

**BEFORE THE NATIONAL GREEN TRIBUNAL
EASTERN ZONE BENCH, KOLKATA**

O. A. No: 10 of 2023/ EZ

Dillip Kumar Samantara and others APPLICANTS

- VERSUS-

The State of Odisha and Others ...RESPONDENTS

I N D E X

SR. NO.	PARTICULARS	PAGE NO.	FE E
1.	Counter Affidavit dated: 12.03.2023 of the Respondent No: 11 along with annexure	01 to 114	

CERTIFIED THAT THE COPIES ARE CORRECT

BY THE RESPONDENT NO: 11

D. 12.03.2023

THROUGH ADVOCATE

Date: 12.03.2023

BIRANCHI NARAYAN MAHAPATRA

ADVOCATE, ORISSA HIGH COURT

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**BEFORE THE NATIONAL GREEN TRIBUNAL
EASTERN ZONE BENCH, KOLKATA**

O. A. No: 10 of 2023/ EZ

IN THE MATTER OF:

Dillip Kumar Samantara and Others.... Applicants

-Versus-

The State of Odisha and othersRespondents

**COUNTER AFFIDAVIT FILED BY THE
ABOVE NAMED RESPONDENT NO: 11
TO THE O.A NO: 10 OF 2023/EZ MOST
RESPECTFULLY SHOWETH AS
FOLLOWS:-**

I **Patitapaban Barik**, S/O: Nakula Barik, aged about 35 years, at/Po:Tankol,-752021, P/S: Jankia, Dist: Khordha, State: Odisha do hereby state on solemn affirmation as under:-

1. That I am the Respondent No: 11 of the O.A and as such I am fully conversant with the facts and proceedings of the Case.

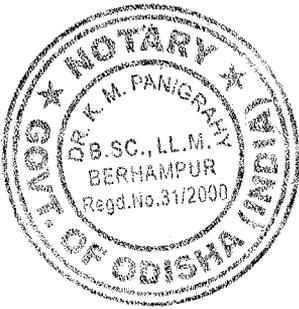
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2. That the averments made in the O.A are not all true and this Hon'ble Tribunal has no jurisdiction to decide the self same issues involved in the O.A, which is already covered under the preview of the investigation by the Police as well the Competent Criminal Court (Jurisdictional Magistrate) as per the averments made by the Applicants in their O.A at Para-19. After initiation of the Criminal proceedings on 20.11.2022 against the lessee the Applicants approached to this Hon'ble Tribunal in the self same allegations. During the time of filing of the O.A the matter is already seized by the Competent Criminal Court U/S: 156 and 157 of Criminal Procedure Code, 1973. In view of this the Present O.A is not maintainable against the lessee Under the Statutory provision of Cr.P.C. The Applicants have been approached to this Hon'ble Tribunal by way of the O.A for the purpose of tainted / biased investigation by the Police against the lessee and also to influence the State Machinery during pendency of the Criminal case investigation. It is a settled Principle Criminal Case investigation should not be tainted/ biased. In



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this Context the Hon'ble Apex Court observed in the matter of Babu Bhai- Versus- State of Gujarat and others (Supra). Copy of the Judgment of the Hon'ble Apex Court passed in the said Case is annexed here to as ANNEXURE-R/11/A Series. The State machinery along with the applicants should be caution and not to interfere with the Criminal Case investigation by way of malafide intention. The Hon'ble Apex Court observed in the Babu Bhai Case at Para-29 as follows:-

29. In Manu Sharma Vs. State (NCT of Delhi) (2010) 6 SCC 1, one of us (Hon'ble P. Sathasivam, J.) has elaborately dealt with the requirement of fair investigation observing as under:- "..... The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the

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constitutional mandate contained in Articles 20 and 21 of the Constitution of India....

It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law dehors his position and influence in the society....



3. That the averments made in the Paragraphs-1 (Page No: 9 of the O.A) are misconceived and misleading. The representations of the Applicants have been fully redressed, which has been admitted by the Applicants in their O.A at Para-19. So, there is no fresh cause of action arise to file this O.A before this Hon'ble Tribunal. The Applicants are clearly stated in their O.A at Para-19 after multiple Complaint Police has been lodged FIRs against the Respondent No: 11. It is apt to mention here that after registration of the FIR under Section 154 of Criminal Procedure Code, 1973 by the Police such issues are coming under the jurisdiction of the competent Criminal Court with reference to U/S: 156 Cr.P.C. But,

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the Applicants are by passing to the original jurisdiction of the competent Criminal Court approached to this Hon'ble Tribunal by taking plea again and again initiation of Criminal Case/Proceedings against the Respondent No: 11, which is contrary to law and violation of the provisions of Criminal Procedure Code, 1973. During the Course of investigation by the Police in connection of the allegations of the Applicants, the said Applicants have no locus standi to approach this Hon'ble Tribunal hurriedly in the self same issues. Prior completion of the investigation by the Police and final judicial verdict of the Competent Criminal Court is depends for further proceeding against the Respondent No: 11, but at that Stage no further litigation is maintainable in the eye of law. The FIRs registered on dated: 20.11.2022 against the Respondent No: 11 will be stand before the criminal Court or it will be ground less and the finally, if the lessee will be acquit from the criminal Cases it will clear after judicial verdict of the Competent Criminal Court. If the lessee will be convict before the competent criminal Court there after the Applicants may be move to the different forum for redressal their Grievances and particularly to enforce any other Statutory law against the lessee, but not at that Stage. Surprisingly, during course of police investigation and before conclude of the Criminal trail the Applicants

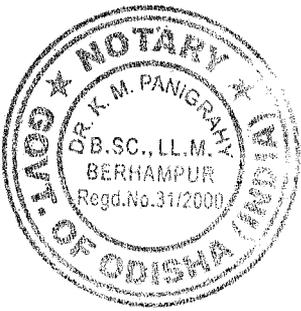


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have approached to this Hon'ble Tribunal by taking plea again and again registration of criminal Case and impose of environmental Compensation in the self same issues, which is not permissible in the eye of law. The Respondent No: 11 has not found guilty by the Competent Criminal Court and the Criminal Cases trail is not commencing as on date. Thus, the O.A filed by the Applicants is not maintainable at all. It shows the Applicants have approached to this Hon'ble Tribunal as Personal vindictive measure not for the protection of the Environment. After registration of the Criminal Case against the Respondent No:11 all the allegation made by the Applicants before the State/ SPCB/ SEIAA/Police authority have been fully redressed and the material annexed with the O.A shows that those involves prior registration of the Criminal Cases. The Police is already taken to the consideration of the allegations of the Applicants and lodged FIRs against the Respondent No: 11 on 20.11.2022 and the list of dates are also clearly shows that from the O.A no further cause of action arise to file fresh Case against the Respondent No: 11 after registration of the FIRs on 20.11.2022. It is apt to mention here that before completion of the investigation by the Police any other law could not be attracting in the self same issues against the Respondent No: 11. After registration of the FIRs against the lessee all the issues



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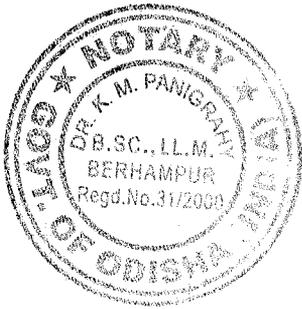
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prior 20.11.2022 (date of registration of the FIRs) now under the preview of the investigation by the Police and Competent Criminal Court is empower to pass any order U/S: 156 of Criminal Procedure Code, 1973 and the Police is also duty bound to comply the Provision Under Section 157 Cr.P.C. The Applicants have been over looked to the Statutory Criminal law and during pendency of the investigation and without following the due process of law approached to this Hon'ble Tribunal with intent to interfere to the criminal Case investigation process and also to bias to the Competent Criminal Court proceedings. For which act of the Applicants is not permissible in the eye of law, if this case will run before this Hon'ble Tribunal, it will be a abuse of the process of law and basic foundation law will be collapsed. The allegations made by the Applicants against the Respondent No: 11 is under the preview of the enquiry by the Police and the Police is doing his job properly/honestly. So, at stage nobody will say the Respondent No: 11 has found guilty under the Criminal law. The Applicants have no locus standi to say at that stage and particularly the Respondent No: 11 has found guilty/convict under the criminal law way of the O.A. During the Course of investigation by the Police if anybody will interfere to the process of law, it will be punishable offence. But, the applicants are trying by way of the O.A



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to review the Police investigation and influence to the authorities of the State as well to the Criminal Court proceedings. Therefore, this O.A is not maintainable in the present circumstance. It is a settled Principle during the Course of investigation no Court and Tribunal Will pass any adverse order against the accused person (Respondent No: 11). If this Hon'ble Tribunal will pass any order/ orders in this Case it will be hit to the investigation as well as Criminal Court proceeding and particularly it leads for conviction before commencement of the Criminal Case trail. The Deponent will prove his innocence before the competent criminal Court. There after the Competent Criminal Court will be decided the issues as per the provision of Criminal law. Before commencement of the Criminal Cases trail he (Respondent No: 11) is not willing to disclose the real facts before this Hon'ble Tribunal and this Hon'ble forum is not competent to decide the Criminal Cases, which has been registered against the lessee. ~~Respondent~~ It is a settled principle the accused Person (Respondent No: 11) will always give answer to the investigation agency or before the Competent Criminal Court, but not before this Hon'ble Tribunal. So, the Respondent No: 11 is not willing / able to answer or defend to the O.A prior completion of the investigation by the Police or conclusion of the Criminal trial before



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the competent Criminal Court. Thus, the O.A could not be run at that stage. After conclusion of the Criminal case trail the respondent No: 11 will get opportunity to say anything in to the affairs, but at that stage if he will open his mouth it will be hit to the Police investigation and may be impact to the Criminal Court trail procedure.

4. That the Respondent No: 11 has been declared as highest bidder vide letter No: 1730/dated: 27.07.2020 by the Tahasildar, Tangi Tahasil office for the Sahadaghai Laterite Stone quarry No: A and the Tahasildar, Tangi executed a lease deed on 18.06.2021 for a long term lease for the operation of the quarry (MGQ 1500 CUM) as per the trms and conditions prescribed under the OMMC Rule, 2016 and amendments made there under. Accordingly the lessee obtained Environmental Clearance/ approved Mining Plan as well as Consent to Establish from the competent authorities. But, till date the lessee is not obtained Consent to operate from the SPCB, even though he has applied CTO and application fees already deposited before the SPCB vide money receipt No: 6098753/dated: 20.10.2022. Unfortunately, the SPCB has failed to grant CTO till date in favour of the lessee. The competent/controlling authorities are also not taking any steps and measures how the lessee will obtain CTO for operation of the Stone quarry as per the policy decision of the State Government. So, the



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statutory authorities have not allowed to operate the quarry till date due to lack of CTO. Thus, there is no question arises in respect of the illegal mining in the outside lease area over the Plot No: 717, 716, 712, 713,714 (Kissam Bagayat) of Khata No: 278 and no point of time the Tahasildar has not raised objection for illegal operation by the lessee in the outside lease area. It is a duty and responsibility of the Controlling /competent authority as well as the Revenue Inspector of the Revenue Circle/ Sub- Collector of the Sub- Division for the protection/preservation of the Sairat Source and non of the authority no Point of time raised any objection to the lessee for any illegality in the lease area. The lessee has not started operation in the lease area and the source is still under the safe custody of the State Government. After getting CTO and Particularly after operation of the Source the lessee will be answerable for any kindly of question. But, as on date the Applicants/State has no authority to raise any type of question to the lessee in connection of any illegality in the outside lease area. The lessee has not started operation over the Plot No: 719 (lease area) due to lack of CTO, how the question will arise any kind of illegal acts outside the lease area. But, after completion of the Police investigation and conclusion of the trail before the Competent Criminal Court all the facts will be clear. At



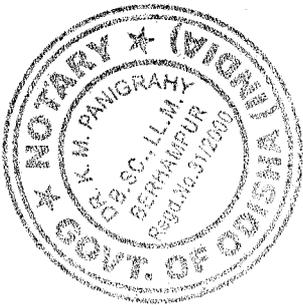
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that stage further discussion of the matter will not just and proper due to investigation is going on and competent criminal Court is closely monitored the Case U/S: 156 Cr.P.C. If the Respondent No: 11 will say anything to defend the O.A, it will be impact to the Criminal justice system.

5. That the averments made in the Para-2 in the O.A is not correct and denied here by. The Respondent No: 11 is again appraised that he is no way related/ involved directly / indirectly over the Plot No: 712, 713, 714, 716 and 717 of Sahadaghai Mouza under Achyutapur Revenue Inspector Circle. The alleged Plots in question are not related to the lessee. It is a duty of the State authorities to protect the Plots in question as a trustee of the Sairat Source, which is clearly mentioned in the OMMC Rule, 2016 and amendments made there under. The lessee has not started operation of his lease area (Plot No: 719) and he has no point of time gone to the lease area as well as other adjacent Plots in question till date. The Case has been filed by the Applicants is premature and no cause of action arise in respect of the lessee to file this Case against him. But, the allegation made by the Applicants is under investigation by the Police, which covered under Section 154, 156 and 157 Cr.P.C. After completion of the Criminal Case trail the real picture will come to the Public. So, at that Stage no



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further discussion is required in view of the investigation is going on by the Police.

6. That the averments made by the applicants in their O.A at para-3 are not correct and denied . The Applicants are liable to be strictly prove with material evidence that the Plots in question is coming under the forest land. But, the Applicants without any material evidence in connection of the forest land and filed this Case by way of only imaginary pleading. It is settled principle pleading should be based on material evidence; otherwise no Court/Tribunal will be oblige to the Party. The Applicants ignored the parameter of law filed this Case by way of imaginary pleading and stated there in the Plots in question is coming under the preview of forest Kissam. Such attitude of the Applicants is liable to be declare as illegal and they have crossed their laxaman Rekha, while filing this Case and particularly they are trying to made a mockery to this Hon'ble Tribunal to obtain orders by playing fraud. The Applicant have been admitted in the same Para the Plots in question is Bagayat Kissam. Thus, the Applicants are playing dual role in this Case only to mislead this Hon'ble Tribunal. How the Applicants are saying without any official record the Plots in question is coming under the forest land, it needs judicial scrutiny. It is profitable to mention here that as per the allegations of the Applicants the



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Police has been registered against the respondent No: 11 and the investigation is going on and the Respondent No: 11 is cooperating with the investigation and competent Criminal Court is also closely monitoring to the investigation of the Police under Section 156 Cr.P.C. Hence, at that stage this Hon'ble Tribunal's interference is not required for the ends of justice and the O.A is also not maintainable at all. After registration of the Criminal Case by the Police all the issues of the Applicants are coming under the preview of the Competent Criminal Court with reference to Under Section 156 Cr.P.C. The Applicants themselves admitted at Para-19 of the O.A and clearly mentioned that after multiple Complaints against the lessee the Police has been lodged Criminal Cases against the Respondent No: 11. There after no further Cause of action arise to file the O.A; it is evident from the list of dates of the O.A. The entire episode is under the Competent Criminal Court jurisdiction. The Applicants have by placing misleading informations in their O.A approached to this Hon'ble Tribunal to get favorable order/orders. Such attitude of the Applicants is highly dangerous for the democracy as well the Criminal justice system. They are trying how the lessee will convict before the Criminal Court and accordingly they have filed this O.A to bias the Criminal Case investigation as well to the Criminal Court proceedings.



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7. That the averments made by the Applicants in their O.A at Para-4 are not correct and denied . The Photographs filed by the Applicants under Annexure-1 has not shown that the Respondent No: 11 is illegally done mining. It is difficult from the Photographs to reach a conclusion that the respondent No: 11 is doing or has been done illegal in the specific plots in question. It is profitable to mention here that by way of Photographs no Court/ Tribunal will reach a Conclusion against any Person. All the issues is already under the investigation of the Police and Competent Criminal Court is also closely monitoring to the Case with reference to U/S: 156 Cr.P.C. Such facts have been admitted by the Applicants in their O.A at Para-19.Thus, further proceeding before this Hon'ble Tribunal is not maintainable at all at that Stage and the issues are self same.

8. That the averments made at Para-5 in the O.A will be clear after investigation of the Police authority. The Deponent is already submitted his suitable reply at Para-2 of this affidavit. The investigation agency will be appraise the real facts to the competent Criminal Court after completion of the investigation. And the Applicants have also admitted that the investigation is going on by the Police which has been clearly mentioned at Para-19 of the O.A.



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9. That the averments made at Para-6 of the O.A is false and fully denied . The Respondent No: 11 has no point of time posted anything in the face Book account in respect of the Sahadaghai lateriate stone quarry. The Applicants are liable to be prove it strict beyond all reasonable doubts. The Applicants may be called for from which face Book account they have obtained the data, it needs judicial scrutiny. The date chart shows that the incident prior registration of the FIRs (date of registration of the FIRs on 20.11.2022). After investigation by the police this episode will be clear. At that stage no further discussion required. The Respondent No: 11 is fully cooperating to the investigation and the Competent Criminal Court is closely monitoring the Case U/S: 156 of Cr.P.C, which has been admitted by the Applicants in their O.A at para-19.



10. That the averments made at Para-7 of the O.A it is a matter of investigation by the Police. The Respondent No: 11 no point of time removed the Cashew tress and done mining activities over the Plots in question. The Applicants should be wait till completion of the investigation of the Police. The investigation is going on and all the allegations of the applicants has been redressed by the Police, which has been admitted by the Applicants in their O.A at Para-19.

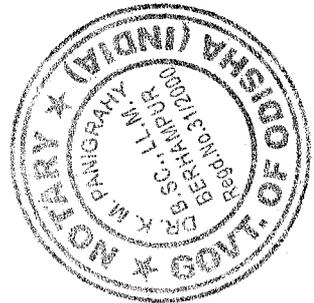
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11. That the averments made at Para-8 is also coming under the preview of the Police investigation. The Respondent No: 11 has not done any mining activity due to lack of CTO. For which, there is no question arise in to the academic atmosphere. All the allegation s of the Applicants which has been annexed with the O.A is coming under the preview of the investigation of the Police and accordingly the Police has been registered a Case against the lessee on 20.11.2022 and the investigation is going on and the Competent Criminal Court is closely monitoring to the Case U/S: 156 Cr.P.C.

12. That the averments made at Para- 9 to 26 are not all true and the Deponent specifically denied. The Applicants are trying to satisfy to the Hon'ble Tribunal by placing Environmental laws. The Respondent No: 11 has not started his quarry operation due to lack of CTO over the Plot No: 719. Hence there is no question arise in respect of the violation of environmental law. The Applicants are creating headache without head. Thus, they are liable to deal strictly and warned not to file such type of Case without any Cause of action. If any kind of deviation of law has been shown the Police will take appropriate action, the issues will be clear after completion of the investigation by the Police and after end of the trail before the competent criminal Court verdict of the Case will come to the picture. At that Stage nobody will say



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the lessee has been convicted and the O.A before this Hon'ble Tribunal is not maintainable in the self same issues and if any kind of observation will come it will be affect to the Competent criminal Court Proceeding and the lessee will not get fair trail from the competent Criminal Court.

