in fact strengthen the basic structure of our constitution. Consequently, we also find that the provisions of Delhi Act 80 of 2007, with respect to various categories of reservations provided therein to be constitutionally valid.

VIII

CONCLUSIONS:

(A) The Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee And Other Measures to Ensure Equity And Excellence) Act, 2007 (Delhi Act 80 of 2007) or any provisions thereof do not suffer from any constitutional infirmities. The validity of the Delhi Act 80 of 2007, and its provisions, are accordingly upheld.

(B) The Notification dated 14-08-2008 issued by the Government of National Capital Territory of Delhi permitting "the Army College of Medical Sciences, Delhi Cantonment, Delhi to allocate hundred percent seats in the said college for admission towards of Army personnel in accordance with the policy followed by the Indian Army" is ultra vires the provisions of Delhi Act 80 of 2007 and also unconstitutional. The same is accordingly set aside.

(C) The admission procedures devised by Army College of Medical Sciences, Delhi Cantonment, Delhi for admitting the students in the first year MBBS course from a pre-defined source, carved out by itself and its parent society, are illegal and ultra vires the provisions of the Delhi Act 80 of 2007.

(D) Clause (5) of Article 15 does not violate the basic structure of the Constitution.

RELIEF

For the aforesaid reasons the impugned judgment of the Delhi High Court is set aside. Consequently, the respondents are directed to admit the Writ Petitioners into the First Year of MBBS Course in Army College of Medical Sciences, if the Writ Petitioners still so desire, for they have been deprived of their legitimate right of admission to the course, for no fault of theirs,

notwithstanding the rank secured by them in the CET. It is true that they have appeared at the common entrance examination held long ago and qualified themselves to get admitted but were deprived of the same on account of the illegal admission policy of Army College of Medical Sciences permitted by the Government of Delhi. In the circumstances, all the respondents are accordingly directed to ensure that the Writ Petitioners are admitted into the First Year MBBS Course in the ensuing academic year by creating supernumerary seats. However, we make it clear that the admissions already made by Army College of Medical Sciences are saved and shall not be affected in any manner whatsoever.

The appeals and the writ petitions are accordingly ordered.

R.P. Matters disposed of.

CENTRE FOR ENVIRONMENT AND FOOD SECURITY

v.

UNION OF INDIA AND ORS.

(Writ Petition (C) No. 645 of 2007)

MAY 12, 2011

[S.H. KAPADIA, CJI, K.S. RADHAKRISHNAN AND SWATANTER KUMAR, JJ.]

Mahatma Gandhi National Rural Employment Guarantee Act, 2005:

Object of its enactment – Discussed.

Discrepancies detected in the implementation of the provisions of the Act – PIL for issuance of appropriate directions to authorities to ensure proper implementation of the Act and the schemes framed thereunder and for investigation to prevent diversion of funds specifically allocated for implementation of the schemes – Supreme Court directed CBI to conduct complete and comprehensive investigation in the matter – It further directed State Government of Orissa, all the State Departments and concerned authorities of Central and State Governments to fully cooperate with the CBI so as to facilitate expeditious completion of investigation – Directions issued – NREGA Operational Guidelines.

CIVIL ORIGINAL JURISDICTION : Under Aritcle 32 of the Constitution of India.

Writ Petition (Civil) No. 645 of 2007.

Indira Jaisingh, ASG, A. Mariarputham, AG, Sikkim, T.S. Doabia, K.K. Venugopal, Jayshree Anand, AAG, Punjab, Aman Sinha, AAG, Uttarakhand, Manish Singhvi, AAG,

Rajasthan, Prashant Bhushan, Pranav Sachdeva, Milind Kumar Anis Suhrawardy, Gopal Singh, Manish Kumar, Gopal Singh, Rituraj Biswas, H.K. Puri, Priya Puri, Hemantika Wahi, Nupur Kanungo, S. Banerjee, Naresh K. Sharma, Aruna Mathur, Yusuf Khan, Avneesh Arputham, Megha Gaur (for Arputham, & Aruna & Co.), Sadhana Sandhu, Aman Ahluwalia, Manpreet Singh Doabia, A. Deb Kumar, S.W.A. Qadri, D.S. Mahra, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh, Anil Kumar Jha, Chhaya Kumar, Vikas Upadhyay, A.K. Pandey, Khwairakpam Nobin Singh, Sapam Biswajit Meitei, Anil Shrivastav, Asha G. Nair, Sanjay R. Hedge, Suresh Chandra Tripathy, Vartika Sahay (for Corporate Law Group), Pragyan P. Sharma, P.V.Yogeswaran, Ekta Singh, Kuldip Singh, Promila, S. Thananjayan, G.N. Reddy, Anuvrat Sharma, Edward Belho, C.M. Kennedy, Balalji Srinivasan, A.P. Mayee, Charudatta Mahendrakar, Rucha A. Mayee, V.N. Raghupathy, Shipra Shukla, Bhanwar Pal Singh, Dr. Rajeev Sharma, M.K. Michael, Sunil Fernandes, Renu Gupta, Sidhan Goel, V.G. Pragasam, S.J. Aristotle, Prabu Ramasubramanian, Manjit Singh, Kamal Mohan Gupta, E. Enatoli Sema, Vijaya, Nimshi, A. Subhashini, G.N. Reddy, V. Pattabhiram Vadrevu, Atul Jha, D.K. Sinha, Prashant Chaudhary, R.K. Verma, Praveen Swarup, D.K. Devesh, Sahil S. Chauhan, Milind Kumar, Ekta Singh and Kuldeep Singh for the appearing parties.

The Order of the Court was delivered by

ORDER

SWATANTER KUMAR, J. 1. This Public Interest Litigation has been filed by the petitioner before this Court for issuance of appropriate directions to the respondents to ensure proper implementation of the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (for short the `Act') and the schemes framed thereunder. The Act was enacted to ensure enhancement of livelihood security of households in the rural areas of the country by providing at least hundred days of guaranteed wage employment in every financial year to every

household whose adult members volunteer to do unskilled manual work and for matters connected therewith and incidental thereto. The authorities appointed under the Act are responsible to ensure proper utilisation of the funds released by Union of India for implementation of the schemes framed under the provisions of the Act. The Central Government issued guidelines, viz., NREGA Operational Guidelines in 2008 for proper implementation. Petitioner has prayed before us that proper investigation is required to be conducted into cases of non-compliance with the provisions of the Act, schemes framed thereunder and the guidelines issued by the Central Government to prevent diversion of funds specifically allocated for implementation of the schemes framed under the Act.

The petition has been pending before this Court for considerable time and certain orders/directions have been issued by the Court from time to time. The Central Government as well as various State Governments had filed certain compliance affidavits with respect to the orders/directions issued by this Court. However, it was felt by this Court that all was not well with the functioning of the various State Governments as well as the Centre for achieving the objectives of the Act.

Observing discrepancies in the implementation of the provisions of the Act, this Court, on 16th December, 2010, passed a detailed order. In the said order, it was noticed that it was in the interest of justice and in larger public interest that this Court should issue appropriate directions to ensure proper and equitable functioning of the Act and the schemes framed thereunder. After noticing in some detail various acts and omissions resulting into disobedience of the statutory mandate and patent lacuna in implementation of the schemes, like disbursement of money to the unemployed, proper registration and utilisation of the funds by the concerned authorities working under the provisions of the Act, special reference was made to the failure on the part of the State of Orissa in implementing

the scheme and various provisions of the Act. The concerned authorities under the State Governments and even in the Central Government have failed to discharge their statutory duties under the provisions of the Act on one hand and on the other they have also violated the orders/directions of this Court. This compelled the Court to pass the following directions on 16th December, 2010:

"Thus, we are compelled to issue the following directions for strict compliance by the concerned authorities:

1. The compliance report shall be filed in the form of affidavit which shall be sworn by the Additional Secretary, in-charge for compliance of the provisions of the Act in the Ministry of Rural Development, Government of India, New Delhi and the Chief Secretary, State of Orissa within three weeks from today.

2. The instances and figures referred to in the survey report submitted by the petitioner shall be specifically dealt with in that affidavit.

3. The affidavit should be filed positively within the stipulated time directed in this order and further we call upon both the Union of India and the State Government to show cause as to why there should not be a direction to the CBI to investigate this matter in accordance with law.

We also issue the direction that affidavits to be filed by the respective authorities shall, inter alia, but specifically answer the following points:

(a) What is the extent of funds released by the Union of India to the State of Orissa for implementation of the schemes under the provisions of the Act for each of the year between 2006 to 2010?

(b) To what extent and for what projects, the released funds have been utilized? Whether state of Orissa has given to

the Central Government the requisite certificate of utilization?

(c) Findings to be recorded whether any amount earmarked for any of the schemes under NREGA has been diverted to any other Head of Account including revenue account by State of Orissa.

(d) How many applicants, of how many households, have been actually employed and have been paid allowances under the provisions of the Act?

(e) The figures in terms of the above directions shall be provided for the period from 2006 to 2010.

(f) Whether any social audit of the projects under the Gram Sabha has been conducted in terms of Section 17(2)? If yes, its detailed findings for the above mentioned period.

(g) Whether all the authorities/officers/officials, from the higher levels in the Central Government or State Governments to the grass-root levels at District, intermediary and Panchayats, to ensure effective implementation of the schemes under the Act have been appointed? If no, reasons therefor.

(h) Whether the Union of India or the State Government, in consultation with the Comptroller and Auditor General of India or otherwise, have conducted any general audit of accounts of the schemes at any level in terms of Section 24 of the Act? If the answer is in the affirmative, then details thereof, particularly, the objections, if any, raised by the Auditors; if the answer is in the negative, then reasons therefor.

(i) Whether the Central Government has issued any directions concerning utilization of funds under NREGA while disbursing the amounts to State of Orissa? Whether these have been complied with by State of Orissa?

(j) Whether the Central Government has received any complaints about working of the schemes, utilization of funds, providing of employment and payment of allowances under the provisions of the Act? If so, what action has been taken in terms of Section 27(2) of the Act? It should be stated with complete statistics and data.

(k) Whether the Union of India or the State of Orissa have, till date, found even a single official/functionary guilty of contravention in terms of Section 25 of the Act and whether any complaint has been filed in any Court of competent jurisdiction? If so, the result thereof.

(l) The contents and the background of the complaints received and referred in `Annexure-R1' to the affidavit filed by the Union of India should be stated precisely. Why the enquiry reports as referred to in `Annexure-R1' to the Affidavit of the Union of India of July 2008, no final reports have been prepared and submitted before this Court till date. Further, it shall also be stated as to why the findings of the interim reports referred in the said affidavit have not been placed before this Court. A complete summary thereof shall be annexed to the Affidavit."

In furtherance to the above directions, the Union of India and the State of Orissa have filed their affidavits in those terms. From the affidavits filed, it was clear that there was temporary diversion of funds, no proper audit has been conducted in terms of Section 24 of the Act and utilization of funds was improper.

Not satisfied with the replies of the Central Government as well as the State of Orissa, this Court on 14th March, 2011 noticed that there are particularly two aspects to be taken care of at this stage; one is concerned with the corruption in the implementation of NREGA Scheme and the other is concerned with the implementation of the Operational Guidelines issued by the Central Government under Section 27 of the Act. In the

case of State of Orissa, it was brought to the notice of the Court that huge amount has been misappropriated and, consequently, the beneficiaries of the NREGA Scheme are deprived of their dues.

Learned Additional Solicitor General, appearing for the Union of India, informed this Court that the Central Government is considering the possibility of handing over the matter to Central Bureau of Investigation (for short the `CBI') for investigation in cases of misappropriation and prayed for time for seeking instructions from the concerned Government in this behalf. This Court further directed the Government of Orissa to implement the Guidelines issued by the Central Government with regard to muster rolls, maintenance of job cards/ applications and transfers to the accounts of the beneficiaries.

It must be noticed at this stage that the Comptroller and Auditor General of India (for short the `CAG') had prepared certain reports in regard to implementation of the schemes framed under the Act. Similar report was prepared by the National Institute for Rural Development (NIRD) after conducting social audits in certain villages of Orissa on request of the Government of Orissa. Both these reports have pointed out the irregularities in implementation of the provisions of the Act and the schemes framed thereunder. These reports have even been accepted by the State Government and it had directed all the Collectors and District Programme Controllers (DPCs) to take necessary follow-up action. They had been instructed to submit exhaustive compliance/action-taken report in relation to the observations made by the CAG and NIRD in their respective reports and to conduct complete verification of all the allegations contained therein.

In the affidavit filed on behalf of the State of Orissa, it was admitted that certain financial and other irregularities in implementation of the schemes have been noticed. Not only this, it was also stated in the affidavits that certain departmental

actions were also initiated against the erring officers/officials. This Court in its order dated 16th December, 2010, had specifically noticed that the interim compliance reports filed by the Fact-Finding Committee constituted by the State Government have not been taken to their logical ends and no action has been taken as per law. All these facts compelled this Court to ask the Central Government to hand-over the investigation into all these incidences of irregularities and discrepancies where, ex-facie, criminal offences are alleged to have been committed.

Learned Additional Solicitor General had placed on record a copy of the letter dated 4th April, 2011 written by the Director, Mahatma Gandhi NREGA to the Director CBI requiring the latter to investigate the matter. Paragraphs 2 and 3 of the said letter read as under:

> "2. A copy of the aforesaid Writ Petition is enclosed, in which the petitioner has mainly emphasized on the alleged irregularities in the implementation of MGNREGS in the State of Orissa. Annexure `A' to the Writ petition is the report of the petitioner titled "Rural Job Scam Survey Report on Implementation of NREGA in Orissa". In the wake of directive from the Hon'ble Supreme Court, it has been decided to refer the Orissa case to the Central Bureau of Investigation. A copy of the counter affidavit along with extracts of relevant Annexures filed by the State of Orissa before the Hon'ble Supreme Court is enclosed.
>
> 3. you are requested to kindly have the matter investigated and cause to initiate criminal proceedings against the delinquent officials under the relevant laws. This may please be accorded priority. This is issued with the approval of the Hon'ble Minister (Rural Development)."

After issuance of this letter, the Panchayti Raj Department of Government of Orissa, issued a Notification dated 23rd April,

2011 in regard to the orders of this Court. The Government of Orissa, referring to the report of a survey conducted by the petitioner herein on performance of NREGA in 100 villages of six districts in Orissa during the year 2006-2007, accorded its consent to CBI to probe into alleged large-scale irregularities and misappropriations of funds under the NREGA scheme in the State of Orissa in exercise of its powers conferred under Section 6 of the Delhi Special Police Establishment Act, 1946. Vide letter of the same date, i.e. 23rd April, 2011, the Special Director, CBI, wrote to Department of Personnel and Training of Government of India stating that the matter proposed to be entrusted to them involves field investigation in a large number of villages in remote parts of the State of Orissa and that the CBI is severely handicapped in respect of manpower and logistic resources. It was requested that their requirement for man- power and logistic resources may be brought to the notice of this Court for seeking appropriate direction in that regard.

During the course of hearing, Mr. Prashant Bhushan, learned counsel appearing for the petitioner made some averments that this investigation should be conducted all over the State and reliance should not only be placed upon the reports of CAG and NIRD but the investigating agency should also take into consideration the survey report prepared by the petitioner (Annexure `A' to the writ petition) to make it a comprehensive and fruitful investigation. However, Mr. Venu Gopal, learned senior counsel appearing for the State of Orissa, contended that the CBI should not be called upon to conduct a fishing enquiry for the entire State in relation to implementation of the provisions of the Act and schemes framed thereunder as it would seriously hamper progress of the same and even demoralize the persons working under the scheme. It was suggested by him that such investigation should be confined to six districts of State of Orissa mentioned in the survey-report of the petitioner (Annexure `A' to the writ petition) and should be limited for the purposes of examining whether there has

been commission of any criminal offence by the officers/officials functioning under the provisions of the Act.

Learned Additional Solicitor General, appearing for the Union of India, argued that the CBI should be permitted to conduct a free and fair investigation all over the State and it should examine and take into consideration all the three documents, i.e. the survey report prepared by the petitioner (Annexure `A' to the writ petition), report of the CAG dated 31st March, 2009 and the report submitted by the NIRD.

Wide powers of investigation are vested in the CBI under the provisions of the Delhi Special Police Establishment Act, 1946. Another provision which has a significant bearing on the matters before us is Section 27(2) of the Act. This provision specifically states that the Central Government may, on receipt of any complaint regarding the issue of improper utilization of funds granted under this Act in respect of any scheme, if prima facie satisfied that there is a case, cause an investigation into the complaint by any agency designated by it. Thus, the Central Government has full power to refer the matter to CBI for investigation in regard to the complaints received by it. The State Government has enquired into complaints received and even engaged NIRD to conduct social-audits and submit its report to the State Government. The Central Government is even vested with the power, in such cases, to stop release of the funds to the scheme and institute appropriate remedial measures for its proper implementation. Thus, it will be useful for the concerned authorities in the Central Government to ponder over the entire matter and propose such directions or measures which the State Government should take in order to prevent recurrence of the events that have taken place in number of States and particularly in the State of Orissa.

Having heard the learned counsel appearing for the parties at some length and keeping in view the background of this case, particularly the factual matrix referred by us above, we consider it appropriate to issue the following directions :

1. The CBI will conduct free and fair investigation in regard to the implementation of provisions of the Act and the schemes framed thereunder without any impediment;

2. This investigation shall be restricted to 100 villages in six districts of Orissa as spelt out in the Notification issued by the State of Orissa dated 23rd April, 2011;

3. The investigating agency shall refer to and take into consideration all the three documents, i.e. the survey report prepared by the petitioner (Annexure `A' to the writ petition), report of the CAG dated 31st March, 2009 and the report submitted by NIRD to the State of Orissa.

4. The CBI shall conduct a complete and comprehensive investigation in the matter. Whereupon, it shall file its report in regard to commission of criminal offences in implementation of the schemes or otherwise before the court of competent jurisdiction for appropriate action. The CBI shall also place a copy thereof on the record of this Court.

5. Other irregularities or illegalities, apart from the commission of criminal offences, which come to the notice of the CBI during the course of this investigation, shall be submitted to the Chief Secretary, State of Orissa in the form of separate report for appropriate action in accordance with law.

6. The investigation should be concluded as expeditiously as possible. However, we would expect the CBI to file its first report within a period

of six months from the date of pronouncement of this order.

7. The State Government of Orissa, all the State Departments and concerned authorities of the Central and State Governments are hereby directed to fully cooperate with the CBI so as to facilitate the expeditious completion of the investigation. The Ministry of Rural Development, Government of India is also directed to provide technical assistance to CBI during the course of investigation in regard to all the matters falling within the scope of that investigation. Union of India shall also furnish the guidelines, directions and measures which are required to be taken by the State of Orissa.

8. Besides issuing the above directions, we hereby also direct that notice to be issued to the States of Uttar Pradesh and Madhya Pradesh to respond to the reports filed by the petitioner along with its rejoinder affidavit dated 21st February, 2011 in regard to implementation of provisions/schemes under the Act in those States.

9. Keeping in view the fact that there has been persistent default on the part of a number of States in fully implementing the provisions of the Act, we hereby direct all the State Governments to file affidavits stating whether they have accepted and are duly implementing the Operational Guidelines issued by the Government of India, within six weeks from today. In the event, these Guidelines have not been accepted or are not being implemented, the affidavit shall specifically state reasons for such non-acceptance and/or non-implementation of the afore-stated directions/guidelines.

10. We also direct the Central Government to consider the entire matter objectively within the framework of the provisions of the statute and place on record of this Court, before the next date of hearing, the directions or measures which it proposes to issue to all the States to prevent recurrence of what has happened in the State of Orissa.

With the above orders, we direct that all concerned shall strictly adhere to and comply with the directions contained in this order. We make it clear that in the event of default this Court would be compelled to take appropriate action against the defaulting officers/officials/authorities.

Stand over for eight weeks.

D.G. Matter pending.

RAM PRAKASH SHARMA

v.

BABULAL IRLA (D) BY LRS. & OTHERS

I.A. NO.3 OF 2011

IN

CIVIL APPEAL NO. 5310 OF 2010

MAY 12, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Rent Control and Eviction:

Eviction matters – Time granted to tenant to vacate the tenanted premises – Premises not vacated within the time granted – Held: In such a case, the tenant should be evicted by the police force, if he does not vacate the premises on his own – Tenant can file an application well in advance to seek extension of time to vacate the premises.

CIVIL APPELLATE JURISDICTION : I.A. No. 3 of 2011

In

Civil Appeal No. 5310 of 2010.

From the Judgment & Order dated 5.9.2008 of the High Cout of Judicature Jabalpur, Bench at Gwalior in Second Appeal No. 285 of 2005.

Madhurima Bora (for Balaji Srinivasan) for the appellant.

Rishi Maheshwari (for Shally Bhasin Maheshwari) for the Respondents.

The following Order of the Court was delivered

O R D E R

Taken on Board.

Heard learned counsel for the parties.

In the facts and circumstances of the case, time to vacate the premises in question is extended till 31st August, 2011 and if the tenants do not vacate on or before the said date, they will be evicted by police force.

We further make it clear that when this Court allows the petition/appeal of the landlord or dismisses the petition/appeal of the tenant and grant some time to vacate the premises in question and if the tenant does not vacate within the time granted, the tenant shall be evicted by police force. This is a general direction we are passing because we are coming across several cases where the tenants are not vacating the premises in question despite granting time by this Court or despite furnishing an undertaking to this Court with a result that the landlord has to initiate contempt proceedings or any other proceedings. Hence, we give a general direction that when tenant's petition/appeal is dismissed and he is given time to vacate then on the expiry of that time, he will be evicted by police force if he does not vacate of his own.

If any extension of time to vacate is desired, that application should be filed well in advance.

The Interlocutory Application is allowed accordingly.

N.J. Interlocutory Application allowed.

ALLAHABAD HIGH SCHOOL SOCIETY ALLAHABAD & ANR.

v.

STATE OF U.P. & ORS.

(Civil Appeal No. 4329 of 2011)

MAY 12, 2011

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

U.P. Societies Registration Act, 1860 – s. 12D(b) – Amendment of Rules, Constitution and Bye-laws of appellant Society, which were registered –Assistant Registrar cancelled registration of the proceedings related to the registered amendments holding that there was manipulation in the record; that the amendments to the proceedings were made arbitrarily, unlawfully and decisions were taken without following the democratic process and in contravention of the provisions of the Act and the Rules – Direction issued to the Chairman, Governing Body to convene fresh meeting and take a decision as per Rules – Said order upheld by the Single Judge and the Division Bench of the High Court – On appeal, held: The basic feature of the Society along with its primary object had been altered by way of amendments to the Rules – Meetings in which the amendments were carried out had not been validly convened and were in violation of the statutory provisions –In the light of the factual findings by the Assistant Registrar which were upheld by the Single Judge and Division Bench, it is impermissible for Supreme Court to exercise jurisdiction under Article 136 of the Constitution – Rules of the Allahabad High Schools Society, 1952 – Constitution of India, 1950 – Article 136.

The Rules, Constitution and Bye-laws of the appellant Society were amended and were registered on 30.05.2007. The said information was communicated to the Assistant Registrar. The Assistant Registrar cancelled

the registration of proceedings related to amendments registered on 30.05.2007 and directed the Bishop, Diocese of Lucknow, who is an ex-officio member of the Society and Chairman of the Governing Body under the Rules, to convene a fresh General Body Meeting, after informing all the Members about the present situation and circumstances, and reasons as per the Rules; and take a fresh decision regarding amendments to the Rules. The appellant-Society challenged the said order. Both the Single Judge as also the Division Bench of the High Court upheld the order passed by the Assistant Registrar. Therefore, the appellant-Society filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 The Assistant Registrar, in his order held that the proceedings were illegal/frivolous. It was also held that the Members of the Society had died prior to 1997 and there was manipulation in the record; and that the amendments to the proceedings were made arbitrarily, unlawfully and decisions were taken without following the democratic process and in contravention of the provisions of the U.P. Societies Registration Act, 1860 and the Rules of the Allahabad High Schools Society, 1952. After arriving at such factual conclusion based on appreciation of acceptable materials, the Assistant Registrar cancelled the registration of proceedings related to the amendments registered on 30.05.2007 under Section 12D(b) of the Act. [Para 12] [768-F-G; 769-F-H]

1.2 The order of the Single Judge of the High Court shows that there was no quorum in the meeting held on 28.05.2007 in which amendments had been carried out. Four Officers and five members of the Society were present in the meeting. One ex-officio member and four members were absent. There were total 14 (fourteen)

members of the Society. In the Special General Meeting held on 28.05.2007 only nine members were present. Three quarter member of 14 members would be 10.5 members. Therefore, according to Rule 38 of the Rules, at least 10 members were required to be present at the Special General Meeting held on 28.05.2007. In the absence of quorum laid down by Rule 38, neither the amendments could be passed in the Special General Meeting of the Society nor could the amendments made be registered by the Assistant Registrar. It was also demonstrated that manipulations/manoeuvrings is writ large that Principal in connivance with the outgoing Bishop, in order to perpetuate themselves in the Society have made amendments for their benefit and to the disadvantage of the Society and therein Dioces Education Board and the Bishop have been deliberately kept at bay. Thereafter, the Single Judge correctly concluded that in such a situation and in the said background, any interference with the order of the Assistant Registrar would amount to perpetuating the illegality and subscribing to apparent illegality committed. [Paras 14 and 15] [771-B-G]

1.3 The order of the Single Judge was challenged before the Division Bench which was also dismissed. The Bench held that there was interpolation and forgery in the records. The basic feature of the Society along with its primary object had been altered by way of amendments to the Rules. The Division Bench accepted that the Assistant Registrar had the jurisdiction not only to deal with the validity of the convening of the meeting but also to examine the import of the resolution regarding the amendments of the Rules. The Division Bench also agreed with the conclusion that appellant No. 2 was not a member of the Society but was holding the office of the Secretary by virtue of being the Principal of the Boys' High School, Allahabad. The Division Bench also

accepted that the meetings in which the amendments were carried out had not been validly convened. The Division Bench has pointed out that the minutes of the three meetings have also been registered on 30.05.2007 by the Assistant Registrar and by the impugned order dated 24.07.2010, he cancelled the registration. Ultimately, the Division Bench has rightly concluded that all other proceedings had been illegal and the meetings were in violation of the statutory provisions. The Division Bench, in view of its findings held that the meetings itself had not been validly convened as per the Rules of the Society and concluded that the orders passed by the Assistant Registrar and the Single Judge does not warrant any interference. A criminal prosecution has also been lodged against appellant No. 2 by filing an FIR under Sections 467, 468, 471, 420 and 409 IPC in which chargesheet has already been filed on 11.07.2010 and the court has also taken cognizance of the same. [Paras 16, 17 and 18] [771-H; 772-A-G]

1.4 In the light of the factual findings by the authority concerned-the Assistant Registrar, affirming the same by the Single Judge and Division Bench of the High Court, it is impermissible for this Court to exercise jurisdiction under Article 136 of the Constitution. The Assistant Registrar, in his order dated 24.07.2010 itself permitted the Bishop, Diocese of Lucknow, who is an ex-officio member of the Society and Chairman of the Governing Body under the Rules, to convene a general body meeting after informing all the members about the present situation and circumstances and reasons, there is no valid ground for interference by this Court. [Para 19] [772-H; 773-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4329 of 2011.