13. That the State/ SPCB/SEIAA authorities have already redressed the grievances which have been filed under ANNEXURE-3 Series by the Applicants. Basing upon the said allegations the Police has been lodged FIRs against the Respondent No: 11 and investigation is going on and the deponent is cooperating with the investigation as per the provision of the Criminal Procedure Code, 1973. The real picture will come after completion of the investigation by the Police. Before completion of the investigation further proceeding against the Respondent No: 11 is not warranted. Thus, the O.A is not maintainable under the law and liable to be dismiss for the ends of justice.

14. That the lessee has not started operation in the lease area due to lack of CTO. So, how the stipulated conditions of the Environmental Clearance have been violated by the lessee, it is a moot question arises in this Case. After completion of the investigation of the Police the real picture will come.



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15. That even though the Revenue Department has sought for reports from the Khurda District administration in respect of the allegation of the Applicants. But, the applicants have failed to attach any action taken report in connection of the issues. The State authorities know very well that the lessee has not started operation in the lease area due to lack of CTO. The allegation Petitions have been relied by the Applicants for eye wash of this Hon'ble Tribunal. In this Context, the Police is doing his job according to law. Thus, the O.A is not maintainable at all, at that stage. If this O.A will run it will be interference with the Criminal Case investigation and also interfering with the Competent Criminal Court proceedings. Thus, the O.A is liable to be dismiss for the ends of justice. The Applicants have been admitted in their O.A at Para-19 the Police is doing his job and thereafter how the Applicants have been approached to this Hon'ble Tribunal in the self same issues, it needs judicial scrutiny.



16. That the Respondent No: 11 has not started his operation in the lease area. So, there is no question arise in connection of the violation of the CTE conditions. The issues are coming under the investigation conducted by the Police in connection of the allegation of the Applicants, which has been admitted by the Applicants in their O.A at Para-19.

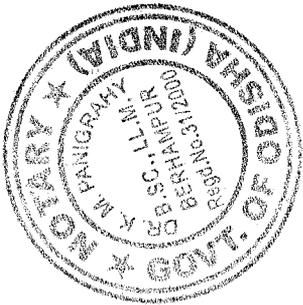
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17. That the Applicants again raised allegations against the Respondent No: 11, he has damaged the road and etc. Without operation of the lease area how the road will be damage and other allegations will arise at that Stage. Whatever may be the allegations of the applicants is coming under the preview of the Police investigation. If any observation will be come in this O.A, it will be badly affect to the Police investigation as well as to the proceedings pending before the competent Criminal Court. Thus, the O.A is not maintainable at that stage. The Applicants have been admitted in their O.A at Para-19 that the Investigation is going on by the Police.

18. That the FIRs registered against the lessee is motivated and Police has been taken steps illegally without any evidence. For which act of the Police will be decide before the competent Criminal Courts. The Applicants have been cleverly relied the issues in the O.A to satisfy the law. But, it is a settled Principle before conviction / acquittal/ final verdict of the competent criminal Court; nobody will say whether the FIRs are true/false. It is a duty of the Prosecution/ Police/ State to prove the Cases before the competent Criminal Court beyond all reasonable doubts against the lessee. By taking pleas in the issues relating to registration of FIRs against the lessee nobody will reach a conclusion that the lessee has committed theft of Minor Minerals. The Competent



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criminal Court is only authority to decide/ declares, whether the lessee will be convict or acquit from the proceeding as per the materials available on record. Before any verdict of the criminal court the Applicants have relied to the FIRs before this Hon'ble Tribunal (Page No: 78 to 90 of the O.A). The issues relating to FIRs are domain of the Competent Criminal Courts as per the statutory provision of law. For which no body will say at that stage/ before verdict of the competent criminal court, the lessee has been committed theft or he is innocent under the Criminal jurisprudence. **If the lessee will be held responsible before the competent criminal Court, he will be liable for loss, damage of the Environment and if the lessee will acquit from the criminal proceeding he will not held responsible for any kind of loss, damage of the Environment.** Whatever may be it is a duty of the Police they will prove before the competent criminal court against the lessee and State will prove before the competent Criminal Court that the lessee has committed theft of the Minor Minerals from the Government Source. The Police has been lodged FIRs against the Respondent No: 11 (lessee) after repeated Complaint made by the Applicants along with Applicants of the O.A (which is available under Page No: 43 to 55 of the Paper Book of the O.A).The Police has taken steps against the



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Respondent No: 11 and accordingly lodged FIRs on 20.11.2022 and investigation is going on and the lessee is fully cooperating with the investigation as per the provisions envisaged under Criminal Procedure Code, 1973. Again in the FIR (page No: 87 of the paper Book) is also clearly stated that the lessee engaged some persons for such acts and he has not directly involved in this acts. The vehicles seized by the Police are not registered in the name of the Respondent No: 11 (lessee). So, there is a question arise direct involvement of the lessee in to the affairs, but Police is already registered FIRs against the lessee and after completion of the investigation by the Police, the real picture will come. The competent criminal Court is also closely monitored the investigation under Section 156 of Criminal Procedure Code, 1973. The Applicants have relied to the FIRs filed in the O.A in self same issue/ ground/ prayer, which has been already under the preview of the police investigation since 20.11.2022. The Applicants are cleverly trying to influence the investigation agency by way of the O.A, which is not maintainable in the eye of law. It is apt to mention here that the Applicants are trying to interfering with the investigation of the Police as well the process of monitoring of the competent criminal court, which is envisaged under Section 156 and 157 of Criminal Procedure Code, 1973. Such steps/



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measures of the Applicants shows that they are trying to bias to the proceeding of the competent criminal court as well as investigation agency by way of the O.A, which is highly objectionable in nature and this Hon'ble Tribunal may kindly avoid such type of Proceedings. The Applicants has not disclosed in their O.A the facts in connection of the progress of investigation by the agency / police or whether the charge sheet has been submitted by the Police before the competent criminal court against the lessee or final report or M/F (Matter is true but fact is no clue) or closer report submitted by the Police relating to the FIRs registered against the lessee on 20.11.2022. The Applicants without verifying the status of the Investigation of the Criminal Cases have been filed the O.A by way of some misleading facts/ submissions, which is not permissible in the eye of law. The Applicants are only placed the materials of the FIRs before this Hon'ble Tribunal to get favorable order/orders. Thus, they are trying to made a mockery to this Hon'ble Tribunal filed some of the materials, which are prior registration of the FIRs (20.11.2022). This Hon'ble Tribunal may kindly ignore the materials available on record and those documents date is very clearly shows that prior to the registration of the Criminal Cases. In the other hand the Applicants of the O.A after registration of the FIRs against the lessee



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initiated another parallel proceeding before this Hon'ble Tribunal in the form of O.A by violating the procedures laid down in the Criminal Procedure Code, 1973 as well ignoring to the proceedings of the Competent Criminal Court. The Applicants without having knowledge of the criminal court proceeding/ investigation status has been relied such FIRs to get favorable orders from this Hon'ble Tribunal. The Applicants are clearly saying at Para -19 of the O.A after multiple complaints from their side, the FIRs has been lodged by the Police against the Respondent No: 11 (lessee) and the Applicants have again sought intervention of this Hon'ble Tribunal at Para- 24 of the O.A to lodge FIR again and again/ each and every day relating to the self same issues/occurrence/ incident. Surprisingly, the Applicants should be aware that before initiation of any criminal proceeding against any person concern, it must be specific date/time/ Place of occurrence is mandatory under the criminal law. The Applicants have failed to explain the specific date/ time of occurrence against the lessee before this Hon'ble Tribunal, while filing of the O.A. Criminal law could not be attract against the Respondent No: 11 by way of paper work or omnibus manner, it is evident from the pleadings of the O.A and prayer made there under. It is a settled principle that repeatedly/ frequently/ each day Criminal law could not be enforced in to the self same occurrence,



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it is evident from the Pleadings of the O.A. Again it is submitted here that , the Applicants placed some of the Materials in their O.A which shows that those are prior the date of the registration of the FIRs dated: 20.11.2022. Thus, all the materials relied by the Applicants are coming under the preview of the Criminal Case investigation, such material validity will be decide before the competent Criminal Court. The Applicants without verifying the Case diary of the Police investigation which has been maintained before the Police Station for submission to the Competent Criminal Court, which is envisaged under Section 172 of Criminal Procedure Code, 1973.



19. That the Applicants have sought intervention of this Hon'ble Tribunal for initiation of Criminal Proceeding against the Respondent No: 11 of the O.A (as per the prayer Point-VI) and also prayed for recovery of the Environmental compensation from the Private Respondent/ Respondent No:11. The entire proceeding before this Hon'ble Tribunal is not maintainable as per the provisions of the Criminal Procedure Code, 1973. The issues involved in the O.A are a matter of investigation by the Police and accordingly investigation is going on, it is admitted facts (as per averments of Para-19 of the O.A) and the Criminal Case is coming under the jurisdiction of the Competent Criminal Court.

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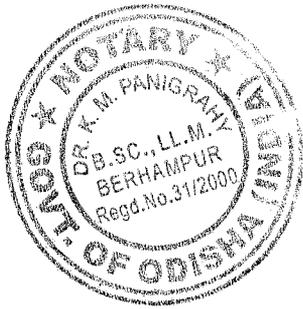
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Thus, the O.A is not maintainable at all from the four corner of law and the Applicants have approached to this Hon'ble Tribunal by way of some misleading facts. The Applicants have already riled the FIRs under page No: 78 to 90 of the O.A) and the said Applicants have also mentioned at Para-19 of the O.A after multiple complaints (under page No: 43 to 55 of the paper Book of the O.A) the Police has taken steps against the Respondent No: 11 with reference to the Jankia Police Station Case No: 399/ dated: 20.11.2022 and another Case No: 400/ 20.11.2022 U/S: 379, 411, 34, 12 of Orissa Mines and Mineral (Prevention of theft Smuggling Activities) Act, 1989, Section 68 of Orissa Minor Minerals Concession Rules, 2004. In view of this the O.A is liable to be dismissed with heavy cost.



20. That after filing of the Criminal Cases against the Respondent No: 11, the Applicants have been moved to this Hon'ble Tribunal by way self same allegations. Basing upon the self same allegations made by the Applicants to the different authorities of the State (it is evident from the Para-19 of the O.A). Thereafter, the Police has started investigation after registration of the Case against the lessee, the Applicants themselves admitted such facts in their Para-19 of the O.A. Before conviction by the Competent Criminal Court the Respondent No: 11 could not be held responsible for any

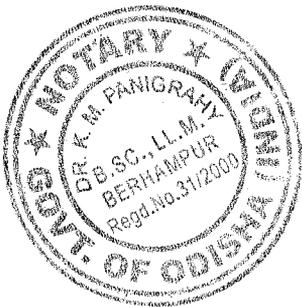
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kind of allegation of the Applicants. The Applicants have no authority to file this Case before final verdict of the Criminal Court in connection of the Criminal complaint against the Respondent No: 11, which is available under Page No: 78 to 90 of the Paper Book. Hence, during pendency of the Criminal Cases before the competent Criminal Court the O.A is not maintainable at all and this Hon'ble Tribunal has no jurisdiction to entertain the O.A, in view of the self same issues pending before the competent Criminal Court and under the investigation of the Police. The Applicants are trying to encroach the jurisdiction of the investigation agency as well as the Criminal Court by way of the O.A, which is highly objectionable in nature and if the O.A will continue before this Hon'ble Tribunal, it will be abuse of the process of law. It is settled principle after registration of the FIR nobody will reach a conclusion that the lessee is fully and finally responsible for any kind of violation of act. After conviction order of the criminal Court the lessee will be held responsible if any kind of allegation raised by the Applicants before this Hon'ble Tribunal. If the Respondent No: 11 will be acquit from the criminal proceeding nobody will be make a question against him. The Applicants are hurriedly approached to this Hon'ble Tribunal without any verdict from the Competent



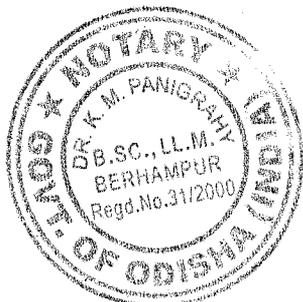
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Criminal Court against the Respondent No: 11. For which the O.A is liable to be dismiss with heavy cost.

21. That once Criminal proceeding has been drawn against the Respondent No: 11 and before completion of the investigation by the Police and final verdict of the competent Criminal Court how the Applicants raised allegation against the Respondent No:11 and filed the O.A by alleging registration of Criminal Case again and again in the self same issues which is covered under the investigation by the Police and the matter Pending before the Competent Criminal Court. The Applicants again prayed in the O.A for recovery of the Environmental Compensation from the Respondent No: 11, which is not maintainable under the law. At that stage nobody is authority/ empowered to interfere of the Criminal investigation and before conviction order of the competent criminal Court and the Applicants have no locus standi to raise question/issues against the Respondent No:11 by way of the O.A, This Hon'ble Tribunal may kindly discourage to the Applicants not to file such type of proceedings. So, the Hon'ble Tribunal may kindly pass appropriate order/orders and to dismiss the O.A keeping in view of the Parameters of law laid down in the Criminal Procedure Code, 1973. Failing which the Criminal Case investigation/ Criminal Court proceeding will be sacked. The Applicants have followed



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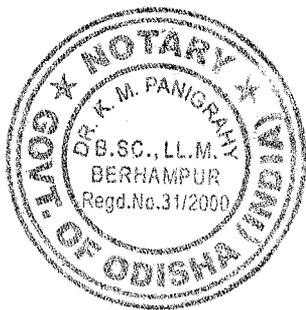
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easy path to bias the Criminal Case investigation as well as proceeding of the Competent Criminal Court in the present form of the O.A. Such type of Practice should be curbed with strong hand. Failing which the basic foundation of law will be collapsed.

22. That the Applicants how and which way moved to this Hon'ble Tribunal by making a parallel proceeding against the Respondent No: 11, it needs consideration for the ends of justice. It shows that the Applicants have been approached to this Hon'ble Tribunal as a personal vindictive measures not for the protection of the Enviornment. The Applicants could not drink the hot and cold water in the same hand. They have approached to the different authorities for necessary action and accordingly after initiation of criminal proceeding against the Respondent No:11 again they have approached to this Hon'ble Tribunal in the form of O.A and particularly by way of self same allegations, which is not permissible in the eye of law. Before finalization of the criminal proceeding they have no locus standi to approach/ jump to this Hon'ble Tribunal by way of another law. It is a settled principle before finalization of the Criminal Proceeding any other law could not be attract in the self same issues. It is a clear Case of abuse of process of law. Hence, the O.A is liable to be dismiss according to law.



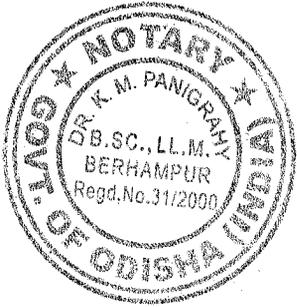
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23. That it is evident from the list of dates filed by the Applicants in their O.A; it is clearly shows that after registration of the FIRs dated: 20.11.2022 no fresh/separate Cause of action has been arise to file the Case before the Hon'ble Tribunal. After registration of the FIRs against the Respondent No:11 all the issues raised by the Applicants are already covered /redressed under the Criminal Cases and the issues is already pending before the competent criminal Court. So, there is no necessity to move the different forum by way of self same issues by the Applicants. If they are willing to say anything they will be approach to the jurisdictional Magistrate of the competent Criminal Court. After initiation of Criminal Case against the lessee the Applicants approached to this Hon'ble Tribunal only to get favorable orders, which is not maintainable in the eye of law and the O.A is liable to be drop at that Stage and this Hon'ble Tribunal may kindly discourage to the applicants for multiple proceeding in the self same issues.



24. That the Applicants have been relied some of the order/orders of the Hon'ble Apex Court as well as the Hon'ble NGT passed in the different context. It is settled Principle each Case will be decides in its own merit. So, such judicial orders will not be applicable in to the present Case. Thus, the O.A is liable to be dismiss

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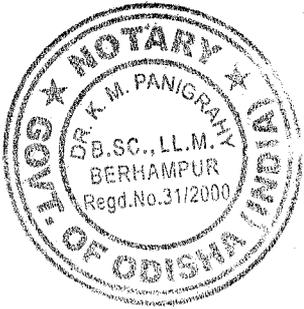
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according to law keeping in view of the Police investigation and Criminal Court proceedings as well as the provisions of the Criminal Procedure Code, 1973.

25. That the Applicants have been obtained orders on 23.01.2023 before this Hon'ble Tribunal by placing misleading informations and to made a mockery to this Hon'ble Tribunal. Due to this order passed by the Hon'ble Tribunal there is excellent chance the investigation of the Police will be bias and State machinery may be taken different views against the Respondent No: 11 before conclusion of the Criminal trial before the Competent Criminal Court. The Hon'ble Tribunal is already observed in the order dated: 23.01.2023 Para-2 (last line) **“which confirms illegal Mining being carried Out by him”**. During the Course of investigation by the Police any kind of adverse order will lead conviction for the Respondent No: 11 prior commencement of the Criminal trial before the Competent Criminal Court. So, the Respondent No: 11 is fully entitled to get fair investigation / trial as per the provision of the Criminal procedure Code, 1973. It is a settled Principle as fixed by the Hon'ble Apex Court during the Course of the investigation no court has authority to interfere/ pass adverse order against the accused person (Respondent No: 11) in connection of the Police investigation. For which the accused Person



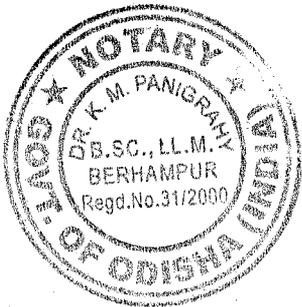
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(Respondent No: 11) will be debarred to get fair investigation/ trail which has been envisaged under the Criminal law. Again this Hon'ble Tribunal is also passed order on 23.01.2023 and observed at Para-14 and 15 in the said order and accordingly directed to the State officials to conduct inspection and fix responsibility against the Respondent No: 11. Even though the Police investigation is going on since 20.11.2022 (date of registration of the FIR) against the Respondent No: 11. Before the completion of the Criminal investigation this Hon'ble Tribunal directed to the State Machinery to conduct another enquiry. For which the accused person (Respondent No: 11) will debar to get fair investigation from the Police as well as from the State machinery. If the State machinery will be take steps to bias the Police taking in to consideration of the Hon'ble Tribunal orders dated: 23.01.2023, the fundamental rights of the accused person (Respondent No: 11) will be automatically seize before the competent Criminal Court. The Hon'ble Apex Court always says fair investigation and fair trail is fundamental right of the accused under the criminal law. But, in this Case the Applicants are openly interfering with the Criminal Case investigation by way of the O.A. The State machinery as well as police will be definitely take steps under influence of the O.A and it is very difficult to get fair investigation/ trail by accused Person



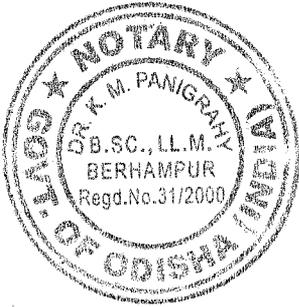
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(respondent No; 11) before the competent Criminal Court. It is respectfully submitted here that this Hon'ble Tribunal has no jurisdiction under the NGT Act, 2010 to supervise the Criminal Case investigation and during the Course of the investigation, it will be not just and proper to made any observation against the accused person (Respondent No: 11). It is settled principle after conviction order of the competent Criminal Court any kind of litigation will arise against the offender. But, after registration of the Case and during the Course of investigation the Applicants have approached to this Hon'ble Tribunal with intent to convict the accused person (Respondent No: 11) before the Competent Criminal Court. But, it is a settled principle, the Criminal law should take its own motion, if any kind of unnecessary interference without authority will come, the basic foundation of the Criminal law will be collapsed and fundamental rights of the accused person (Respondent No: 11) will be affected.



26. That the Hon'ble Apex Court observed in the matter of VIJAY SYAL AND ANR-Versus- STATE OF PUNJAB AND ORS decided on 22.05.2003 with reference to the Appeal (Civil) No: 812 of 2002 as follows:-

“In order to sustain and maintain sanctity and solemnity of the proceedings in law courts it is

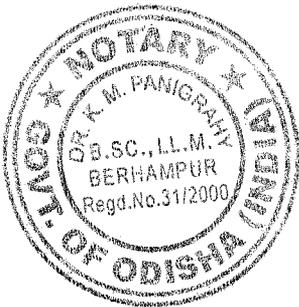
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necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the court, when a court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take consequences that follow on account of its own making. At times lenient or liberal or generous treatment by courts in dealing with such Matters are either mistaken or lightly taken instead of learning proper lesson. Hence there is a compelling need to take serious view in such matters to ensure expected purity and grace in the administration of justice". Copy of the Judgement of the Hon'ble Apex Court is annexed here to as ANNEXURE-R/11/B Series.



27. That the Hon'ble Apex Court observed in the matter of A.V. PAPAYYA SASTRY & ORS-Versus- State of A.P and others decided on 07.03.2007 with reference to the Appeal (Civil) No: 5097-5099 of 2004 as follows:-

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“It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings”. Copy of the Judgement of the Hon'ble Apex Court is annexed here to as ANNEXURE-R/11/C Series.

28. That the Hon'ble Apex Court observed at Para-5 in the matter of S.P Chengalvaraya Naidu -vs Jagannath decided on 27 October, 1993 as follows:-



5) xxxxxxxxxxxx

We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One, who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right

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to approach the court. He can be summarily thrown out at any stage of the litigation. Copy of the Judgement is annexed here to as ANNEXURE-R/11/D Series.

28. That the Hon'ble Apex Court observed at Para: 20 and 21 in the matter of INDIAN BANK-versus- M/S SATYAM FIBRES (INDIA) PVT.LTD decided on 09/08/1996 reproduced below:-

20) xxxxxxxxxxxxxx

This plea could not have been legally ignored by the Commission which needs to be reminded that the Authorities, be they Constitutional, Statutory or Administrative, (and particularly those who have to decide a lis) possess the power to recall their judgments or orders if they are obtained by fraud as Fraud and Justice never dwell together (Fraus et jus nunquam cohabitant). It has been repeatedly said that Fraud and deceit defend or excuse no man (Fraus et dolus nemini patrocinari debent).

21. In Smith v. East Elloe Rural District Council (1956) AC 736, the House of Lords held that the effect of fraud would normally be to vitiate any act or order. order obtained by fraud



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practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order. Copy of the Judgement is annexed here to as ANNEXURE-R/11/E Series.

29. That the Hon'ble Delhi High Court observed at Para- 7 in the matter of SONAL MANSINGH-Versus- BEENA OM PRAKASH with reference to the RC. REV. No. 148/2011 decided on 12th September, 2011 read as follows:-



Para-7 (17). *Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No Court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.*” Copy of the judgement of the Hon'ble Delhi High Court is annexed here to as ANNEXURE-R/11/F Series.

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30. That in view of the above facts and circumstances of the Case this Hon'ble Tribunal may kindly recall the order dated: 23.01.2023 passed in this Case for the ends of justice.

31. That the Respondent No: 11 is craves leave of this Hon'ble Tribunal to file further affidavit, if necessary for proper adjudication of the matter.

VERIFICATION

I **Patitapaban Barik**, S/O: Nakula Barik, aged about 35 years, at/Po: Tankol -752021, P/S: Jankia, Dist: Khordha, State: Odisha do her by verify that the contents of the affidavit believed to be true and that I have not suppressed any material fact.

Verified at Berhampur on 12.03.2023.

IDENTIFIED BY

Done
12.03.2023

ADVOCATE
(*B.N. Mahapatra*)

DEPONENT

Patitapaban Barik

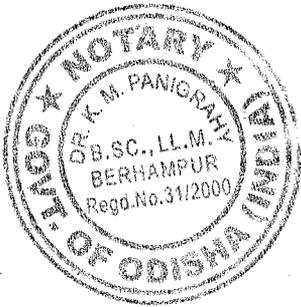
Dr. K.M. Panigrahy
NOTARY
Berhampur (Ganjam)

No.
Time
Place:

DECLARATION

The deponent having been identified by me as above, I solemnly affirm before this the A.M./P.M. read over and explained and deponent who seems perfectly to have understood the contents and tenor of the affidavit.

Dr. K.M. Panigrahy
Dr. K.M. Panigrahy
Notary Berhampur (Ganjam)
Regd. No.31/2000



Babubhai vs State Of Gujarat & Ors on 26 August, 2010

Supreme Court of India
Babubhai vs State Of Gujarat & Ors on 26 August, 2010
Author: . B Chauhan
Bench: P. Sathasivam, B.S. Chauhan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1599 of 2010
(Arising out of SLP(Crl.) No. 2077 of 2010)

Babubhai ...Appellant

Versus

State of Gujarat & Ors. ...Respondents

WITH

CRIMINAL APPEAL NOS. 1600-1605 of 2010
(Arising out of SLP(Crl.) Nos. 3235-3240 of 2010)

State of Gujarat & Ors. ...Appellants

Versus

Ganeshbhai Jakshibhai Bharwad & Ors. ...Respondents

JUDGMENT

Dr. B.S. CHAUHAN, J.

1. Leave granted.

2. These appeals and other connected appeals have been preferred against the judgment and order dated 22.12.2009 of the High Court of Gujarat at Ahmedabad, passed in Special Criminal Application Nos. 1675/2008, 1679/2008 with Crl. Misc. Application Nos. 8249/2009, 8361/2009, 8363/2009 and 7687/2009.

3. Facts and circumstances giving rise to the present cases are that on 7.7.2008, some altercation took place between members of the Bharwad and the Koli Patel communities over the plying of rickshaws in the area surrounding Dhedhal village of Distt. Ahmedabad, Gujarat. The Bharwad community had been preventing the Koli Patels from running their rickshaws in the said area.

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Amexuse-R/11/A Series

On the next day, i.e. on 8.7.2008, case No. C.R.No.I- 154/2008, was registered at 17:30 hours in the Bavla Police Station under Sections 147, 148, 149, 302, 307, 332, 333, 436 and 427 of the Indian Penal Code, 1860 (hereinafter called as "IPC") read with Section 135 of the Bombay Police Act, 1951 (for short "BP Act") and Sections 3, 7 of Prevention of Damages of Public Property Act, 1984 (for short "1984 Act") for an incident which occurred at Village Dhedhal, wherein Mr. M.N. Pandya, Sub-Inspector of Police, Bavla Police Station has stated that while he was patrolling in Bavla Town, he received a message from H.C. Kanaiyalal, Police Station Officer, at 10.00 a.m. that some altercation/incident had taken place between the two communities at Dhedhal Cross Roads. On receiving the said information, he along with other police personnel, rushed to the place of incident, however, by that time the crowd had already dispersed. Thereafter, he received information that a clash was going on between the said two communities in Dhedhal village. Immediately, he contacted the Control Room, as well as the Deputy Superintendent of Police of Dholka, for further police support and rushed to the spot where he found about 2000-3000 persons from both the communities, all with sticks, dhariyas, swords etc., attacking each other. The police resorted to teargas shells as well as to lathi charges to disperse the crowd. Several rounds of firing were resorted to in order to disperse the mob. In the incident, more than 20 persons were injured and three houses of members of the Bharwad community were set on fire. One person, namely Ajitbhai Prahladbhai, also died. Several police personnel were also injured. No person was named in the said FIR.

4. Another FIR, being Case No. C.R.No. I-155 of 2008, was registered at Bavla Police Station on the same date i.e. 8.7.2008 at 22:35 hrs by Babubhai Popatbhai Koli Patel (appellant in SLP (Crl.) No.2077/2010 and respondent in SLP (Crl.) Nos. 3235-3240/2010) (hereinafter called as complainant), resident of village Vasna, Taluka Bavla, wherein he alleged that an incident took place on the same day at 9:15 hours near Dhedhal village in which he named 18 persons as accused. As per this FIR, an incident occurred on 7.7.2008 in the evening at about 6.30 p.m. His cousin Jayantibhai Gordhanbhai told him that when Budhabhai of their village and two rickshaw-walas were taking passengers at Dhedhal Chokdi, the Bharwads of Dhedhal village who were also plying rickshaws, chhakdas etc. told the Koli Patels not to take passengers from there and they took away the keys of the jeep, beat up the Koli Patel boys, abused and threatened them and told them not to bring jeeps and rickshaws to Dhedhal Chokdi. Babubhai Popatbhai Koli Patel, complainant reached Dhedhal Chokdi and met Budhabhai Laljibhai Koli Patel of his village and his brother Jayantibhai Laljibhai and enquired about the incident. They complained about browbeating and threatening by the Bharwads as the Bharwads wanted that no one else should bring jeeps and chhakdas to Dhedhal Chokdi. The informant/complainant stated that Kantibhai Ratanbhai Bharwad and other persons standing nearby told them to stop and threats were made by the Bharwads. On the date of the incident, when the informant was coming towards Dhedhal village from Vasna, his cousin Vadibhai Pakhabhai's tractor and one chhakda rickshaw were passing through the road. When they reached near Dhedhal village pond, the rickshaw and tractor were halted, his car was also stopped and he got down from the car and saw that 10 to 12 persons belonging to the Bharwad community were assaulting his cousin Vadibhai Pakhabhai and Amubhai Pakhabhai with sticks. They were also assaulting the chhakda rickshaw-walas. He saw Ganesh Jaksi of the Bharwad community of Dhedhal village having tamancha-like weapon in his hand and instigating the other persons to indulge in violence. He also saw Sanjay Chela Bharwad, Dhiru Matam Bharwad, Sura Rajji Bharwad

TRUE COPY ATTESTED

BY ADVOCATE

Babubhai vs State Of Gujarat & Ors on 26 August, 2010

of Dhedhal intercepting people going on the road and Karshan Chako Bharwad, Moman Natha Bharwad, Kalu Sedhu Bharwad, Kalu Hari Bharwad, Chinu Bhikhu Bharwad assaulting Vadibhai Pakhabhai and Amubhai as well as the chhakda rickshaw-wala saying that the road was not for them and thus, they should not pass through it. The complainant and Manubhai went to rescue Vadibhai. At that time, Jayantibhai Laljibhai Patel of their village and Matambhai Vadibhai Patel came on a motor cycle. They were also stopped and all the persons jumped on them and started assaulting and abusing them. He saw that Surabhai Rajibhai Bharwad had inflicted stick blows on Manubhai due to which he was injured and became unconscious. When the mob beat up Manubhai, at that time, other Bharwads from Dhedhal village had also arrived.

5. The Bharwads started beating passersby on vehicles, who had worn clothes like Koli Patels and causing injuries to them. The Bharwads made calls on mobile phones to call other Bharwads. The Bharwads assaulted and killed Manubhai Koli Patel and Ajitbhai Prahladbhai Koli Patel by assaulting them with deadly weapons like revolver, dhariyas and sticks and also caused serious injuries to Babubhai Popatbhai Koli Patel, informant/complainant on his head and hand. They also caused minor and major injuries to other persons.

6. On 9.7.2008, the inquest panchnama was carried out and three dead bodies were sent for post mortem. The report of the autopsy revealed a large number of injuries inflicted on the deceased persons. Statements of injured witnesses, who were admitted in Long Life Hospital, namely Dashratbhai Popatbhai Patel (PW.26), Hemubhai Babubhai Patel (PW.12), Jayantibhai Laljibhai (PW.14), Vadibhai Pakhabhai (PW.27) were recorded on 10.07.2008. Statements of injured witness Matambhai Vadibhai (PW.18) were recorded on 10.7.2008 and 21.7.2008.

7. The accused in both the cases filed Special Criminal Application No. 1675/2008 praying for investigation of CR No.I-154/2008 registered with Bavla Police Station by an independent agency like the CBI, Special Criminal Application No. 1679/2008 for quashing of C.R. No.I-154/2008 and C.R. No.I-155/2008 registered with Bavla Police Station. Three applications being Criminal Misc. Application Nos. 8249/2009, 8361/2009 and 8363/2009 to quash and set aside the proceedings undertaken by Sessions Court during the pendency of the applications filed earlier were made. Twenty two persons were arrested. On completion of investigation, the charge sheet was filed on 10.10.2008 against 12 accused persons and the case was committed to Sessions Court.

8. By judgment and final order dated 22.12.2009, the High Court quashed the FIR registered as CR No.I-155/2008 and clubbed the investigation of the FIR along with the investigation of the other FIR bearing CR No.I-154/2008 to the extent it was feasible. The court transferred the investigation to the State CID Crime Branch and directed the new Investigating Officer to investigate the Bavla Police Station C.R.No.I-154/2008 as it stood earlier prior to the deletion of Section 302 IPC with a further clarification that quashing of the FIR registered by Bavla Police Station i.e. C.R.No.I-155 of 2008 could not mean that accused in respect of the said FIR has been discharged of the offences as they would face the charges in C.R. No.I-154/2008 and the accused who stood arrested in connection with C.R.No.I-155 of 2008 would stand arrested in connection with case C.R. No.I-154/2008. Hence, these appeals.

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Annexure - R/11/A series.

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9. Shri R.K. Abichandani, learned senior counsel appearing for the appellant/complainant in C.R. No.I-155/2008, and Shri Tushar Mehta, learned Additional Advocate General have submitted that the High Court quashed the FIR without appreciating that there are no common factors in both the FIRs so as to indicate that both FIRs had arisen out of the same transaction. Thus, the FIRs could not be clubbed; the incident recorded in CR No. I-155/08 occurred prior in point of time and facts recorded in both the FIRs make it evident that there had been two separate incidents at two different places and for distinct offences. In CR No. I-155/08, three persons belonging to Koli Patel community had died and 26 persons of the same community were injured at the hands of Bharwads, whereas no person from the Bharwad community suffered any injury. Both the FIRs had been lodged specifying that the FIR in CR No.I-155/08 has been in respect of the incident occurred at 9.15 am while the incident involved in CR No. I-154/08 has been in respect of incident occurred at 9.30 am. The incident first in time took place at Dhedhal Chokdi (Cross Roads) while the other incident occurred in village Dhedhal near the pond. The Court further erred in granting the relief to persons/applicants before it who had been absconding according to the Investigating Agency. Thus, their applications could not have been entertained. The appeals deserve to be allowed and the judgment and order of the High Court is liable to be set aside.

10. On the contrary, Shri U.U. Lalit, Shri C.A. Sundaram, Shri Rajeev Dhavan, and Shri P.S. Narsimha, learned senior counsel appearing for the respondents-accused in C.R. No.I- 155/2008, have opposed the appeals contending that the High Court reached the correct conclusion that both the crimes were two parts of the same transaction. They occurred at the same place and the version given by Babubhai Popatbhai Koli Patel in C.R. No.I-155/2008 cannot be considered a counter version giving rise to a cross case. Thus, no interference with the impugned judgment and order of the High Court is required.

11. We have considered the rival submissions made by learned counsel for the parties and perused the record. Two FIRs.

12. In Ram Lal Narang Vs. Om Prakash Narang & Anr. AIR 1979 SC 1791, this Court considered a case wherein two FIRs had been lodged. The first one formed part of a subsequent larger conspiracy which came to the light on receipt of fresh information. Some of the conspirators were common in both the FIRs and the object of conspiracy in both the cases was not the same. This Court while considering the question as to whether investigation and further proceedings on the basis of both the FIRs was permissible held that no straitjacket formula can be laid down in this regard. The only test whether two FIRs can be permitted to exist was whether the two conspiracies were identical or not. After considering the facts of the said case, the Court came to the conclusion that both conspiracies were not identical. Therefore, lodging of two FIRs was held to be permissible.

13. In T.T. Antony Vs. State of Kerala & Ors. (2001) 6 SCC 181, this Court dealt with a case wherein in respect of the same cognizable offence and same occurrence two FIRs had been lodged and the Court held that there can be no second FIR and no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences. The investigating agency has to proceed only on the information about commission of a cognizable offence which is first entered in the Police Station diary by the

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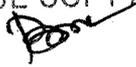
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Officer In-charge under Section 158 of the Code of Criminal Procedure, 1973 (hereinafter called the Cr.P.C.) and all other subsequent information would be covered by Section 162 Cr.P.C. for the reason that it is the duty of the Investigating Officer not merely to investigate the cognizable offence report in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and the Investigating Officer has to file one or more reports under Section 173 Cr.P.C. Even after submission of the report under Section 173(2) Cr.P.C., if the Investigating Officer comes across any further information pertaining to the same incident, he can make further investigation, but it is desirable that he must take the leave of the court and forward the further evidence, if any, with further report or reports under Section 173(8) Cr.P.C. In case the officer receives more than one piece of information in respect of the same incident involving one or more than one cognizable offences such information cannot properly be treated as an FIR as it would, in effect, be a second FIR and the same is not in conformity with the scheme of the Cr.P.C. The Court further observed as under:

"A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate..... However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution." (Emphasis added).