From the Judgment & Order dated 25.3.2011 of the High

Court of Judicature at Allahabad, U.P. in Special Appeal No. 281 of 2011.

C.S. Vaidyanathan, P.N. Misra, Ashok Khare, C.L. Pandey, R. Venkataramani, T.P. Singh, V.B. Singh, Yatish Mohan, Vinita Y. Mohan, Manish Goyal, Pooja, C.D. Singh, E.C. Vidya Sagar, Piyush Sharma, Shailender, Prabhakar Awasthi, Sushil Mishra, Dr. I.B. Gaur, H.K. Puri for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. I.A. No.4 – Application for impleadment is allowed.

2. Leave granted.

3. This appeal is directed against the judgment and final order dated 25.03.2011 passed by the Division Bench of the High Court of Judicature at Allahabad in Special Appeal No. 281 of 2011 whereby the Division Bench confirmed the order dated 22.02.2011 passed by the learned Single Judge and the order dated 24.07.2010 passed by the Assistant Registrar, Firms, Societies & Chits, Allahabad, who cancelled the proceedings related to amendments registered on 30.05.2007.

4. **Brief facts:**

(a) The appellant-Allahabad High School Society (hereinafter referred to as "the Society") was established in the year 1861 and was registered on 09.02.1888 under the U.P. Societies Registration Act, 1860 (hereinafter referred to as "the Act"). According to the constitution of the Society, it was established and registered with the object to advance the cause of Christian education in Allahabad, according to the teaching of the Church of England as by law established, especially amongst the children of the European and Anglo-Indian population, in conformity with, and agreeably to, the provisions of the Rules of the Allahabad High Schools Society, 1952 (in short 'the Rules'). The memorandum of the Society contains various clauses which includes that the Society shall consist of the Bishop of Lucknow and of other Members not exceeding

23, three of whom shall be respectively the Senior Chaplain for the time being of the Church of England at Allahabad, the Commissioner for the time being of the Allahabad Division and the Collector for the time being of the Allahabad District. The affairs of the Society shall be managed by all the Members of the Society that the Bishop of Lucknow, the Honorary Secretary and the Honorary Treasurer of the Society, shall have the authority to execute all contracts and deeds on behalf of the Society. The management of the Girls' School shall be conducted by a Standing Committee of all the lady Members of the Society and the management of the Boys' School shall be conducted by a Standing Committee of all the men who are Members of the Society. These Schools shall be subject to the inspection of the Government and of the Diocesan Council and make such returns as may be required by the Diocesan Council from time to time.

(b) On 28.05.2007, Rules, Constitution and Bye-laws of the Society, in question, were amended, which were registered on 30.05.2007 and the above-said information was also communicated to the Assistant Registrar, Firms, Societies & Chits, Allahabad. Since several objections were raised about the amendments made on 28.05.2007, the Assistant Registrar, who is the competent authority under the Act, after analyzing all the materials with reference to various clauses of memorandum, had concluded that the amendments were made arbitrarily, unlawfully and without following the democratic process, and in contravention of the provisions of the Act and the Rules and, therefore, by order dated 24.07.2010, cancelled the registration of the proceedings related to amendments registered on 30.05.2007, under Section 12D(b) of the Act, in pursuance of notice issued under Section 12D(1) of the Act. In the same order, the Assistant Registrar issued direction to the Bishop, Diocese of Lucknow, who is an ex-officio member of the Society and Chairman of the Governing Body under the Rules, to convene a General Body Meeting, after informing all the Members about the present situation and circumstances

and reasons regarding amendments to the Rules to comply with Rule 11 of the 1952 Rules and to form a Governing Body and present the same.

(c) The above order of the Assistant Registrar was challenged by the appellant-Society before the learned Single Judge of the High Court of Allahabad in Civil Misc. Writ Petition No. 46551 of 2010. The learned Single Judge, after going into the merits of the claim with reference to statutory provisions and all other relevant materials, vide his order dated 22.02.2011, confirmed the order passed by the Assistant Registrar and dismissed the writ petition filed by the Society.

(d) Aggrieved by the order of the learned Single Judge, the Society filed Special Appeal No. 281 of 2011 before the Division Bench of the High Court assailing the correctness of the judgment and order dated 22.02.2011. The Division Bench, after considering the rival claims and taking note of the basic and core objects of the Society to impart Christian education in Allahabad and neighbouring areas, by judgment and order dated 25.03.2011, confirmed the orders passed by the learned Single Judge and the Assistant Registrar, consequently, dismissed the special appeal being devoid of any merits. The said order is under challenge in this appeal by way of special leave.

5. Heard Mr. C.S. Vaidyanathan, learned senior counsel for the appellant-Society, Mr. R. Venkataramani, learned senior counsel for respondent No.3 and Mr. T.P. Singh, learned senior counsel for the impleaded party.

6. In view of the various proceedings, orders by the authorities under the Act and the decision of the learned Single Judge, the Division Bench and this Court after taking note of the fact that the Assistant Registrar had issued a direction to the Chairman of the Governing Body to convene a fresh General Body Meeting after notifying all the Members about the

present situation and circumstances and reasons as per the Rules and take a fresh decision regarding amendments to the Rules, we are of the view that it is not necessary to refer all those factual details and earlier orders.

7. The points for consideration in this appeal are whether the Assistant Registrar was justified in cancelling the amendments and permitting the Chairman, Governing Body, to convene fresh meeting and take a decision as per the Rules and whether the learned Single Judge and the Division Bench of the High Court have committed any error in confirming the said order?

8. It is not in dispute that the Assistant Registrar of the Society issued certain show cause notices to the appellants which were challenged by filing Civil Misc. Writ Petition No. 9598 of 2010. When notices dated 02.02.2010 and 11.02.2010 were issued to the Society, they filed the said writ petition praying for issuance of a writ in the nature of *certiorari* for quashing the same. The High Court, after finding that it would be appropriate to adjudicate the matter by the relevant authority on the basis of relevant records whether the amendments made in the bye-laws by the appellants were valid or not and whether the object of the Society meaning in the initial bye-laws has been changed or not or whether it is against public policy, all these have to be adjudicated on the basis of the show cause notices and it will be inappropriate to go into the correctness of the same at this stage, dismissed the writ petition vide order dated 16.04.2010 as not maintainable and directed the Registrar to decide the dispute between the parties after affording opportunity to the appellants as well as the respondents-objectors.

9. The appellants, not satisfied with the above order of the learned Single Judge, filed Special Appeal No. 615 of 2010 before the Division Bench which was dismissed on 20.05.2010 observing that there was a fraud, manipulation and documents

have been forged.

10. The following discussion and conclusion of the Division Bench about Mr. C.V. Innis, functioning as Secretary of the Society are relevant:

> "Mr. Cedric Valentine Innis, was born on 18.09.1948. He is a CNI CHRISTIAN (Anglo-Indian). He was appointed as Principal of the BHS on 12.01.1988 by the Chairman of the Society/The Bishop of Lucknow, Diocese of Lucknow, C.N.I. He took charge on 15.03.1988. He was confirmed after one year w.e.f. 15.03.1989. At the time of his appointment as Principal the age of superannuation of Principal BHS had already been enhanced from 58 years to 60 years. The age of superannuation was enhanced on the recommendation of Diocesan Education Board which had resolved on 10.01.1985 to fix the retirement age of the Principals of the English medium Schools, governed by the Anglo-Indian Education Code, of the Diocese of Lucknow to sixty years. The proviso permitted yearly extensions up to a maximum of five years. The Society in the Governing Body meeting held on 12.12.1985 accepted and adopted the Diocesan Education Board Resolution dated 10.01.1985.
>
> The Predecessor of Mr. C.V. Innis, retired at the age of 60 years. The age of superannuation of the teaching staff was enhanced in the meeting dated 23.11.2006 from 58 years to 62 years. In the proceedings of the meeting dated 23.11.2006, it had not been mentioned as to whether the meeting was a Governing Body Meeting or an Annual General Meeting. There was no agenda for enhancing the age of superannuation. The proceedings of the meeting dated 23.11.2006 filed as Annexure SRA-II at Page 70 is a forged document as it mentions enhancement in age of superannuation of management staff and non-teaching staff whereas in the original proceedings of 23.11.2006 produced by the counsel for the appellant only the age of superannuation of the teaching staff had been enhanced. A question arises that what was the need for forgery for enhancing the age of superannuation. The answer appears to be simple. The appellants wanted to hide under the carpet that Principal's age of superannuation had already been enhanced by the Society on 12.12.1985 and they wanted to hide the control of Diocese of Lucknow.
>
> From the aforesaid discussion, it appears that the meeting dated 23.11.2006 was illegal being in violation of Rule 11 and in such a meeting age of superannuation could not be enhanced. The enhancement made in the meeting dated 23.11.2006 would not confer any right on Mr. C.V. Innis the Principal of BHS. His age of superannuation was 60 years and there being no material on record about any extension of service granted to him, it appears that he retired from the post of Principal of BHS in September, 2008."

11. Against the dismissal of the Special Appeal No. 615 of 2010, the Society approached this Court by way of special leave petition and the same was dismissed vide order dated 15.06.2010 with an observation that the Assistant Registrar is free to pass an order on merits including the question of jurisdiction in accordance with law.

12. With this background, we have to verify whether the order of the Assistant Registrar dated 24.07.2010 holding that all the proceedings were illegal/frivolous or not. The Assistant Registrar, in his order, has also held that the Members of the Society had died prior to 1997 and there was manipulation in the record. It is pertinent to refer the discussion and ultimate conclusion by the Assistant Registrar which reads as under:

> "After going through the complaints pertaining to the amendment made by the Bishop and other people, evidence and documents presented as had been

mentioned above, proceedings for brining fraudulent amendments are found to be contrary to the registered bye laws as well as directions given by the Assistant Registrar to comply with the provisions of the Societies Registration Act, 1860. In spite of several opportunities, the applicant has failed to prove the veracity and the genuineness of the proceedings. It is also obvious through the documents that neither list nor balance sheet has been produced regularly every year under Section 4(1) of the Act. From the documents produced, it is also clear that after complaints were made and information as sought regarding renewal, Shri C.V. Innes has sought to deposit the requisite fee under Section 3A(5) of the Act.

In the list relating to managing committee as submitted,15 lists have been submitted of members of the managing committee from the year 1977-78 to year 1997-98; in the said list 3 persons have been mentioned as occupying the post of Secretary; the reasons for the same are not clear. Along with the documents submitted, an affidavit of Shri C.V. Innes has also been submitted in which it is stated that all persons who were officers and members of the society prior to 1997 are dead. In such a situation it is not clear how the identity of the society continued to exist. If all the members were dead then it is not clear how new members were elected and whether they were elected under rules or not….."

Apart from this, the Assistant Registrar has also specifically concluded that the amendments to the proceedings were made arbitrarily, unlawfully and decisions were taken without following the democratic process and in contravention of the provisions of the Act and the Rules. After arriving at such factual conclusion based on appreciation of acceptable materials, the Assistant Registrar cancelled the registration of proceedings related to the amendments registered on 30.05.2007 under Section 12D(b) of the Act.

13. The said order of the Assistant Registrar dated 24.07.2010 was challenged in the writ petition which was dismissed by the learned Single Judge vide order dated 22.02.2011 pointing out that the alleged Secretary of the appellants Mr. Innis has no business to continue in the said post. It is apt and relevant to quote the following conclusion of the learned Single Judge which reads as under:

"Most surprising feature in the present case is that Secretary of the Society is no one else than the Principal of the institution himself. He has been nominated as Secretary by virtue of being ex-officio Member. In order to perpetuate himself in the society and in the institution being fully aware of the fact that he was going to attain the age of superannuation and his Secretaryship would also automatically come to an end, an attempt was made by him to get his age extended and on the strength of the same to continue as Secretary of the society. After attaining the age of superannuation, Principal of the institution is not at all entitled to continue as Secretary. Specific mention has been made that petitioner No. 2 was Secretary by virtue of being Principal, who happens to be ex-officio member, and once he attained the age of superannuation as Principal, then he could be elected as Secretary only when he was valid member of the society, but at no point of time he had ever been enrolled as valid member of the general body of the society. This specific statement of fact has not been disputed in the rejoinder affidavit. Once this is the factual situational in respect of status of petitioner No. 2 as Principal of the institution has already attained the age of superannuation and this fact has not been substantiated before this Court as to in what way and manner he had been enrolled as member of the general body of the society, then legitimately petitioner No. 2 has no grievance. The Bishop who had accepted the request to act as Chairman along with petitioner No. 2 has already washed his sin, by resigning and submitting letter

on 29.07.2010, regretting therein his deeds. These averments have been mentioned in paragraph 4(d) of the counter affidavit and said specific averments have not at all been replied."

14. It was also highlighted and demonstrated that there was no quorum in the meeting held on 28.05.2007 in which amendments had been carried out. It is seen that four Officers and five members of the Society were present in the meeting. One ex-officio member and four members were absent. There were total 14 (fourteen) members of the Society. In the Special General Meeting held on 28.05.2007 only nine members were present. Three quarter member of 14 members would be 10.5 members. Therefore, according to Rule 38 of the Rules, at least 10 members were required to be present at the Special General Meeting held on 28.05.2007. In the absence of quorum laid down by Rule 38, neither the amendments could be passed in the Special General Meeting of the Society nor could the amendments made be registered by the Assistant Registrar. The above details, as noted in the order of the learned Single Judge clearly show that there was no quorum in the meeting held on 28.05.2007 in which the amendments had been carried out.

15. It was also demonstrated that manipulations/ manoeuvrings is writ large that Principal in connivance with the outgoing Bishop, in order to perpetuate themselves in the Society have made amendments for their benefit and to the disadvantage of the Society and therein Dioces Education Board and the Bishop have been deliberately kept at bay. After saying so, the learned Single Judge correctly concluded that in such a situation and in this background, any interference with the order of the Assistant Registrar would amount to perpetuating the illegality and subscribing to apparent illegality committed.

16. The above-said order of the learned Single Judge was challenged before the Division Bench by way of Special Appeal

No. 281 of 2011 which was also dismissed on 25.03.2011. The Bench has also arrived at a conclusion that there was interpolation and forgery in the records. The basic feature of the Society along with its primary object had been altered by way of amendments to the Rules. The Division Bench has accepted that the Assistant Registrar had the jurisdiction not only to deal with the validity of the convening of the meeting but also to examine the import of the resolution regarding the amendments of the Rules. The Division Bench has also agreed with the conclusion that the appellant No. 2 was not a member of the Society but was holding the office of the Secretary by virtue of being the Principal of the Boys' High School, Allahabad.

17. The Division Bench has also accepted that the meetings in which the amendments were carried out had not been validly convened. The Division Bench has pointed out that the minutes of these three meetings have also been registered on 30.05.2007 by the Assistant Registrar and by the impugned order dated 24.07.2010, he cancelled the registration. Ultimately, the Division Bench has rightly concluded that all other proceedings had been illegal and the meetings were in violation of the statutory provisions. The Division Bench, in view of its findings held that the meetings itself had not been validly convened as per the Rules of the Society and concluded that the orders passed by the Assistant Registrar and the learned Single Judge do not warrant any interference.

18. It is also brought to our notice that a criminal prosecution has also been lodged against the appellant No. 2 by filing an FIR dated 09.03.2010 in Crime No. 54 of 2010 under Sections 467, 468, 471, 420 and 409 IPC in which chargesheet has already been filed on 11.07.2010 and the court has also taken cognizance of the same.

19. In the light of the factual findings by the authority concerned-the Assistant Registrar, affirming the same by learned Single Judge and Division Bench, it is impermissible

for this Court to exercise jurisdiction under Article 136 of the Constitution. It is relevant to point out that the Assistant Registrar, in his order dated 24.07.2010 itself permitted the Bishop, Diocese of Lucknow, who is an ex-officio member of the Society and Chairman of the Governing Body under the Rules, to convene a general body meeting after informing all the members about the present situation and circumstances and reasons, there is no valid ground for interference by this Court. Consequently, appeal fails and the same is dismissed.

N.J. Appeal dismissed.

KALYANESHWARI

v.

U.O.I. & ORS.

(Writ Petition (C) No. 260 of 2004)

MAY 12, 2011

[S.H. KAPADIA, CJI., K.S. RADHAKRISHNAN AND SWATANTER KUMAR, JJ.]

Contempt of Courts Act, 1971 – Contempt petition against public interest litigant-NGO and its official – On the ground that they had abused the process of law by filing petitions under the guise of public interest, against one business rival at the behest of another – Issuance of show cause notice – Contemners hardly disputed the observations made by Supreme Court in the show cause notice – Contemners only attempted to tender an unconditional apology for their acts and omissions – Held: Though unconditional apology was tendered but the bonafide and intent of the contemnors tendering such an apology is not certain – Contemnors are liable to be punished for their offensive and contemptuous behaviour which undermined the dignity of the courts of law and justice administration system and also prejudicially affected the rights of parties who were not even impleaded as parties in the public interest litigation – Certain directions issued – Administration of Justice.

Contempt of Court – Power of Court to punish for contempt – Explained.

Contempt of Court – Circumstances where court can reject an apology that has been tendered – Explained.

'BK', Secretary of the petitioner NGO had filed a writ petition before the Gujarat High Court and prayed that the respondents' asbestos manufacturing unit be closed and

demolished. The same was rejected since the petition had been filed at the behest of rival industrial groups and was not *bona fide.* The said judgment of the Gujarat High Court had attained finality but 'BK' disregarding the said fact filed a Writ Petition before this Court to brush aside the judgment of the High Court stating that the Gujarat High Court had failed to apply its mind. This Court disposed of the Writ Petition with certain directions.

Besides disposing of the Writ Petition, the Court also noticed the contemptuous behaviour of the petitioner NGO and its officials and issued show-cause notice to the petitioner NGO and its Secretary 'BK' in his personal capacity, to show cause why proceedings under the Contempt of Courts Act, 1971 be not initiated against them. 'BK' filed a response affidavit on behalf of the petitioner NGO as well as himself and tendered his unconditional apology and prayed for dropping of the contempt proceedings.

Issuing certain directions, the Court

HELD: 1.1 The apology tendered even at the outset of proceedings has to be *bona fide*, should demonstrate repentance and sincere regret on the part of the contemner lest the administration of justice is permitted to be crudely hampered with immunity by the persons involved in the process of litigation or otherwise. An apology which lacks *bona fides* and is intended to truncate the process of law with the ulterior motive of escaping the likely consequences of such flagrant violation of the orders of the Court and disrespect to the administration of justice, cannot be accepted. [Para 6][782-H; 783-A-C]

Prem Surana v. *Additional Munsif and Judicial Magistrate* **(2002) 6SCC 722: 2002 (1) Suppl. SCR 524 – referred to.**

1.2 The rule of law has to be maintained whatever be the consequences. The 'welfare of people' is the supreme law and this enunciates adequately the ideal of 'law'. This could only be achieved when justice is administered lawfully, judiciously, without any fear and without being hampered or throttled by unscrupulous elements. The administration of justice is dependent upon obedience or execution of the orders of the Court. The contemptuous act which interfered with administration of justice on one hand and impinge upon the dignity of institution of justice on the other, bringing down its respect in the eye of the commoner, are acts which may not fall in the category of cases where the Court can accept the apology of the contemner even if it is tendered at the threshold of the proceedings. [Para 7] [783-D-F]

Aligarh Municipal Board v. Ekka Tonga Mazdoor Union **(1970) 3 SCC 98;** *M.Y. Shareef v. The Hon'ble Judges of the High Court of Nagpur* **AIR 1955 SC 19: 1955 SCR 757;** *L.D. Jaikwal v. State of U.P.* **(1984) 3 SCC 405: 1984 (3) SCR 833;** *Advocate-General, State of Bihar* v. *M/s. Madhya Pradesh Khair Industries* **(1980) 3 SCC 311 – referred to.**

Black's Law Dictionary **8th edn., 1999 – referred to.**

1.3 Making of scandalous allegations against the judicial system always needs to be discouraged. Moreover, invoking the extraordinary jurisdiction of the constitutional Courts allegedly in the name of public interest and using it as a platform for lowering the dignity of the institution of justice is an act which besides being contemptuous also is undesirable. [Para 13] [785-A-B]

M.B. Sanghi Advocate v. *High Court of Punjab and Haryana* **(1991) 3SCC 600: 1991 (3) SCR 312 – relied on.**

2.1 In the instant case, the contemner certainly abused the process of law by filing petitions, under the

guise of public interest, against one business rival at the behest of another. The writ petition filed by him before this Court was obviously filed with the intent of creating impediments in the establishment and operation of industrial units dealing with the mining, manufacture and production of Asbestos and its products which are carrying out their operations in accordance with law and without infringing the rights of any person. [Para 15] [785-F-G]

Consumer Education and Research Center* v. *Union of India* **(1995)SCC 42: 1995 (1) SCR 626; *B.K. Sharma* v. *Union of India* **AIR 2005 Guj 203 – referred to.**

2.2 The respondent-contemners, in their reply-affidavit, have hardly disputed the observations made by this Court in the show cause notice issued to them. They have only attempted to tender an unconditional apology for their various acts and omissions. The bonafide and intent of the respondents in tendering such an apology is not certain. The examination of the factual matrix of the instant case and conduct of the respondent-contemners, particularly the reply filed by them, places it beyond ambiguity that they have committed the following acts and omissions intentionally, which have undermined the dignity of this Court and the justice delivery system:

(a) The contemners have abused the process of law to the extent that it impinged upon the dignity of the justice delivery system as well as prejudicially affected the rights of other private parties.

(b) The contemners have withheld material facts from the Court which were in their personal knowledge. While withholding such material facts, they have also persisted upon filing petitions after petitions in the name of public interest with somewhat similar reliefs.

(c) The contemner, made irresponsible remarks and statements against the High Court without any justifiable cause in law.

(d) The public interest litigation instituted by the contemner lacks *bona fide* and, in fact, was instituted at the behest of a rival industrial group which was interested in banning of the activity of mining and manufacturing of asbestos and its products by obtaining certain orders and directions from this Court. A definite attempt was made by the contemners to secure a ban on these activities with ultimate intention of increasing the demand of cast and ductile iron products as it has come on record that they are some of the suitable substitutes for asbestos. Thus, it was litigation initiated with ulterior motive of causing industrial imbalance and financial loss to the industry of asbestos through the process of court.

(e) The contemner has also filed petitions and affidavits either with incorrect facts or with facts which even to the knowledge of the contemner were not true. [Para 3 and 22] [702-B-C; 787-G-H; 788-A-H; 789-A-C]

2.3 The Court has to keep in mind that there is a duty upon the courts to eliminate the cause of such litigation. The maxim *Justitia est duplex, viz., severe puniens, et vere praevenniens* by its very virtue imposes dual obligation upon the Courts of considering various facets of severe punishment on the one hand and really and efficiently preventing crime on the other, with the ultimate object of maintaining the dignity of law. In other words, the Court has to balance the quantum of punishment keeping in view the seriousness of the offence committed by the contemners. Repeated contemptuous behaviour of the contemners before the High Court as well as this Court

certainly needs to be deprecated and punished in accordance with law. Even if somewhat liberal view were to be taken still it is the duty of this Court to ensure that such unscrupulous and undesirable public interest litigation be not instituted in the Courts of law so as to waste the valuable time of the Courts as well as preserve the faith of the public in the justice delivery system. [Para 23] [789-D-F]

2.4 The contemners when asked to address the quantum of sentence, again tendered an apology but none of the contemptuous behaviour spelled out in the order dated 21st January, 2011 was denied by the contemners at any stage of the proceedings or even in their reply affidavit to the show cause notice. Having given due consideration to all the relevant factors and behaviour of the contemners, the contemners are liable to be punished for their offensive and contemptuous behaviour which has undermined the dignity of the Courts of law and justice administration system as well as prejudicially affected the rights of third parties who, in fact, were not even impleaded as parties in the public interest petitions. They have squandered the valuable time of this Court which could have been devoted more fruitfully in dealing with the pending cases and matters of greater urgency and importance. [Paras 24 and 25] [789-G-H; 790-A-C]

2.5 The contemner is awarded sentence of simple imprisonment till rising of this Court. A sentence of fine of Rs.2,000/- is also imposed on the contemners, to be paid within one week from today. In default, he would undergo simple imprisonment for a period of one week. A cost of Rs.1,00,000/- is imposed upon the contemners to be paid to the S.C. Legal Services Committee. The Registrar of Societies, Government of NCT of Delhi is directed to take action against the contemner-society in

accordance with law and submit its action-taken report, interim or final, to this Court within six weeks from today. [Para 26] [790-D-G]

Case Law Reference:

[2002] 1 Suppl. SCR 524	**Referred to.**	**Para 6**
(1970) 3 SCC 98	**Referred to.**	**Para 10**
[1955] SCR 757	**Referred to.**	**Para 11**
[1984] 3 SCR 833	**Relied on.**	**Para 12**
[1991] 3 SCR 312	**Referred to.**	**Para 13**
[1995] 1 SCR 626	**Referred to.**	**Para 16**
AIR 2005 Guj 203	**Referred to.**	**Para 17**
(1980) 3 SCC 311	**Referred to.**	**Para 21**

CIVIL ORIGINAL JURISDICTION : Suo Motu Contempt Petition In Writ Petition (C) No. 260 of 2004.

Ashish Mohan, K.K. Mohan for the Petitioner.

H.P. Raval, Mohan Parasaran, ASG, Harish Chandra, S.W.A. Qadri, Rekha Pandey, S.S. Rawat, Mukesh Verma, Saima Bakshi, Varuna Bhandari Gugnani, D.K. Thakur, C.K. Sharma, Anil Katiyar, A.K. Sharma, D.S. Mehra for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. In our detailed order dated 21st January, 2011, besides disposing of the Writ Petition No. 260 of 2004 with the directions as contained in paragraph 16 of that order, we noticed the contemptuous behaviour of the petitioner NGO and its officials and had issued show-cause notice to the petitioner Kalyaneshwari and its Secretary Shri B.K. Sharma, in his personal capacity, which reads as under:

"Keeping in view the conduct of the petitioner, particularly, B.K. Sharma, we hereby issue notice to him as well as the petitioner to show cause why proceedings under the Contempt of Courts Act, 1971 be not initiated against them and/or in addition/alternative, why exemplary cost be not imposed upon them. Further, we also call upon the petitioner to show cause why the Registrar, Government of NCT, Delhi be not directed to take action against them in accordance with law."

2. In response to this show-cause notice, Shri B.K. Sharma had filed a response affidavit dated 22nd March, 2011 on behalf of Kalyaneshwari as well as himself. This is a very short affidavit of seven paragraphs in which the petitioner has rendered his unconditional apology and prayed before this Court not to initiate proceedings under the Contempt of Courts Act, 1971. He further prayed to discharge the notice of contempt and drop proceedings for imposition of cost and revocation of license and registration of the NGO Kalayneshwari. Relevant portion of the said affidavit reads as under:

"2. THAT deponent herein tenders his unconditional apology to this Hon'ble Court with folded hands concerning all actions in respect of which this Hon'ble Court has been pleased to issue Show Cause Notice as to why proceedings under the Contempt of Courts Act, 1971 be not initiated against the Petitioner and the deponent herein and further as to why exemplary costs be not imposed upon them and their license be not cancelled/revoked.

3. THAT deponent herein unconditionally withdraws each and every averment and allegation made by the Petitioner in respect of the Judgment of the Hon'ble high Court of Gujarat dated 9.12.2004 passed in Special Civil Application Nos. 14460, 14813 and 14819 of 2004 titled B.K. Sharma v. Union of India and others reported in AIR 2005 Gujarat Page 203. Petitioner further withdraws all such pleadings made in this regard in the affidavit filed by

the petitioner through deponent in response to the order dated 13.8.2010 passed by the Hon'ble Court as well as all the consequent proceedings."

3. There is no doubt that at the very initial stage, the respondents have tendered apology and prayed for dropping of the contempt proceedings. We are not quite certain as to the *bona fide* and intent of the respondents in tendering such an apology. For a Court to accept the apology in a contempt action, it is required that such apology should be *bona fide* and in actual repentance of the conduct which invited initiation of contempt proceedings. Furthermore, the conduct should be such which can be ignored without compromising the dignity of the Court. 'Contempt' is disorderly conduct of a contemner causing serious damage to the institution of justice administration. Such conduct, with reference to its adverse effects and consequences, can be discernibly classified into two categories: one which has a transient effect on the system and/or the person concerned and is likely to wither away by the passage of time while the other causes permanent damage to the institution and administration of justice. The latter conduct would normally be unforgivable.

4. Institutional tolerance which the judiciary possesses, keeping in mind the larger interest of the public and administration of justice, should not be misunderstood as weakness of the system. Maintaining the magnanimity of law is the linchpin to the wheels of justice. Therefore, in certain cases, it would be inevitable for the Court to take recourse to rigours of the statute.

5. It is the seriousness of the irresponsible acts of the contemners and the degree of harm caused to the institution and administration of justice which would decisively determine the course which the Court should adopt, i.e. either drop the contempt proceedings or continue proceedings against the contemner in accordance with law.

6. The apology tendered even at the outset of proceedings has to be *bona fide*, should demonstrate repentance and sincere regret on the part of the contemner lest the administration of justice is permitted to be crudely hampered with immunity by the persons involved in the process of litigation or otherwise. An apology which lacks *bona fides* and is intended to truncate the process of law with the ulterior motive of escaping the likely consequences of such flagrant violation of the orders of the Court and disrespect to the administration of justice cannot be accepted. In the case of *Prem Surana* v. *Additional Munsif and Judicial Magistrate* [(2002) 6 SCC 722] this Court sternly reprimanded a contemner who had slapped the Presiding Officer in open court and held that "the slap on the face of the judicial officer is in fact a slap on the face of the justice delivery system in the country and as such question of acceptance of any apology or an undertaking does not and cannot arise, neither can there be any question of any leniency as regards the sentence."

7. The rule of law has to be maintained whatever be the consequences. The 'welfare of people' is the supreme law and this enunciates adequately the ideal of 'law'. This could only be achieved when justice is administered lawfully, judiciously, without any fear and without being hampered or throttled by unscrupulous elements. The administration of justice is dependent upon obedience or execution of the orders of the Court. The contemptuous act which interfered with administration of justice on one hand and impinge upon the dignity of institution of justice on the other, bringing down its respect in the eye of the commoner, are acts which may not fall in the category of cases where the Court can accept the apology of the contemner even if it is tendered at the threshold of the proceedings.

8. The Black's Law Dictionary (8th edn., 1999) defines 'Contempt' as, "Conduct that defies the authority or dignity of a Court or legislature." It also adds that "Because such conduct interferes with the administration of justice, it is punishable."

9. This special jurisdiction has to be unquestionably invoked when the offending acts are intentional by the contemner at the cost of eroding the system of administration of justice which practice is necessarily required to be deprecated at the very initial stage.

10. In the case of *Aligarh Municipal Board* v. *Ekka Tonga Mazdoor Union* [(1970) 3 SCC 98], this Court said that it is the seriousness of the irresponsible acts of the contemners and the degree of harm caused to the administration of justice which would decisively determine whether the matter should be tried as a criminal contempt or not.

11. In the case of *M.Y. Shareef* v. *The Hon'ble Judges of the High Court of Nagpur* [AIR 1955 SC 19], this Court while explaining the requirements of genuine apology held as under:

> "45…..With regard to apology in proceedings for contempt of court, it is well-settled that an apology is not a weapon of defense to purge the guilty of their offence; nor is it intended to operate as a universal, panacea, but it is intended to be evidence of real contriteness."

12. Similar observations were made by this Court in the case of *L.D. Jaikwal* v. *State of U.P.* [(1984) 3 SCC 405], wherein this Court held as under:

> "6. We do not think that merely because the appellant has tendered his apology we should set aside the sentence and allow him to go unpunished. Otherwise, all that a person wanting to intimidate a Judge by making the grossest imputations against him has to do, is to go ahead and scandalize him, and later on tender a formal empty apology which costs him practically nothing. If such an apology were to be accepted, as a rule, and not as an exception, we would in fact be virtually issuing a "licence" to scandalize courts and commit contempt of court with impunity….."

13. Making of scandalous allegations against the judicial system always needs to be discouraged. Moreover, invoking the extraordinary jurisdiction of the constitutional Courts allegedly in the name of public interest and using it as a platform for lowering the dignity of the institution of justice is an act which besides being contemptuous also is undesirable. This Court, in the case of *M.B. Sanghi Advocate* v*. High Court of Punjab & Haryana* [(1991) 3 SCC 600], has cautioned against the growing tendency of maligning the reputation of judicial officers by disgruntled elements who fail to secure desired orders. While observing that it was high time that such tendency is to be nipped in the bud, this Court said, "such causes raise larger issues touching the independence of not only the concerned Judge, but the entire institution… It is high time that we realize that the much cherished judicial independence has to be protected not only from the executive or the legislature, but also from those who are an integral part of the system."

14. We have referred to the above judgments of this Court with an intention to indicate the callous attitude of the contemners despite the directions of this Court in paragraph 16 of its order dated 21st January, 2011. Such contemptuous actions of the contemners have increased with passage of time rather than being reduced.

15. In the present case, Shri B.K. Sharma has certainly abused the process of law by filing petitions, under the guise of public interest, against one business rival at the behest of another. The writ petition filed by him before this Court was obviously filed with the intent of creating impediments in the establishment and operation of industrial units dealing with the mining, manufacture and production of Asbestos and its products which are carrying out their operations in accordance with law and without infringing the rights of any person.

16. This Court in the case of *Consumer Education and Research Center* v. *Union of India* [(1995) 3 SCC 42], had pronounced a detailed judgment giving directions in relation to

various matters pertaining to operation of units engaged in manufacture and production of asbestos and its products. This resulted in presentation of a Bill in this regard by the Central Government before the *Rajya Sabha*. Despite the detailed directions already given in the above judgment of this Court and introduction of a Bill before the Parliament, Shri B.K. Sharma persisted in filing petitions after petitions praying for complete ban on manufacture, import and use of asbestos to secure unlawful closure of asbestos industry for the purpose of settling business rivalry.

17. Sh. B.K. Sharma had filed a writ petition before the Gujarat High Court titled as *B.K. Sharma* v*. Union of India,* [AIR 2005 Guj 203] in which every attempt was made to prevent respondent No.5 in that case, M/s. Sopai Ltd., from completing construction of its asbestos production unit and proceeding further with any activity. In fact, it was prayed that construction raised by them be demolished which was declined by the Gujarat High Court. The Gujarat High Court also declined to accept the prayer for closure of that asbestos manufacturing unit and held in specific terms that the petition had been filed at the behest of rival industrial groups and lacks *bona fide*.

18. Shri B.K. Sharma, disregarding the fact that this judgment of the Gujarat High Court had attained finality on whole factual matrix, filed Writ Petition No. 260 of 2004 before this Court and tried to brush aside the judgment of the Gujarat High Court stating, "Gujarat High Court had failed to apply its mind". Besides making such irresponsible statement against the judgment of a constitutional Court, Shri B.K. Sharma miserably failed to explain and clarify as to why the present petition was filed in face of the judgment of this court in the case of *Consumer Education and Research Centre* (supra).

19. Shri B.K. Sharma even went to the extent of filing incorrect affidavits before this Court and the Court was compelled to pass an order on 27th August, 2010 directing him

to explain his conduct in reference to the observations made by the Gujarat High Court in the said judgment.

20. It was argued before the Court, by several of the respondents, on different occasions that the whole purpose of filing the present writ petition was to secure a ban on mining and manufacture of asbestos which would inevitably result in increase in the demand of cast and ductile iron products as they are a suitable substitute for asbestos. It was, thus, argued that the petition before the Gujarat High Court as well as this petition has been filed at the behest of the industrial group engaged in production of cast and ductile iron products.

21. It is a settled principle of law that contempt is a matter primarily between the Court and the contemner. The Court has to take into consideration the behaviour of the contemner, attendant circumstances and its impact upon the justice delivery system. If the conduct of the contemner is such that it hampers the justice delivery system as well lowers the dignity of the Courts, then the Courts are expected to take somewhat stringent view to prevent further institutional damage and to protect the faith of the public in the justice delivery system. In the case of *Advocate-General, State of Bihar* v. *M/s. Madhya Pradesh Khair Industries* [(1980) 3 SCC 311], this Court took the view that abuse of the process of court, calculated to hamper the due course of judicial proceedings or the orderly administration of justice, is contempt of court. Where the conduct is reprehensible as to warrant condemnation, then the Court essentially should take such contempt proceedings to their logical end. There cannot be mercy shown by the Court at the cost of injury to the institution of justice system.

22. The respondent-contemners, in their reply-affidavit, have hardly disputed the observations made by this Court in the show cause notice issued to them. They have only attempted to tender an unconditional apology for their various acts and omissions which certainly were prejudicial to the administration of justice and have even adversely affected the

rights of the other parties in the disguise of a petition filed in public interest. The contemners have abused the process of law by instituting various petitions under the garb of 'Public Interest Litigation' and have succeeded, at least partially, in damaging the asbestos industry in the country. They even withheld the facts from the Court which were within their personal knowledge. The examination of the factual matrix of the present case and conduct of the respondent-contemners, particularly the reply filed by them, places it beyond ambiguity that they have committed the following acts and omissions intentionally, which have undermined the dignity of this Court and the justice delivery system:

(a) The contemners have abused the process of law to the extent that it impinged upon the dignity of the justice delivery system as well as prejudicially affected the rights of other private parties.

(b) The contemners have withheld material facts from the Court which were in their personal knowledge. While withholding such material facts, they have also persisted upon filing petitions after petitions in the name of public interest with somewhat similar reliefs.

(c) The contemner, B.K. Sharma, has made irresponsible remarks and statements against the Gujarat High Court without any justifiable cause in law.

(d) The public interest litigation [Writ Petition (C) No. 260 of 2004] instituted by the contemner lacks *bona fide* and, in fact, was instituted at the behest of a rival industrial group which was interested in banning of the activity of mining and manufacturing of asbestos and its products by obtaining certain orders and directions from this Court. A definite attempt was made by the contemners to secure a

ban on these activities with ultimate intention of increasing the demand of cast and ductile iron products as it has come on record that they are some of the suitable substitutes for asbestos. Thus, it was litigation initiated with ulterior motive of causing industrial imbalance and financial loss to the industry of asbestos through the process of court.

(e) The contemner has also filed petitions and affidavits either with incorrect facts or with facts which even to the knowledge of the contemner were not true.

23. Despite this, the Court has to keep in mind that there is a duty upon the courts to eliminate the cause of such litigation. The maxim *Justitia est duplex, viz., severe puniens, et vere praevenniens* by its very virtue imposes dual obligation upon the Courts of considering various facets of severe punishment on the one hand and really and efficiently preventing crime on the other, with the ultimate object of maintaining the dignity of law. In other words, the Court has to balance the quantum of punishment keeping in view the seriousness of the offence committed by the contemners. Repeated contemptuous behaviour of the contemners before the Gujarat High Court as well as this Court certainly needs to be deprecated and punished in accordance with law. Even if we were to take somewhat liberal view, still it is the duty of this Court to ensure that such unscrupulous and undesirable public interest litigation be not instituted in the Courts of law so as to waste the valuable time of the Courts as well as preserve the faith of the public in the justice delivery system.

24. The contemners when asked to address the quantum of sentence, again tendered an apology but none of the contemptuous behaviour spelled out in our order dated 21st January, 2011 was denied by the contemners at any stage of the proceedings or even in their reply affidavit to the show cause notice.

25. Having given our due consideration to all the relevant factors and behaviour of the contemners, we have no hesitation in holding that the contemners are liable to be punished for their offensive and contemptuous behaviour which has undermined the dignity of the Courts of law and justice administration system as well as prejudicially affected the rights of third parties who, in fact, were not even impleaded as parties in the public interest petitions. They have squandered the valuable time of this Court which could have been devoted more fruitfully in dealing with the pending cases and matters of greater urgency and importance.

26. In these circumstances, we direct as follows:

(1) We order and award sentence of simple imprisonment till rising of this Court to the contemner, Shri B.K. Sharma.

(2) We also impose a sentence of fine of Rs.2,000/- on the contemners, to be paid within one week from today. In default, he shall undergo simple imprisonment for a period of one week.

(3) Lastly, we impose a cost of Rs.1,00,000/- upon the contemners to be paid to the S.C. Legal Services Committee.

(4) We also hereby direct the Registrar of Societies, Government of NCT of Delhi to take action against the contemner-society, namely Kalyaneshwari, in accordance with law and submit its action-taken report, interim or final, to this Court within six weeks from today.

N.J. Matter Pending.

B. KOTHANDAPANI

v.

TAMIL NADU STATE TRANSPORT CORPORATION LTD.

(Civil Appeal Nos. 4330-4331 of 2011)

MAY 12, 2011

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Motor Vehicles Act, 1988:

Compensation towards "permanent disability" – In a motor vehicle accident claimant-Foreman suffered partial loss of eye-sight and amputation of right hand finger – HELD: Tribunal rightly awarded compensation under the head "permanent disability" besides awarding compensation for loss of earning capacity.

The appellant, met with a motor vehicle accident as a result of which, besides other injuries, he suffered disability due to partial loss of eye-sight and amputation of middle finger of his right hand. He was a Foreman in a company and his monthly salary after deductions was Rs 3,295.28/- . The Motor Accident Claims Tribunal assessed the permanent disability to the extent of 85% and taking note of the age and vocation of the claimant, allowed him a compensation of Rs.5,05,053.45, which included Rs.1,50,000/- towards permanent disability. On appeal, the High Court set aside the award of Rs.1,50,000/- granted under the head of "permanent disability" holding that the claimant had been awarded a sum of Rs. 3 lakh towards the loss of earning capacity. It awarded a further sum of Rs.50,000/- in addition to the amount awarded by the Tribunal.

In the instant appeals filed by the claimant, the only question for consideration before the Court was: Whether

the appellant was entitled to a sum of Rs. 1,00,000/- towards "permanent disability" in addition to the amount awarded under the head "loss of earning capacity"?

Partly allowing the appeals, the Court

HELD: 1.1. It is true that the compensation for loss of earning power/capacity has to be determined based on various aspects including permanent injury/disability. At the same time, it cannot be construed that compensation cannot be granted for permanent disability of any nature. It cannot be disputed that apart from the fact that the permanent disability affects the earning capacity of the person concerned, undoubtedly, one has to forego other personal comforts and even for normal avocation they have to depend on others. In the case on hand, two doctors had explained the nature of injuries, treatment received and the disability suffered due to partial loss of eye-sight and amputation of middle finger in the right hand. At the time of accident, the claimant was working as a Foreman. Taking note of his nature of work, the partial loss of the eye sight and the loss of middle finger of the right hand not only affects his earning capacity but also affects normal avocation and day-to-day work. In such circumstances, the Tribunal was fully justified in granting a sum of Rs.1,50,000/- towards permanent disability.[para 12] [798-D-H; 799-A]

Ramesh Chandra vs. Randhir Singh & Ors. **1990 (3) SCR 1 = (1990) 3 SCC 723 – relied on.**

1.2. Considering the evidence of injured-claimant as PW-1 and two doctors as PWs. 2 and 3 coupled with the Disability Certificates and medical documents, the High Court was not justified in disallowing a sum of Rs.1,00,000/- from the total compensation of Rs.5,05,053.45 awarded by the Tribunal. The Corporation

is liable to pay Rs. 5,05,053.45 with interest as awarded by the Tribunal.[para 13] [799-B-C]

Cholan Roadways Corporation Ltd. vs. Ahmed Thambi and Others, **2006 (4) CTC 433 – cited.**

Case Law Reference:

2006 (4) CTC 433	**cited**	**para 10**
1990 (3) SCR 1	**relied on**	**para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4330-4331 of 2011.

From the Judgment & Order dated 13.12.2006 of the High Court of Judicature at Madras in C.M.A. No. 103 & 122 of 2011.

Vipin Nair, P.B. Suresh, Vivek Sharma (for Temple Law Firm) for the Appellant.

T. Harish Kumar for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are directed against the judgment and final order dated 13.12.2006 passed by the High Court of Judicature at Madras in C.M.A. Nos. 103 and 122 of 2001 in and by which the High Court modified the award of the Tribunal, i.e., from Rs. 5,05,053.45/- to Rs.4,05,053.45/- as compensation payable to the appellant-claimant.

3. **Brief facts:**

(a) The appellant-claimant sustained grievous injuries in a motor vehicle accident, which occurred on 21.05.1998 for which he made a claim before the Motor Accident Claims Tribunal,

Chennai (hereinafter referred to as "the Tribunal") in O.P. No. 3868 of 1998 for a sum of Rs. 12 lakhs as compensation. The Tribunal, after finding that the accident was caused due to the negligence of the driver of the Tamil Nadu State Transport Corporation (Villupuram Division-III), Kancheepuram (hereinafter referred to as "the Corporation"), by order dated 20.12.2000, quantified the compensation and passed an award for Rs.5,05,053.45.

(b) Aggrieved by the award of the Tribunal, the Corporation filed C.M.A. No. 103 of 2001 before the High Court of Madras challenging the quantum of compensation. The appellant-claimant also filed C.M.A. No. 122 of 2001 before the High Court for the enhancement of the compensation amount. Inasmuch as both the appeals arose from the same award of the Tribunal, the High Court heard and decided the appeals together and passed a common order on 13.12.2006 reducing the compensation to the extent of Rs.1,00,000/-. In other words, by the said order, the High Court allowed the appeal of the Corporation to the extent of Rs.1,00,000/- and dismissed the appeal of the claimant for enhancement of the compensation.

(c) Questioning the judgment and final order of the High Court, the claimant has filed the above appeals by way of special leave petitions before this Court praying for enhancement of compensation to the extent awarded by the Tribunal.

4. Heard Mr. Vipin Nair, learned counsel for the appellant-claimant and Mr. T. Harish Kumar, learned counsel for the respondent-Corporation.

5. The only point for consideration in these appeals is whether the appellant is entitled to a sum of Rs. 1,00,000/- towards "permanent disability" in addition to the amount awarded under the head "loss of earning capacity"? Inasmuch as the issue is confined only to the quantum of compensation, it is not necessary to traverse the factual details relating to the

accident. Even otherwise, the claimant alone has filed the present appeals and the Corporation has not challenged the findings relating to negligence, it is not necessary to go into the conclusion arrived at on the negligence aspect holding that the driver alone was responsible for the accident. Even, with regard to the quantum of compensation, except reduction of Rs. 1,00,000/- which was awarded by the Tribunal for permanent disability, it is not necessary to go into the quantum of compensation under various heads and the ultimate order of the Tribunal and the High Court.

6. The appellant-claimant, in his evidence as PW-1, deposed that he had sustained injury on the center finger of the right hand, his knee joint on the right leg had been dislocated, injury on the right cheek and eyes, that he cannot see with his left eye, his right foot had been injured and his right ankle joint dislocated. He further explained that after the accident, he was immediately taken to the Government Hospital at Chengalpet and received the First Aid and later he had been admitted in the Govt. Stanley Hospital and was under treatment for 25 days as inpatient. The Discharge Summary issued therein has been marked as Ex. P-1. He further narrated that he had undergone Physiotherapy after 25 days which is evident from Ex. P-2. He had also undergone skin surgery at the Stanley Hospital and the certificate relating to the same has been marked as Ex.P-3. Even after discharge from the Stanley Hospital, he was not fully recovered and he had been admitted in Malar Hospital at Adayar and received treatment for two days. The Discharge Summary has been marked as Ex.P-4. According to the appellant-claimant, the middle finger of his right hand had been amputated at the Malar Hospital, Adayar. The prescription issued at the Malar Hospital has been marked as Ex. P-5. From his evidence, it is seen that during the time of the accident, he was working as a Foreman in M/s Armstrong Hydraulics Limited and after the accident he is unable to do any work as he cannot bend the fingers of his right hand and using his left

hand for eating and there is pain in his right leg and he cannot travel in a two wheeler or in a transport bus.

7. Dr. R. Rajappa was examined as PW-2. In his evidence, he deposed that the appellant-claimant was injured in the accident said to have been occurred on 21.05.1998 and he had received treatment as an inpatient at the hospital at Chengalpet, later he had been admitted as an inpatient at the Govt. Stanley Hospital. He had seen a lengthy scar on his right eye and his right eyebrow had been found to be fallen and the retina of the eye was found to be large and that it had lost the shrinking capacity and the nerves of the eye had been affected and there was no circulation of blood and he lost his eye sight by about 3 meters. On examination and perusing the medical documents about his treatment, he concluded 30% of the disability had been caused due to the injury on the right eye and issued a Disability Certificate which has been marked as Ex. P-9.

8. Dr. J.R.R. Thiagarajan was also examined as PW-3. In his evidence, he deposed that the right hand of the appellant had been injured due to the said accident and his middle finger on the right hand had been amputated and a plate had been placed on the fore finger towards the dislocation of the bone. He also explained that he had undergone treatment towards the injury on the right forehand and on the right cheek and that the plate is still there on the right fore finger due to which he cannot bend the fore finger and other fingers properly and it is difficult for him to eat and there was swelling on the palm of his right hand and issued a Disability Certificate which has been marked as Ex. P-10. The Certificate issued by the employer Ex. P-8 shows that at the time of the accident, the appellant was working as a Grade-III worker in the firm M/s Armstrong Hydraulics Ltd. and he was getting a salary of Rs.3,295.28/- after deductions.

9. The Disability Certificates, Exs.P-9 & P-10, issued by the two doctors, show that the appellant had disability to the extent of 90%. The Tribunal, after considering the fact that the

assessment of disability may vary to the extent of 5%, concluded that the appellant had sustained permanent disability to the extent of 85% and taking note of his age and avocation, awarded compensation of Rs. 1,50,000/- for the same.

10. The High Court, relying on its own Full Bench decision in *Cholan Roadways Corporation Ltd. vs. Ahmed Thambi and Others,* 2006 (4) CTC 433, after finding that since the claimant had been awarded a sum of Rs. 3 lakhs towards the loss of earning capacity set aside the award of Rs. 1,50,000/- granted under the head "permanent disability" and awarded a further sum of Rs.50,000/- in addition to the amount awarded by the Tribunal.

11. In *Ramesh Chandra* vs. *Randhir Singh & Ors*. (1990) 3 SCC 723 while considering award of compensation for permanent disability (right foot amputated) caused by the accident under Section 110B of the Motor Vehicles Act, 1939 which is similar to Section 168(1) of the Motor Vehicles Act, 1988, this Court upheld the award of compensation under separate head of pain, suffering and loss of enjoyment of life, apart from the head of loss of earnings. The discussion and ultimate conclusion are relevant which reads as under:-

> **"7.** With regard to ground XIX covering the question that the sum awarded for pain, suffering and loss of enjoyment of life etc. termed as general damages should be taken to be covered by damages granted for loss of earnings is concerned that too is misplaced and without any basis. The pain and suffering and loss of enjoyment of life which is a resultant and permanent fact occasioned by the nature of injuries received by the claimant and the ordeal he had to undergo. If money be any solace, the grant of Rs 20,000 to the claimant represents that solace. Money solace is the answer discovered by the Law of Torts. No substitute has yet been found to replace the element of money. This, on the face of it appeals to us as a distinct head, quite apart from the inability to earn livelihood on the basis of

> incapacity or disability which is quite different. The incapacity or disability to earn a livelihood would have to be viewed not only *in praesenti but in futuro* on reasonable expectancies and taking into account deprival of earnings of a conceivable period. This head being totally different cannot in our view overlap the grant of compensation under the head of pain, suffering and loss of enjoyment of life. One head relates to the impairment of person's capacity to earn, the other relates to the pain and suffering and loss of enjoyment of life by the person himself. For these reasons, we are of the considered view that the contentions raised by the truck owner appellant in that behalf must be negatived and we hereby negative them."