14. In Upkar Singh Vs. Ved Prakash & Ors. (2004) 13 SCC 292, this Court considered the judgment in T.T. Antony (supra) and explained that the judgment in the said case does not exclude the registration of a complaint in the nature of counter claim from the purview of the court. What had been laid down by this Court in the aforesaid case is that any further complaint by the same complainant against the same accused, subsequent to the registration of a case, is prohibited under the Cr.P.C. because an investigation in this regard would have already started and further the complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence, will be prohibited under section 162 Cr.P.C. However, this rule will not apply to a counter claim by the accused in the first complaint or on his behalf alleging a different version of the said incident. Thus, in case, there are rival versions in respect of the same episode, the Investigating Agency would take the same on two different FIRs and investigation can be carried

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under both of them by the same investigating agency and thus, filing an FIR pertaining to a counter claim in respect of the same incident having a different version of events, is permissible.

15. In Rameshchandra Nandlal Parikh Vs. State of Gujarat & Anr. (2006) 1 SCC 732, this Court reconsidered the earlier judgment including T.T. Antony (supra) and held that in case the FIRs are not in respect of the same cognizable offence or the same occurrence giving rise to one or more cognizable offences nor are they alleged to have been committed in the course of the same transaction or the same occurrence as the one alleged in the First FIR, there is no prohibition in accepting the second FIR.

16. In Nirmal Singh Kahlon Vs. State of Punjab & Ors. (2009) 1 SCC 441, this Court considered a case where an FIR had already been lodged on 14.6.2002 in respect of the offences committed by individuals. Subsequently, the matter was handed over to the Central Bureau of Investigation (CBI), which during investigation collected huge amount of material and also recorded statements of large number of persons and the CBI came to the conclusion that a scam was involved in the selection process of Panchayat Secretaries. The second FIR was lodged by the CBI. This Court after appreciating the evidence, came to the conclusion that matter investigated by the CBI dealt with a larger conspiracy. Therefore, this investigation has been on a much wider canvass and held that second FIR was permissible and required to be investigated. The Court held as under:

"The second FIR, in our opinion, would be maintainable not only because there were different versions but when new discovery is made on factual foundations. Discoveries may be made by the police authorities at a subsequent stage. Discovery about a larger conspiracy can also surface in another proceeding, as for example, in a case of this nature. If the police authorities did not make a fair investigation and left out conspiracy aspect of the matter from the purview of its investigation, in our opinion, as and when the same surfaced, it was open to the State and/or the High Court to direct investigation in respect of an offence which is distinct and separate from the one for which the FIR had already been lodged." (Emphasis added).

17. Thus, in view of the above, the law on the subject emerges to the effect that an FIR under Section 154 Cr.P.C. is a very important document. It is the first information of a cognizable offence recorded by the Officer In-Charge of the Police Station. It sets the machinery of criminal law in motion and marks the commencement of the investigation which ends with the formation of an opinion under Section 169 or 170 Cr.P.C., as the case may be, and forwarding of a police report under Section 173 Cr.P.C. Thus, it is quite possible that more than one piece of information be given to the Police Officer In-charge of the Police Station in respect of the same incident involving one or more than one cognizable offences. In such a case, he need not enter each piece of information in the Diary. All other information given orally or in writing after the commencement of the investigation into the facts mentioned in the First Information Report will be statements falling under Section 162 Cr.P.C.

In such a case the court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the

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same transaction. If the answer is affirmative, the second FIR is liable to be quashed. However, in case, the contrary is proved, where the version in the second FIR is different and they are in respect of the two different incidents/crimes, the second FIR is permissible. In case in respect of the same incident the accused in the first FIR comes forward with a different version or counter claim, investigation on both the FIRs has to be conducted.

18. The instant case is required to be examined in the light of the aforesaid settled legal propositions. If the two FIRs are read together, it becomes clear that the incident started in the morning as per both the FIRs. C.R. No.I-154/2008, lodged by Mr. M.N. Pandya, Sub Inspector of Police stated that he reached the place of occurrence after receiving the information from the police station and found that mob had already dispersed. The case of the prosecution is that when the police reached the place of occurrence of the first incident, the mob had already dispersed, could not be correct for the reason that some of the witnesses have stated that the clash was going on when the police arrived and police resorted to force to disperse the mob. In fact, it was the police who summoned the ambulances which took the injured persons to hospitals. In the first incident as per the said FIR the place of occurrence had been village Dhedhal near the pond. In the pond, the damaged tractor, motor cycle and chhakda were found. Mr. M.N. Pandya called the extra police force and went inside the village. He found 2000-4000 persons and witnessed a free fight between them. The Koli Patels had surrounded some of the houses of the Bharwads. Some persons had been locked inside their houses and they had also put their houses at fire. The superior officers also came there. Police has used force to disperse the mob in the said incident and there were heavy casualties and there was loss of lives also. If we examine minutely the FIR in C.R. No.I-155/2008, the incident also occurred near the pond in the village Dhedhal. The damaged tractor, motor cycle and chhakda were there in the pond. One person Ajitbhai Prahladbhai was killed in the incident. Babubhai Popatbhai Koli Patel also got injured. While comparing both the FIRs there is no doubt that both the incidents had occurred at the same place in close proximity of time, therefore, they are two parts of the same transaction. More so, the death of Ajitbhai Prahladbhai has been mentioned in both the FIRs. From the report for deletion of Section 302 IPC, it is apparent that it is not the case of the Investigating Officer that the death of Ajitbhai Prahladbhai had not occurred during the course of the incident in connection with which C.R. No.I-154 of 2008 came to be registered.

19. It is also evident that houses of the Bharwads were inside the village in contiguous areas and the offence had spread over the entire area as is evident from the panchnama of the scene of offence drawn in C.R. No.I-155 of 2008 as well as from the contents of the said FIR. Same situation regarding the place of occurrence appears from the panchnama of the scene of incident in C.R. No. I-154/2008. Panchnama of the scene of incident of C.R. No.I-154/2008 includes the scene of occurrence of C.R. No.I-155/2008 which makes it clear that both the FIRs pertain to the two crimes committed in the same transaction. The scene of offence panchnamas establish clearly that the incidents in both the cases could not be distinct and independent of each other. In fact, it is nobody's case that incident relating to CR No.I-155/08 occurred at Dhedhal Chokdi (Cross-Roads).

20. In view of the above, we are of the considered opinion that the High Court reached the correct conclusion and second FIR C.R. I-155/2008 was liable to be quashed. Tainted Investigation

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21. In some of the applications before the High Court, allegations of bias malafide against the investigating agency had been made submitting that investigation had not been fair and impartial and therefore, it stood vitiated because of material irregularities and therefore, investigation be handed over to some independent agency like CBI. The Court examined the grievance of those applicants and recorded the following findings:-

(i) In spite of the fact that serious allegations had been made as regards the manner in which investigation had been made in the affidavit in reply, such allegations had not been denied;

(ii) The investigation has been one-sided. Statements of witnesses belonging to only one community had been recorded, and the members of the other community had been totally excluded from recording their statements, indicating bias in favour of one community and against the other;

(iii) In CR No.I-154/2008 several Koli Patels had been arraigned as accused, many of them are not named by any witness in their statements annexed with the charge-sheet. Thus, it was not clear as to how the said persons have been implicated in the offences in question. Such accused would certainly go scot-free, which clearly indicates the nature of investigation which has been carried out in respect of one of the FIRs;

(iv) Not a single witness named in the charge sheet belongs to the Bharwad community and despite the fact that statements of witnesses reveal that persons belonging to both the communities have sustained injuries, in the charge sheet, as well as the statements placed on record by the prosecution, not a single person belonging to the Bharwad community is shown to have sustained injuries;

(v) Though the witnesses refer to names of the Bharwads whose houses were set on fire after shutting them in, none of the persons belonging to the Bharwad community are cited as witnesses nor are their statements recorded. This is the nature of the investigation carried out in respect of C.R.No. I-154 of 2008;

(vi) When in respect of the second FIR pertaining to the alleged first incident, the informant was in a position to name all the accused belonging to the Bharwad community along with their father's name and surname, it is surprising that in the investigation carried out by the Investigating Officer no statement of any person belonging to the Bharwad community naming any person belonging to the Koli Patel community as having taken part in the incident has been recorded;

(vii) The offence has been bifurcated into two parts and one serious in nature and the other a much diluted one. Even in the diluted offence, some persons belonging to one community have been named as accused though no material has been collected to connect most of them with the offence in question. There is nothing to indicate as to how the said names came to be revealed. All the accused belonging to the same community, i.e., Koli Patels have been shown to be absconding accused in the charge-sheet filed against some of the accused belonging to the Bharwad community despite the fact

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that they are shown as witnesses in another FIR and their statements had been recorded by the Investigating Officer;

(viii) Accused of one case have been shown by the prosecution in the charge sheet as absconding accused but they had been attending court proceedings in the company of the Investigating Officer in another case;

(ix) There is over-action in relation to one FIR and complete inaction in so far as the another FIR is concerned. The resultant effect of the poor investigation carried out in connection with one FIR would be that all the accused of the said FIR would be acquitted and only the accused of another FIR which belongs to one community would have to face the prosecution;

(x) In such a fact-situation, persons who would otherwise be co-accused, would be witness against them in the case arising out of the another FIR which would cause immense prejudice to them;

(xi) Deletion of offence under section 302 IPC from the FIR CR No.I-154/2008 was totally unwarranted; and

(xii) Charge-sheet against same set of 12 persons had been filed in relation to both the FIRs. However, there was no evidence against the said persons in connection with some of the offences and the prosecution was ready and preparing to get them discharged under section 169 Cr.P.C.

On appreciation/consideration of the material available on record, the High Court recorded the aforesaid findings of fact and came to the following conclusion:

"The manner in which the investigation has been carried out as well as the manner in which these cases have been conducted before this Court, clearly indicate that the investigation is not fair and impartial and as such the investigating agency cannot be permitted to continue."

Thus, it is evident from the above that not only investigation in respect of both the FIRs had not been fair and has caused serious prejudice to one party but even before the High Court conduct of the party and investigating agency has not been fair.

22. None of the learned counsel appearing for the parties has raised any doubt about the correctness of those findings, rather all of them have fairly conceded that investigation was not conducted properly.

23. The High Court, in view of the fact that there has not been a fair investigation, transferred the case to State CBCID, however, it issued the following directions:

"The investigation in respect of the first information report registered vide Bavla Police Station I-C.R. No.154 of 2008 is transferred to the State CID Crime Branch. Both the Investigating Officers of the aforesaid FIRs shall hand over the investigation

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papers to the new investigating agency. The Investigating Officer who is entrusted with the investigation shall carry out further investigation in Bavla Police Station I-C.R. No.154 of 2008 as it stood earlier prior to the report for deletion of section 302 IPC. It is clarified that quashing of the first information report registered vide Bavla Police Station I-C.R. No.155 of 2008 does not mean that the accused in respect of the said FIR shall stand discharged of the offences. They shall now face the said charges in the first information report registered vide Bavla Police Station I-C.R. No.154 of 2008. The accused who are arrested in connection with Bavla Police Station I-C.R. No.155 of 2008 shall stand arrested in connection with Bavla Police Station I-C.R. No.154 of 2008."

24. We fail to understand that if the High Court has quashed the FIR in C.R.No. I-155/2008, how the charge sheet, which was filed after investigation of allegations made therein, could survive and be directed to be read in another case and other consequential orders be also read in another case.

Further in case the High Court came to the conclusion that investigation was totally biased, unfair and tainted, the investigation had to be held to have stood vitiated and as a consequence thereof charge sheets filed in both the cases could have become inconsequential.

25. The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the Investigating Officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The Investigating Officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The Investigating Officer "is not to bolster up a prosecution case with such evidence as may enable the court to record conviction but to bring out the real unvarnished truth". (Vide R.P. Kapur Vs. State of Punjab AIR 1960 SC 866; Jamuna Chaudhary & Ors. Vs. State of Bihar AIR 1974 SC 1822; and Mahmood Vs. State of U.P. AIR 1976 SC 69).

26. In State of Bihar Vs. P.P. Sharma AIR 1991 SC 1260, this Court has held as under:

"Investigation is a delicate painstaking and dextrous process. Ethical conduct is absolutely essential for investigative professionalism.Therefore, before countenancing such allegations of mala fides or bias it is salutary and an onerous duty and responsibility of the court, not only to insist upon making specific and definite allegations of personal animosity against the Investigating Officer at the start of the investigation but also must insist to establish and prove them from the facts and circumstances to the satisfaction of the court.Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power....The word 'personal liberty' (under Article 21 of the Constitution) is of the widest amplitude covering variety of rights which goes to constitute personal liberty of a citizen. Its deprivation shall be only as per procedure prescribed in the Code and

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the Evidence Act conformable to the mandate of the Supreme Law, the Constitution. The investigator must be alive to the mandate of Article 21 and is not empowered to trample upon the personal liberty arbitrarily..... An Investigating Officer who is not sensitive to the constitutional mandates may be prone to trample upon the personal liberty of a person when he is actuated by mala fides."

27. In Navinchandra N. Majithia Vs. State of Meghalaya & Ors. AIR 2000 SC 3275, this Court considered a large number of its earlier judgments to the effect that investigating agencies are guardians of the liberty of innocent citizens. Therefore, a heavy responsibility devolves on them of seeing that innocent persons are not charged on an irresponsible and false implication. There cannot be any kind of interference or influence on the investigating agency and no one should be put through the harassment of a criminal trial unless there are good and substantial reasons for holding it. Cr.P.C. does not recognize private investigating agency, though there is no bar for any person to hire a private agency and get the matter investigated at his own risk and cost. But such an investigation cannot be treated as investigation made under law, nor can the evidence collected in such private investigation be presented by Public Prosecutor in any criminal trial. Therefore, the court emphasised on independence of the investigating agency and deprecated any kind of interference observing as under:

"The above discussion was made for emphasising the need for official investigation to be totally extricated from any extraneous influence..... All complaints shall be investigated with equal alacrity and with equal fairness irrespective of the financial capacity of the person lodging the complaint.A vitiated investigation is the precursor for miscarriage of criminal justice."

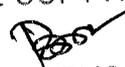
(Emphasis added)

28. In Nirmal Singh Kahlon (supra), this Court held that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused under Article 21 of the Constitution of India.

29. In Manu Sharma Vs. State (NCT of Delhi) (2010) 6 SCC 1, one of us (Hon'ble P. Sathasivam, J.) has elaborately dealt with the requirement of fair investigation observing as under:- "..... The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India...."

It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility

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lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society....

The Court is not to accept the report which is contra legem (sic) to conduct judicious and fair investigation....

The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expansive power of the police to make investigation.....".

30. This Court in K. Chandrasekhar Vs. State of Kerala & Ors. (1998) 5 SCC 223; Ramachandran Vs. R.

Udhayakumar & Ors. (2008) 5 SCC 413; and Nirmal Singh Kahlon (supra); Mithabhai Pashabhai Patel & Ors. Vs. State of Gujarat (2009) 6 SCC 332; and Kishan Lal Vs. Dharmendra Bafna (2009) 7 SCC 685 has emphasised that where the court comes to the conclusion that there was a serious irregularity in the investigation that had taken place, the court may direct a further investigation under Section 173(8) Cr.P.C., even transferring the investigation to an independent agency, rather than directing a re-investigation. "Direction of a re-investigation, however, being forbidden in law, no superior court would ordinarily issue such a direction."

31. Unless an extra ordinary case of gross abuse of power is made out by those in charge of the investigation, the court should be quite loathe to interfere with the investigation, a field of activity reserved for the police and the executive. Thus, in case of a mala fide exercise of power by a police officer the court may interfere. (vide: S.N. Sharma Vs. Bipen Kumar Tiwari & Ors. AIR 1970 SC 786).

32. In Kashmeri Devi Vs. Delhi Administration & Anr. AIR 1988 SC 1323, this Court held that where the investigation has not been conducted in a proper and objective manner it may be necessary for the court to order for fresh investigation with the help of an independent agency for the ends of justice so that real truth may be revealed. In the said case, this court transferred the investigation to the CBI, after coming to the conclusion that investigation conducted earlier was not fair.

33. The above referred to judgments of this Court make it clear that scheme of investigation, particularly, Section 173(8) Cr.P.C. provides for further investigation and not of re- investigation. Therefore, if the Court, comes to the conclusion that the investigation has been done in a manner with an object of helping a party, the court may direct for further investigation and ordinarily not for re-investigation. The expression ordinarily means normally and it is used where there can be an exception. It means in the large majority of cases but not invariably. "Ordinarily" excludes "extra-ordinary" or "special circumstances". (vide: Kailash Chandra Vs. Union of India AIR 1961 SC 1346; Eicher Tractors Ltd., Haryana Vs. Commissioner of Customs, Bombay AIR 2001 SC 196; and State of A.P. Vs. Sarma Rao & Ors. AIR 2007 SC 137).

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Thus, it is evident that in exceptional circumstances, the court in order to prevent the miscarriage of criminal justice, if considers necessary, it may direct for investigation de novo wherein the case presents exceptional circumstances.

34. In the instant case, admittedly, the High Court has given detailed reasons for coming to the conclusion that the investigation has been totally one-sided, biased and mala fide. One party has been favoured by the investigating agency. The natural corollary to this finding is that the other party has been harassed in an unwarranted manner. Thus, the cause of the other party has been prejudiced. The charge sheets filed by the investigating agency in both the cases are against the same set of accused. A charge sheet is the outcome of an investigation. If the investigation has not been conducted fairly, we are of the view that such vitiated investigation cannot give rise to a valid charge sheet. Such investigation would ultimately prove to be precursor of miscarriage of criminal justice. In such a case the court would simply try to decipher the truth only on the basis of guess or conjunctures as the whole truth would not come before it. It will be difficult for the court to determine how the incident took place wherein three persons died and so many persons including the complainant and accused got injured. Not only the fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. Investigating agency cannot be permitted to conduct an investigation in tainted and biased manner. Where non- interference of the court would ultimately result in failure of justice, the court must interfere.

In such a situation, it may be in the interest of justice that independent agency chosen by the High Court makes a fresh investigation. Thus, the order of the High Court requires modification to the extent that the charge sheets in both the cases and any order consequent thereto stand quashed. In case, any of the accused could not get bail because of the pendency of these appeals before this Court, it shall be open to him to apply for bail or any other relief before the appropriate forum. In case, such an application is filed, we request the appropriate court to decide the same expeditiously and in accordance with law. It is further clarified that those persons who were arrested in connection with CR No. I-155/08 would not stand arrested in connection with CR No. I-154/08. However, if during the fresh investigation, any incriminating material against any person is discovered, the Investigating Authority may proceed in accordance with law. It shall be open to the accused to approach the appropriate forum for any interim relief as per law.

35. In view of the above, the appeals are disposed of with the modification of the order of the High Court to the extent explained hereinabove.

.....J.

(P. SATHASIVAM)

.....J.

(Dr. B.S. CHAUHAN) New Delhi, August 26, 2010.

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CASE NO.:
Appeal (civil) 812 of 2002

PETITIONER:
VIJAY SYAL AND ANR.

RESPONDENT:
STATE OF PUNJAB AND ORS.