12. It is true that the compensation for loss of earning power/capacity has to be determined based on various aspects including permanent injury/disability. At the same time, it cannot be construed that compensation cannot be granted for permanent disability of any nature. For example, take the case of a non-earning member of a family who has been injured in an accident and sustained permanent disability due to amputation of leg or hand, it cannot be construed that no amount needs to be granted for permanent disability. It cannot be disputed that apart from the fact that the permanent disability affects the earning capacity of the person concerned, undoubtedly, one has to forego other personal comforts and even for normal avocation they have to depend on others. In the case on hand, two doctors had explained the nature of injuries, treatment received and the disability suffered due to partial loss of eye-sight and amputation of middle finger in the right hand and we have already adverted to the avocation, namely, at the time of accident, he was working as Foreman in M/s Armstrong Hydraulics Ltd. Taking note of his nature of work, partial loss in the eye sight, loss of middle finger of the right hand, it not only affects his earning capacity but also affects normal avocation and day-to-day work. In such circumstance,

we are of the view that the Tribunal was fully justified in granting a sum of Rs.1,50,000/- towards permanent disability.

13. Considering the evidence of injured-claimant as PW-1 and two doctors as PWs. 2 & 3 coupled with the Disability Certificates and medical documents, we conclude that the High Court was not justified in disallowing a sum of Rs.1,00,000/- from the total compensation of Rs.5,05,053.45 awarded by the Tribunal. We agree with the contention raised by the learned counsel for the appellant-claimant and restore the award of the Tribunal. In other words, the Corporation is liable to pay Rs. 5,05,053.45 with interest as awarded by the Tribunal. If the said amount has not been deposited so far, the Corporation is directed to deposit the same in the Tribunal within two months from the date of the receipt of this order and if any amount had already been deposited/paid to the claimant, the same shall be adjusted. On such a deposit being made, the appellant-claimant is permitted to withdraw the same. The appeals are allowed to the extent mentioned above. There shall be no order as to costs.

R.P. Appeals partly allowed.

PRAKASH KADAM AND ETC. ETC.

v.

RAMPRASAD VISHWANATH GUPTA AND ANR.

(Criminal Appeal Nos.1174-1178 of 2011)

MAY 13, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Code of Criminal procedure, 1973:

s.439 – Bail – Allegation against accused-policemen that they functioned as contract killers and killed the victim-deceased in fake encounter – Bail granted by Sessions court – Cancellation of bail by High Court – On appeal, held: The version of accused that the deceased was shot in a police encounter was found to be false during investigation – The prosecution material collected during investigation prima facie indicated that the deceased was abducted by accused during the day time and was taken to the police station and from there he was taken to some unknown place where he was shot dead – This was a very serious case wherein prima facie some police officers and staff were engaged by some private persons to kill their opponent i.e. the deceased and the police officers and the staff acted as contract killers for them – If such police officers and staff can be engaged as contract killers to finish some person, there may be very strong apprehension in the mind of the witnesses about their own safety – This aspect was completely ignored by the Sessions Judge while granting bail to accused – High Court was perfectly justified in canceling the bail to the accused.

s.439 – Bail – Grant and cancellation – Considerations for – Held: It is not an absolute rule that the considerations for cancellation of bail is different from the consideration of grant of bail and it depends on the facts and circumstances of the case – In considering whether to cancel the bail, the

Court has to consider various factors such as the gravity and nature of the offence, prima facie case against the accused, the position and standing of the accused etc. – If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him – The said principle applies when the same Court which granted bail is approached for canceling the bail – It will not apply when the order granting bail is appealed against before an appellate/revisional Court.

***Police firing**: Fake encounter – Fake 'encounters' are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law – In cases where a fake encounter is proved against policemen in a trial, they must be given harsh punishment – Sentence/Sentencing.*

***Rule of law:** Collapse of – Effect – Held: When rule of law collapses, it is replaced by law of jungle – Idea of Matsyanyaya-state of affairs where the big fish devours the smaller one as dwelt upon in ancient Indian works (such as Mahabharata) and by ancient Indian thinkers (Kautilya) – Discussed.*

The accused-appellants were the policemen accused of a contract killing case pending before the Sessions Court. They were charge sheeted for offences punishable under Sections 302/34, 120-B, 364/34 IPC. The prosecution case was that the victim-deceased and accused no.14 were in common business and were close to each other. Some differences arose between them and it was alleged that accused no.14 decided to eliminate the deceased in a false police encounter. For the said purpose, he hired the services of other accused and abducted the deceased and his friend on 11.11.2006. The deceased and his friend were taken to the police station whereafter the deceased was killed and his dead body was thrown near Nana Nani park. The dead body, after sometime was collected from the said place by the police

to create a false case of encounter. A case was registered on the same day i.e. on 11.11.2006 against the deceased on the complaint of accused no.9. In the said FIR, it was shown that accused no.9 and other police officers had gone to Nana Nani Park on the basis of certain information and the deceased was asked to surrender before the police and instead of surrendering, the deceased attempted to kill the police and in retaliation he was shot by them. It was also alleged that the deceased's friend was in custody of police for about a month.

The complainant was the brother of the deceased and was a practicing advocate. When he came to know about the incident of abduction of his brother, he started searching for his brother and in the meantime also sent telegrams to Police Commissioners indicating apprehension that his brother might be eliminated in a false police encounter. On the same day it was flashed on T.V. channels that the deceased was killed in police encounter. The complainant filed a writ petition to get directions from the High Court to the police to register a case in respect of death of his brother.

The High Court directed the magistrate to make an inquiry under Section 176(1A), Cr.P.C. The magistrate after holding the inquiry submitted the report that the deceased was shot by the police in police custody. The report also stated that the death had not taken place at the spot alleged by police and that the deceased had not disappeared from the police custody before he was done to death, but the deceased was abducted by the police. The report also held that a false FIR was lodged by accused no.9 to show that the deceased was killed in a police encounter at Nana Nani Park and the FIR was filed to cover up the murder of the deceased. After the inquiry report was submitted by the magistrate, the High Court constituted a special investigating team. During

investigation, it was revealed that accused no.1 (who was described as an 'encounter specialist), accused no.9 and 14 had entered into a conspiracy to eliminate the deceased and other officers and some criminals were involved in the execution of the said conspiracy. Everywhere the accused had taken the plea that the deceased was shot dead in an encounter and that they were members of the Police team involved in that encounter and were also present at the time of the alleged encounter. The instant appeals were filed against the judgment of the High Court by which the High Court cancelled the bail granted to the appellants by the sessions court.

Dismissing the appeals, the Court

HELD: 1.1. It is not an absolute rule that the considerations for cancellation of bail is different from the consideration of grant of bail and it will depend on the facts and circumstances of the case. In considering whether to cancel the bail, the Court has also to consider the gravity and nature of the offence, *prima facie* case against the accused, the position and standing of the accused, etc. If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him. Moreover, the said principle applies when the same Court which granted bail is approached for canceling the bail. It will not apply when the order granting bail is appealed against before an appellate/revisional Court. [Paras 16, 17] [813-F-H; 814-A-B]

Bhagirathsinh s/o Mahipat Singh Judeja vs. State of Gujarat **(1984) 1 SCC 284 = (1984) 1 SCR 839;** *Dolat Ram and others vs. State of Haryana* **(1995) 1 SCC 349 = (1994) 6 Suppl SCR 69;** *Ramcharan vs. State of M.P.* **(2004) 13 SCC 617 = (2004) 13 SCC 617 – relied on.**

1.2. There is no absolute rule that once bail is granted to the accused then it can only be cancelled if there is likelihood of misuse of the bail. That factor, though no doubt important, is not the only factor. There are several other factors also which may be seen while deciding to cancel the bail. [Para 18] [814-C]

1.3. This was a very serious case and could not be treated like an ordinary case. The accused who were policemen were supposed to uphold the law, but the allegation against them was that they functioned as contract killers. Their version that the deceased was shot in a police encounter was found to be false during the investigation. [Para 19] [814-D-E]

2.1. The examination of the material on record showed that accused no. 11, 17 and 19 who were attached to Versova Police Station, as per the station diary entry 33 of Versova Police Station left Versova Police Station to go to D.N.Nagar Police Station on a special assignment. That entry No.33 was taken in the station diary of Versova Police Station at 18.05 hours. Entry No.25 in the station diary of D.N.Nagar Police Station at 18.55 hrs. showed that accused no.9, 11, 15, 17, 18, 9 and 22 left the Police Station to go near Nana Nani Park to verify and to arrest a hardened criminal. The 3 police officers i.e. accused no.11, 17 and 19 were specially called from the Versova Police Station and they were in the team of the police officers and staff who accompanied accused no.9. This team left the police station at 18.55 hrs. as per the said entry and it appeared that at about 8 to 8.15 p.m. the deceased was shot dead. At this stage, the defence of the accused is not required to be taken into consideration, because during the investigation, it was found that there was no encounter and the deceased was shot dead in a fake encounter. This station diary No.25 of 18.55 hrs. would show that

accused No.17, 18 and 19 were the members of the team which killed the deceased. Not only that, as per the record of D.N.Nagar Police station, on 11.11.2006, at 6 p.m. accused no.9, 11 and 18 had collected weapons and ammunition. Naturally, those weapons were collected by the said officers to go to some place for a mission. According to them, they went to Nana Nani Park where the deceased was killed. In view of this, the presence of accused no.18 in the team which executed the said plan and killed the deceased did not appear to be in doubt. Merely because accused No.18 himself did not fire is not sufficient. Accused Nos. 17 and 19 were also members of that team. These accused persons had consistently taken a stand that they were present at the time of the said encounter and this was clear from their stand taken before the High Court as well as before the Supreme Court in special leave petition filed by accused Nos. 13, 16, 19 and 21. In that SLP also they had stated that accused Nos. 17 and 18 were also in the encounter team. Therefore, there was a *prima facie* case against them. [Para 20] [814-F-H; 815-A-H]

2.2. As far as accused Nos. 16, 17, 18 and 19 were concerned, there was sufficient material to prima facie establish their role in this conspiracy and the alleged execution of the deceased. Accused No.13 was allegedly given duty of guarding the friend of the deceased at Hotel Mid Town where he was detained illegally. Accused No.13 was one of the petitioners before the Supreme Court and had claimed that he was a member of the encounter team along with accused no.9 and others, and this admission found corroboration from the contents of the FIR registered by accused no.9 himself. In fact, the prosecution material collected during the investigation *prima facie* indicated that the deceased was abducted during the day time and was taken to D.N.Nagar Police Station and from there he was taken to some unknown

place where he was shot dead. At 9 p.m. some police officers came back to the police station and deposited their weapons and kept their blood stained clothes. [Paras 21, 22] [816-A-E]

3. This was a very serious case wherein *prima facie* some police officers and staff were engaged by some private persons to kill their opponent i.e. the deceased and the police officers and the staff acted as contract killers for them. If such police officers and staff can be engaged as contract killers to finish some person, there may be very strong apprehension in the mind of the witnesses about their own safety. If the police officers and staff could kill a person at the behest of a third person, it cannot be ruled out that they may kill the important witnesses or their relatives or give threats to them at the time of trial of the case to save themselves. This aspect was completely ignored by the Sessions Judge while granting bail to the accused persons. The High Court was perfectly justified in canceling the bail to the accused-appellants. The accused/appellants were police personnel and it was their duty to uphold the law, but far from performing their duty, they appeared to have operated as criminals. Thus, the protectors have become the predators. [Paras 23, 24] [816-F-H; 817-A-B]

CBI vs. Kishore Singh **2010 (14) SCR 95 - relied on.**

4. In cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake 'encounters' are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law. If crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their

duties. It is imperative to mention that our ancient thinkers were of the view that the worst state of affairs possible in society is a state of lawlessness. When the rule of law collapses it is replaced by Matsyanyaya, which means the law of the jungle. In Sanskrit the word 'Matsya' means fish, and Matsyanyaya means a state of affairs where the big fish devours the smaller one. All our ancient thinkers have condemned Matsyanyaya vide 'History of Dharmashastra' by P.V. Kane Vol. III p. 21. A glimpse of the situation which will prevail if matsyanyaya comes into existence is provided by Mark Antony's speech in Shakespeare's 'Julius Caesar' quoted at the beginning of this judgment. This idea of matsyanyaya (the maxim of the larger fish devouring the smaller ones or the strong despoiling the weak) is frequently dwelt upon by Kautilya, the Mahabharata and other works. It can be traced back to the Shatapatha Brahmana XI 1.6.24 where it is said "whenever there is drought, then the stronger seizes upon the weaker, for the waters are the law," which means that when there is no rain the reign of law comes to an end and matsyanyaya begins to operate. [Paras 25, 28, 29] [817-C-D-H; 818-A-D]

Shanti Parva of Mahabharat **Vo. 1 – referred to.Vo. 1;** *'History of Dharmashastra'* **by P.V. Kane Vol. III p. 21 – referred to.**

Case Law Reference:

(1984) 1 SCR 839	**relied on**	**Para 16**
(1994) 6 Suppl SCR 69	**relied on**	**Para 16**
(2004) 13 SCC 617	**relied on**	**Para 16**
2010 (14) SCR 95	**relied on**	**Para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1174-1178 of 2011.

From the Judgment & Order dated 21.1.2011 of the High Court of Judicature at Bombay in Criminal Application Nos. 5283-5285 & 5303-5304 of 2010.

Vinay Navare, Keshav Ranjan (for Abha R. Sharma) for the Appellant.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J.

A curse shall light upon the limbs of men;
Domestic fury and fierce civil strife
Shall cumber all the parts of Italy;
Blood and destruction shall be so in use
And dreadful objects so familiar
That mothers shall but smile when they behold
Their infants quarter'd with the hands of war;
All pity choked with custom of fell deeds:
And Caesar's spirit, ranging for revenge,
With Ate by his side come hot from hell,
Shall in these confines with a monarch's voice
Cry "Havoc!" and let slip the dogs of war;
That this foul deed shall smell above the earth
With carrion mean, groaning for burial.

— (Shakespeare: Julius Caesar Act 3 Scene 1)

1. Leave granted. Heard learned counsel for the appellants and perused the record.

2. This case reveals to what grisly depths our society has descended.

3. This appeal has been filed against the impugned judgment and order dated 21.1.2011 passed by the High Court of Judicaure at Bombay in Criminal Application Nos. 5283-5285 and 5303-5304 of 2010 by which the High Court has cancelled the bail granted to the appellants by the Sessions Court.

4. The appellants are policemen accused of a contract killing in Sessions Case No. 317/2010 which is pending before the Sessions Judge, Greater Bombay. The appellants have been charge-sheeted for offences punishable under Sections 302/34,120-B, 364/34 IPC and other minor offences. The victim of the offence is deceased Ramnaryan Gupta @ Lakhanbhaiyya. The prosecution case is that the appellants were engaged as contract killers by a private person to eliminate the deceased.

5. The case of the prosecution in brief is that the deceased Ramnarayan Gupta and the accused No. 14, Janardan Bhange were, once upon a time, very close to each other. Both of them had been working as estate agents and, mainly their business was to purchase land from the farmers whose land has been acquired by the Government under the Land Acquisition Act and to whom 12 percent of the land was given by the Government. This 12 percent of the land was being purchased at meager price by the deceased and accused No. 14, Janardan Bhange and was being sold on premium at later stage. During the course of that business, both of them had been exchanging the files pending with them for disposal pertaining to the said land.

6. There were some differences between the deceased Ramnarayan Gupta and accused No. 14, Janardan and hence it is alleged that the accused Janardan decided to eliminate the deceased in a false police encounter. Hence, he hired the services of the accused, and in pursuance of the said conspiracy the deceased Ramnarayan Gupta and his friend Anil Bheda were abducted on 11.11.2006 from near a shop named Trisha Collections at Vashi, New Bombay by 4 or 5 well-built persons who appeared to be policemen and were forcibly bundled into a Qualis car. The complainant, brother of the deceased, sent telegrams and fax messages to different authorities complaining that the said two persons had been

abducted by some persons who appeared to be policemen and were in danger of losing their lives.

7. It is alleged that at Bhandup Complex the deceased was shifted to an Innova vehicle. The deceased and witness Anil Bheda were taken to D.N. Nagar police station in two separate vehicles i.e. one Qualis and the other Innova. It is alleged that the deceased was killed and his dead body was thrown near Nana-Nani Park at Versova. The dead body, after some time, was collected from the said place by the police to create a false case of police encounter. A case vide C.R. No. 302/2006 was registered on 11.11.2006 at Versova Police Station against deceased Ramnarayan Gupta on the complaint made by accused No. 9. In the said FIR it was shown that accused No. 9 and other police officers had gone to Nana-Nani Park on the basis of certain information and that the deceased was asked to surrender before the police. Instead of surrendering before the police, the deceased had attempted to kill the police and in retaliation he was shot by them.

8. It is also alleged that witness Anil Bheda was initially detained at D.N. Nagar Police Station and thereafter he was taken to Kolhapur and he was further detained at Mid Town Hotel at Andheri. As such the witness Anil Bheda was in custody of the police for about one month from 11.11.2006. His wife had lodged a missing complaint at Vashi police station on the same day, but she was compelled to withdraw that complaint.

9. The complainant is the brother of the deceased and is a practicing advocate. He came to know within a few minutes of the incident of abduction of his brother. He, therefore, along with advocate Mr. Ganesh Ayyer, started searching for his brother and in the meantime he had also sent telegrams to Police Commissioner of Thane, Mumbai and New Bombay of the alleged abduction of his brother and indicated apprehension that his brother would be eliminated in a false police encounter.

On the same day it was flashed on T.V. channels that the deceased had been killed in a police encounter. The complainant, therefore, approached the High Court on 15.11.2006 by filing a writ petition (WP 2473/2006) to get directions from the High Court to the police to register a case in respect of death of his brother.

10. On the aforesaid writ petition the High Court on 13.2.2008 passed an order that the offence of murder be registered against the accused. During the investigation the statement of Anil Bheda and other witnesses were recorded. So far, the police have charge-sheeted 19 accused.

11. After the High Court by its order dated 13.2.2008 had directed the Metropolitan Magistrate, Railway Mobile Court, Andheri to make an inquiry under Section 176(1A) Cr.P.C., the Metropolitan Magistrate after holding the inquiry submitted a report dated 11.8.2008 that Ramnarayan Gupta was shot by the police when he was in police custody. The report also stated that the death had not taken place at the spot alleged by the police, and that the deceased had not disappeared from the police custody before he was done to death, but that the deceased was abducted by the police. The report also held that a false FIR was lodged by accused No. 9 Police Inspector Pradip Suryavanshi of D.N. Nagar Police Sttion to show that Ramnarayan Gupta was killed in a police encounter at Nana-Nani Park, and this FIR was filed to cover up the murder of the deceased Ramnarayan Gupta.

12. After the inquiry report was submitted by the Metropolitan Magistrate, the Division Bench of the Bombay High Court by its order dated 13.8.2009 in the aforesaid criminal writ petition constituted a Special Investigation Team for investigation of this case. Mr. K.M.M. Prasanna, DCP, Mumbai City, was appointed as head of the investigation team, and he was directed to record the statement of the complainant and to treat that statement as the FIR. Copy of the order of the Bombay High Court dated 13.8.2009 is Annexure P-3 to this

appeal. Accordingly, the statement of the complainant was recorded on 20.8.2009 which was treated as the FIR (Annexure P4 to this appeal) and investigation was carried out. The statement and supplementary statement of Anil Bheda, which corroborates the prosecution case, is Annexure P5 to this appeal.

13. During investigation, it was revealed that accused No.1 Police Inspector Pradip Sharma (who is described as an 'encounter specialist'), accused No.9 - PI Pradip Suryawanshi and accused No. 14 - Janardan Bhanage, had entered into a conspiracy to eliminate Ramnarayan Gupta. It appears that accused No.14 Janardan Bhanage had some personal enmity with Ramnarayan Gupta. Thereafter other officers and some criminals were involved in the execution of the said conspiracy. Accused No.4 – Shailendra Pande , accused No.5 - Hitesh Solanki, accused N0.6 - Akil Khan, accused No.8 - Manoj Mohan Raj, accused No.12 - Mohd. Moiddin and accused No.21 – Suresh Shetty and accused No.7 police constable Vinayak Shinde had abducted Ramnarayan Gupta and Anil Bheda from Vashi, on 11.11.2006. Accused No.1 PI Pradip Sharma, accused No.2 Police Constable Tanaji Desai, accused No.9 P.I. Pradip Suryavanshi, accused No.15 API - Dilip Palande were the persons who actually fired and shot dead the deceased. Accused No.11 API Nitin Satape and accused no.22 PSI Arvind Sarvankar claimed to have fired during the encounter, though the bullets fired from their fire arms were not recovered. Accused Nos. 13,16, 17, 18 and 19, whose bail orders were cancelled by the High Court, are said to be the members of the team which shot him dead. Accused No.13 Devidas Sakpal had allegedly guarded Anil Bheda at Hotel Mid Town on certain occasions and accused No.16 Head Constable Prakash Kadam had joined the abductors at about 4.30 p.m. and since then he was with Anil Bheda. He was also with Anil Bheda when he was taken out from D.N.Nagar Police Station in the evening and also later on at Hotel Mid Town from time to time.

14. On behalf of the prosecution, it is pointed out that in the FIR lodged by P.I. Pradip Suryavanshi showing the killing of Ramnarayan Gupta in an encounter at Nana-Nani Park, he had given names of police officers and police staff, who were in that team. The names of accused Nos.13,16, 17, 18 and 19 are shown in the said FIR. On that basis an entry was made in the station diary, where also the names of these persons were shown. It is also pointed out that in the magisterial enquiry, which was initially directed by the Police Commissioner, these persons had claimed to be members of the encounter team. When the complainant filed the Writ Petition against the State for taking action against the culprits, some of these persons had a peared to contest the writ petition. After the writ petition was allowed and this Court directed investigation, accused Nos. 13, 16, 19 and 20 filed Special Leave Petition challenging that order, which was dismissed. Everywhere they had taken the plea that Ramnarayan Gupta was shot dead in an encounter and that they were members of the Police team involved in that encounter and were also present at the time of the alleged encounter. The learned Counsel also pointed out that there is sufficient material to show that these persons were involved in the commission of the crime.

15. The Sessions Court granted bail to the appellants but that has been cancelled by the High Court by the impugned judgment.

16. It was contended by learned counsel for the appellants before us, and it was also contended before the High Court, that the considerations for cancellation of bail is different from the consideration of grant of bail vide *Bhagirathsinh s/o Mahipat Singh Judeja vs. State of Gujarat* (1984) 1 SCC 284, *Dolat Ram and others vs. State of Haryana* (1995) 1 SCC 349 and *Ramcharan vs. State of M.P.* (2004) 13 SCC 617.

17. However, we are of the opinion that that is not an absolute rule, and it will depend on the facts and circumstances of the case. In considering whether to cancel the bail the Court

has also to consider the gravity and nature of the offence, prima facie case against the accused, the position and standing of the accused, etc. If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him. Moreover, the above principle applies when the same Court which granted bail is approached for canceling the bail. It will not apply when the order granting bail is appealed against before an appellate/revisional Court.

18. In our opinion, there is no absolute rule that once bail is granted to the accused then it can only be cancelled if there is likelihood of misuse of the bail. That factor, though no doubt important, is not the only factor. There are several other factors also which may be seen while deciding to cancel the bail.

19. This is a very serious case and cannot be treated like an ordinary case. The accused who are policemen are supposed to uphold the law, but the allegation against them is that they functioned as contract killers. Their version that Ramnarayan Gupta was shot in a police encounter has been found to be false during the investigation. It is true that we are not deciding the case finally as that will be done by the trial court where the case is pending, but we can certainly examine the material on record in deciding whether there is a prima facie case against the accused which disentitles them to bail.

20. Accused No. 11 API Nitin Sartape, accused No.17 PSI Ganesh Harpude, and accused No.19 PSI Pandurang Kokam, who were attached to Versova Police Station, as per the station diary entry 33 of Versova Police Station left Versova Police Station to go to D.N.Nagar Police Station on a special assignment. That entry No.33 was taken in the station diary of Versova Police Station at 18.05 hours. Entry No.25 in the station diary of D.N.Nagar Police Station at 18.55 hrs. shows that Police Inspector Suryavanshi, API Dilip Palande (accused No.15), PSI Arvind Sarvankar (accused No.22), PSI Patade (accused No.18) and API Sartape (accused No.11), PSI Harpude (accused No.17) and Police Constable Batch

No.26645 i.e. Pandurang Kokam (accused No.19) left the Police Station to go near Nani Nani Park to verify and to arrest a hardened criminal. It appears that 3 police officers i.e. AP Sartape, PSI Harpude and Constable Pandurang Kokam were specially called from the Versova Police Station and they were in the team of the police officers and staff who accompanied PI Suryavanshi. This team left the police station at 18.55 hrs. as per the said entry and it appears that at about 8 to 8.15 p.m. Ramnarayan was shot dead. At this stage, the defence of the accused need not be taken into consideration, because during the investigation, it has been found that there was no encounter and Ramnarayan Gupta was shot dead in a fake encounter. This station diary No.25 of 18.55 hrs. goes to show that accused No.17 PSI Hapude, accused No.18 PSI Patade and accused No.19 Constable Pandurang Kokam were the members of the team which killed Ramnarayan. Not only this, as per the record of D.N.Nagar Police station, on 11.11.2006, at 6 p.m. Police Inspector Suryavanshi, API Sartape and PSI Anand Patade had collected weapons and ammunition. Naturally, those weapons were collected by the said officers to go to some place for a mission. According to them, they went to at Nana Nani Park where Ramnarayan Gupta was killed. In view of this, the presence of PSI Patade in the team which executed the said plan and killed Ramnarayan does not appear to be in doubt. Merely because accused No.18 PSI Patade himself did not fire is not sufficient. Accused Nos. 17 Ganesh Harpude and accused No.19 Pandurang Kokam, as pointed out above, were also members of that team. It is also material to note that these accused persons had consistently taken a stand that they were present at the time of the said encounter and this is clear from their stand taken before the High Court as well as before the Supreme Court in Special Leave Petition filed by the accused Nos. 13, 16, 19 and 21. In that SLP also they had stated that accused Nos. 17 and 18 were also in the encounter team. Hence there is a prima facie case against them.