DATE OF JUDGMENT: 22/05/2003

BENCH:
SHIVARAJ V. PATIL & ARIJIT PASAYAT

JUDGMENT:
JUDGMENT

2003 Supp(1) SCR 242

The Judgment of the Court was delivered by

SHIVARAJ V. PATIL J. These appeals are directed against the common judgment and order dated 4.1.2001 passed by the Division Bench of the High Court. The controversy relates to selection/non-selection of candidates to the posts of Assistant District Transport Officer (for short 'ADTO'). The Punjab Subordinate Selection Board advertised 12 posts of ADTOs on 15.5.1995. Out of them, 7 posts were for the general category, 4 for SC/ST and one was reserved for Ex-servicemen. A written test was conducted on 24.3.1996, the result of which was declared on 1.4.1998, declaring 78 persons successful. Out of these 78 persons, 61 belonged to general category, 15 belonged to SC/ST category and 2 belonged to category of Ex-servicemen. Later, on 22.4.1998, 40 more candidates were declared successful by lowering the standard. Out of these 40 candidates, 21 belonged to general category, 13 to SC/ST category and 6 to Ex-servicemen category. Criteria for selection were framed on 22.4.1998; final result was declared on 15.5.1998 and the appointments were made on 18.5.1998. Out of the candidates selected and appointed, 6 were from the general category, 3 were from SC/ST and 1 from Ex-servicemen category. Out of the 78 candidates whose result was declared on 1.4.1998, 4 candidates belonging to general category were selected. However, out of 40 candidates whose result was declared later, 2 candidates belonging to general category were selected. The appellants in these appeals approached the High Court by filing writ petitions for quashing the select list of the candidates published by the authorities in Tribune dated 23.5.1998, for issuing writ of mandamus directing the respondents to consider their claim on the basis of their merit from amongst the candidates originally invited for interview and to issue a writ in the nature of prohibition restraining the respondents from giving effect to the selection made. It may be mentioned here itself that the selected candidates were appointed on 18.5.1998 and having joined the services, they are continuing in service. The High Court considering the rival contentions on their relative merits and after perusing the records did not find any merit in the writ petitions. Consequently, they were dismissed by the impugned common order. Hence, these appeals.

Appellant No. 1 in Civil Appeal No. 812 of 2002 argued his case as party-in-person and submissions were made by the learned counsel on behalf of the other appellants. We may make it clear at the outset that none of the appellants belonged to the category of either SC/ST or Ex-servicemen and their claim is also not against these categories. Hence, we consider it unnecessary to consider the validity of selection of the candidates made in these two categories. In other words, we confine our consideration to the validity of selection of the candidates made in the general category. Mainly, the submissions made on behalf of the appellants were that after declaration of the result of the written examination on 1.4.1998, standard

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could not have been lowered for making other 40 candidates eligible for the purpose of interview; criteria could not have been framed after declaration of result of the written examination; maximum 21 candidates could have been called for interview in the ratio of 1:3 in the general category on the basis of the merit of the written examination whereas out of 78 candidates whose result was declared on 1.4.1998, more than 60 candidates were from the general category. In this regard, reliance was placed on Ashok Kumar Yadav and Ors. v. State of Haryana and Ors., [1985] 4 SCC 417.

Learned Additional Solicitor General and learned senior counsel for the respondents at the outset submitted that they have preliminary objection for the very entertaining of these appeals and considering the contentions advanced on behalf of the appellants on merits having regard to their conduct. According to them, the appellants made deliberate misrepresentation with regard to the allocation of marks stating that 150 marks were for the written test and 100 marks for interview. Further, mala fides were attributed to authorities on the basis of the relation and political influence, which they gave it up before the High Court but again reiterated in the SLPs. According to the learned counsel, these two grounds are good enough to dismiss the appeals by revoking leave granted without examining them on merits. Although, we find justification in these submissions but having heard the parties at length, we consider these appeals on the merits of the contentions as well. On behalf of the respondents, further submissions were made explaining the criteria fixed, in what circumstances, more number of candidates were called for interview and how the selection made was fair and proper. According to them, mere calling more number of candidates for interview did not vitiate the selection made having regard to the facts and circumstances of the case; at any rate, the appellants being lower in merit, even otherwise, could not get any benefit. According to the learned counsel for the respondents, the impugned judgment of the High Court is perfectly valid and justified. They also submitted that pursuant to the selection made, the selected non-official respondents have been continuing in service since May, 1998, i.e., they are continuing in service for about 5 years by now and as such these are not the fit cases for exercise of jurisdiction under Article 136 of the Constitution of India to interfere with the impugned judgment and order.

It is useful to reproduce the chart furnished at the time of hearing indicating names of candidates, their categories, qualification, marks obtained in written test as well as interview and the total marks:

C.A.NO.	Sr.	Name	List* No.	Category	Total
812/02	1.	Umesh Kumar, Appellant	1	G	2 (MA-II) 124
12 5	138.5				
	2.	Vijay Kumar, Appellant	1	G	3 (MA-II) 126
1 1 5	140.5				
	3.	Karanbir Singh, Resp.4	1	G	1 (Sports) 127
205	148*5				
	4.	Gurinderjit Singh, Resp.5		I	G ----- 127
19	146				
	5.	Tarlochan Singh, Resp.6	1	G	----- 124 71
75	145.75				
	6.	Manjit Singh, Resp. 7	I	G	2 (MA-II) 123
20.25	145.25				
	7	Gurcharan Singh. Resp 8	Angrej Singh. Resp .9	8	II
G II	G	I(NSS) 120	120 22.5	143.5 22.87	142.87
	9.	Sukhwinder Kumar. Res. 101		SC	I (NSS/NCC)
121	19.37	141.37			
	10.	Dhien Singh. Resp. II	II	SC	2 (MA) 119
19.5	140.5				
	11.	Karam Singh. Respt 12	1	SC	2 (MA/LLB)
124	15.75	141.75			
	12.	Jaswant Singh, Respt.	13	11	SC 5 (MA=2.

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NCC-3)	114	21.5	140.5					
5986/02 Zulfikar AM, Appl. 5985/02 Gurdeep Singh, Appl 937/02								
Sarpinderjit Singh. Appl.			1	G I	G 1			G
2(LLB)	122	122	128	12.25	136.25	14.25	136.25	11.5
141.50								

2(MA)

Not selected but better than all the				Appellants
Ram Nath	1	G	121	21.75 142.75
Paramjit Singh	I	G	123	19 142

*Note - The names of the candidates from among 78 candidates called for interview for the first time are shown as in List-I and names of the candidates from among 40 candidates called for interview are shown as in List-II.

In para 8 of the Writ Petition No. 7349 of 1998 filed by the appellant No. 1 in Civil Appeal No. 812 of 2002, it is averred that he came to know on inquiry that the entire selection had been made in a totally arbitrary and biased manner to help certain selected candidates; respondent No. 8 is the nephew of Shri Jasdev Singh Sandhu, Chairman of the respondent-Board; sister's husband of Harmail Singh, Minister for Public Works in the present Government is one of the selected candidates; Shri Angrej Singh, respondent No. 9 is politically very-well connected and is a close friend of sitting MLA. In order to help these persons who did not come within the first list, second list was issued. In para 10 of the writ petition, it is asserted that 100 marks were kept for interview as against the total marks of 250 (150 marks for written test + 100 marks for interview) which is totally arbitrary. Thus, 40% marks have been allocated for interview as against 12.2%, which are permissible in law. In the replication to the written statement filed, in para 8, it is stated that relationship of respondent No. 8 with Shri Jasdev Singh Sandhu, the Chairman, is concerned, it is fairly conceded that this has been mentioned wrongly but not with mala fide intention. In the impugned judgment, the question of mala fide is not dealt with, obviously, in view of the replication filed by the appellants to the written statement before the High Court as noticed above. In the impugned judgment, the question of allocation of 100 marks for interview were excess, is also not dealt with as it does not appear to have been urged on behalf of the appellants. Criteria for selection were framed on 22.4.1998. The criteria for selection which was produced is Annexure-R-1 in the writ petition before the High Court clearly indicated total marks for selection 240, out of them 200 marks were allocated for competitive test, 15 marks for additional educational, sports and other qualifications and 25 marks were allocated for interview. The appellants were very much aware of Annexure R-1. The impugned order shows that the grievance of the appellants was in regard to the publication of the criteria, subsequent to declaration of the result of written examination; not that 100 marks allocated for interview were excessive. With all this, it is painful to note that the appellants in Civil Appeal No. 812 of 2002 on page K of List of dates stated that 100 marks were kept for interview as against the total marks of 250 (150 marks for written test + 100 marks for interview) It is further stated that the selection has been made in totally biased manner as the nephew of the Chairman of the respondent-Board, the sister's husband of the Minister for Public Works and a friend of known political families in Punjab, have been appointed. It may be stated here itself that those persons were neither made parties nor any particulars were given touching mala fides. At page 34 of SLP in paras K and L, same things are repeated as to the allotment of 100 marks for interview and also mala fides attributed to certain persons to accommodate the private respondents. It is further stated that arbitrarily 100 marks were set apart for interview out of 250 marks in order to help them only and that the entire selection was arbitrary. This is also the state of affairs even with regard to the other appellants in other appeals At the hearing when pointed out, the appellants regretted for the wrong statements and misrepresentation made but added

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that they were not with any mala fide intention. Looking to the background, specific statements made in the replication filed by the appellant before the High court, being aware of the criteria that the marks for interview were only 25, having given up mala fides and having not urged the same before the High Court and taking note that the appellants have sworn affidavits in support of the SLPs that they understood the accompanying synopsis, list of dates and paragraphs contained in Special Leave Petitions and that they were fully conversant with the facts of the case and that the contents of the affidavit were true to their knowledge and nothing material has been concealed there from and no part of it is false, we find it difficult to accept that the statements were made in the SLPs bonafidely. It appears to us that these statements were made in SLPs to get leave and/or interim orders on the ground of excessive marks allocated for interview and mala fides. In our view, this conduct of the appellants is condemnable and we may straightaway say without any hesitation that they have disintitiled themselves for any relief on this score.

A bench of three learned Judges of this Court in Hari Narain v. Badri Das, [1964] 2 SCR 203 revoked the special leave granted to the appellant and dismissed the appeal for making inaccurate, untrue and misleading statement in SLP observing that "It is of utmost importance that in making material statements and setting forth grounds in applications for special leave, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with application for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. That is why we have come to the conclusion that in the present case, special leave granted to the appellant ought to be revoked. Accordingly, special leave is revoked and the appeal is dismissed. The appellant will pay the costs of the respondent."

Again in Rajabhai Abdul Rehman.Munshi v. Vasudev Dhanjibhai Mody, [1964] 3 SCR 480, this Court observed that "exercise of the jurisdiction of the Court under Article 136 of the Constitution is discretionary; it is exercised sparingly and in exceptional cases, when a substantial question of law falls to be determined or where it appears to the Court that interference by this Court is necessary to remedy serious injustice. A party who approaches this Court invoking the exercise of this overriding discretion of the Court must come with clean hands. If there appears on his part any attempt to overreach or mislead the Court by false or untrue statements or by withholding true information which would have a bearing on the question of exercise of the discretion, the Court would be justified in refusing to exercise the discretion or if the discretion has been exercised in revoking the leave to appeal granted even at the time of hearing of the appeal."

In the same judgment, Hidayatullah, J. concurring with judgment of Shah J. delivered on behalf of himself and Sarkar J., added that "I have considered the matter carefully. This is not a case of a mere error in the narration of facts or of a bona fide error of judgment which in certain circumstances may be considered to be venial faults. This is a case of being disingenuous with the Court by making out a point of law on a suppositious state of facts, which facts, if told candidly, leave no room for the discussion of law. The appellant has by dissembling in this Court induced it to grant special leave in a case which did not merit it. I agree, therefore, that this leave should be recalled and the appellant, made to pay the costs of this appeal."

Yet again, a bench of three learned Judges of this Court in Udai Chand v. Shanker Lal and Ors., [1978] 2 SCR 809 revoked the special leave and dismissed it after referring to the decisions in Hari Narain and Rajabhai Abdul Rehman Munshi (supra). It was further observed that this Court cannot permit abuses of the process of law and of law courts.

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However, even otherwise we proceed to examine on the merits of the contentions urged on either side at length and with all seriousness.

From the chart extracted above in regard to the marks secured by the appellants and the respondents, it is evident that respondents 4-7 (in general category) were in the first list i.e. they were from out of the 78 candidates. The appellants cannot make grievance as far as these candidates are concerned in the sense that they were in the first list and not in the second list so as to give them advantage. No doubt, respondents 8 and 9 (in general category) were called for interview in the second list out of 40 candidates. Admittedly, the marks secured by these respondents are more than any of the appellants in the general category. It is pointed out that the two candidates namely Ram Nath and Paramjit Singh in general category called in the first list of the interview have secured more marks than all the appellants. Even if the respondents 8 and 9 were to be denied appointment on the ground that they were called for the interview in the second list, the position of the appellants could not improve. One more fact to be kept in mind is that two candidates belonging to Scheduled Castes category having secured higher marks than the appellants could be selected in the general category. Thus, even otherwise, the appellants would not succeed in getting selected for appointments. Merely because 40 more candidates were called for interview without anything more, selection of the candidates does not get vitiated particularly so when malafides were given up and 100 marks were not allocated for interview as wrongly stated by the appellants.

As can be seen from the difference of marks secured by the candidates in interview, it does not appear abnormal or per se does not smell of any foul play or does not appear patently arbitrary. The lowest of the marks given in the interview are 11.5 and the highest are 22.87. Further marks secured in the interview and the marks secured in written test are also not grossly disproportionate. This apart, out of total marks of 240, only 25 marks were earmarked for interview. So 25 marks for interview out of 240 as against 200 for written test and 15 marks for qualification and other activities do not admit an element of arbitrariness or give scope for use of discretion by members of the Interview Committee recklessly or designedly in giving more marks to show favour in interview so as to give an advantage or march to an undeserving candidate of their over others who had shown extraordinary merit in written test. From the chart, we find among the candidates, marks secured in the written test were between 119 to 128 except in one case belonging to Scheduled Castes were 114. This apart, the marks secured in the interview are based on the assessment of the Interview Committee. Normally, it is not for the court to sit in judgment over such assessment and particularly in the absence of any mala fides or extraneous considerations attributed and established. The interview marks of 25 as against total marks of 240, cannot be taken as excessive. It comes to 10.4%. Possibly the selection would have been vitiated, if the marks for interview were 100 as against 150 marks for written test as sought to be made out. Unfortunately, for the appellants, their misrepresentation in this regard, is unfolded very clearly as already stated above. Further, the appellants, knowing the criteria fixed for selection and allocation of marks, did participate in the interview; when they are not successful, it is not open to them to turn around and attack the very criteria. The High Court in the impugned order has found that the criteria contained in Annexure R-1 filed in the writ petition was published and that such criteria was adopted earlier also in respect of other selections.

The appellants heavily relied on a decision of this Court by four learned Judges in Ashok Kumar Yadav's case (supra) in support of their contentions that where there is a composite test consisting of written examination followed by viva voce test, the number of candidates to be called for interview on the basis of marks obtained in the written examination should not exceed twice or at the highest thrice the number of vacancies to be filled; further marks allocated to viva voce test should not be more than 12.2%. The learned counsel for the respondents from the very judgment

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pointed out that it does not advance the case of the appellants having regard to the facts and circumstances of the cases at hand. In the aforementioned case of Yadav, the facts were that in October, 1980, Haryana Public Service Commission (HPSC) invited applications for recruitment to 61 posts in Haryana Civil Service (Executive) and Allied Services. The recruitment was governed by the Punjab Civil Service (Executive Branch) Rules, 1930 as applicable in the State of Haryana. In response to that advertisement issued by HPSC, about 6000 candidates applied for recruitment and appeared at the written examination. Out of them, over 1300 obtained more than 45% marks and were called for interview. HPSC invited all the 1300 and odd candidates for interview and the interviews lasted for almost half a year. Though originally, applications were invited for recruitment to 61 posts, the number of vacancies during the time taken in the written examination and viva voce test rose to 119. It seems there were some candidates who had obtained very high marks at the written examination but owing to securing poor marks in the viva voce test, they could not come within first 119 candidates and consequently they were not selected. Aggrieved by the non-selection, they filed writ petitions in the I High Court challenging the validity of the selection. It was contended that the marks given in the viva voce test should be ignored and selection should be made only on the basis of the marks obtained by the candidates at the written examination. The writ petitions were allowed by the Division Bench of the High Court. Hence, the appeals were filed before this Court aggrieved by the judgment of the High Court. The High Court took the view that there was reasonable likelihood of bias vitiating the selection process based on the fact that though only 61 vacant posts were advertised over 1300 candidates representing more than 20 times the number of available vacancies were called for viva voce test. The Division Bench pointed out that in order to have proper balance between the objective assessment of a written examination and the subjective assessment of personality by a viva voce test, the candidates to be called for interview at viva voce test should not exceed twice or at the highest, thrice the number of available vacancies. Since the candidates were called 20 times the number of available vacancies, the High Court held that the selection process was vitiated. This Court disagreed with this conclusion reached by the Division Bench of the High Court. While doing so, this Court observed that HPSC was not right in calling for interview all the 1300 and odd candidates; it was difficult to see how a viva voce test for properly and satisfactorily measuring the personality of a candidate can be carried if over 1300 candidates were to be interviewed for recruitment to a service if viva voce test was to be carried out in a thorough and scientific manner, to arrive at a fair and satisfactory evaluation of the personality of a candidate, the interview must take anything between 10 to 30 minutes. This Court, while considering the question whether selection made by HPSC after calling 1300 candidates for interview was vitiated on that account, in paragraph 21, held thus:-

"We do not think that the selections made by the Haryana Public Service Commission could be said to be vitiated merely on the ground that as many as 1300 and more candidates representing more than 20 times the number of available vacancies were called for interview, though on the view taken by us that was not the right course to follow and not more than twice or at the highest thrice, the number of candidates should have been called for interview. Something more than merely calling an unduly large number of candidates for interview must be shown in order to invalidate the selections made. That is why the Division Bench relief on the comparative figures of marks obtained in the written examination and at the viva voce test by the petitioners, the first 16 candidates who topped the list in the written examination and the first 16 candidates topped the list on the basis of the combined marks obtained in the written examination and the viva voce test, and observed that these figures showed that there was reasonable likelihood of arbitrariness and bias having operated in the marking at the viva voce test. Now it is true that some of the petitioners did quite well in the written examination but fared badly in the viva voce test and in fact their performance at the viva voce test appeared to have

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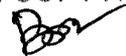
deteriorated in comparison to their performance in the year 1977-78. Equally it is true that out of the first 16 candidates who topped the list in the written examination, 10 secured poor rating in the viva voce test and were knocked out of the reckoning while 2 also got low marks in the viva voce test but just managed to scrape through to come within the range of selection. It is also true that out of the first 16 candidates who topped the list on the basis of the combined marks obtained in the written examination and the viva voce test, 12 could come in the list only on account of high marks obtained by them at the viva voce test, though the marks obtained by them in the written examination were not of sufficiently high order. These figures relied upon by the Division Bench may create a suspicion in one's mind that some element of arbitrariness might have entered the assessment in the viva voce examination. But suspicion cannot take the place of proof and we cannot strike down the selections made on the ground that the evaluation of the merits of the candidates in the viva voce examination might be arbitrary. It is necessary to point out that the Court cannot sit in judgment over the marks awarded by interviewing bodies unless it is proved or obvious that the marking is plainly and indoubtably arbitrary or affected by oblique motives. It is only if the assessment is patently arbitrary or the risk of arbitrariness is so high that a reasonable person would regard arbitrariness as inevitable, that the assessment of marks at the viva voce test may be regarded as suffering from the vice of arbitrariness. Moreover, apart from only three candidates, namely Trilok Nath Sharma, Shakuntala Rani and Balbir Singh one of whom belonged to the general category and was related to Shri Raghubar Dayal Gaur and the other two were candidates for the seats reserved for Scheduled Castes and were related to Shri R.C.Marya, there was no other candidate in whom the Chairman or any members of the Haryana Public Service Commission was interested, so that there could be any motive for manipulation of the marks at the viva voce examination. There were of course general allegations of casteism made against the Chairman and the members of the Haryana Public Service Commission, but these allegations were not substantiated by producing any reliable material before the Court. The Chairman and member of the Haryana Public Service Commission in fact belonged to different castes and it was not as if any particular caste was predominant amongst the Chairman and members of the Haryana Public Service Commission so as even to remotely justify an inference that the marks might have been manipulated to favour the candidates of that caste. We do not think that the Division Bench was right in striking down the selections made by the Haryana Public Service Commission on the ground that they were vitiated by arbitrariness or by reasonable likelihood of bias."