21. As far as accused Nos. 16, 17, 18 and 19 are concerned, there is sufficient material to prima facie establish their role in this conspiracy and the alleged execution of Ramnarayan Gupta. Accused No.13 was allegedly given duty of guarding Anil Bheda at Hotel Mid Town where he was being detained illegally. It is contended by the learned Counsel for the accused that if any duty of guarding or surveillance is given to a Police Constable by his superiors, he is bound to discharge that duty and merely because he was given the guarding duty, it cannot be said that he was party to the conspiracy. However, it cannot be forgotten that accused No.13 was one of the petitioners before the Supreme Court and had claimed that he was a member of the encounter team along with PI Suryavanshi and others, and this admission finds corroboration from the contents of the FIR registered by PI Suryavanshi himself.

22. In fact, the prosecution material collected during the investigation prima facie indicates that Ramnarayan Gupta was abducted during the day time and was taken to D.N.Nagar Police Station and from there he was taken to some unknown place where he was shot dead. At 9 p.m. some police officers came back to the police station and deposited their weapons and kept their blood stained clothes.

23. In our opinion this is a very serious case wherein prima facie some police officers and staff were engaged by some private persons to kill their opponent i.e. Ramnarayan Gupta and the police officers and the staff acted as contract killers for them. If such police officers and staff can be engaged as contract killers to finish some person, there may be very strong apprehension in the mind of the witnesses about their own safety. If the police officers and staff could kill a person at the behest of a third person, it cannot be ruled out that they may kill the important witnesses or their relatives or give threats to them at the time of trial of the case to save themselves. This aspect has been completely ignored by the learned Sessions Judge while granting bail to the accused persons.

24. In our opinion, the High Court was perfectly justified in canceling the bail to the accused-appellants. The accused/ appellants are police personnel and it was their duty to uphold the law, but far from performing their duty, they appear to have operated as criminals. Thus, the protectors have become the predators. As the Bible says "If the salt has lost its flavour, wherewith shall it be salted?", or as the ancient Romans used to say,"Who will guard the Praetorian guards?" (see in this connection the judgment of this Court in *CBI vs. Kishore Singh,* Criminal Appeal Nos.2047-2049 decided on 25.10.2010).

25. We are of the view that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake 'encounters' are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law. In our opinion if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties.

26. We warn policemen that they will not be excused for committing murder in the name of 'encounter' on the pretext that they were carrying out the orders of their superior officers or politicians, however high. In the Nuremburg trials the Nazi war criminals took the plea that 'orders are orders', nevertheless they were hanged. If a policeman is given an illegal order by any superior to do a fake 'encounter', it is his duty to refuse to carry out such illegal order, otherwise he will be charged for murder, and if found guilty sentenced to death. The 'encounter' philosophy is a criminal philosophy, and all policemen must know this. Trigger happy policemen who think they can kill people in the name of 'encounter' and get away with it should know that the gallows await them.

27. For the above reasons, these appeals are dismissed.

28. Before parting with this case, it is imperative in our

opinion to mention that our ancient thinkers were of the view that the worst state of affairs possible in society is a state of lawlessness. When the rule of law collapses it is replaced by Matsyanyaya, which means the law of the jungle. In Sanskrit the word 'Matsya' means fish, and Matsyanyaya means a state of affairs where the big fish devours the smaller one. All our ancient thinkers have condemned Matsyanyaya vide 'History of Dharmashastra' by P.V. Kane Vol. III p. 21. A glimpse of the situation which will prevail if matsyanyaya comes into existence is provided by Mark Antony's speech in Shakespeare's 'Julius Caesar' quoted at the beginning of this judgment.

29. This idea of matsyanyaya (the maxim of the larger fish devouring the smaller ones or the strong despoiling the weak) is frequently dwelt upon by Kautilya, the Mahabharata and other works. It can be traced back to the Shatapatha Brahmana XI 1.6.24 where it is said "whenever there is drought, then the stronger seizes upon the weaker, for the waters are the law," which means that when there is no rain the reign of law comes to an end and matsyanyaya begin to operate.

30. Kautilya says, 'if danda be not employed, it gives rise to the condition of matsyanyaya, since in the absence of a chastiser the strong devour the weak'. That in the absence of a king (arajaka) or when there is no fear of punishment, the condition of matsyanyaya follows is declared by several works such as the Ramayana II, CH. 67, Shantiparva of Mahabharat 15.30 and 67,16. Kamandaka II. 40, Matsyapurana 225.9, Manasollasa II. 20.1295 etc.

31. Thus in the Shanti Parva of Mahabharat Vol. 1 it is stated:-

"Raja chen-na bhavellokey prithivyaam dandadharakah

Shuley matsyanivapakshyan durbalaan balvattaraah"

32. This shloka means that when the King carrying the rod

of punishment does not protect the earth then the strong persons destroy the weaker ones, just like in water the big fish eat the small fish. In the Shantiparva of Mahabharata Bheesma Pitamah tells Yudhishthir that there is nothing worse in the world than lawlessness, for in a state of Matsyayaya, nobody, not even the evil doers are safe, because even the evil doers will sooner or later be swallowed up by other evil doers.

33. We have referred to this because behind the growing lawlessness in the country this Court can see the looming danger of matsyanyaya.

34. The appeals are dismissed, but it is made clear that the trial court will decide the criminal case against the appellants uninfluenced by any observations made in this judgment, or in the impugned judgment of the High Court.

D.G. Appeals dismissed.

AMAR NATH ROY AND ORS.

v.

ARUN KUMAR KEDIA AND ANR.

Contempt Petition (C) No. 139 of 2011

IN

Civil Appeal No. 2663 of 2004

MAY 13, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Rent control and eviction:

Eviction order – Tenant's appeal dismissed by Supreme Court – Tenant granted nine months time from the date of dismissal of appeal to vacate the tenanted premises – Tenant did not vacate the tenanted premises even after the period granted – Contempt petition – Supreme Court disposed of the contempt petition directing eviction of tenant by police force – Contempt of Court.

CIVIL APPELLATE JURISDICTION : Contempt Petition No. 139 of 2011.

In

Civil Appeal No. 2663 of 2004.

From the Judgment & Order dated 12.3.2004 of the High Court Calcutta in F.A.No. 23 of 2000.

Jaideep Gupta, Sarad Kumar Singhania for the Appellant

Ramesh Singh (for O.P. Khaitan & Co) for the Respondent.

The following Order of the Court was delivered

O R D E R

Heard learned counsel for the parties.

In this case, the tenant's appeal being Civil Appeal No. 2663 of 2004 was dismissed by this Court by our order dated November 04, 2009 and we gave the tenant nine months' time from that date to vacate the premises in question. Review Petition filed by the tenant was also dismissed on March 25, 2010.

We are informed that the tenant has not vacated the premises in question. Hence, this contempt petition.

Accordingly, we direct that the tenant-Anderson Wright & Co. shall be evicted from 7, Red Cross Place, P.S. Hare Street, Kolkata-700 001 forthwith by police force.

The Contempt Petition is disposed of.

D.G. Contempt Petition disposed of.

MOHAMMAD AHMAD & ANR.
v.
ATMA RAM CHAUHAN & ORS.
(Civil Appeal No. 4422 of 2011)

MAY 13, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Rent Control and Eviction:

Interim order – Writ petition before High Court arising out of order of eviction of tenants – Orders by Single Judge enhancing the monthly rent while granting stay of dispossession of tenants, as an interim measure – HELD: Enhancement in rent will not ipso facto be deemed to be unreasonable and exorbitant unless the tenant is able to give cogent reasons for the same – In the instant case, in the absence of any valuation report, the assessment and the judgment of the Single Judge, after taking into account the yardsticks and the contentions of both the parties appears to be absolutely correct – In order to minimize landlord-tenant litigation, guidelines and norms enumerated – Constitution of India, 1950 – Articles 226, 132 and 142 – Interim order.

Two shops each admeasuring 12'x10', both equivalent to 240 sq. ft. belonging to landlords-respondents nos. 1 to 3 and under tenancy of the appellants, were released by the appellate authority in the appeal arising out of the application u/s 21(1)(a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The shops were fetching a monthly rent of Rs.40/- and Rs.20/- (a total of Rs.60/-). In the writ petition filed by the tenants, the Single Judge of the High Court, by order dated 14.9.2005, granted stay of their dispossession enhancing the monthly rent to Rs.600/-.

Since the writ petition remained pending, the Single Judge after hearing both the parties, by order dated 13.2.2007, enhanced the rent of both the shops to Rs.2100/- per month, as an interim measure.

On the strength of some unreported decisions, it was contended for the tenants-appellants that the practice of enhancement of rent during the pendency of writ petitions under Articles 226/227 and that too without any valuation report, was deprecated by the Supreme Court. It was further contended that the monthly rent having been enhanced to Rs.600/- only on 14.9.2005, no case was made out for further enhancement to Rs.2100/- by order dated 13.2.2007 within a period of two years.

Dismissing the appeal, the Court

HELD: 1. In the case in hand it is clearly reflected that respondents-landlords made an offer to the appellants/ tenants which they agreed, and only thereafter the rent was enhanced from Rs. 600/- per month to Rs. 2100/- per month, for both the shops. Thus, the ratio of the judgments cited on behalf of the appellants has no application to the facts of the case. [para 15] [830-E-F]

2.1. The rent as has been fixed by the Single Judge for the two shops, having total area of 240 sq. ft., to Rs. 2100/- per month is not only reasonable but would be just and proper. Any enhancement in rent will not *ipso facto* be deemed to be unreasonable and exorbitant, unless the party aggrieved is able to give cogent reasons for the same. [para 17] [831-D-E]

Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd. **2004 (6) Suppl. SCR 843 = (2005)1 SCC 705 – relied on.**

2.2. No doubt, it is true that the Single Judge has applied his own yardstick in working out the rent but only after both parties' contentions were taken into account and the said yardstick appears to be absolutely correct and perfect method of working out the current market rental of the premises. Even though no valuation report was taken into consideration, as there was none, but the assessment and judgment of the Single Judge cannot be disallowed, even if detailed reasons have not been assigned by the Single Judge for enhancing the rent because the ultimate conclusion arrived at by him does not suffer from any infirmity, illegality or perversity. [para 18-19] [832-E-H]

3.In the considered view of the Court, majority of these cases are filed because landlords do not get reasonable rent akin to market rent, then on one ground or the other litigation is initiated. In order to minimise landlord-tenant litigation, the following guidelines and norms are laid down:

(i) The tenant must enhance the rent according to the terms of the agreement or at least by ten percent, after every three years and enhanced rent should then be made payable to the landlord. If the rent is too low (in comparison to market rent), having been fixed almost 20 to 25 years back, then the current market rate should be worked out either on the basis of valuation report or reliable estimates of building rentals in the surrounding areas, let out on rent recently.

(ii) Apart from the rental, property tax, water tax, maintenance charges, electricity charges for the actual consumption of the tenanted premises and for common area shall be payable by the tenant only so

that the landlord gets the actual rent out of which nothing would be deductible. In case there is enhancement in property tax, water tax or maintenance charges, electricity charges then the same shall also be borne by the tenant only.

(iii) The usual maintenance of the premises, except major repairs would be carried out by the tenant only and the same would not be reimbursable by the landlord.

(iv) But if any major repairs are required to be carried out then in that case only after obtaining permission from the landlord in writing, the same shall be carried out and modalities with regard to adjustment of the amount spent thereon, would have to be worked out between the parties.

(v) If prevalent market rent assessed and fixed between the parties is paid by the tenant then landlord shall not be entitled to bring any action for eviction against such a tenant at least for a period of 5 years. Thus, for a period of 5 years the tenant shall enjoy immunity from being evicted from the premises.

(vi) The parties shall be at liberty to get the rental fixed by the official valuer or by any other agency, having expertise in the matter.

(vii) The rent so fixed should be just, proper and adequate, keeping in mind, location, type of construction, accessibility with the main road, parking space facilities available therein etc. Care ought to be taken that it does not end up being a bonanza for the landlord. [para 21] [833-B-H; 834-A-D]

Case Law Reference:

2004 (6) Suppl. SCR 843 relied on para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4422 of 2011.

From the Judgment & Order dated 13.7.2007 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 39727 of 2004.

Dinesh Kumar Garg for the Appellants.

Rachna Gupta, R.C. Kaushik for the Respondents.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted.

2. One half of the *lis* between landlord and tenant would not reach courts, if tenant agrees to pay the present prevalent market rate of rent of the tenanted premises to the landlord. In that case landlord would also be satisfied that he is getting adequate, just and proper return on the property. But the trend in the litigation between landlord and tenant shows otherwise. Tenant is happy in paying the meagre amount of rent fixed years ago and landlord continues to find out various grounds under the Rent Acts, to evict him some how or the other. This case appears to be another classic example of the aforesaid scenario.

3. Thumb nail sketch of the facts of the case are mentioned hereinbelow:-

Appellants herein are the tenants of two shops admeasuring 10x12 feet each, equivalent to 240 sq. ft., situated at National Highway Chakrata Saharanpur (U.P.). The map attached alongwith counter affidavit of the Respondent Nos. 1 to 3 (which is not disputed by the Appellants) shows that these

shops are part of the building known as Jaitpur Sadan, now coming under commercial area. As per the sketch on record, it is bounded by 110 ft. wide National Highway to the east, a 90 ft. wide Town Hall Road to the west, a 20 ft. by lane to the south, and nothing is shown and no construction appears to be there in the north. In all, Jaitpur Sadan has five shops of the same size facing east and four shops of the same size and one adjoining mini-store (which is probably another smaller shop) and staircase for reaching first floor, facing west.

4. Earlier when the abovementioned Jaitpur Sadan was constructed, it appears that the same was about 20 Kms. away from the city of Saharanpur. Now with the passage of time, the outer limits of the city have grown and have come to include the said building. Thus, it can be called a commercial area.

5. Respondent No. 1 who was working as the Medical Officer at Zila Parishad, Saharanpur retired on 31.07.1992. For his personal bonafide need he needed these two small shops, *i.e.* an east-facing room (for consultation and setting up medical equipment) and an adjoining west-facing room (to serve as a waiting room for patients). The sketch map shows that one of the shops facing western side is already in his occupation. He had requested both Appellant No.1 and Respondent No.4, Shri Md. Ahmad Iqbal, respectively, for release of any one pair of shops, but neither of the two acceded to his request.

6. Thus, he filed an application under Section 21(1)(a) of the U.P. Act No. 13 of 1972 (hereinafter shall be referred to as the 'Act') against the Appellants/Tenants as well as the Respondent No.4 praying for release of any one pair of the said two pairs of shops in his favour. At that time the Appellants were paying rent at Rs. 40 and Rs. 20/- (total Rs. 60/- per month) for the pair of shops in their possession.

7. The matter was contested by the Appellants before the Prescribed Authority/IV Additional Civil Judge, Saharanpur,

whereby and whereunder the said authority allowed the application of Respondents Nos.1 to 3 - landlords and on a comparative assessment of facts and circumstances, released the property (shown as Item A in the Map annexed) in which Respondent No.4 was a tenant, in their favour.

8. Feeling aggrieved thereof Rent Control Appeals were preferred by both the parties, i.e., Respondent Nos.1 to 3 - landlords and Respondent No.4 before Additional District Judge, Saharanpur. Vide judgment and order dated 24.08.2004, the Appellate Court upheld the decree of the IV Additional Civil Judge, Saharanpur but modified it, to the extent that the pair of shops in tenancy of present Appellants be released (shown as Item B in the Map annexed), instead of the pair of shops in the possession of Respondent No.4 as decreed by the Trial Court, and furthermore, they were directed to deliver peaceful and vacant possession thereof to the Respondent Nos. 1 to 3, within one month from the date of the said order. Thus, the order of release passed by Prescribed Authority came to be partially modified by the Appellate Authority in as much as the order of release for two shops in their favour was maintained.

9. Thus, unsatisfied and feeling aggrieved thereof the Appellants preferred Civil Miscellaneous Writ Petition No. 39727 of 2004 before learned Single Judge of the High Court of Judicature at Allahabad. It appears while considering the application for stay, the learned Single Judge directed that the Appellants will not be dispossessed from the shops in dispute provided, w.e.f. September, 2005 onwards they pay the Respondent Nos. 1 to 3, rent at the rate of Rs. 600/- per month by 7th of each succeeding month. In case of two defaults, the stay order would stand vacated automatically. Non-payment of rent may also be a ground for dismissal of the writ petition. The said order was passed by learned Single Judge in the

Appellants' Writ Petition on 14.09.2005.

10. It appears that the said writ petition continued to be pending before learned Single Judge. The same matter again came up for hearing before another learned Single Judge on 13.02.2007. On the said date learned counsel for Respondent Nos. 1 to 3 submitted that the rent of the shops is too meagre looking to the present rent available for other similarly situated shops,so a prayer was made that it be increased reasonably according to market rate. On this offer being made, learned counsel appearing for the Appellants submitted that the case for enhancement of rent may be considered by the court according to the condition, location and situation etc. of the tenanted shops. It was further submitted by the learned counsel for the Appellants that in case Appellants are evicted from the disputed shops then they would suffer irreparable loss and injury. Lastly, it was contended by them that even though many accommodations are available nearby but none would be available at the rent, which is being paid presently by Appellants to landlords.

11. In the light of aforesaid offer having been made by the Respondents and duly considered by the Appellants, the learned Single Judge thought it fit to enhance the rate of rent from Rs. 600/- per month for both the shops to Rs. 2100/- per month, payable from February 2007.

12. Even though, the Appellants' writ petition was kept pending and directed to be listed in the month of July, 2007 for reporting compliance of the aforesaid directions, the Appellants feeling aggrieved thereof have preferred this appeal on variety of grounds.

13. We have accordingly heard Mr. Dinesh Kumar Garg for the Appellants and Mrs. Rachna Gupta and Mr. R.C. Kaushik for the Respondents and perused the record.

14. The first thrust of the arguments of learned counsel for Appellant was that the rent having been enhanced to Rs. 600/- per month only on 14.09.2005, no case was made out for further enhancement from Rs. 600/- to Rs. 2100/- per month vide the impugned order dated 13.02.2007, within two years thereof. It was then submitted that this Court has deprecated severely the practice of enhancement of rent in petitions filed under Articles 226/227 of the Constitution of India, during the pendency of those petitions on merits in the High Court, that too without any valuation report. To advance contention in this regard, several unreported orders of this Court have been placed before us. They are judgment and order dated 19.01.2009 passed in Civil Appeal No. 316 of 2009 titled *Md. Iqbal Vs. Atma Ram & Ors.*; order dated 03.01.2008 passed in Civil Appeal No. 14 of 2008 titled *Md. Safi (D) Th. his LRs. & Ors. Vs. Sri Farhat Ali Khan* and order dated 20.10.2008 passed in Civil Appeal No. 6171 of 2008 titled *Sadan Gopal Gautam Vs. Sushila Devi & Ors.*

15. Critical scrutiny of the aforesaid judgments/ orders would show that in these cases neither there was any offer made by the landlord nor any corresponding acceptance by the tenant, still the High Courts, in each of these cases, had enhanced the rates of rent unilaterally. But in the case in hand it is clearly reflected that Respondents-landlords made an offer to the Appellants/tenants which they agreed, only thereafter the rent was enhanced from Rs. 600/- per month to Rs. 2100/- per month, for both the shops. Thus, the ratio of the aforesaid judgments cited by learned counsel for Appellants has no application to the facts of the present case.

16. On the other hand learned counsel appearing for Respondents strenuously contended that building known as Jaitpur house, with the passage of time has come within the market area of Saharanpur and can therefore be called as falling within the meaning of commercial area. It was also

contended that looking to various factors such as the nature of construction, its prime location in the city, being situated on the main highway, and thus having easy accessibility to it and the availability of all other amenities and facilities etc. even the rent fixed by learned Single Judge at the rate of Rs. 2100/- per month for both the shops is on the lower side and too meagre. According to her, the total area under occupation of the Appellants would be 240 sq. ft. and with the rent fixed at Rs.2100/-, the rent would come to Rs.87.50 per sq. ft. This according to her is too low, keeping in mind the present trend and the prevalent market rate of rent. She thus submitted that no case for interference is made out and the appeal being devoid of merit and substance deserves to be dismissed.

17. Thus, looking to the matter from all angles we are of the considered opinion that the rent as has been fixed by the learned Single Judge for the two shops having total area 240 sq. ft. to Rs. 2100/- per month is not only reasonable but would be just and proper. Any enhancement in rent will not *ipso facto* be deemed to be unreasonable and exorbitant, unless the party aggrieved is able to give cogent reasons for the same. In this context, we may profitably refer to the judgment pronounced by this Court, reported in (2005)1 SCC 705 titled Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd. The relevant portion thereof is reproduced hereinbelow:-

> "In the case at hand, it has to be borne in mind that the tenant has been paying Rs. 371.90/- rent of the premises since 1944. The value of real estate and rent rates have skyrocketed since that day. The premises are situated in the prime commercial locality in the heart of Delhi, the capital city. It was pointed out to the High Court that adjoining premises belonging to the same landlord admeasuring 2000 sq. ft. have been recently let out on rent at the rate of Rs. 3,50,000/- per month. The Rent Control Tribunal was right in putting the tenant on terms of payment

> of Rs. 15,000/- per month charges for use and occupation during the pendency of appeal. The tribunal took extra care to see that the amount was retained in deposit with it until the appeal was decided so that the amount in deposit could be disbursed by the appellate Court consistently with the opinion formed by it at the end of the appeal. No fault can be found with the approach adopted by the Tribunal. The High Court has interfered with the impugned order of the Tribunal on a erroneous assumption that any direction for payment by the tenant to the landlord of any amount at any rate above the contractual rate of rent could not have been made. We cannot countenance the view taken by the High Court. We may place on record that it has not been the case of the tenant-respondent before us, nor was it in the High Court, that the amount of Rs. 15,000/- assessed by the Rent Control Tribunal was unreasonable or grossly on the higher side".

In fact, learned Single Judge has also taken note of the aforesaid judgment of this Court and only thereafter, the rental was worked out from Rs. 600/- per month for two shops to Rs. 2100/- per month.

18. No doubt, it is true that learned Single Judge has applied his own yardstick in working out the rent but only after both parties' contentions were taken into account and the said yardstick appears to be absolutely correct and perfect method of working out the present market rental of the premises.

19. Even though, the report of the valuation was not taken into consideration as there was none but the assessment and judgment of the learned Single Judge cannot be disallowed, even though detailed reasons have not been assigned by the learned Single Judge for enhancing the rate of rent because the ultimate conclusion arrived at by him does not suffer from any infirmity, illegality or perversity.

20. Thus in our considered opinion, the appeal from such an interim order of the learned Single Judge, being devoid of merit and substance deserves to be dismissed. We accordingly do so.

21. According to our considered view majority of these cases are filed because landlords do not get reasonable rent akin to market rent, then on one ground or the other litigation is initiated. So before saying omega, we deem it our duty and obligation to fix some guidelines and norms for such type of litigation, so as to minimise landlord-tenant litigation at all levels. These are as follows:-

(i) The tenant must enhance the rent according to the terms of the agreement or at least by ten percent, after every three years and enhanced rent should then be made payable to the landlord. If the rent is too low (in comparison to market rent), having been fixed almost 20 to 25 years back then the present market rate should be worked out either on the basis of valuation report or reliable estimates of building rentals in the surrounding areas, let out on rent recently.

(ii) Apart from the rental, property tax, water tax, maintenance charges, electricity charges for the actual consumption of the tenanted premises and for common area shall be payable by the tenant only so that the landlord gets the actual rent out of which nothing would be deductible. In case there is enhancement in property tax, water tax or maintenance charges, electricity charges then the same shall also be borne by the tenant only.

(iii) The usual maintenance of the premises, except major repairs would be carried out by the tenant only and the same would not be reimbursable by the landlord.

(iv) But if any major repairs are required to be carried out

then in that case only after obtaining permission from the landlord in writing, the same shall be carried out and modalities with regard to adjustment of the amount spent thereon, would have to be worked out between the parties.

(v) If present and prevalent market rent assessed and fixed between the parties is paid by the tenant then landlord shall not be entitled to bring any action for his eviction against such a tenant at least for a period of 5 years. Thus for a period of 5 years the tenant shall enjoy immunity from being evicted from the premises.

(vi) The parties shall be at liberty to get the rental fixed by the official valuer or by any other agency, having expertise in the matter.

(vii) The rent so fixed should be just, proper and adequate, keeping in mind, location, type of construction, accessibility with the main road, parking space facilities available therein etc. Care ought to be taken that it does not end up being a bonanza for the landlord.

22. These are some of the illustrative guidelines and norms but not exhaustive, which can be worked out between landlord and tenant so as to avoid unnecessary litigation in Court.

23. As mentioned hereinabove, the aforesaid appeal is dismissed with costs throughout.

24. Counsels' fee Rs. 10,000/-.

R.P. Appeal dismissed.

RANGAMMAL
v.
KUPPUSWAMI & ANR.
(Civil Appeal No. 562 of 2003)

MAY 13, 2011

[J.M. PANCHAL AND GYAN SUDHA MISRA, JJ.]

Evidence Act, 1872:

s.101 – Burden of proof – Suit for partition – Property of third person (who later got herself impleaded as defendant no. 2), included in plaint-schedule property on the basis of a sale deed stated to have been executed by the alleged guardian of defendant no. 2 when she was a minor, on the ground of legal necessity to pay the debts of her deceased mother – Defendant no. 2 disputing genuineness of the sale deed – High Court placing the burden on defendant no. 2 that she should have challenged genuineness of the sale deed – HELD: The burden of proving a fact always lies upon the person who asserts – Until such burden is discharged, the other party is not required to be called upon to prove his case – In the instant matter, when the plaintiff pleaded that the disputed property fell into his share by virtue of the sale deed, then it was clearly for him to prove that it was executed for legal necessity of defendant no. 2 while she was a minor – It was not defendant no. 2/appellant who claimed any benefit from the sale deed or asserted its existence,, therefore, the burden of challenging the sale deed specifically when she had not even been dispossessed from the disputed share by virtue of the sale deed, did not arise at all – Since the High Court has misplaced the burden of proof, the impugned judgment of the High Court as also the judgments of the courts below are clearly vitiated, as it is a well established dictum of the

Evidence Act that misplacing the burden of proof would vitiate the judgment.