In that case the marks allocated for viva voce test came to 22.2% of the total number of marks kept for the competitive examination. This percentage of 33.3% was in the case of Ex-service officers and 22.2% was in the case of other candidates.

As regards the allocation of marks for interview, in paras 23 and 24 of the same judgment it is stated thus:-

"23. This Court speaking through Chinnappa Reddy, J pointed in Lila Dhar v. State of Rajasthan, [1982] 1 SCR 320 that the object of any process of selection for entry into public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So open competitive examination has come to be accepted almost universally as the gateway to public services But the question is how should the competitive examination be devised? The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case. To quote the words of Chinnappa Reddy, J. "In the very nature of things it would not be within the province or even the competence of the Court and the Court would not venture into such exclusive thickets to discover ways out, when the

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matters are more appropriately left" to the wisdom of the experts. It is not for the court to lay down whether interview test should be held at all or how many marks should be allowed for the interview test. Of course the marks must be minimal so as to avoid charges of arbitrariness, but not necessarily always. There may be posts and appointments, where the only proper method of selection may be by a viva voce test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allow a fairly height percentage of marks for the viva voce test. That is why rigid rules cannot be laid down in these matters by courts. The expert bodies are generally the best judges. The Government aided by experts in the field may appropriately decide to have a written examination followed by a viva voce test.

24. It is now admitted on all hands that while a written examination assesses the candidate's knowledge and intellectual ability, a viva voce test seeks to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the viva voce test, there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities can be evaluated, perhaps with some degree of error, by viva voce test, much depending on the constitution of the interview board."

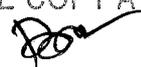
Even having found allocation of 22.2% marks for viva voce test were unreasonable and excessive, selection was not upset as stated hereunder:-

"28. But the question which then arises for consideration is as to what is the effect of allocation of such a high percentage of marks for the viva voce test, both in case of ex-service officers and in case of other candidates, on the selections made by the Haryana Public Service Commission. Though we have taken the view that the percentage of marks allocated for the viva voce test in both these cases is excessive, we do not think we would be justified in the exercise of our discretion in setting aside the selections made by the Haryana Public Service Commission after the lapse of almost two years. The candidates selected by the Haryana Public Service Commission have already been appointed to various posts and have been working on these posts since the last about two years. Moreover the Punjab Civil Set vice (Executive Branch) Rules, 1930 under which 33.3% marks in case of ex-service officers and 22.2% marks in case of other candidates have been allocated for the viva voce test have been in force for almost 50 years and everyone has acted on the basis of these rules. If selections made in accordance with the prescription contained in these rules are now to be set aside, it will upset a large number of appointments already made on the basis of such selections and the integrity and efficiency of the entire administrative machinery would be seriously jeopardized. We do not therefore propose to set aside the selections made by the Haryana Public Service Commission though they have been made on the basis of an unduly high percentage of marks allocated for the viva voce test."

This Court in Ashok Kumar Yadav's case, aforementioned, found allocation of 12.2% marks for viva voce test was fair and just and in that view directed that marks allocated for the viva voce test shall not exceed 12.2% of the total marks taken into account for the purpose of selection. Even judged by this standard in the present appeals, the marks allocated for viva voce test being 25 as against total marks of 240 are less than 12.2% i.e. well within the ambit of direction given. In that case, this Court declined to exercise discretion to set aside the selection made by the HPSC after the lapse of 2 years taking note that the selected candidates had already been appointed to various posts.

In All India State Bank Officers' Federation and Ors. v. Union of India and

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Ors., [1997] 9 SCC 151, this Court observed, "there can be no rigid or hard and fast rule that the interview marks can only be 15 per cent and no more. The percentage of marks for viva voce or interview which can be regarded as unreasonable will depend on the facts of each case. Decisions of this Court show that no rigid rule, relating to percentage of marks for interview of general universal application can or has been laid down. What the interview or viva voce marks should be may vary from service to service and the office or position or the purpose for which the interview is to be held. But the interview marks should not be so high as to give an authority unchecked scope to manipulate or act in an arbitrary manner while making selection."

This Court in a recent decision in *Jasvinder Singh and Ors. v. State of J&K* and Ors., [2003] 2 SCC 132, after referring to earlier decisions, pointed out that the very observations made in *Ashok Kumar Yadav's* case show that there cannot be any hard and fast rule of universal application for allocating the marks for viva voce vis-a-vis the marks for written examination and consequently the percentage indicated therein alone cannot be the touchstone in all cases; what ultimately is required to be ensured is as to whether the allocation as such is with an oblique intention and whether it is so arbitrary as capable of being abused and misused in its exercise. Para 7 of the said judgment reads:-

"7. In *Mehmood Alam Tariq v. State of Rajasthan*, [1988] 3 SCC 241, prescription of 33% as minimum qualifying marks of 60 out of total 180 marks set apart for viva voce examination does not by itself incur any constitutional infirmity. In *Manjeet Singh v. ESI Corpn.*, [1990] 2 SCC 367 this Court held that in the absence of any prescription of qualifying marks for the interview test the same 40% as applicable for written examination was reasonable. In *Anzar Ahmad v. State of Bihar*, [1994] 1 SCC 150 this Court exhaustively reviewed the entire case law on the subject including the one in *Ashok Kumar Yadav* case and upheld a selection method which involved allocation of 50% marks for academic performance and 50 marks for the interview. The very observations in *Ashok Kumar Yadav* case would go to show that there cannot be any hard-and-fast rule of universal application for allocating the marks for viva voce vis-a-vis the marks for written examination and consequently the percentage indicated therein alone cannot be the touchstone in all cases. What ultimately required to be ensured is as to whether the allocation, as such is with an oblique intention and whether it is so arbitrary as capable of being abused and misused in its exercise. Judged from the above the Division Bench could not be held to have committed any error in sustaining the allocation of 25 marks (20%) for viva voce as against 100 marks for written examination for selection of candidates in the present case. The learned Single Judge, in our view, has adopted a superficial exercise and proceeded on a misunderstanding of the real ratio of the decision in *Ashok Kumar Yadav* case. Further, the learned Single Judge appears to have applied the ultimate decision in the said case to the case on hand drawing certain inferences on mere assumptions and surmises or some remote possibilities, without any proper or actual foundation or basis, there for."

The observations made in para 8 of the same judgment in somewhat similar circumstances which have negative impact on the contentions urged on behalf of the appellants are:-

"8. The learned single Judge also seems to have been very much carried away by few instances noticed by him as to the award of higher percentage of marks in viva voce to those who got lower marks in the written test as compared to some who scored higher marks in the written examination but could not get as much higher marks in viva voce. Picking up a negligible few instances can not provide the basis for either striking down the method of selection or the selections ultimately made. There is no guarantee that a person who fared well in the written test will or should be presumed to have fared well in the viva voce test and also the expert opinion about as well as experience in viva voce does not lend credence to any such

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general assumptions, in all circumstances and for all eventualities. That apart, the variation of written test marks of those who were found to have been awarded higher marks in viva voce vis-a-vis those who secured higher marks in the written test but not so in the viva voce cannot be said to be so much (varying from five marks and at any rate below even 10) as to warrant any proof of inherent vice in the very system of selection or the actual selection in the case I here was no specific allegation of any mala fides or bias against the Board constituted for selection or anyone in the Board nor any such plea could be said to have been substantiated in this case. The observation by the learned Single Judge that there was a conscious effort made for bringing some candidates within the selection zone cannot be said to be justified from the mere fact of certain instances noticed by him on any general principle or even on the merits of those factual instances alone. Further, the course adopted by the learned Single Judge in directing selection from general candidates of all those who have obtained 56 marks in the written examination cannot be justified at all and it is not given to the Court to alter the very method of selection and totally dispense with viva voce in respect of a section alone of the candidates, for purposes of selection. On a careful and overall consideration of the judgments of the learned Single Judge and that of the Division Bench, we are of the view that the decision of the learned Single Judge cannot be sustained for the reasons assigned by him and the decision of the Division Bench cannot be considered to suffer any such serious infirmity in law to call for our interference."

In Civil Appeal No. 937 of 2002 the learned counsel for the appellant urged an additional ground that 5 marks fixed for higher educational qualifications were not given to the appellant. According to him the appellant had additional qualifications of M.A. and LL.B.; he ought to have been given additional marks for M.A. as well as LL.B., but only 2 marks were given for both the qualifications together, which affected his chance of selection. It appears that this point was not urged before the High Court and no opportunity was available to the respondents to meet this point. However, during the course of hearing, based on the criteria fixed for selection, it was explained to us by the learned counsel for the respondents that for additional educational qualifications 5 marks were set apart. Out of them maximum marks available to the highest educational qualification of a candidate were to be given and not that marks were to be given to every additional educational qualification. It is better to look at the criteria, which was filed as Annexure R-1 in the writ petition, which is reproduced hereunder: -

"ANNEXURE R-1

CRITERIA/FORMULA ADOPTED FOR SELECTION OF CANDIDATES FOR THE POST OF NAIB TEHSILDAR BY THE SUBORDINATE SERVICES SELECTION BOARD, PUNJAB

Total marks for selection		240
(i) marks allotted for competitive test		200
(ii) Marks allotted for Additional Educational, sports	15 and other	
Qualifications		
(iii) Marks allotted for interview/ (VIVA-VOCE)	25	
I. A. Marks allotted for Educational Qualification		5
(for additional Qualification)		
(i) Ph.D.	5	
(ii) M.A./M.Sc./M.Tech and other post graduate degrees		
1st Division	3	
2nd Division and		
3rd Division	2	
(iii) LL.B.	2	
(iv) Any other qualification	1	

Note: The candidate will be given the marks on the basis of his/her highest

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qualification and not on the basis of his/her each qualification lower than this.

II. B. SPORTS/EXTRA CURRICULAR ACTIVITIES 5

(i) Sports			
International winner		5	
National winner		3	
State winner		2	
(ii) N.C.C.			3
C Certificate	3		
B Certificate	2		
A Certificate			I
(iii) N.S.S.			
2			
One camp		1	
Two or more camp	2		

III. INTERVIEW

Interview marks of the Board will be 25 and the system for awarding the marks would be same as approved separately for all categories.

Sd/-
(Jasdev Singh Sandhu) Chairman
14.1.1999

Sd/-
(Ashok Loomba)

Sd/-
(Kulbir Singh Randhawa)

Member

Sd/-
(Parkash Singh Gardhiwal)

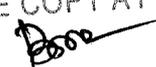
(Virsa Singh Valioha) Member

Member

Sd/-
(Jarnail Singh Wahid) Member"

From Annexure R-1 it is clear that total marks for selection were 240. Marks allocated for competitive test were 200, marks allocated for additional educational, sports and other qualifications were 15 and marks allocated for interview (Viva voce) are 25. Marks allocated for educational qualifications are 5 and maximum marks are 5 for Ph.D., for post graduation in first division 3 marks, for second and third divisions 2 marks, for LL.B. 2 marks and any other qualification 1 mark. If the argument of the learned counsel for the appellant is to be accepted, it may result in anomalous situation. Suppose, a candidate, who possesses three additional qualifications including Ph.D., in that event he would be entitled 5 marks for Ph.D. and additional marks for every additional educational qualifications. Then the total marks to be assigned to a candidate for the educational qualifications shall be more than 5 marks. In the case of the appellant, although he had two additional educational qualifications, the maximum marks to which he was entitled for highest qualification were given. Hence he cannot make any grievance. This being the position, we do not find any merit in the contention. Hence it is rejected.

In Civil Appeal No. 5985 of 2002 it was urged that no marks were given to the appellant for additional educational qualifications. It appears that this point also was not raised before the High Court and similarly no opportunity was available to the respondents to meet the point. The learned counsel for the appellant contended that the appellant had additional post graduation qualification and no marks were given to him. It was brought to our notice by showing the original record that in the application form no mention was made about additional post graduation qualification acquired by the appellant and no record or certificate was placed before the authorities at appropriate time to show that the appellant had acquired additional qualifications. Hence the contention has no merit and consequently it is rejected.

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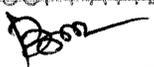
In these appeals, the non-official respondents having been appointed in May, 1998, are continuing in service almost for a period of five years. On this ground as well as looking to the conduct of the appellants in making misrepresentation to this Court and finding no merit in these appeals, we should decline to interfere with the impugned judgment and order. It may be noted that even in the Ashok Kumar Yadav 's case (supra) this Court set aside the judgment of the Division Bench of the High Court by rejecting the challenge to the validity of the selection made by the HPSC.

In order to sustain and maintain sanctity and solemnity of the proceedings in law courts it is necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the court, when a court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take consequences that follow on account of its own making. At times lenient or liberal or generous treatment by courts in dealing with such matters are either mistaken or lightly taken instead of learning proper lesson. Hence there is a compelling need to take serious view in such matters to ensure expected purity and grace in the administration of justice.

Before we part with these cases, we must observe that the misrepresentation made by the appellants in the SLPs supported by an affidavit require serious action but we refrain from taking any further action in view of the apology and regret expressed by the appellants during the hearing. But, we administer a warning to them to be careful in future and not to make any misrepresentation or false statement before any court and impose cost also.

For the reasons stated and discussion made above, these appeals are dismissed but with cost of Rs.10,000/- (Rs. 5000 to be paid by each of the appellants) in Civil Appeal No. 812 of 2002 and Rs. 5,000 in each one of the remaining appeals to be paid by the appellants which amount shall be deposited with the Legal Aid Committee of the Supreme Court.

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CASE NO.:
Appeal (civil) 5097-5099 of 2004

PETITIONER:
A.V. PAPAYYA SASTRY & ORS

RESPONDENT:
GOVERNMENT OF A.P. & ORS

DATE OF JUDGMENT: 07/03/2007

BENCH:
C.K. THAKKER & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

C.K. THAKKER, J.

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

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

It was further case of the appellants that a preliminary notification under sub-section (1) of Section

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4 of the Land Acquisition Act was for the first time issued on August 10, 1973 but nothing further was done in the matter. The Ceiling Act came into force in the State of Andhra Pradesh on February 17, 1976. It, inter alia, covered the Visakhapatnam Urban Agglomeration. The appellants filed their declarations taking the stand that possession of land had already been handed over to Port Trust Authorities even before the Act came into force and the provisions of the Ceiling Act, therefore, would not apply to such land. In the light of the above factual position and the case of the appellants, the Special Officer and Competent Authority, Urban Land Ceiling, Visakhapatnam vide his order dated May 25, 1981 in C.C. No. 6143 of 1976 declared that the land-owners of Survey Nos. 3/1, 3/2 and 4 were 'non-surplus land holders'. Then the Government again issued notification under sub-section (1) of Section 4 of the Act on August 29, 1981. Urgency clause under Section 17(4) was not invoked since the possession of land was already with the Port Trust Authorities. A declaration under Section 6 was issued on October 12, 1982. No award, however, was passed.

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

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

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Meanwhile, however, the land-owners filed a petition being Writ Petition No. 11754 of 1994 praying therein that the High Court may direct the State Authorities to complete proceedings under the Land Acquisition Act and pass an award. During the pendency of the writ petition the revision was allowed by the State Government under Section 34 of the Ceiling Act on January 20, 1995 and the order passed by the Special Officer and Competent Authority, Urban Land Ceiling, Visakhapatnam declaring that the appellants had no surplus land had been set aside. The appellants, therefore, filed another petition, being Writ Petition No. 3102 of 1995 questioning the legality of the order passed in revision. The learned single Judge allowed both the petitions i.e. Writ Petition Nos. 11754 of 1994 and 3102 of 1995 and by order dated June 4, 1996 directed the authorities to complete Land Acquisition Proceedings and pass award within three months. The learned single Judge also held that the order under the Ceiling Act was passed by the Special Officer and Competent Authority, Urban Land Ceiling, Visakhapatnam in 1981 while suo motu revisional powers were exercised in 1994-95 i.e. after thirteen years. Such action was, therefore, illegal, unlawful and unwarranted. Accordingly, the order passed in revision was set aside. Writ appeals filed by the State were dismissed. A direction was issued by the Division Bench to fix market value on the basis of notification under Section 4(1) issued on May 17, 1991. Special Leave Petition (Civil) Nos. 14860-14861 of 2000 filed by the State Authorities were dismissed by this Court on October 20, 2000.

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

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

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authorities under the Ceiling Act to conclude proceedings.

The High Court, after hearing the learned counsel for the parties and considering the records and proceedings including the report submitted by CBI, held that the case was of a fraud and by suppressing material facts, several orders were passed and actions were taken. In view of correct and true facts and reports which clearly established that the authorities were misled, that proceedings were initiated to revise the order, dated May 25, 1981. The Court, therefore, held that the order dated April 27, 2004 passed by the Division Bench was required to be recalled and recall applications were allowed.

The Court therefore passed the following order;

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

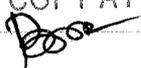
We further direct that the proceedings under ULC Act have to be completed within a period of one month from the date of receipt of this order by the concerned authorities by giving opportunity to the petitioners and respondents herein to put forward their cases and after final decision is taken by the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

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

We have heard learned counsel for the parties.