Partition:

Suit for partition – HELD: In a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property i.e. disputed property is included in the schedule to the suit for partition, and the same is contested by a third party who is allowed to be impleaded, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family.

Pleadings:

***Suit –** Held**:** A suit has to be tried on the basis of the pleadings of the contesting parties filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the plaintiff and the contesting case of the defendant in the form of issues emerges out of that – In the instant case, the plaintiff/respondent no. 1 has miserably failed to prove his case as per his pleadings in the plaint and the burden to prove that the sale deed on which he based his claim, in fact was valid has not even been cast on him.*

Delay/Laches:

Suit for partition – Property of a third person (who subsequently got herself impleaded as defendant no. 2) included in the plaint scheduled property on the basis of a sale deed executed 31 years back by the alleged guardian of defendant no. 2 while she was a minor – High Court holding that delay in challenging the sale deed should have been

explained by defendant no. 2 – HELD: It is the plaintiff who based his case on execution of the sale deed of the property of defendant no. 2, and when there was a dispute about the genuineness of the sale deed and defendant no. 2 was in occupation of the property, it is the plaintiff who should have filed the suit claiming title on the basis of the sale deed, before the said property could be included in the suit for partition – Thus, there was no cause of action for defendant no. 2 to file a suit challenging the alleged sale deed as she asserted actual physical possession of the property and knowledge of sale deed could not be attributed to her prior to receiving the copy of the plaint disclosing execution of the alleged sale deed – Cause of action.

Costs:

Suit for partition – Property of third party (who later got herself impleaded as defendant no. 2) included in schedule to the plaint – HELD: Defendant no. 2 was unnecessarily dragged into this litigation at the instance of the plaintiff, who filed a partition suit which was apparently collusive in nature and was filed clearly with an oblique motive and evil design – It was a compulsion on the part of defendant no. 2 to contest the suit for decades wasting time, energy and expenses – Therefore, a token cost of Rs.25,000/- would be paid to her by plaintiff.

The plaintiff-respondent no. 1 filed a suit for partition and separate possession against the principal defendant (defendant no. 1/ respondent no. 2) including the property of the appellant in the schedule to the plaint without arraying her as a party to the suit. The case of the plaintiff was that the share which originally belonged to the appellant had been sold to the predecessors of the plaintiff and defendant no. 1 by way of a sale deed dated 24.2.1951 executed by the legal guardian of the appellant

when she was less than even three years of age. The sale deed was claimed to have been executed for legal necessity in order to discharge the debt of the appellant's deceased mother. The appellant filed an application for impleadment and was arrayed as defendant no. 2 in the said suit. She pleaded that the suit was collusive in nature so as to deprive her of her property by fraudulently stating that her deceased mother owed debt during her life time and in order to discharge the same, the so-called legal guardian executed the alleged sale deed dated 24.2.1991. The appellant-defendant no. 2 further pleaded that since she was a minor and was living with her maternal uncle, as she had lost both her parents, at the time of the alleged sale deed and, as such, the said sale deed ought not to be held legally binding on her so as to include her property for partition in the said collusive suit. The trial court decreed the suit. The first appellate court dismissed the appeal filed by defendant no. 2. Her second appeal was also dismissed by the High Court holding that it was for the appellant (defendant no. 2) to prove that the property shown in the sale deed, which fell into her share, was not sold for the purpose of discharging the liability of her deceased mother.

In the instant appeal filed by defendant no. 2, the questions for consideration before the Court were: (i) Whether in a partition suit filed by the plaintiff/respondent no. 1 the courts below could shift the burden of proof on the 2nd defendant-appellant regarding the validity of a sale deed, which was executed when the appellant was admittedly a minor, contrary to the pleading in the plaint claiming title to the suit land on the basis of the alleged sale deed? and (ii) Whether the question of limitation could arise against the 2nd defendant/appellant shifting the burden on her to challenge the sale deed, when the

case of execution of the alleged sale deed was set up by the plaintiff/respondent no. 1 in the plaint for the first time when he filed partition suit against respondent no. 2, without impleading the appellant, but claimed benefit of title to the suit land on the basis of the alleged sale deed.

Partly allowing the appeal, the Court

HELD: 1.1. Section 101 of the Evidence Act, 1872 defines 'burden of proof' which clearly lays down that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge the same. Until the court arrives at such a conclusion, it cannot proceed on the basis of weakness of the other party. [Para 14] [853-D-F]

1.2. In the instant case, it is the plaintiff/respondent No.1 who pleaded that the disputed property fell into his share and relied upon the alleged sale deed dated 24.2.1951 and included the subject-matter of the property which formed part of the sale deed and claimed partition. This sale deed was denied by the 2nd defendant/ appellant on the ground that it was bogus and a sham transaction which was executed admittedly in 1951 when she was a minor. Thus, it was the plaintiff/respondent No.1 who should have first of all discharged the burden that the sale deed executed during the minority of the

appellant was genuine and was fit to be relied upon. If the courts below including the High Court had felt satisfied on this aspect, only then the burden could be shifted on the 2nd defendant/appellant to dislodge the case of the plaintiff that the sale deed was not genuine. But when the plaintiff merely pleaded in the plaint but failed to lead any evidence – much less proof, that the sale deed was genuine and was executed in order to discharge the burden of legal necessity in the interest of minor, then the High Court clearly misdirected itself by recording in the impugned order that it is defendant no. 2/appellant who should have challenged the genuineness of the sale deed after attaining majority within the period of limitation, when she had not even been dispossessed from the disputed share. [Para 14 and 19] [853-G; 857-B-F]

1.3. When the plaintiff-respondent No.1 came with a specific pleading for the first time in a partition suit that the appellant's share had been sold out by her *de facto* guardian without even the permission of the court, therefore, in view of s.101 of the Evidence Act, it was clearly the plaintiff/respondent No.1 who should have discharged the burden that the same was done for legal necessity of the minor in order to discharge the debt which the deceased mother of the appellant was alleged to have been owing to some one. When the plaintiff/ respondent No.1 failed to discharge this burden, the question of discharge of burden to disprove the sale deed by the 2nd defendant/appellant does not arise at all as per the provisions of the Evidence Act. [Para 17-18] [855-E-G]

Subhra Mukherjee vs. Bharat Coaking Coal Ltd, **AIR 2000 SC 1203 – relied on.**

1.4. Since the High Court has misplaced burden of

proof, it clearly vitiated its own judgment as also the judgments of the courts below since it is well established dictum of the Evidence Act that misplacing of burden of proof would vitiate the judgment. It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording the findings in a particular way definitely vitiates the judgment, as it has happened in the instant matter. [Para 20] [857-G-H; 858-A]

Koppula Koteshwara Rao vs. *Koppula Hemant Rao,* ***2002 AIHC 4950 (AP)*****;** *State of J & K* vs. *Hindustan Forest Company,* **2006 (12) SCC 198;** *Corporation of City of Bangalore* vs. *Zulekha Bi,* **2008 (5) SCR 325 = 2008 (11) SCC 306 (308), relied on.**

1.5. The law on burden of proof as laid down in various decisions is, when a person after attaining majority, questions any sale of his property by his guardian during his minority, the burden lies on the person who upholds/asserts the purchase not only to show that the guardian had the power to sell but further that the whole transaction was bona fide. [Para 15] [854-C-D]

Roop Narain vs. *Gangadhar,* **9WR 297; and** *Anna Malay* vs. *Na U Ma,* **17C 990 –referred to.**

1.6. The plaintiff/respondent No.1, therefore, has miserably failed to prove his case as per his pleading in the plaint and the burden to prove that the sale deed in fact was valid has not even been cast on him that the share of appellant had been sold out by the de facto guardian by sale deed dated 24.2.1951 for consideration

without permission of the court when the appellant was a minor. [Para 16] [855-A-B]

2.1. It is further well-settled that a suit has to be tried on the basis of the pleadings of the contesting parties filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the plaintiff and the contesting case of the defendant in the form of issues emerges out of that. In the instant case, this basic principle, seems to have been missed not only by the trial court but consistently by the first appellate court which has been compounded by the High Court. [Para 24] [859-B-C]

2.2. The basic case pleaded by the plaintiff had been misconstrued and the burden to prove genuineness, veracity and legal efficacy of the sale deed dated 24.2.1951 was shifted on the appellant clearly missing that it is the plaintiff/respondent No.1 who was bent upon to include the appellant's property also for partition by relying upon the story of execution of sale deed when the partition suit was between the plaintiff and defendant No.1. [para 26] [859-F-G]

2.3. The High Court as also the courts below have clearly misconstrued the entire case of the plaintiff and tried it contrary to the pleadings. The High Court has recorded that "*the present suit which was filed in the year 1982, is after 31 years"* i.e. after 31 years of the execution of the sale deed dated 24.2.1951. But, the High Court has fallen into a crystal clear error as it has patently missed that the suit had not been filed by the appellant as she was the 2nd defendant who was later impleaded in the suit. [para 11] [851-G-H; 852-A]

3.1. The High Court has held that the delay in

challenging the sale deed of 1951 should have been explained at the instance of the 2nd defendant-appellant when it is the plaintiff who brought the story of execution of the sale deed of appellant's property in their favour. In fact, if there was a dispute about the genuineness and veracity of the sale deed and the appellant was in occupation of her share, then it is the plaintiff who should have filed a suit claiming title on the basis of the sale deed which was claimed to have been executed in their favour by the *de facto* guardian of the appellant when she was a minor before the said property could be included in the suit for partition between the plaintiff and the defendant excluding the 2nd defendant/appellant and the consequence of not doing so or the delay in this regard, obviously will have to be attributed to the plaintiff/ respondent no. 1. [Para 27] [859-H; 860-A-D]

3.2. The High Court, therefore, has fallen into an error while observing that the appellant/defendant No.2 in the suit should have assailed the sale deed and cannot do so after 31 years of its execution when it is unambiguously an admitted factual position that it is the plaintiff/respondent No.1 who had filed a suit for partition against defendant No.1/respondent No.2 and in that partition suit it was plaintiff/respondent No.1 who banked upon the story that the sale deed had been executed by the legal guardian of the appellant, for legal necessity which was to discharge the debt of the appellant's deceased mother. The High Court has clearly missed that the suit had not been filed by the appellant but she was merely contesting the suit as the 2nd defendant by getting herself impleaded in the partition suit when it came to her knowledge that the property which is in her occupation and possession has also been included in the schedule in the suit for partition between plaintiff/

respondent No.1 and the 1st defendant/respondent No.2 and when she received the copy of the plaint, execution of the alleged sale deed way back in 1951 was disclosed to her for the first time. Therefore, there was no cause of action for her to file a suit challenging the alleged sale deed, as knowledge of the same cannot be attributed to her in this regard as she asserted actual physical possession on her share. [Para 17 and 28] [855-C-D; 860-E-H]

4.In a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property, meaning thereby, a disputed property is included in the schedule of the suit for partition, and the same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the plaintiff's joint family in regard to which decree for partition is sought. [Para 31] [861-F-H; 862-A]

5.1. In the result, the judgment and order of the High Court in so far as the share of the 2nd defendant/appellant is concerned, is set aside and, consequently, the decree passed by the trial court, upheld by the first appellate court and the High Court in so far as it illegally includes the share of the appellant which had not devolved on the family of the plaintiff/respondent No.1 and defendant No.1/ respondent No.2, but was claimed on the basis of a sale deed which could not be proved either by evidence or

law, is set aside. However, it is made clear that the decree which has been passed by the trial court in so far as partition between plaintiff/respondent No.1 and defendant No.1/respondent No.2 is concerned, shall remain intact. The trial court accordingly shall modify the decree passed in O.S. No.255 of 1982 by excluding the share of the appellant claimed on the basis of the sale deed dated 24.2.1951. [Para 30 and 32] [861-D-E; 862-A-D]

5.2. It is a matter of concern of this Court that the appellant who was in actual physical and peaceful possession of her property which she had inherited from her deceased parents, was unnecessarily dragged into this litigation at the instance of the plaintiff, who filed a partition suit which was apparently collusive in nature as it included the share of a third party to which the plaintiff and 1st defendant's family had no clear title. It was clearly a compulsion on the part of 2nd defendant/appellant to contest the collusive suit for decades wasting time, energy and expense over a litigation which was started by the plaintiff clearly with an oblique motive and evil design. Therefore, a token cost of Rs.25,000/- shall be paid by plainitiff/respondent No.1 to the appellant. [Para 33] [862-F-H; 863-A-B]

Case Law Reference:

9WR 297	**referred to**	**para 15**
17C 990	**referred to**	**para 15**
AIR 2000 SC 1203	**relied on**	**para 18**
2002 AIHC 4950 (AP)	**relied on**	**Para 20**
2006 (12) SCC 198	**relied on**	**para 21**
2008 (5) SCR 325	**relied on**	**Para 22**

CIVIL APPELLATE JURISIDCTION : Civil Appeal No. 562 of 2003.

From the Judgment & Order dated 11.7.2002 of the High Court of Judicature at Madras in S.A. No. 703 of 1992.

Jayanth Muth Raj, T.N. Rao for the Appellant.

Krishnamurthi Swami, Prabha Swami, S.J. Aristole, Prabu Ramasubramani, L.A.J. Selvan, Priya Aristotle, V.G. Pragasam for the Respondents.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. This appeal by special leave has been filed by the appellant Tmt. Rangammal against the order dated 11.07.2002 passed by the learned single Judge of the High Court of Judicature at Madras in Second Appeal No. 703/1992 by which the appeal was dismissed by practically a summary order although the substantial question of law which was formulated at the time of admission of the appeal was as follows:

> "Whether the sale deed executed by the *de facto* guardian on behalf of the minor without the permission of the court could be held to be valid ?

2. However, on hearing the appeal in the light of the prevailing facts and circumstances of the instant matter, we are of the view that the question also arises whether in a partition suit filed by the plaintiff/respondent No.1 herein, the courts below could shift the burden of proof on the defendant - appellant regarding the validity of a sale deed, which was executed when the appellant was admittedly a minor, contrary to the pleading in the plaint filed in a suit for partition, who claimed title to the suit land on the basis of the alleged sale deed. Still further the question arises whether the question of limitation could arise

against the defendant/appellant shifting the burden on her to challenge the sale deed, when the story of execution of the alleged sale deed was set up by the plaintiff/respondent No.1 in the plaint for the first time when he filed partition suit against his brother, without impleading the appellant, but claimed benefit of title to the suit land on the basis of the alleged sale deed.

3. In order to decide the aforesaid controversy, it is necessary to relate the facts giving rise to this appeal in so far as it is relevant which disclose that the appellant Tmt. Rangammal was impleaded as second defendant in a suit for partition bearing O.S. No. 255/1982 which had been filed by one Kuppuswami plaintiff-respondent No.1 herein in the court of District Munsif, Palani, against his brother Andivelu who was the principal defendant/1st defendant/respondent No.2 herein for partition and separate possession, but the plaintiff also included the property of the appellant-Rangammal in the schedule to the plaint without including her as a party to the suit as it was pleaded by the plaintiff-respondent No.1-Kuppuswami that the share which originally belonged to the appellant-Rangammal, was transferred to their predecessors, who were father and uncle of the plaintiff and defendant No.1/Respondent No.1 Andivelu, by way of a sale deed dated 24.2.1951 executed in their favour by Kumara Naicker who claimed to be the legal guardian of the Rangammal when the appellant/Rangammal was admittedly a minor and was barely few years old, less than even three years. The sale deed was claimed to have been executed for legal necessity in order to discharge the debt of the deceased mother of the appellant in the year 1951 which according to the case of the plaintiff-respondent No. 1 had been transferred to their branch by virtue of the aforesaid sale deed executed on 24.2.1951 by the alleged guardian of the appellant Kumara Naicker.

4. Since the appellant had not been impleaded in the suit

for partition although her property was included in the partition suit between the two brothers i.e. plaintiff Kuppuswami-respondent No.1 herein and Andivelu 1st defendant – respondent No.2 herein, the appellant filed an application for impleadment in the partition suit before the trial court which was allowed.

5. The appellant herein who was impleaded as a second defendant in the suit clearly pleaded that the partition suit filed by Kuppuswami-plaintiff against his brother Andivelu 1st defendant –respondent No.2 herein, was collusive in nature as this was clearly to deprive the appellant from her share by relying on an alleged sale deed dated 24.2.1951 by fraudulently stating that the deceased mother of the appellant was owing certain debt during her lifetime and in order to discharge the same, the so-called legal guardian of the appellant Kumara Naicker executed a sale deed in favour of the father and uncle of the plaintiff and defendant No.1 who are respondents herein. It was, therefore, submitted by the appellant/2nd defendant in the suit that the sale deed dated 24.2.1951 alleged to have been executed in order to discharge the debt of her deceased mother, when the appellant was a minor, ought not to be held legally binding on her and so as to include her property for partition in the partition suit which had been instituted by an altogether different branch of the family who had separated more than three generations ago. Hence she specifically pleaded that the partition suit including her property was clearly collusive in nature and therefore the suit was fit to be dismissed.

6. In order to appreciate whether the courts below were justified in depriving the appellant Tmt. Rangammal from her share, it appears necessary to relate some other salient facts of the case leading up to the filing of this appeal. The schedule-property comprising an area of 4 acres and 10 cents described in various survey numbers originally belonged to one Laksmi

Naicker-the common ancestor of contesting parties who had two sons and an oral partition had taken place between them in regard to the properties of the joint family including the schedule-property. Thereafter, a sale deed dated 24.2.1951 in respect of the schedule-property was executed by Kumara Naicker –alleged legal guardian of appellant-Rangammal who was one of the sons of late Kumara Naicker and wife of the elder son of Laksmi Naicker-Thottammal a cousin of her son, who was descendent of Kumara Naicker. Kumara Naicker, i.e. the son of the elder son of Laksmi Naicker executed the sale deed on behalf of the appellant herein, who was the daughter of younger son of Laksmi Naicker and Andi Naicker was admittedly a minor, representing himself as her guardian since she had lost both her father and her mother at the time of the execution of the sale deed. However, the appellant according to her case continued in possession of half of the schedule property according to the oral partition which had fallen into the share of her father since the only brother of the appellant/ Rangammal had died unmarried. Thus, the appellant continued to be in possession of half of the property without any knowledge about the alleged sale deed.

7. The appellant's case is that as she was a minor and had lost both her parents, she was living with her maternal uncle even at the time of the alleged sale. The appellant's case is that the suit was instituted between the plaintiff-respondent No.1 herein and 1st defendant-respondent No.2 herein under the pretext of partition but in fact the idea behind institution of the suit was to oust the appellant who continued to be in possession of half of the share of the property being the sole legal representative of the younger son of Laksmi Naicker who was Andi Naicker. As already stated, the appellant in fact was not even made a party in the partition suit initially but was later impleaded as 2nd defendant after she filed an application for her impleadment.

8. However, the High Court while dealing with the second appeal arising out of the partition suit, cast the burden completely on the appellant/2nd defendant to prove that the property shown in the sale deed which fell into the share of the appellant, was not for the purpose of discharge of the liability of her deceased mother who according to her case was not owing any debt to anyone including Kumara Naicker. But the suit was finally decreed in favour of the plaintiff/respondent No.1 holding therein that the appellant's deceased mother was owing certain debts and for discharge of the same, the so-called legal guardian of the appellant who was Kumara Naicker executed a sale deed in favour of the plaintiff's father and defendant No.1's father in respect of the entire property of Rangammal and this was done ostensibly as the appellant's mother had to discharge certain debts which she was owing to the plaintiff's father during her lifetime. Thus, the District Munsif, Palani, decreed the suit in favour of the plaintiff/1st respondent herein Kuppuswami. While doing so, the trial court recorded a finding that the sale deed dated 24.2.1951 by which half share of the appellant in the suit property was transferred when the appellant was a minor had been executed by legal guardian Kumara Naicker for legal necessity according to the case of the appellant herein, Kumara Naicker the so-called legal guardian was neither her natural guardian nor guardian appointed by the court and hence the sale deed executed by him to the extent of half share of the schedule property of appellant-Rangammal was clearly void, illegal, inoperative and hence not binding on her. The trial court decreed the suit against which the appeal before the 1st appellate court was dismissed. The matter then came up to the High Court by way of a second appeal.

9. Learned counsel for the appellant while challenging the judgment and orders of the courts below submitted that the sale deed executed by the so-called *de facto* guardian Kumara

Naicker and Thottammal cannot be held to be binding on her as she was a minor in the custody of her maternal uncle and not Kumara Naicker –father of the respondent No.2 and hence the sale deed executed by him on her behalf was not binding on her as the same was executed in order to deprive her of her half share in the disputed property which is situated on the eastern portion of the schedule property.

10. The learned single Judge of the High Court however was pleased to dismiss the second appeal holding therein that the present suit out of which the second appeal arose was filed in the year 1982 which was after 31 years of the execution of the sale deed dated 24.2.1951. The single Judge further observed that if the appellant Tmt. Rangammal was aggrieved of the sale deed executed by the *de facto* guardian, she ought to have challenged it within three years from the date of attaining majority. The High Court went on to hold that until the date of filing of the present suit by the 1st respondent and even thereafter, the appellant had not chosen to challenge the sale deed executed by the *de facto* guardian and she never asserted any title in respect of the suit property irrespective of the sale deed in order to establish that she was aggrieved of the sale deed and hence it was too late for the appellant to raise such a plea in the High Court by way of a second appeal.

11. We have heard learned counsel for the parties at length and on a consideration of their submissions in the light of the judgments and orders of the courts below, specially the High Court, we are clearly of the view that the High Court as also the courts below have clearly misconstrued the entire case of the plaintiff as well as the respondents and tried it contrary to the pleadings. The High Court has recorded that *"the present suit which was filed in the year 1982, is after 31 years"* i.e. after 31 years of the execution of the sale deed dated 24.2.1951. But it can be instantly noticed that the High Court has fallen into a crystal clear error as it has patently and unambiguously

missed that the suit had not been filed by the appellant Tmt. Rangammal as she was the 2nd defendant who was later impleaded in the suit but the partition suit had been filed by the plaintiff-Kuppuswami-respondent No.1 herein against his brother the 2nd respondent-Andivelu-1st defendant which was a suit for partition of the property but while doing so he included and asserted title to the property in the schedule of the plaint which admittedly had fallen into the share of the appellant's deceased-father which devolved upon her after the death of her father, mother and brother who died unmarried. But it is the plaintiff/respondent No.1 who came up with a case in the plaint that this property was transferred for legal necessity by the so-called legal guardian of the appellant by executing a sale deed on 24.2.1951 in favour of the respondents predecessors who were father and uncle of the plaintiff and 1st defendants/ respondents herein.

12. The learned single Judge of the High Court as also the trial court and the lower appellate court thus have lost sight of the fact that it is the plaintiff/respondent No.1 herein who had come up with a case that the half share of the disputed property which on partition had fallen into the share of the appellant's father was sold out by Kumara Naicker as guardian of the appellant-who was a minor in order to discharge some debt which the appellant's deceased mother was alleged to be owing. However the disputed property which was sold in order to discharge the alleged burden of debt vide sale deed dated 24.2.1951 was purchased by the plaintiff-1st respondent's father Arumuga Gounder and their uncle Kumara Naicker which means that the legal guardian Kumara Naicker claims the property of the appellant who was minor and then sold it to himself and nephew Arumuga Gounder. Furthermore, it is also the plaintiff's case that the property which had fallen into the share of Tmt. Rangammal had been sold out by Kumara Naicker to the father of Kuppuswami–Arumuga Gounder and Andivelu who was his own son.

13. Therefore, it is more than apparent that when the plaintiff/respondent came up with a case of execution of sale deed on 24.2.21951 for half of the schedule property/disputed property alleged to have been sold out for legal necessity which had fallen into the share of appellant Rangammal, the burden clearly lay on the plaintiff/respondent No.1 to discharge that the sale deed executed by Kumara Naicker to his own son and nephew Arumuga Gounder in regard to the share which had admittedly fallen into the appellant share Rangammal who was a minor, was sold for the legal necessity. But this burden by the trial court was wrongly cast upon the appellant/Rangammal to discharge, although, it is well-settled that the party who pleads has also to prove his case.

14. *Section 101 of the Indian Evidence Act, 1872 defines 'burden of proof' which clearly lays down that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party. In* view of this legal position of the Evidence Act, it is clear that in the instant matter, when the plaintiff/respondent No.1 pleaded that the disputed property fell into the share of the plaintiff by virtue of the sale deed dated 24.2.1951, then it was clearly for the plaintiff/respondent No.1 to prove that it was executed for legal necessity of the appellant-while she was a minor. But, the High Court clearly took an erroneous view while holding that it is the defendant/appellant

who should have challenged the sale deed after attaining majority as she had no reason to do so since the plaintiff / respondent No.1 failed to first of all discharge the burden that the sale deed in fact had been executed for legal necessity of the minor's predecessor mother was without permission of the court. It was not the defendant/respondent who first of all claimed benefit of the sale deed or asserted its genuineness, hence the burden of challenging the sale deed specifically when she had not even been dispossessed from the disputed share, did not arise at all.

15. Plethora of commentaries emerging from series of case laws on burden of proof which are too numerous to cite, lay down that *when a person after attaining majority, questions any sale of his property by his guardian during his minority, the burden lies on the person who upholds/asserts the purchase not only to show that the guardian had the power to sell but further that the whole transaction was bona fide.* This was held in the case of *Roop Narain* vs. *Gangadhar, 9WR 297,* as also in *Anna Malay* vs. *Na U Ma,* 17C 990. Thus when the plaintiff/respondent No.1 came up with a case that the minor's share/appellant herein was sold for legal necessity by her uncle Kumara Naicker, then it was the plaintiff/respondent No.1 who should have discharged the burden to prove that the minor/ appellant's share had been sold of by the *de facto* guardian Kumara Naicker without permission of the court, could be held to be legal and valid so as to include the same in the partition suit between two brothers, which has not been discharged at all by the plaintiff/respondent No.1. In fact, the real brother of plaintiff Kuppuswami who is defendant No.1/respondent No.1 herein Andivelu has also not supported the case of the plaintiff that the half share of appellant/Rangammal in the disputed property was sold out vide sale deed dated 24.2.1951 for legal necessity without permission of the Court and hence defendant No.1/respondent No.2 also has not supported the case of the

plaintiff/respondent No.1 on this count.