Mr. K.K. Venugopal, Senior Advocate, appearing for the appellants contended that the High Court committed an error in law in passing the impugned order. It was clear from the evidence on record and various communications that before the proposal was submitted by the Port Trust Authorities for acquisition of land for a public purpose (construction of quarters for its employees), advance possession of land had been taken over by Port Trust Authorities and land-owners were not in possession of the property. The said fact was noted by the Special Officer and Competent Authority, Urban Land Ceiling, Visakhapatnam and an order was passed in May, 1981 that the appellants were 'not surplus land owners'. In or about 1985, however, there appeared to be encroachment over the land and some officers of the Port

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Trust, with a view to save their skin, wrote a letter on December 19, 1985 that the possession of land had not been handed over to Port Trust Authorities since tenants were occupying the land. The said statement was not correct and could not have been considered for initiating proceedings under the Ceiling Act. It was also submitted by the counsel that suo motu power was sought to be exercised after a decade. As per settled law, revisional powers should be exercised within 'reasonable time'. By no stretch of imagination, more than ten years can be said to be 'reasonable time'. According to the learned counsel, learned single Judge was wholly justified in allowing both the writ petitions filed by the land-owners and in issuing directions, namely, (i) to complete land acquisition proceedings and pass award; and (ii) exercise of revisional powers after about thirteen years was wholly unwarranted. The said order was confirmed by the Division Bench in Writ Appeals. Special Leave Petitions were also dismissed by this Court. After dismissal of Special Leave Petitions, neither it was open to the authorities to make an application for recalling earlier orders as has been done in June, 2001, nor it was permissible for the Court to grant such relief. It was also submitted that the Division Bench, while dealing with Writ Appeals took note of the fact that the land was 'agricultural land' and was having fruit bearing trees i.e. a garden land. The said finding had not been disturbed even by this Court in SLPs. The Division Bench ought to have taken into account that fact as well. By not doing so, an illegality had been committed and the order deserves to be set aside.

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

The CBI made an enquiry and the report was submitted by the Police Inspector which revealed startling facts. From the report, it is clear that fraud was

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committed by the land owners in collusion with officers of the respondents. Criminal proceedings were also initiated and they are pending. It was, therefore, submitted that the High Court was right in recalling its earlier order.

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

Having given anxious consideration to the rival contentions of the parties, in our opinion, no case has been made out by the appellants for interference with the order passed by the High Court allowing the applications and recalling earlier order. The High Court has considered the matter in detail. The case of land-owners was that advance possession was taken over by Port Trust Authorities in August, 1972. The subsequent facts and letter by Chief Engineer of Port Trust in 1985 clearly revealed that it was not so. Possession of land was never with the land owners and was not given to Port Trust Authorities. From the record it is clear that neither the land-owners nor the Port Trust Authorities were in actual or physical possession of land, but it was occupied by tenants and disputes were also going on between the tenants and land owners. Therefore, the basis on which the Special Officer and Competent Authority, Urban Land Ceiling proceeded to decide the matter was non-existent and non est.

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

We are further of the view that the State Government, in the facts and circumstances of the case, was right in exercising revisional jurisdiction under

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

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

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

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

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

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

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

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

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

Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.

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

Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as 'wholly perverse', Kuldip Singh, J. stated: "The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on

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falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation".
(emphasis supplied)

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

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

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

"The judiciary in India also possesses inherent power, specially under Section 151 C.P.C., to recall its judgment or order if it is obtained by fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the Decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the Constitution of the Tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the Court's business".

(emphasis supplied)

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

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

"It is unrealistic to expect the appellant company to resist a claim at the first instance on the basis of the fraud because appellant company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the company to file

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a statutory appeal against the award. Not only because of bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.

Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No Court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.

The allegation made by the appellant Insurance Company, that claimants were not involved in the accident which they described in the claim petitions, cannot be brushed aside without further probe into the matter, for, the said allegation has not been specifically denied by the claimants when they were called upon to file objections to the applications for recalling of the awards. Claimants then confined their resistance to the plea that the application for recall is not legally maintainable. Therefore, we strongly feel that the claim must be allowed to be resisted, on the ground of fraud now alleged by the Insurance Company. If we fail to afford to the Insurance Company an opportunity to substantiate their contentions it might certainly lead to serious miscarriage of justice".
(emphasis supplied)

Mr. Venugopal, no doubt, contended that when the order passed by the earlier Division Bench was not interfered with by this Court and SLPs were dismissed, it was not open to the High Court thereafter to entertain recall-applications and grant the relief of recalling of earlier orders. According to him, such an exercise of power was unlawful and abuse of process of law.

In this connection, our attention has been invited by the learned counsel to a decision of this Court in *Abbai Maligai Partnership Firm & Anr. v. K. Santhakumaran & Ors.*, (1998) 7 SCC 386 : JT 1998 (6) SC 396. In that case, after dismissal of Special Leave Petition by this Court, review petition was entertained by the High Court and earlier judgment was recalled. When the matter reached this Court, setting aside the order passed by the High Court, the Court observed:

"The manner in which the learned Single Judge of the High Court exercised the review jurisdiction, after the special leave petitions against the self-same order had been dismissed by this court after hearing learned counsel for the parties, to say the least, was not proper. Interference by the learned single Judge at that stage is subversive of judicial discipline. The High Court was aware that SLPs against the orders dated 7.1.87 had already been dismissed by this court. This High Court, therefore, had no power or jurisdiction to review the self same order,

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which was the subject matter of challenge in the SLPs in this court after the challenge had failed. By passing the impugned order on 7.4.1994, judicial propriety has been sacrificed. After the dismissal of the special leave petitions by this court, on contest, no review petitions could be entertained by the High Court against the same order. The very entertainment of the review petitions, in the facts and circumstances of the case was an affront to the order of this Court. We express our strong disapproval and hope there would be no occasion in the future when we may have to say so. The jurisdiction exercised by the High Court, under the circumstances, was palpably erroneous. The respondents who approached the High Court after the dismissal of their SLPs by this court, abused the process of the court and indulged in vexatious litigation. We strongly deprecate the manner in which the review petitions were filed and heard in the High Court after the dismissal of the SLPs by this court." (emphasis supplied)

The respondents, on the other hand, placed reliance upon *Kunhayammed & Ors. v. State of Kerala & Anr.*, (2000) 6 SCC 359 : JT 2000 (9) SC 110, wherein this Court had an occasion to consider the application of the doctrine of merger to orders passed by this Court while exercising jurisdiction under Article 136 of the Constitution. The Court there observed that exercise of jurisdiction by this Court under Article 136 is in two stages; (i) granting of a special leave to appeal; and (ii) hearing of appeal. The Court went on to observe that the doctrine of merger does not apply to first stage i.e. at the stage of granting of special leave to appeal. It applies only at the second stage of hearing of appeals. The Court in the light of above position, laid down the following principles:

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

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

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing,

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modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

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

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

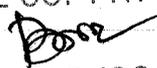
(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

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

In Kunhayammed, Abbai Maligai was considered and it was observed that in the facts and circumstances of that case, this Court did not approve the order passed by the High Court. The Court noted that in Abbai Maligai, this Court did not consider the doctrine of merger. According to the Court, a careful reading of Abbai Maligai "brings out the correct statement of law and fortifies us in taking the view" as taken. [see also S. Shanmugavel Nadar v. State of T.N. & Anr., (2002) 8 SCC 361 : JT 2002 (7) SCC 568].

The matter can be looked at from a different angle

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as well. Suppose, a case is decided by a competent Court of Law after hearing the parties and an order is passed in favour of the applicant/plaintiff which is upheld by all the courts including the final Court. Let us also think of a case where this Court does not dismiss Special Leave Petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior.

Hence, the argument of Mr. Venugopal cannot be upheld. Even if he is right in submitting that after dismissal of SLPs, the respondent herein could not have approached the High Court for recalling its earlier order passed in April, 2000 and the High Court could not have entertained such applications, nor the recalling could have been done, in the facts and circumstances of the case and in the light of the finding by the High Court that fraud was committed by the land-owners in collusion with the officers of the Port Trust Authorities and Government, in our considered view, no fault can be found against the approach adopted by the High Court and the decision taken. The High Court, in our opinion, rightly recalled the order, dated April 27, 2000 and remanded the case to the authorities to decide the same afresh in accordance with law.

Mr. Venugopal also submitted that the Division Bench of the High Court in an order dated April 27, 2000 observed that the land being a garden land having fruit bearing trees which had been cultivated by a tenant, it did not fall within the description of 'urban land' or 'vacant land' within the meaning of Section 2(o) or 2(q) of the Ceiling Act and the said aspect had not been gone into at all by the State Government. The High Court thereafter considered the provisions of the Ceiling Act and held that the land was agricultural land and required to be excluded from the operation of the Ceiling Act.

As to the above, we may only observe that it was never the case of land-owners while filling a form under Section 6 of the Act that the provisions of the Act were not applicable to the land in question because the land was used for agriculture or horticulture purposes or that it was having fruit bearing trees. The exclusion or non-operation of the Act was sought only on the ground that the possession of the land had already been handed over to Port Trust Authorities in 1972 and hence the land cannot become subject matter of the Ceiling Act. In view of the above fact, in our opinion, the High Court was

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right in passing the impugned order directing the authorities to consider all aspects and pass an appropriate order in accordance with law. Last but not the least. We are exercising jurisdiction under Article 136 of the Constitution. It is discretionary and equitable in nature. Clause (1) of the said Article confers very wide and extensive powers on this Court to grant special leave to appeal against any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in India. The Article commences with a non-obstante clause, "Notwithstanding anything in this Chapter" (i.e. Chapter IV of Part V). These words are of overriding effect and clearly indicate the intention of the Framers of the Constitution that it is a special jurisdiction and a residuary power unfettered by any statute or other provisions of Chapter IV of Part V of the Constitution. It is extraordinary in its amplitude. Its limit, when it chases injustice, is the sky. Such power, therefore, may be exercised by this Court whenever and wherever justice demands intervention by the highest Court of the country.

Article 136, however, does not confer a right of appeal on any party. It confers discretion on this Court to grant leave to appeal in appropriate cases. In other words, the Constitution has not made the Supreme Court a regular Court of Appeal or a Court of Error. This Court only intervenes where justice, equity and good conscience require such intervention.

In *Baiganna v. Deputy Collector of Consolidation*, (1978) 2 SCR 509 : (1978) 2 SCC 461; Krishna Iyer, J. pithily stated;

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

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

Keeping in view totality of facts and attending circumstances including serious allegations of fraud said to have been committed by the land-owners in collusion with officers of the respondent-Port Trust and Government, report submitted by the Central Bureau of Investigation (CBI), prima facie showing commission of fraud and initiation of criminal proceedings, etc. if the High Court was pleased to recall the earlier order by issuing directions to the authorities to pass an appropriate order afresh in accordance with law, it cannot be said that there is miscarriage of justice which calls for interference in exercise of discretionary and equitable jurisdiction of this Court. We, therefore, hold that this is not a fit case which calls for our intervention under Article 136 of the Constitution. We, therefore, decline to do so.

Before parting with the matter, we may state that all the observations made by us hereinabove have been made only for the purpose of deciding the legality and validity of the order passed by the High Court. We may

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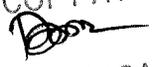
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clarify that we may not be understood to have expressed any opinion on merits of the matter one way or the other. Therefore, as and when the matter will be considered by the authorities in pursuance of the directions of the High Court, it will be decided on its own merits without being inhibited by the observations made by us in this judgment.

For the foregoing reasons, the appeals deserve to be dismissed and are accordingly dismissed with costs.

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Annexure-R/11/D Series.

S.P Chengalvaraya Naidu vs Jagannath on 27 October, 1993

Supreme Court of India

S.P Chengalvaraya Naidu vs Jagannath on 27 October, 1993

Equivalent citations: 1994 AIR 853, 1994 SCC (1) 1

Author: K Singh

Bench: Kuldip Singh (J)

PETITIONER:

S.P CHENGALVARAYA NAIDU

Vs.

RESPONDENT:

JAGANNATH

DATE OF JUDGMENT 27/10/1993

BENCH:

KULDIP SINGH (J)

BENCH:

KULDIP SINGH (J)

SAWANT, P.B.

CITATION:

1994 AIR 853

1994 SCC (1) 1

JT 1993 (6) 331

1993 SCALE (4)277

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by KULDIP SINGH, J.- "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

2. Predecessor-in-interest of the respondents-plaintiffs filed application for final decree for partition and separate possession of the plaint-properties and for mesne profits. The appellants-defendants contested the application on the ground that the preliminary decree, which was sought to be made final, was obtained by fraud and, as such, the application was liable to be dismissed. The trial Judge accepted the contention and dismissed the application for grant of final decree. The respondents-plaintiffs went in appeal before the High Court. A Division Bench of the High Court went through

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S.P Chengalvaraya Naidu vs Jagannath on 27 October, 1993

plethora of case-law and finally allowed the appeal and set aside the order of the trial court. This appeal is by way of certificate granted by the High Court.

3. One Jagannath was the predecessor-in-interest of the respondents. He was working as a clerk with one Chunilal Sowcar. Jagannath purchased at court auction the properties in dispute which belonged to the appellants. Chunilal Sowcar had obtained a decree and the court sale was made in execution of the said decree. Jagannath had purchased the property in the court auction on behalf of Chunilal Sowcar, the decree-holder. By a registered deed dated November 25, 1945, Jagannath relinquished all his rights in the property in favour of Chunilal Sowcar. Meanwhile, the appellants who were the judgment-debtors had paid the total decretal amount to Chunilal Sowcar. Thereafter, Chunilal Sowcar, having received the decretal amount, was no longer entitled to the property which he had purchased through Jagannath. Without disclosing that he had executed a release deed in favour of Chunilal Sowcar, Jagannath filed a suit for partition of the property and obtained a preliminary decree. During the pendency of the suit, the appellants did not know that Jagannath had no locus standi to file the suit because he had already executed a registered release deed, relinquishing all his rights in respect of the property in dispute, in favour of Chunilal Sowcar. It was only at the hearing of the application for final decree that the appellants came to know about the release deed and, as such, they challenged the application on the ground that non-disclosure on the part of Jagannath that he was left with no right in the property in dispute, vitiated the proceedings and, as such, the preliminary decree obtained by Jagannath by playing fraud on the court was a nullity. The appellants produced the release deed (Ex. B- 15) before the trial court. The relevant part of the release deed is as under:

"Out of your accretions and out of trust vested in me, purchased the schedule mentioned properties benami in my name through court auction and had the said sale confirmed. The said properties are in your possession and enjoyment and the said properties should henceforth be held and enjoyed with all rights by you as had been done:

So far if any civil or criminal proceedings have to be conducted in respect of the said properties or instituted by others in respect of the said properties you shall conduct the said proceedings without reference to me and shall be held liable for the profits or losses you incur thereby. All the records pertaining the aforesaid properties are already remaining with you.

4. The High Court reversed the findings of the trial court on the following reasonings:

"Let us assume for the purpose of argument that this document, Ex. B-15, was of the latter category and the plaintiff, the benamidar, had completely divested himself of all rights of every description. Even so, it cannot be held that his failure to disclose the execution of Ex. B-15 would amount to collateral or extrinsic fraud. The utmost that can be said in favour of the defendants is that a plaintiff who had no title (at the time when the suit was filed) to the properties, has falsely asserted title and one of the questions that would arise either expressly or by necessary implication is whether the plaintiff had a subsisting title to the properties. It was up to the defendants, to plead and establish

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Annexure-R/11/D series.

S.P Chengalvaraya Naidu vs Jagannath on 27 October, 1993

by gathering all the necessary materials, oral and documentary, that the plaintiff had no title to the suit properties. It is their duty to obtain an encumbrance certificate and find out whether the plaintiff had still a subsisting title at the time of the suit. The plaintiff did not prevent the defendants, did not use any contrivance, nor any trick nor any deceit by which the defendants were prevented from raising proper pleas and adducing the necessary evidence. The parties were fighting at arm's length and it is the duty of each to traverse or question the allegations made by the other and to adduce all available evidence regarding the basis of the plaintiff's claim or the defence of the defendants and the truth or falsehood concerning the same. A party litigant cannot be indifferent, and negligent in his duty to place the materials in support of his contention and afterwards seek to show that the case of his opponent was false. The position would be entirely different if a party litigant could establish that in a prior litigation his opponent prevented him by an independent, collateral wrongful act such as keeping his witnesses in wrongful or secret confinement, stealing his documents to prevent him from adducing any evidence, conducting his case by tricks and misrepresentation resulting in his misleading of the Court. Here, nothing of the kind had happened and the contesting defendants could have easily produced a certified registration copy of Ex. B-15 and non-suited the plaintiff; and, it is absurd for them to take advantage of or make a point of their own acts of omission or negligence or carelessness in the conduct of their own defence." The High Court further held as under:

"From this decision it follows that except proceedings for probate and other proceedings where a duty is cast upon a party litigant to disclose all the facts, in all other cases, there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. It would cut at the root of the fundamental principle of law of finality of litigation enunciated in the maxim 'interest reipublicae ut sit finis litium' if it should be held that a judgment obtained by a plaintiff in a false case, false to his knowledge, could be set aside on the ground of fraud, in a subsequent litigation." Finally, the High Court held as under:

"The principle of this decision governs the instant case. At the worst the plaintiff is guilty of fraud in having falsely alleged, at the time when he filed the suit for partition, he had subsisting interest in the property though he had already executed Ex. B-15. Even so, that would not amount to extrinsic fraud because that is a matter which could well have been traversed and established to be false by the appellant by adducing the necessary evidence. The preliminary decree in the partition suit necessarily involves an adjudication though impliedly that the plaintiff has a subsisting interest in the property."

5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders,

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Ametuse-R/11/D series.

S.P Chengalvaraya Naidu vs Jagannath on 27 October, 1993

bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants- defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

7. We, therefore, allow the appeal, set aside the impugned judgment of the High Court and restore that of the trial court. The appellants shall be entitled to their costs which we quantify as Rs 11,000.

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Annexure-R/11/E Series.

PETITIONER:
INDIAN BANK

Vs.

RESPONDENT:
M/S SATYAM FIBRES (INDIA) PVT.LTD

DATE OF JUDGMENT: 09/08/1996

BENCH:
KULDIP SINGH, S. SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

S. SAGHIR AHMAD. J.

These are two appeals against the judgments of the National Consumer Disputes Redressal Commission, New Delhi.