16. The plaintiff/respondent No.1 therefore has miserably failed to prove his case as per his pleading in the plaint and the burden to prove that the sale deed in fact was valid has not even been cast on plaintiff/respondent No.1 that the share of appellant-Rangammal had been sold out by Kumara Naicker vide sale deed dated 24.2.1951 for consideration without permission of the Court when the appellant was a minor.

17. The High Court, therefore, has fallen into an error while observing that the appellant/defendant No.2 in the suit should have assailed the sale deed and cannot do so after 31 years of its execution when it is unambiguously an admitted factual position that it is the plaintiff/respondent No.1 who had filed a suit for partition against his brother defendant No.1/respondent No.2 and in that partition suit it was plaintiff/respondent No.1 who banked upon the story that a sale deed had been executed by his Uncle Kumara Naicker who claimed it to be the legal guardian of the appellant-Rangammal who admittedly was a minor for legal necessity which was to discharge the debt of the appellant's deceased mother. Hence, in view of Section 101 of the Indian Evidence Act, 1872 it is the plaintiff/respondent No.1 who should have first of all discharged the burden that in fact a sale deed had been executed for the share which admittedly belonged to appellant-Rangammal in order to discharge the burden of debt for legal necessity and for the benefit of the appellant who admittedly was a minor.

18. When the plaintiff-respondent No.1-Kuppuswami came with a specific pleading for the first time in a partition suit that the appellant's share had been sold out by her *de facto* guardian Kumara Naicker without even the permission of the court, it was clearly the plaintiff/respondent No.1 who should have discharged the burden that the same was done for legal necessity of the minor in order to discharge the debt which the

deceased mother of the appellant was alleged to have been owing to some one. When the plaintiff/respondent No.1 failed to discharge this burden, the question of discharge of burden to disprove the sale deed by the 2nd defendant/appellant–Rangammal do not arise at all as per the provisions of Evidence Act. It may be relevant at this stage to cite the ratio of the decision of this Court delivered in the matter of *Subhra Mukherjee* vs. *Bharat Coaking Coal Ltd, AIR 2000 SC 1203,* whether the document in question was genuine or sham or bogus, the party who alleged it to be bogus had to prove nothing until the party relying upon the document established its genuineness. This was the view expressed by this Court in the matter of *Subhra Mukherjee* vs. *Bharat Coaking Coal Ltd,* AIR 2000 SC 1203 = 2000 (3) SCC 312. This case although did not relate to a suit for partition or question relating to minority, it was a case wherein the appellant refused to hand over possession of property to the respondent-government company when ordered to do so. Instead she filed a suit for declaration of title in respect of property. The evidence of plaintiff/appellant indicated several discrepancies and inconsistencies due to which the trial court dismissed the suit but the 1st appellate court and the High Court, had allowed the appeal which was upheld by the Supreme Court as it was held that the High Court rightly allowed the respondent's/government company's second appeal and rightly found that the sale in favour of the appellant was not bona fide and thus confer no rights on them.

19. Application of Section 101 of the Evidence Act, 1872 thus came up for discussion in this matter and while discussing the law on the burden of proof in the context of dealing with the allegation of sham and bogus transaction, it was held that party which makes allegation must prove it. But the court was further pleased to hold wherein the question before the court was "whether the transaction in question was a bona fide and

genuine one" so that the party/plaintiff relying on the transaction had to first of all prove its genuineness and only thereafter would the defendant be required to discharge the burden in order to dislodge such proof and establish that the transaction was sham and fictitious. This ratio can aptly be relied upon in this matter as in this particular case, it is the plaintiff/respondent No.1-Kuppuswami who relied upon the alleged sale deed dated 24.2.1951 and included the subject-matter of the property which formed part of the sale deed and claimed partition. This sale deed was denied by the defendant/appellant on the ground that it was bogus and a sham transaction which was executed admittedly in 1951 when she was a minor. Thus, it was the plaintiff/respondent No.1 who should have first of all discharged the burden that the sale deed executed during the minority of the appellant was genuine and was fit to be relied upon. If the courts below including the High Court had felt satisfied on this aspect, only then the burden could be shifted on the defendant/appellant to dislodge the case of the plaintiff that the sale deed was not genuine. But when the plaintiff merely pleaded in the plaint but failed to lead any evidence – much less proof, that the sale deed was genuine and was executed in order to discharge the burden of legal necessity in the interest of minor, then the High Court clearly misdirected itself by recording in the impugned order that it is the defendant/appellant herein who should have challenged the genuineness of the sale deed after attaining majority within the period of limitation.

20. Since the High Court has misplaced burden of proof, it clearly vitiated its own judgments as also of the courts below *since it is well established dictum of the Evidence Act that misplacing burden of proof would vitiate judgment.* It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and

recording findings in a particular way definitely vitiates the judgment as it has happened in the instant matter. This position stands reinforced by several authorities including the one delivered in the case of *Koppula Koteshwara Rao* vs. *Koppula Hemant Rao, 2002 AIHC 4950 (AP)*.

21. It has been further held by the Supreme Court in the case of *State of J & K* vs. *Hindustan Forest Company, 2006 (12) SCC 198*, wherein it was held that the onus is on the plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus.

22. It was still further held by this Court in the matter of *Corporation of City of Bangalore* vs. *Zulekha Bi, 2008 (11) SCC 306 (308)* that it is for the plaintiff to prove his title to the property. This ratio can clearly be made applicable to the facts of this case for it is the plaintiff who claimed title to the property which was a subject-matter of the alleged sale deed of 24.2.1951 for which he had sought partition against his brother and, therefore, it was clearly the plaintiff who should have first of all established his case establishing title of the property to the joint family out of which he was claiming his share. When the plaintiff himself failed to discharge the burden to prove that the sale deed which he executed in favour of his own son and nephew by selling the property of a minor of whom he claimed to be legal guardian without permission of the court, it was clearly fit to be set aside by the High Court which the High Court as also the courts below have miserably failed to discharge. The onus was clearly on the plaintiff to positively establish his case on the basis of material available and could not have been allowed by the High Court to rely on the weakness or absence of defence of the defendant/appellant herein to discharge such onus.

23. The courts below thus have illegally and erroneously

failed not to cast this burden on the plaintiff/respondent No.1 by clearly misconstruing the whole case and thus resulted into recording of findings which are wholly perverse and even against the admitted case of the parties.

24. *It is further well-settled that a suit has to be tried on the basis of the pleadings of the contesting parties which is filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the plaintiff and the contesting case of the defendant in the form of issues emerges out of that.* This basic principle, seems to have been missed not only by the trial court in this case but consistently by the first appellate court which has been compounded by the High Court.

25. Thus, we are of the view, that the whole case out of which this appeal arises had been practically made a mess by missing the basic principle that the suit should be decided on the basis of the pleading of the contesting parties after which Section 101 of The Evidence Act would come into play in order to determine on whom the burden falls for proving the issues which have been determined.

26. We further fail to comprehend as to how the basic case pleaded by the plaintiff had been misconstrued and the burden of discharge of genuineness, veracity and legal efficacy of the sale deed dated 24.2.1951 was shifted on the appellant-Rangammal clearly missing that it is the plaintiff's/respondent No.1 case who was bent upon to include Rangammal's property also for partition by relying upon the story of execution of sale deed when the partition suit was between the two brothers who were plaintiff-Kuppuswami and defendant No.1-Andivelu.

27. Coming now to the next question, we are unable to appreciate as to how the High Court has held that the delay in challenging the sale deed of 1951 should have been done at

the instance of the 2nd defendant-appellant herein when it is the plaintiff who brought the theory/story of execution of the sale deed of appellant Rangammal's property into the branch of plaintiff/respondents' branch by pleading and asserting that this had fallen into the share of their predecessor as one of the predecessors was the *de facto* guardian of the appellant Rangammal. In fact, if there was a dispute about the genuineness and veracity of the sale deed and the appellant was in occupation of her share, then it is the plaintiff who should have filed a suit claiming title on the basis of the sale deed which was claimed to have been executed in their favour by the *de facto* guardian of Rangammal when she was a minor before this property could be included in the suit for partition between the brothers excluding the 2nd defendant/appellant Rangammal and the consequence of not doing so or delay in this regard, obviously will have to be attributed to the plaintiff/respondent.

28. Thus, the High Court fell into a clear error when it observed that the suit was barred by limitation as it had been filed after 31 years of the execution of the sale deed which on the face of it is factually incorrect. The High Court has clearly erred while recording so, as it seems to have missed that the suit had not been filed by the appellant herein but she was merely contesting the suit as the 2nd defendant by getting herself impleaded in the partition suit when it came to her knowledge that the property which is in her occupation and possession has also been included in the schedule in the suit for partition between plaintiff/respondent No.1 herein-Kuppuswamy and the 1st defendant/respondent No.2 herein-Andivelu and when she received the copy of the plaint, execution of the alleged sale deed way back in 1951 was disclosed to her for the first time. Hence, there was no cause of action for her to file a suit challenging the alleged sale deed as knowledge of the same cannot be attributed to her in this regard as she asserted actual physical possession on her share.

29. The appellant who claimed to be in occupation and peaceful possession of her share to the extent of half which is situated on the eastern side of the schedule property, had no reason to file a suit assailing the sale deed when she was in actual physical possession of her share and suddenly out of the blue, a partition suit was filed by the plaintiff/respondent No.1 wherein the property of the appellant also was included in the schedule of the partition suit which was to be partitioned between the two brothers by metes and bounds by setting a cooked up story that the appellant's share, who belonged to an altogether different branch of the family, had been given away by her *de facto* guardian Kumara Naicker by executing a sale deed in favour of the respondents' predecessor way back on 24.2.1951 when the appellant admittedly was a minor.

30. We are, therefore, constrained to partly set aside the judgment and order of the High Court in so far as the share of the appellant Rangammal is concerned and consequently the decree passed by the trial court, upheld by the first appellate court and the High Court which had been illegally decreed including the share of the appellant -Rangammal which had not devolved on the family of the plaintiff/respondent No.1 and defendant No.1/respondent No.2, but was claimed on the basis of a sale deed which could not be proved either by evidence or law, is fit to be set aside.

31. It hardly needs to be highlighted that *in a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property meaning thereby disputed property is included in the schedule of the suit for partition, and the same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property*

belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the plaintiff's joint family in regard to which decree for partition is sought.

32. However, we make it clear that the decree which has been passed by the trial court in so far as partition between plaintiff/respondent No.1 and defendant No.1/respondent No.2 is concerned, shall remain in tact but the said decree shall exclude the property which had fallen into the share of appellant-Rangammal but was claimed to have been transferred to the branch of the plaintiff and 1st defendant-respondents herein vide sale deed dated 24.2.1951 The trial court being the court of District Munsif, Palani, accordingly shall modify the decree passed in O.S. No.255 of 1982 by excluding the share of the appellant –Rangammal claimed on the basis of the sale deed dated 24.2.1951. Thereafter, if the decree is put to execution, the executing court shall ensure that such portion of the property which is in occupation of Rangammal which was alleged to have been sold vide sale deed dated 24.2.1951, shall not be put into execution while partitioning the remaining property between the plaintiff-Kuppuswami and 1st defendant -Andivelu - respondent No.2.

33. Thus, this appeal in so far as the claim of the appellant-Rangammal to the extent of half of the share in the schedule to the suit property, situated on the eastern portion is concerned, stands allowed with a token cost which is quantified at rupees twenty five thousand as we are of the view that the appellant who was in actual physical and peaceful possession of her property which she had inherited from her deceased parents, was unnecessarily dragged into this litigation at the instance of the plaintiff-Kuppuswami who filed a partition suit which was apparently collusive in nature as it included the share of a third party to which the plaintiff and 1st defendant's family had no clear title. Under the facts and circumstance of the instant case,

it was clearly a compulsion on the part of the appellant/Tmt. Rangammal to contest the collusive suit for decades Kwasting time, energy and expense over a litigation which was started by the plaintiff clearly with an oblique motive and evil design. Hence the cost shall be paid by the respondent No.1-Kuppuswami to the appellant-Rangammal as indicated above.

34. Accordingly, this appeal stands allowed with costs.

R.P. Appeal allowed.

STATE OF KERALA AND ANR.
v.
C.P. RAO
(Criminal Appeal No. 1098 of 2006)

MAY 16, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

Prevention of Corruption Act, 1988 – ss.7 and 13(2) r/w s.13(1)(d) – Bribery case – Non-examination of complainant – Effect of – Allegation that respondent demanded illegal gratification from complainant CW1 for allotting pass marks to D-Pharma students in practical examination – Conviction of respondent by trial court – High Court acquitted the respondent on the ground that the complainant was not examined – Justification of – Held: Justified – In view of the examination system prevailing, respondent alone was not in a position to allot higher marks – Besides, it is the case of the respondent that when CW 1 met him in a hotel room, the respondent shouted that some currency notes had been thrust into his pocket by CW 1 – Such shouts were heard by PW-1 and PW 2 – Their evidence could not be, in any way, shaken by manner of cross-examination – Further, PW 3 gave evidence of the previous animosity between the college authorities and the respondent – In the background of these facts, the non-examination of CW 1 was very crucial – The case was not proved beyond reasonable doubt.

Appeal – Against order of acquittal – Scope of interference – Discussed.

The prosecution case was that the respondent demanded illegal gratification of Rs. 5000/- from the complainant CW 1 for allotting pass marks to D-Pharma

students in practical examination. The respondent was convicted under Sections 7 and 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988. On appeal, the High Court acquitted the respondent on the ground that CW 1 was not examined and the only explanation given was that he was not available in the country but no details were given as to where the complainant was. Hence the present appeal.

Dismissing the appeal, the Court

HEDL:1. It is an admitted case that the accused-respondent alone cannot give such marks. In view of the examination system prevailing such marks have to be approved by others. The respondent alone, therefore, is admittedly not in a position to allot higher marks. Apart from that, it is the case of the respondent that when CW 1 met him in a hotel room, the respondent shouted that some currency notes had been thrust into his pocket by CW 1. Such shouts of the respondent were heard by PW 1 and PW 2. The evidence of PW 1 and PW 2 were recorded by the Trial Court. The evidence of PW 1 and PW 2 could not be, in any way, shaken by manner of cross-examination. PW 3 has also given evidence of the previous animosity between the college authorities and the respondent who had an occasion to file reports with the college authorities on the basis of some inspection. In the background of these facts, especially the non-examination of CW 1, was very crucial. When there was no corroboration of testimony of the complainant regarding the demand of bribe by the accused, it has to be accepted that the version of the complainant is not corroborated and, therefore, the evidence of the complainant cannot be relied on. [Paras 5 and 6] [868-G-H; 869-A-E]

Panalal Damodar Rathi v. State of Maharashtra **1979(4) SCC 526 – relied on.**

2. Mere recovery of tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The presence of the complainant in a bribery case is necessary. The prosecution has to prove the charge beyond reasonable doubt like any other criminal offence and the accused should be considered innocent till it is proved to the contrary by proper proof of demand and acceptance of illegal gratification, which is the vital ingredient to secure the conviction in a bribery case. [Para 10, 11, 12] [870-B-D; 871-A-B]

C.M. Girish Babu v. CBI, Cochin, High Court of Kerala **2009(3)SCC779;** *A. Subair v. State of Kerala* **2009(6) SCC 587 – relied on.**

Suraj Mal v. State (Delhi Admn.) **1979(4) SCC 725 – referred to.**

3. Further, it is a well settled principle that when the court has to exercise its discretion in an appeal arising against an order of acquittal, the Court must remember that the innocence of the accused is further re-established by the judgment of acquittal rendered by the High Court. Against such decision of the High Court, the scope of interference by this Court in order of acquittal has been very succinctly laid down by a Three-Judge bench of this Court in the case of *Sanwat Singh* as follows:- (1) An appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup's case 1934 L.R. 61 I.A. 398 afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of

this Court, such as (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified. This Court is in respectful agreement with the aforesaid salutary principles settled by this Court and is constrained to hold that this appeal has no merit and is accordingly dismissed. [Paras 14, 15] [871-C-H; 872-A-C]

Sanwat Singh & others v. State of Rajasthan **1961(3) SCR 120 – relied on.**

Case Law Reference:

1979 (4) SCC 526	**relied on**	**Para 6, 7, 8**
2009(3)SCC 779	**relied on**	**Para 10**
1979(4) SCC 725	**referred to**	**Para 10**
2009(6) SCC 587	**relied on**	**Para 11, 12**
1961(3) SCR 120	**relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1098 of 2006.

From the Judgment & Order dated 19.1.2005 of the High Court of Kerala at Ernakulam in Crl. A.No. 180 of 1998.

G. Praksh, Ramesh Babu M.R. for the Appellant

P.P. Rao, Guntur Prabhakar for the Respondent.

The Judgment of the Court was delivered by

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

2. This is an appeal against the judgment and order of acquittal dated 19th January, 2005 rendered by the High Court. The respondent facing a trial, was convicted under Sections 7 and 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988 by the Special Judge, Thiruvananthapuram, in Criminal Case No. 9 of 1996 and the respondent was sentenced to undergo rigorous imprisonment for 20 months and pay a fine of Rs. 2500/- under the former charge and rigorous imprisonment for two years and a fine of Rs. 2500/- under the second charge. Default stipulations were also there.

3. The facts relating to that case have been summed up in the judgment of the High Court and we are not repeating the same here once again.

4. In passing the order of acquittal, the High Court examined and analysed in detail the evidence of the case. The High Court found that the complainant CW 1 was not examined and the only explanation given was that he was not available in the country but no details were given as to where the complainant was. The defence of the respondent in this case has also been noted by the High Court in some detail.

5. The prosecution case is that the demand of illegal gratification of Rs. 5000/- was made by the respondent from CW 1 on 19.10.1994 for the purpose of giving pass marks to all the students who appeared in the practical examination of pharmaceutical-II in D-Pharma final examination in the year 1994. It is an admitted case that the respondent alone cannot give such marks. In view of the examination system prevailing such marks have to be approved by others. The respondent alone, therefore, is admittedly not in a position to allot higher

marks. Apart from that, it is the case of the respondent that when CW 1 met him in a hotel room, the respondent shouted that some currency notes had been thrust into his pocket by CW 1. Such shouts of the respondent were heard by PW 1 and PW 2. The evidence of PW 1 and PW 2 were recorded by the Trial Court. The evidence of PW 1 and PW 2 could not be, in any way, shaken by manner of cross-examination. PW 3 has also given evidence of the previous animosity between the college authorities and the respondent who had an occasion to file reports with the college authorities on the basis of some inspection.

6. In the background of these facts, especially the non-examination of CW 1, was found very crucial by the High Court. The High Court has referred to the decision of this Court in *Panalal Damodar Rathi Vs. State of Maharashtra* 1979(4) SCC 526 wherein a Three-Judge Bench of this Court held that when there was no corroboration of testimony of the complainant regarding the demand of bribe by the accused, it has to be accepted that the version of the complainant is not corroborated and, therefore, the evidence of the complainant cannot be relied on.

7. In the aforesaid circumstances, the Three-Judge Bench in *Pannalal Damodar Rathi case*(supra) held that there is grave suspicion about the appellant's complicity and the case has not been proved beyond reasonable doubt. (see para 11)

8. This Court finds that the appreciation of the ratio in *Panalal Damodar Rathi case*(supra) by the High Court was correctly made in the facts and circumstances of the case.

9. Apart from that, Mr. P.P. Rao, learned counsel for the respondent has drawn attention of this Court to some other pronouncements of this Court on the relevant question.

10. In *C.M. Girish Babu* Vs. *CBI, Cochin, High Court of*

Kerala reported in 2009(3)SCC 779, this Court while dealing with the case under the Prevention of Corruption Act 1988, by referring to its previous decision in the case of *Suraj Mal* Vs. *State (Delhi Admn.)* reported in 1979(4) SCC 725 held that mere recovery of tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused. In the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe conviction cannot be sustained. (See para 18)

11. In a subsequent decision of this Court also under the Prevention of Corruption Act, in the case of *A. Subair* Vs. *State of Kerala* 2009(6) SCC 587, this Court made certain pertinent observations about the necessity of the presence of the complainant in a bribery case. The relevant observations have been made in paragraph 18 and 19 which are quoted below:-

> 18. The High Court held that since the Special Judge made attempts to secure the presence of the complainant and those attempts failed because he was not available in India, there was justification for non-examination of the complainant.
>
> 19. We find it difficult to countenance the approach of the High Court. In the absence of semblance of explanation by the investigating officer for the non-examination of the complainant, it was not open to the courts below to find out their own reason for not tendering the complainant in evidence. It has, therefore, to be held that the best evidence to prove the demand was not made available before the court.

12. Those observations quoted above are clearly applicable in this case. In the context of those observations,

this Court in paragraph 28 of *A. Subair* (supra) made it clear that the prosecution has to prove the charge beyond reasonable doubt like any other criminal offence and the accused should be considered innocent till it is proved to the contrary by proper proof of demand and acceptance of illegal gratification, which is the vital ingredient to secure the conviction in a bribery case.

13. In view of the aforesaid settled principles of law, we find it difficult to take a view different from the one taken by the High Court.

14. In coming to its conclusion, we are reminded of the well settled principle that when the court has to exercise its discretion in an appeal arising against an order of acquittal, the Court must remember that the innocence of the accused is further re-established by the judgment of acquittal rendered by the High Court. Against such decision of the High Court, the scope of interference by this Court in order of acquittal has been very succinctly laid down by a Three-Judge bench of this Court in the case of *Sanwat Singh & others* Vs. *State of Rajasthan* 1961(3) SCR 120. At page 129, Justice Subba Rao(as His Lordship then was) culled out the principles as follows:-

> "The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup's case 1934 L.R. 61 I.A. 398 afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every

> matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

We are in respectful agreement with the aforesaid salutary principles settled by this Court and we are constrained to hold that this appeal has no merit and is accordingly dismissed.

B.B.B. Appeal dismissed.

BIRENDER PODDAR
v.
STATE OF BIHAR
(Criminal Appeal No. 373 of 2006)

MAY 16, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

Penal Code, 1860:

ss. 302/34 and 498-A – Murder – Circumstantial evidence – Death of a married woman in her matrimonial home – Evidence of beating and torture of deceased by her husband and his relatives – Medical evidence indicating injuries on dead body which were sufficient to cause the death – HELD: It was a case of homicidal death – There was nothing on record to establish the defence case that deceased was suffering from jaundice and she died a natural death –There is no reason to interfere with the concurrent finding of guilt recorded by two courts below – Conviction of husband upheld – Circumstantial evidence.

Evidence:

Related witnesses – Testimony of – HELD: Just because evidence is given by interested persons, that is no ground for discarding the same – In the instant case, the evidence of the relatives of the deceased is quite cogent and it clearly established the prosecution case – Penal Code, 1860 – ss. 302/34 and 498-A.

The appellant along with three others was convicted and sentenced to imprisonment for life u/s 302/34 IPC for causing the death of appellant's wife. The appellant was also convicted u/s 498-A IPC. The High Court affirmed the conviction and the sentence. The SLP as regards the

three others stood dismissed, as they did not surrender, and leave was granted only to the appellant.

Dismissing the appeal, the Court

HELD: 1.1. The instant case rests solely on circumstantial evidence. It is true that in cases where death takes place within the matrimonial home, it is very difficult to find direct evidence. But, for appreciating circumstantial evidences, the court has to be cautious and find out whether the chain of circumstances led by the prosecution is complete and the chain must be so complete and conclusive as to unmistakably point to the guilt of the accused. [para 8] [878-D-E]

Hanumant Govind Nargundkar and another v. State of Madhya Pradesh **1952 SCR 1091 = AIR 1952 SC343;** *Bhagat Ram v. State of Punjab* **AIR 1954 SC 621 and** *Eradu and others v. State of Hyderabad* **AIR 1956 SC 316 – relied on**

1.2. The evidence of PWs 5, 6, 7 and 8 on which the prosecution relied, shows that there is consistent evidence of ill-treatment of the deceased. The appellant had an illicit relation with his brother's wife and as the deceased was complaining of such illicit relations, she was subjected to torture. Some letters were written by the deceased to PW-8 complaining of such ill-treatment, one of which has been made an exhibit (Ext. 1). [para 9] [878-H; 879-A-B]

1.3. There is also evidence of beating and injury mark on the deceased. There is clear evidence of the doctor (PW-9), who conducted the post-mortem, and the postmortem report (Ext.-4), indicating deep incised injuries on the neck and on the abdomen of the deceased, which were sufficient to cause the death. [para 9, 11 and 12] [879-A, G-H; 880-A-B]

1.4. The case of the defence that the deceased was suffering from jaundice has not been proved at all. The only evidence that the deceased was suffering from jaundice and was given some treatment is the evidence of PW-12, who in his evidence, did not claim that he is a medical practitioner. He did not depose that the deceased was suffering from jaundice. He merely stated that, for treatment, the deceased was referred to Patna on 02.09.1993. Thus, the High Court has rightly opined that the defence case is wholly inconsistent with the material on record and it is a case of homicidal death in the matrimonial home. [para 13] [880-C]

1.5. As regards the identification of the dead body, the High Court concluded that there was positive evidence of identification, not only by the father of the deceased (PW-8) but also by her cousin and her own brother, that is, PWs 5 and 7. The High Court has noted that it may be true that there was petrification in the dead body having regard to the time gap between the death and the postmortem, but there is nothing in the postmortem report to suggest that the body was beyond identification. The High Court has noted that there is no such suggestion given to the doctor in his cross examination on behalf of the appellant. The High Court has noted the fact that the hospital authority gave the custody of the dead body to the father of the girl and thereafter the body was cremated. In view of such clear finding based on the materials on record, there is no inconsistency in the evidence about the identification of the dead body. [para 14] [880-D-F]

1.6. With regard to reliance by the prosecution on witnesses who are related to the deceased, the law is well-settled that merely because the witnesses are related is not a ground to discard their evidence. It is of course true that the evidence of the interested witnesses has to be carefully scrutinised. In the instant case, the

evidence given by PWs 5, 6, 7 and 8 is quite cogent and clearly established the prosecution case. The High Court has scrutinised the evidence of the relations with due care and caution. Therefore, this Court does not discern any error in the appreciation of their evidence either by the trial court or by the High Court. That being the position, there is no reason to interfere with the concurrent finding recorded by the courts below. [para 15 and 17-18] [880-G; 881-E-G]

Rajendra and Another v. *State of Uttar Pradesh* **2009 (5) SCR 589 = (2009) 13 SCC 480 – held inapplicable.**

Namdeo v. *State of Maharashtra* **2007 (3) SCR 939 = (2007) 14 SCC 150;** *State of Maharashtra v. Ahmed Shaikh Babajan and Others* **2008 (14) SCR 1184 = (2009) 14 SCC 267 - referred to.**

Case Law Reference:

1952 SCR 1091	**relied on**	**para 8**
1954 SC 621	**relied on**	**para 8**
AIR 1956 SC 316	**relied on**	**para 8**
2009 (5) SCR 589	**held inapplicable**	**para 16**
2007 (3) SCR 939	**referred to**	**para 17**
2008 (14) SCR 1184	**referred to**	**para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 373 of 2006.

From the Judgment & Order dated 18.7.2002 of the High Court of Patna in Criminal Appeal (DB) No. 9 and 44 of 1997.

Manu Shanker Mishra, Rituraj Choudhary, Mayur Chaturvedi, C.D. Singh for the Appellant.

Gopal Singh, Chandan Kumar for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Initially four persons filed the special leave petition but as three of them, namely, Petitioner Nos. 1, 2 and 3 refused to surrender, their special leave petition stood dismissed by an order dated 05.01.2004.

2. Leave was granted in respect of the present appellant on 27.03.2006.

3. This appeal which is now surviving only at the instance of Birender Poddar, the husband of the deceased woman, is directed against the concurrent judgment and order of his conviction. In the Sessions Trial No. 380 of 1994, the appellant stood convicted under Section 302/34 of the Indian Penal Code and was sentenced to suffer imprisonment for life. The appellant was also convicted under Section 498-A of the Indian Penal Code and was sentenced to suffer two years rigorous imprisonment, sentence to run concurrently. The High Court on appeal, affirmed the conviction and the sentences.

4. We have gone through the records of the case carefully and also the judgment of the High Court and also of the learned Sessions Judge.

5. The learned counsel for the appellant in support of the appeal raised several contentions. His main contention is that there is no direct evidence in the case. He further submitted that there is substantial contradiction in the matter of identification of the dead body. He also submitted that out of the several witnesses cited by the prosecution, PWs 1, 2 and 3 have turned hostile and the other witnesses, namely, PWs 5, 6, 7 and 8 are relations and interested witnesses. The learned counsel further submitted that there is substantial contradiction in this matter between the medical evidence and the oral evidence. He, therefore, submitted that in the facts of this case, the conviction against the appellant should be quashed and considering the fact that he has been in custody for all these years, he should be set free immediately.

6. Learned counsel for the appellant has further raised a

defence that the deceased died a natural death as she was suffering from jaundice. Learned counsel further urged that the entire evidence on which the prosecution relied consists of evidences of interested persons who are related with the deceased woman.

7. The learned counsel for the State supporting the concurrent findings of the Sessions Court and that of the High Court urged that there is no contradiction in the material part of the prosecution case and the defence taken by the appellant has not at all been proved. Learned counsel further submitted that the evidences of the so-called hostile witnesses do not support the defence version of the case and there is no discrepancy in the material part of the prosecution case and both the courts, especially the High Court, have correctly appreciated the facts of the case.

8. It is obviously true that this case rests solely on circumstantial evidence. It is true that in cases where death takes place within the matrimonial home, it is very difficult to find direct evidence. But for appreciating circumstantial evidences, the court has to be cautious and find out whether the chain of circumstances led by the prosecution is complete and the chain must be so complete and conclusive as to unmistakably point to the guilt of the accused. It is well settled that if any hypothesis or possibility arises from the evidences which is incompatible with the guilt of the accused, in such case, the conviction of the accused which is based solely on circumstantial evidences is difficult to be sustained.

(See AIR 1952 SC 343 '*Hanumant Govind Nargundkar and another v. State of Madhya Pradesh',* AIR 1954 SC 621 *'Bhagat Ram v. State of Punjab'* and AIR 1956 SC 316 *'Eradu and others v. State of Hyderabad'*)

9. Following the aforesaid time honoured principles, if we look into the facts of the case, we find from the evidence of PWs 5, 6, 7 and 8 on which the prosecution relied that there is

consistent evidence of ill-treatment of the deceased. There is also evidence of beating and injury mark on the deceased. There is consistent evidence that the appellant had an illicit relation with one Janki Devi, who is the wife of the brother of the appellant, and as the deceased was complaining of such illicit relations of the appellant with that lady, she was subjected to torture. Some letters were written by the deceased to the PW-8 complaining of such ill-treatment, one of which has been made an exhibit (Exhibit 1).

10. Now coming to the question of the defence version which has been taken by the appellant, we find that the defence of the appellant that the deceased was suffering from jaundice has not been proved at all. There is no evidence on record that the deceased was treated for jaundice. There is no pathological report nor is there any medical subscription of any drug being administered on the deceased for treatment of jaundice. The only evidence on which the defence relies in support of the defence case that the deceased was suffering from jaundice and was given some treatment is the evidence of PW-12 Mohd. Naseem. PW-12, in his evidence, did not claim that he is a medical practitioner. He did not give any evidence of his qualification. He merely claims that he is an in-charge Medical Officer of primary health centre, Khagania. In his evidence also, PW-12 did not depose that the deceased was suffering from jaundice. He merely stated that, for treatment, the deceased was referred to Patna on 02.09.1993. These being the sum total of the evidence adduced by the appellant in support of the defence, we reach the same conclusion which was reached by the High Court that such defence is not at all worthy of any credence.

11. As against that, there is clear evidence on record of Doctor Raja Rajeshwar Prasad Singh(PW-9), the post-mortem doctor and from the postmortem report which is Exhibit-4, the following injuries appear on the dead body of the deceased: -

"(i) Incised injury in the front of neck at the level of Thyroid Cartilage-4"X2"X2". Trachea has been completely cut.

Right and left internal (illigible) and external (illigible), internal (illigible) vein were cut.

(ii) Incised injury on the upper part of right side of abdomen through which small intestine was out. Size injury 3"X2" communicating with the abdomen." (Quoted from the paper book)

12. These injuries are sufficient to cause death.

13. Judging the said material on record as against the so-called defence case of the accused, the High Court opined, in our view rightly, that the defence case is wholly inconsistent with the material on record and it is a case of homicidal death in the matrimonial home.

14. Dealing with the question of identification of the dead body, we find that the High Court concluded that there was positive evidence of identification, not only by the father of the deceased woman (PW-8) but also by her cousin and her own brother, that is PWs 5 and 7. The High Court has noted that it may be true that there was patrification in the dead body having regard to the time gap between the death and the postmortem report but there is nothing in the postmortem report to suggest that the body was beyond identification. The High Court has noted that there is no such suggestion given to the doctor in his cross examination on behalf of the appellant. The High Court has noted the fact that the hospital authority gave the custody of the dead body to the father of the girl and thereafter the body was cremated. In view of such clear finding based on the materials on record, we do not find that there is any inconsistency in the evidence about the identification of the dead body.

15. Now coming to the question of reliance by the prosecution on witnesses who are related to the deceased, we find that the law is well-settled that merely because the witnesses are related is not a ground to discard their evidence. On the other hand, the court has held that in many cases, the relations are only available for giving evidence, having regard

to the trend in our present society, where other than relations, witnesses are not available. It is of course true that the evidence of the interested witnesses have to be carefully scrutinised. We find that the High Court has scrutinised the evidence of the relations with due care and caution.

16. In this connection, the learned counsel for the appellant has relied on a few decisions of this court. Reliance was placed on the decision of this Court in the case of *Rajendra and Another* v. *State of Uttar Pradesh* [(2009) 13 SCC 480]. In that case, though in the F.I.R., throttling was alleged and no injury mark was found on the neck of the deceased and the Doctor in cross examination suggested the possibility of suicide, this Court held that in such a case holistic approach should be taken (Para 10) and ultimately dismissed the appeal. We are of the view that the said decision does not, in any way, render any assistance to the appellant in this case.

17. Two other decisions which have been cited by learned counsel for the appellant were rendered in the case of *Namdeo* v. *State of Maharashtra* [(2007) 14 SCC 150] and in the case of *State of Maharashtra v. Ahmed Shaikh Babajan and Others* [(2009) 14 SCC 267] which dealt with the question of appreciation of evidence of interested witnesses. Both those decisions follow the well-settled principle that just because evidence is given by the interested persons that is no ground for discarding the same. We have already held that in the instant case, the evidence given by PWs 5, 6, 7 and 8 is quite cogent and clearly established the prosecution case.

18. We, therefore, do not discern any error in the appreciation of their evidence either by the trial court or by the High Court. That being the position, we find no reason to interfere with the concurrent finding referred to above.

19. The appeal is, therefore, dismissed.

R.P. Appeal dismissed.

M.P. STATE
v.
PRADEEP KUMAR GUPTA
(Criminal Appeal No. 992 of 2007)

MAY 18, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

Madhya Pradesh Municipality Act, 1961 – s. 86 – Sanction for prosecution of a public servant – Respondent-employee, an engineer in Municipal Corporation – Punishment imposed on him in the form of withdrawal of two increments – Sanction for prosecution of respondent granted by the State Government – Validity of – Held: Respondent was appointed by the State Government and remained under the control of the State Government throughout his service – State Government besides being the Appointing Authority was also the Authority to impose punishment and remove the respondent – Consequently, in terms of s. 19 of the PC Act, 1988, the State Government was competent to grant sanction to prosecute the respondent – Thus, High Court erred in holding that the grant of sanction for prosecution by the State Government was invalid – Madhya Pradesh Municipal Service (Executive) Rules, 1973 – rr. 17 and 32 – Prevention of Corruption Act, 1988 – s. 19.

Respondent-public servant was appointed by the State Government. He was posted as an Engineer in the Municipal Corporation. In the course of employment, the penalty of withdrawing of two increments was imposed on the respondent by the State Government. The State Government granted sanction to prosecute the respondent. In a revision, the High Court held that sanction for prosecution granted to the respondent was invalid and quashed the same. It was held that the

respondent could be removed from the post by the Mayor-in-Council under the relevant provisions of the Madhya Pradesh Municipal Corporation Act. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: **The respondent having been appointed under Section 86 of the Madhya Pradesh Municipality Act, 1961 has been appointed by the State Government and remains under the control of the State Government throughout his service. It is clear from Rule 32 of the Madhya Pradesh Municipal Service (Executive) Rules, 1973 that the State Government is the Appointing Authority and the State Government can impose on the members of the State Service penalties mentioned in clause (i) to (vi) of such Rule. Therefore, the State Government being the Appointing Authority and being the Authority to impose punishment on the employee is also the Authority which can remove an employee from the service. It is clear from Section 19 of the Prevention of Corruption Act, 1988 that the Authority who is competent to remove the person concerned is competent to grant sanction. The High Court, without considering these aspects of the Act and Rules, came to an erroneous finding. Thus, the order of the High Court is set aside. [Paras 10, 13, 14, 17] [886-A, G-H; 887-A; 888-B]**

Ashok Baijal vs. M.P. Government 1998 **Crl. L.J. 3511 –distinguished.**

State of Tamil Nadu vs. T. Thulasingam and Ors. **AIR 1975 SupremeCourt 1314 – referred to.**

Case Law Reference:

1998 Crl. L.J. 3511	**Distinguished.**	**Para 3**
AIR 1975 Supreme Court 1314	**Referred to.**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 992 of 2007.

From the Judgment & Order dated 17.12.2004 of the High Court of Judicature of M.P. Bench at Indore in Criminal Revision No. 380 of 2003.

S.K. Dubey, Vikas Bansal, Vibha Datta Makhija for the Appellant.

Jitendra Mohan Sharma for the Respondent.

The Judgment of the Court was delivered by

A.K. GANGULY, J. 1. This appeal is filed at the instance of the State impugning the order of the High Court dated 17.12.2004 whereby the High Court in a revision filed before it was pleased to held that sanction for prosecution which was granted to the respondent, Sh. Pradeep Kumar Gupta was invalid and High Court was pleased to quash the same.

2. In coming to the said finding, the High Court, inter alia, held that Sh. Pradeep Kumar Gupta, (hereinafter called the respondent), was posted as an Engineer in Municipal Corporation of Ujjain and was a public servant and can be removed from the said post by the Mayor-in-Council under the relevant provisions of the Madhya Pradesh Municipal Corporation Act and the sanction for prosecution granted by the State Government is invalid and incompetent.

3. In support of the said finding, the High Court, inter alia, relied on a judgment of *Ashok Baijal Vs. M.P. Government* reported as 1998 Crl. L.J. 3511.

4. We have heard the counsel appearing for the parties. We are of the view that the conclusions reached by the High Court are not warranted either in facts or in law for the reasons discussed herein-under.

5. From the order dated 4.10.1983 of the Government of Madhya Pradesh Local Self Government, it is clear that the respondent was appointed under Section 86(1) of the Madhya Pradesh Municipality Act and such appointment was made by the State Government in terms of Rule 17 of the Madhya Pradesh Municipal Service (Executive) Rules, 1973. It is thus clear that the respondent was appointed by the State Government.

6. The learned counsel for the appellant has also drawn the attention of this Court to other materials on record from which it appears that the respondent, after such appointment, was deputed by order dated 9.11.99 of M.P. Local Self Government in the Municipal Corporation, Khandwa in place of Municipality of Ujjain.

7. Our attention is also drawn to the fact that in the course of his employment, the respondent suffered a penalty of withholding of two increments and the same was also imposed by the Government. The said order of punishment was filed in the trial court by the respondent himself. These are admitted facts of the case.

8. These facts were also available before the High Court, but unfortunately, the High Court has not at all considered these facts.

9. Now, coming to the legal question, it appears that Section 86 of the M.P. Municipalities Act, 1961 (hereinafter referred to as the said Act) provides for constitution of State Municipal Services. In Section 86 it is also made clear that such services to be constituted by the State Government shall make rules in respect of the recruitment, qualification, appointment, promotion, etc. and also for dismissal, removal, conduct, departmental punishment under Section 86(2) of the Act. Section 86(4) also provides that the State Government may transfer any member of the said municipal service from one municipal council to another municipal council.

10. It is, therefore, clear that the respondent having been appointed under Section 86 of the said Act, has been appointed by the State Government and remains under the control of the State Government throughout his service. The relevant rule in this connection is the Madhya Pradesh Municipal Service (Executive) Rules, 1973. Under Rule 2(b) of the said Rules, Appointing Authority has been defined as follows:

> (b) "Appointing Authority" means State Government in respect to Select Grades, Class I, Class II and Class III Chief Municipal Officers

11. Similarly, under Rule 2(i) service has been defined as follows:

> (i) "Service" means the Municipal Service for the State constituted under sub-section (i) of Section 86 of the Act.

12. Rule 32 of the said Rule provides as follows:

> 32. Authorities who may impose penalties – (1) Subject to the provisions of the Act and these rules the penalties mentioned in clauses (I) to (ii) of Rule 31 may be imposed on a member of the service by the [appointing authority or Divisional Commissioner or Director].
>
> (2) Subject to the provisions of the Act and these rules, the penalties mentioned in clauses (iv) to (vi) of Rule 31 shall not be imposed on a member of the service except by the appointing authority and in consultation with the Public Service Commission.

13. It is clear from the aforesaid Rules that the State Government is the Appointing Authority and the State Government can impose on the members of the State Service penalties mentioned in clause (i) to (vi) of such Rule. Therefore, State Government being the Appointing Authority and being the Authority to impose punishment on the employee is also the Authority who can remove an employee from the service.

14. That being the position, it is clear from the provisions of Section 19 of the Prevention of Corruption Act, 1988 that the Authority who is competent to remove the person concerned is competent to grant sanction. Unfortunately, the High Court, without considering these aspects of the Act and Rules, relied only on the judgment of *Ashok Baijal* (supra) in coming to an erroneous finding. Provision of Section 19(1) of Prevention of Corruption Act, 1988 is set out hereunder:

> 19. Previous sanction necessary for prosecution – (1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, -
>
> (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
>
> (b) in the case of a person who is employed with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
>
> (c) in the case of any other person, of the authority competent to remove him from his office.

15. Similar views have been expressed in the case of *State of Tamil Nadu Vs. T. Thulasingam* and others reported in AIR 1975 Supreme Court 1314.

16. We are, however, not called upon to decide the correctness of the decision rendered in *Ashok Baijal* case (supra). We further make it clear that the decision is *Ashok Baijal* case (supra) is not attracted to the facts and circumstances of this case. However, we do not express any

opinion on the correctness of the proposition laid down in *Ashok Baijal* case (supra).

17. This appeal is allowed, the order of the High Court is set aside and the trial of the case of the respondent may proceed in accordance with law.

N.J. Appeal allowed.

GOPAL

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 1710 of 2007)

MAY 19, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

Penal Code, 1860: s.304 (Part I) and s.324 – Five accused – Appellant-accused inflicted knife blow on the victim resulting in his death – Other accused persons inflicted sword blows and blow by cycle chain on the complainant party – Trial court held appellant guilty for commission of offences u/ss.148, 302, 323/149, IPC, and other accused persons u/ss.148, 302/149, 323 – High Court found appellant guilty u/s.304 (Part I) and sentenced him to undergo rigorous imprisonment for 10 years while other accused were found guilty only u/s.324 – Both appellant and State challenged the judgment of High Court – Held: Conviction of appellant-accused u/s.304 (Part I) upheld, however, in order to meet the ends of justice, his sentence reduced to period already undergone which was more than 6 years – Conviction of the other accused u/s.324 upheld in view of the fact that medical evidence showed that injuries sustained by the complainant party were simple in nature and, further, injuries sustained by the accused were not explained by the prosecution.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1710 of 2007.

From the Judgment & Order dated 19.10.2005 of the High Court of Madhya Pradesh, Indore Bench, Indore in Crl. A. No. 328 of 1995

WITH

Crl. A.No. 1711 of 2007.

S.K. Dubey, Subhash Kaushik, Malini Poduval, Praveena Gautam, C.D. Singh, Vikas Bansal, Vibha Datta Makhija, Vartika Sahay, Malini Poduval for the Appellant.

The following Order of the Court was delivered

O R D E R

1. This order shall dispose of Criminal Appeal No.1711 of 2007 also as both the appeals arise out of the common judgment and order passed by the Division Bench of the High Court of Madhya Pradesh at Indore, in Criminal Appeal No. 328 of 1995, preferred by accused Gopal and Criminal Appeal No. 429 of 1998 preferred by accused Shankarlal, Nandlal, Dinesh and Chhote @ Chhotalal decided on 19.10.2005.

2. Five accused were charged and prosecuted for commission of offences punishable under Section 147, 148, 302/149, 323/149 IPC in the court of 3rd Additional Sessions Judge, Ratlam, Madhya Pradesh in Sessions Case No. 227 of 1992. The Trial Court pronounced the judgment on 31.3.1995, holding the accused Gopal guilty for commission of offences under Sections 148, 302,323/149 IPC, accused Shanker Lal and Nand Lal under Sections 148,302/149, 323 IPC, accused Chhotelal and Dinesh under Sections 148/302/149,323/149 IPC and awarded punishment together with fine as described in its judgment.

3. Against the said judgment and order, as mentioned hereinabove, two criminal appeals were preferred before the Division Bench of the High Court, which were disposed of by the common impugned judgment.

4. The High Court, in the appeal of Gopal, has found him guilty for commission of offence under Section 304 Part-I IPC and awarded rigorous imprisonment for 10 years, whereas in the other Criminal Appeal, accused Shankarlal, Nandlal and Chhotelal were found guilty for commission of offence under Section 324 IPC and awarded sentence to the period already undergone by them with fine of Rs. 200/- each. The accused

Dinesh was not found guilty for any of the offences and was, accordingly, acquitted.

5. State has preferred appeal only against that part of the judgment and order, whereby accused Shankarlal, Nandlal and Chhotelal have been found guilty under Section 324 IPC and accused Dinesh has been acquitted. Accused Gopal has preferred appeal on the ground that in view of the free fight between accused and the complainant party and the nature of injuries sustained by some of the accused persons, he deserves to be acquitted.

6. It is pertinent to mention here that State has not preferred any appeal against the judgment of the High Court wherein and whereunder conviction and sentence awarded to accused Gopal under Section 302 IPC was altered to one under Section 304 Part-I IPC. In this view of the matter, the State cannot challenge that accused Gopal should have been convicted under Section 302 IPC.

7. The prosecution story, in short, is as under:

That on 30.6.1992, a meeting of a Patidar Community was convened wherein Ramchandra was not present. On 1.7.1992, a panchayat meeting was also convened by Ramchandra wherein Shankarlal was present but, due to some reason, the meeting could not be held. Thereafter, on the same day, when Tulsiram, Ramchandra, Mitthulal and Shantilal were passing from the house of Shankarlal, accused Gopal abused them and inflicted knife blow on the chest of Mitthulal, accused Shankarlal inflicted sword blow on Ramchandra and Nandram inflicted sword blow on Kalu. Accused Chhotelal inflicted blow by cycle-chain on Tulsiram. On account of injury sustained by Mitthulal on his chest, caused by accused Gopal, with the aid of knife, he fell on the ground and died instantaneously. Accused Dinesh was pelting stones on the injured persons.

8. A report of the incident was lodged by Tulsi Ram vide Exb P-12. Investigation commenced on the strength of the

report lodged by Tulsi Ram. Police prepared spot map and arrested accused persons and at their instance, weapons of offence were recovered. Dead body of Mitthulal was sent for post-mortem examination and the injured were sent to hospital for their medical examination and treatment.

9. PW-4 Dr. Deep Vyas conducted post-mortem on the body of the deceased. He had found stab wound measuring 2" x ½ " on the abdomen. Omentum was coming out with profuse bleeding. On internal examination, he found a wound on liver measuring 2" x 1". The diaphragm was found out. In the opinion of Dr. Deep Vyas, Mitthulal died due to syncope on account of shock and hemorrhage caused by stab injury. Exb. P-8 is the post-mortem report.

10. On account of the aforesaid evidence, it could not be disputed before us that Mitthulal had met with homicidal death.

11. After completion of the investigation, all the accused were charge-sheeted. They pleaded not guilty to the charges and pleaded that they were falsely implicated in this case. They had taken a specific defence to the effect that Ramchandra, Tulsiram, Mitthulal, Kaluram and Shantilal had come to their house and abused them and started beating accused Shankarlal and on the intervention of accused Gopal, he too was assaulted by knife. According to them complainant party was the aggressor.

12. The prosecution, in order to bring home the charges levelled against the accused, examined 13 witnesses. In defence, the accused had also examined two witnesses. However, on appreciation of the evidence, available on record, Trial Court found them guilty for the offences as mentioned hereinabove.

13. In appeal before the High Court, accused Gopal has been found guilty under Section 304 Part-I IPC and was sentenced to undergo rigorous imprisonment for 10 years, whereas other accused namely; Shankarlal, Nandlal and

Chhotelal have been found guilty only under Section 324 IPC and have been let off on the period already undergone which varies from 77 to 79 days with fine, and accused Dinesh has been completely acquitted of all the charges. Hence, these appeals by accused Gopal and State of Madhya Pradesh.

14. We have accordingly heard learned counsel appearing for the parties and gone through the lengthy record.

15. Mr. Subhash Kaushik, learned counsel appearing for the appellant Gopal contended that from record it proved that the complainant party was not residing in village Harthali. They along with other persons were called by one Poonamchand to attend the Panchayat of their community but on the date of incident, the Panchayat could not be convened and the complainant party, while returning back to Ratlam, attacked accused Shankarlal in front of his house causing injury to him as well as to the accused Gopal. Since, injuries were sustained by Shankarlal and Gopal. They, therefore, had acted in self defence. It was also contended by learned counsel for the accused Gopal that the prosecution has failed to explain the injuries sustained by Shankarlal and Gopal and the complainant party was aggressor.

16. On the other hand, Mr. S.K. Dubey, learned senior counsel appearing for the State has strenuously contended before us that the evidence has not been read properly inasmuch as accused Gopal deserves to be convicted under Section 302 IPC, even though he might have inflicted only single injury on the chest of Mitthulal. It was further contended that Mitthulal had died instantaneously which shows the nature and the force with which the injury was caused by accused Gopal on the chest of Mitthulal. It was further contended that other accused persons could not have been convicted only under Section 324 IPC, whereas the injuries sustained by the complainant party were serious in nature. It was also argued that the sentence of period already undergone with fine of Rs.200/- of each was too lenient and deserves to be enhanced.

17. As mentioned hereinabove, since there is no appeal preferred by the State against that part of the judgment whereby the accused Gopal has been found guilty for commission of offence under Section 304 Part-I IPC and acquitted under Section 302 IPC, we are afraid, there cannot be any scope for considering the conviction of accused Gopal from Section 304 Part-I to 302 IPC.

18. As regards other accused, the High Court has assigned cogent and valid reasons as to why they have been found guilty for commission of offence under Section 324 IPC. The High Court has also noted that the injuries sustained by the accused persons have not been explained by the prosecution at all. Apart from the above, from the evidence of PW-5 Dr. B.E. Boriwal, it has also come on record that the injuries sustained by injured persons were simple in nature. This aspect of the matter has been dealt with by the High Court in paras 8 & 9 of the impugned judgment.

19. In the light of aforesaid contentions, we are of the considered opinion that the appeal of accused Gopal can only be allowed in part to the extent that his conviction has to be upheld under Section 304 Part-I IPC but sentence can be reduced to the period already undergone by him, which is more than six years. This, according to us, would meet the end of justice. However, in Criminal Appeal No. 1711 of 2007, we find absolutely no merit or substance and the same deserves to be dismissed.

20. In the result, Criminal Appeal No. 1710 of 2007 filed by accused Gopal is partly allowed inasmuch as his conviction under Section 304 Part-I IPC is upheld but sentence is reduced to the period already undergone by him. He be released from the jail immediately if not required in any other case. Criminal Appeal No. 1711 of 2007 filed by the State is hereby dismissed.

D.G. Appeal dismissed.