2. The facts on record indicate that the respondent had entered into Contract No.31/89 with a French Firm M/s STE Kolori (for short, 'Buyer') for supply of 1 lac metres of cotton grey sheeting of the value of French Francs 4,37,500/-. In due course, the goods were shipped to the Buyer and on 09.06.90, respondent drew two Bills of Exchange on the Buyer for French Franc 3,50,000/- and French Franc 87,500/-. The draft mentioned at the top that the Bills of Exchange had to be co-accepted by the Buyer's bank. These documents were sent by the appellant to that Bank on 18.6.90 as requested by the respondent but on 9.7.90, the documents were returned unpaid. However, on the instructions of the respondent, the documents were re-presented to Banque Leumi, Paris on 13.7.90. On 9.4.91, on the instructions of the respondent, a telex was sent to Banque Leumi, Paris to transfer the documents to another French Bank, namely, Society Lyonnaise De Banque, Lyon, France, and on the same day, fresh Bills of Exchange dated 6.3.91 were sent to the French Bank at the request of the respondent. In these Bills of Exchange, there was no clause for co-acceptance by the French Bank which, however, returned the documents unpaid on 9.8.91.

3. On 26th August, 1991, respondent forwarded a fresh set of Bills of Exchange for being sent to the French Bank. The Bills of Exchange, on their face, specifically provided for acceptance by the Buyer and co-acceptance by the French Bank.

4. It appears that the Buyer, namely, M/s STE Kolori went under liquidation and an order was passed by the Commercial Court at Lyon, France for winding up the firm. The Court also appointed a Liquidator who wrote to the respondent to file its claim.

5. On 1st January, 1992, Napean Sea Rood Branch of the appellant at Bombay wrote a letter to the French Bank that payment of the Bills of Exchange forwarded to it earlier may be made. The French Bank wrote on 9.1.92 that the Bills

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of Exchange had not been paid as the Buyer was under liquidation. The Bank also, during course of correspondence, wrote that under French Law, co-acceptance by the Bank, was not permissible nor would it have given the Bank Guarantee, even if a request was made in that regard by the appellant for and on behalf of the respondent. It was, at this stage, that respondent gave a notice dated 26.3.92 to the appellant claiming the entire amounts of the Bills of Exchange and subsequently filed a complaint before the National Consumer Disputes Redressal Commission at New Delhi (for short, 'Commission') claiming the value of the goods shipped to the Buyer at France, from the appellant. The Commission by its judgment and order dated 16.11.93 allowed the claim with the direction to the appellant to pay to the respondent French Francs 4,10,000/- with interest (in rupees) at the rate of 18% on the rupee equivalent of the above amount with effect from 31st December, 1989 together with a sum of Rs. 10,000/- as costs to the respondent. It was against this judgment that the claimant filed, in this Court, Civil Appeal No. 1737 of 1995. The connected Civil Appeal No. 1334 of 1995 has been filed against the judgment and order dated 13.12.94 by which the Commission has rejected the Review Petition filed by the appellant. Both the appeals were admitted by this Court on 20.2.95 and are being disposed of by this Judgment.

6. It may be stated that the Commission, while decreeing the claim of the respondent, had relied upon the Uniform Rules for Collection made by the International Chamber of Commerce as also the covering letter of the respondent dated 26th August, 1991 accompanying the two Bills of Exchange, which, according to the Commission, on the face of it, indicated that co-acceptance of the French Bank had to be obtained and since the appellant, while forwarding the Bills of Exchange to the French Bank, had not indicated in its letter that the Bills had also to be co-accepted by the French Bank, it acted negligently. This omission was also treated by the Commission as deficiency in service.

7. Review of this judgment was sought by the appellant on the ground that the respondent's letter dated 26th August, 1991 accompanying the Bills of Exchange did not mention that co-acceptance of the French Bank had to be obtained. It was pointed out to the Commission that the letter dated 26th August, 1991 which was placed on the record by the respondent and in which a specific mention was made that co-acceptance from French Bank had to be obtained, was a letter forged by the respondent to obtain a decree in its favour. The appellant contended that this letter was never issued to the appellant. The letter dated 26.8.91 which was actually issued to them did not contain any direction for obtaining co-acceptance by the French Bank. The Commission in its judgment dated 13.12.94 (disposing of the review application) has considered both the letters and has reproduced the contents thereof but it did not go into the question whether the letter filed by the respondent was a forged letter or not.

8. The relevant portion of the findings recorded by the Commission in its judgment passed on the review application is quoted below :-

" The Opposite Party - Bank - has alleged that the letter of 26th August, 1991 from the Complainant to the Opposite Party - Bank which was the letter with which the Bills of Exchange were submitted to the Opposite Party - Bank - for

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collection, did not specifically direct the Bank to secure co-acceptance of the Bills of Exchange by the French Bank. The Opposite Party - Bank - has alleged that the letter of 26th August, 1991 submitted as Annexure 'A' to the Complaint petition bearing No.2776 was not the true letter sent by Complainant; it is a forgery & fabrication. The true letter of the same date (i.e. 26th August, 1991) was No.2775 which was the covering letter of Bills of Exchange and this letter did not contain the material instructions regarding co-acceptance by the French Bank. For facility the two letters are reproduced below :

(i) Letter No.2776 of 26th August, 1991 from the Complainant to the Opposite Party - Bank:

"We refer your letter dated 14.8.1991 informing us about return of documents Nos. 0005207 (FOBC 17794) and 0005208 (FOBC 17795) for Rs. 3,50,000 and FF 87,000/ respectively.

In this connection we are enclosing fresh sets of Bills of Exchange with a request to kindly represent the documents immediately to our buyer through M/s Societe Lyonnaise De Banque, Lyon, France. Kindly note that the Bills of Exchange have to be accepted by our buyer and co-accepted by the bank viz; Societe Lyonnaise De Banque for payment on 31.12.1991."

(ii) The letter No.2775 of 26th August, 1991 from the Complainant to the Opposite Party Bank:

"We refer your letter dated 14.8.1991 informing us about return of documents Nos.0005207 (FOBC 17794) and 0005208 (FOBC 17795) for Rs.3,50,000 and FF 87,000/- respectively.

In this connection, we are enclosing fresh sets of Drafts with a request to kindly represent the documents immediately to our buyer through M/s. Societe Lyonnaise De Banque, Lyon, France."

It will be noticed from the letters reproduced above that the material instruction regarding co-acceptance of the Bills of Exchange by the French Bank is absent in the letter No.2775 whereas it is specifically recorded in the letter No.2776. According to the Opposite Party - Bank - the letter of 26th August No.2776 is a forgery created by the Complainant for the purpose

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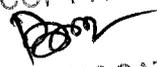
of this case. During the hearing there was considerable effort on the part of the Opposite Party-Bank - to prove that the letter No.2776 was never issued and this has been forged to support the case of the Complainant whereas the Complainant vehemently maintained that this was a genuine letter and that there was evidence to support its contention. We did not think it necessary to go into this question. We only pointed out to the Complainant that in the ordinary course of correspondence, in its letter of No.2776 the Complainant should have stated that this was in continuation of its previous letter No.2775 and that the letter No.2776 was necessitated by the omission in the letter No.2775 of the vital directions regarding co-acceptance of the Bills of Exchange. We did not get a satisfactory answer to this question.

We have also once again gone through the records of the case, the oral arguments and the written submission made by the parties at the rehearing limited to the question of the letter No.2776 being a forgery and its effect on the findings corded in the order of this Commission of 16th November, 1993.

It will be observed from the order that the Bills of Exchange clearly specified that the same were to be co-accepted by the foreign bank besides being accepted by the buying French Firm. In these circumstances it was the duty of the Opposite Party Bank to ensure co-acceptance by the foreign Bank. The responsibility of the Bank to obtain co-acceptance of the Bills of Exchange is also manifest from the Rules of Collection laid down by the International Chamber of Commerce. As the collecting bank on behalf of its customer (Complainant) who had entrusted the task of collection of Bills of Exchange to it the Opposite Party - Bank, the latter is responsible for seeing that the form of acceptance of Bills of Exchange is complete and correct.

The Rules require that "all documents sent for collection must be accompanied by collection order which is to be made by the Bank in accordance with the instructions of the client or the principal.

The instructions for co-

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acceptance by the foreign bank on the Bills of Exchange were clear and unambiguous and as such even if we ignore the covering letter No.2776 of 26th August, 1991 said to have been sent by the Complainant to the Bank on the ground that this is a forged document, it will not affect the decision already arrived at in any manner.

9. As pointed out earlier, the Commission did not decide the question whether the letter dated 26th August, 1991, filed by the respondent was a forged letter as it was of the opinion that even if both the letters, namely, the letter filed by the appellant in Review Petition as also the letter filed by the respondent in the original proceedings, were ignored, the appellant was still under a liability to have mentioned in its letter to the French Bank to whom the Bills of Exchange were forwarded, that the French Bank had also to co-accept the Bills before delivering the documents to the Buyer as the respondent had specifically mentioned this requirement in the Bills of Exchange drawn on and addressed to M/s STE Kolori and their Bankers, namely, Societe Lyonnaise De Banque, Lyon, France. This finding, like the findings recorded by the Commission in its original judgment dated 16.11.93, is based on the interpretation of certain Clauses of the Rules of the International Chamber of Commerce.

10. There are two Banks, namely, the Indian Bank, Bombay (appellant) through whom the Bills of Exchange were forwarded and the French Bank, namely, Societe Lyonnaise De Banque, Foreign Department, Lyon, France for payment. It is not disputed that the Banks had to act in accordance with the Uniform Rules for Collection made by the International Chamber of Commerce (hereinafter referred to as ICC Rules). The extent of liability, default, negligence or deficiency in service, on the part of either or the Banks would, therefore, depend on a correct reading and interpretation of the ICC Rules which, we unhesitatingly say, at the outset, were misread, misunderstood and misinterpreted by the Commission.

11. Clause B of the ICC Rules which came into force with effect from January 1, 1979 contains Definitions some of which (which are relevant for this case) are reproduced below :-

"1. (i) "Collection" means the handling by banks on instructions received of documents as defined in (ii) below, in order to a) obtain acceptance and/or, as the case may be, payment, or b) deliver commercial documents against acceptance and/or, as the case may be, against payment, or c) deliver documents on other terms and conditions.

(ii) "Documents" means financial documents and/or commercial documents:

(a) "financial documents" means bills of exchange, promissory notes, cheques, payment receipts or other similar instruments used for obtaining the payment of money;

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(b) "Commercial documents" means invoices, shipping documents, documents of title or other similar documents, or any other documents, whatsoever, not being financial documents.

2. The "parties thereto" are :

- (i) the "principal" who is the customer entrusting the operation of collection to his bank;
- (ii) the "remitting bank" which is the bank to which the principal has entrusted the operation of collection;
- (iii) the "collecting bank" which is any bank, other than the remitting bank, involved in processing the collection order;
- (iv) the "presenting bank" which is the collecting bank making presentation to the drawee.

3. The "drawee" is the one to whom presentation is to be made according to the collection order."

Clause C provides as under :-

"All documents sent for collection must be accompanied by a collection order giving complete and precise instructions. Banks are only permitted to act upon the instructions given in such collection order, and in accordance with these Rules.

If any bank cannot, for any reason, comply with the instructions given in the collection order received by it, it must immediately advise the party from whom it received the collection order."

Article 2, 3 as also Article 15 provide as under:-

"Article 2

Banks must verify that the documents received appear to be as listed in the collection order and must immediately advise the party from whom the collection order was received of any documents missing.

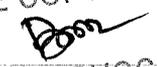
Banks have no further obligation to examine the documents.

Article 3

For the purpose of giving effect to the Instructions of the principal, the remitting bank will utilise as the collecting bank:

- (i) the collecting bank nominated by the principal, or in the absence of such nomination,
- (ii) any bank, of its own or another bank's choice in the country of payment or acceptance, as the case may be.

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collection order may be sent to the collecting bank directly or through another bank as intermediary.

Banks utilising the services of other banks for the purpose of giving effect to the instructions of the principal do so for the account of and at the risk of the latter.

The principal shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws or usages.

Article 15

The presenting bank is responsible for seeing that the form of the acceptance of a bill of exchange appears to be complete and correct, but is not responsible for the genuineness of any signature or for the authority of any signatory to sign the acceptance.

12. Clauses 2 and 3 specify the parties to the transaction for purpose of "Collection" as defined in Sub-clause 1(i) of Clause B. These parties are the "Principal" who entrusts the operation of "Collection" to his Bank. This, in the instant case, would be the respondent as the respondent entrusted the operation of "Collection" to the appellant. The other party is the "Remitting Bank", namely, a Bank to whom the operation of "Collection" is entrusted by the "Principal". In the instant case, the "Remitting Bank" would be the appellant as it was this Bank to whom the respondent had entrusted the job of "Collection". Another Bank which is involved in the whole transaction is the "Collecting Bank". According to the definition, this would be a Bank other than the "Remitting Bank". There is, yet, a third Bank, namely, the "Presenting Bank" which, according to the definition, is, in fact, the "Collecting Bank" making presentation to the "Drawee". "Drawee" has been defined in Sub-clause 3 of Clause 8 as the person to whom presentation is made according to the collection order. Although, in the definition, there are three banks, namely, the "Remitting Bank", the "Collecting Bank" and the "Presenting Bank", the identity of "Collecting Bank" and the "Presenting Bank" is the same as the "Collecting Bank" not only collects the documents from the "Remitting Bank", it also presents those documents to the "Drawee" for payment. The "Remitting Bank" cannot be the "Collecting Bank" or the "Presenting Bank" as the "Collecting Bank" has been defined in the ICC Rules as a Bank OTHER THAN THE REMITTING BANK".

13. Clause C which has already been extracted above requires that the documents sent for "Collection" must be accompanied by a collection order. The collection order has to contain complete and precise instructions so as to enable the Bank to act in accordance with the instructions contained in the collection order and in accordance with the ICC Rules. This will also be clear from the definition of "Collection" as set out in Sub-clause 1(i) of Clause B, which means "the handling by Banks, ON INSTRUCTIONS RECEIVED, of documents", which are either "Commercial or Financial" as defined in Sub-clause (ii)(a) and (b). The definition of "Financial Documents" also includes Files of Exchange. The words "for the purpose of giving effect to the INSTRUCTIONS OF THE PRINCIPAL" occurring in Article 3 also

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make it clear that the Principal has to give instructions separately (in addition to the documents) to the Remitting Bank to enable it to instruct the Collecting Bank accordingly.

14. "Acceptance" is dealt with in Article 15 which indicates that the responsibility of seeing that the Bill of Exchange is accepted, completely and correctly, is that of the "Presenting Bank".

15. The Commission, while disposing of the complaint of the respondent by its original order dated 16.11.93, had held that not only the Bill of Exchange but the covering note accompanying those Bills clearly indicated that the Bill was to be accepted by the Buyer and co-accepted by the Foreign Bank. It, then, proceeded to say as under:-

"The Rules for Collection laid down by the International Chamber of Commerce leave no room for doubt that as per Article 3 of the said Rules, for giving effect to the instructions of the principal, i.e., the customer entrusting the operation of collection to his Bank, the remitting bank (viz. the Bank to which the principal has entrusted the operation of collection) is the collecting Bank. As observed earlier, under Article 15 it is the presenting Bank which is responsible for seeing that the form of acceptance of a Bill of Exchange appears to be complete and correct. Under Item C "General Provisions and Divisions" of the above Rules "All documents sent for collection must be accompanied by a collection order which has to be made by the Bank in accordance with the instructions of the client or the principal". The opposite party Bank failed to do so. We reject its plea that it was not responsible to obtain the co-acceptance of the Bank and there was no deficiency of service on its part."

16. A mere perusal of the above passage of the Commission's judgment indicates that the Commission fell into a serious error in treating the "Remitting Bank" as the "Collecting Bank" and, then, fastening liability on the appellant by observing that the appellant had not acted in accordance with Article 15 of the ICC Rules under which it was the responsibility of the "Presenting Bank" to see that the "Documents" were accepted in accordance with the instructions of the "Principal". The Commission thus treated appellant not only as the "Remitting Bank" but also as the "Collecting Bank" and "Presenting Bank" which is not permissible as the identity of "Remitting Bank" is different and distinct from that of the "Collecting Bank" and/or the "Presenting Bank".

17. As pointed out earlier, the main judgment of the Commission is based on the ground that there was letter dated 26.8.91 which contained specific instruction that there had to be co-acceptance by the Foreign Bank.

18. As against this, there is, admittedly, another letter of 26th August, 1991 from the respondent to the appellant which does not contain this instruction. When this letter

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was filed before the Commission and a review of the judgment was sought on the ground that the letter containing the instruction for obtaining co-acceptance of the French Bank was never issued to the appellant and that the only letter issued on that date was the letter in which this instruction was not mentioned, the Commission, instead of deciding the controversy as to whether the other letter relied upon by the respondent was, at all, sent or issued to the appellant, proceeded to decide the controversy on the ground that even if no such letter was issued, the recital in the Bill of Exchange about co-acceptance by the French Bank was enough and the appellant having not acted in terms of the Bill of Exchange and having not obtained the co-acceptance of the French Bank, was liable to pay to the respondent the entire price of the goods supplied to the Buyer to whom the documents would not have been delivered had it been mentioned that before delivering the documents to the Buyer, co-acceptance by the French Bank was necessary, as in that event, the documents would have been either returned, as was done on previous occasions, or the French Bank would have given co-acceptance and thus made payment of the entire amount to the respondent.

19. In view of the findings recorded by us that under the ICC Rules, it is the responsibility of the "Principal" to give or send specific and precise instructions to the Bank besides sending the "Commercial/Financial Documents", Commission was under a duty to decide as to whether the appellant had issued the letter containing the requirement of co-acceptance by the French Bank. The Commission could not legally avoid to decide this question particularly as the appellant had contended before the Commission that the letter No.2776 of 26th August, 1991 was forged and fabricated by the respondent and that the only letter issued by the respondent was letter No.2775 dated 26th August, 1991. The contents of both the letters have already been reproduced by the Commission in its judgment by which the review application has been disposed of which would indicate that in the letter No.2775, there is no requirement to obtain co-acceptance by the French Bank whereas in the other letter, namely, letter No.2776, this condition has been specifically mentioned.

20. By filing letter No.2775 of 26.8.91 along with the Review Petition and contending that the other letter, namely, letter No.2776 of the even date, was never written or issued by the respondent, the appellant, in fact, raised the plea before the Commission that its judgment dated 16.11.93, which was based on letter No. 2776, was obtained by the respondent by practising fraud not only on the appellant but on the Commission too as letter No.2776 dated 26.8.91 was forged by the respondent for the purpose of this case. This plea could not have been legally ignored by the Commission which needs to be reminded that the Authorities, be they Constitutional, Statutory or Administrative, (and particularly those who have to decide a lis) possess the power to recall their judgments or orders if they are obtained by fraud as Fraud and Justice never dwell together (Fraus et jus nunquam cohabitant). It has been repeatedly said that Fraud and deceit defend or excuse no man (Fraus et dolus nemini patrocinari debent).

21. In Smith v. East Elloe Rural District Council (1956) AC 736, the House of Lords held that the effect of fraud would normally be to vitiate any act or order. order obtained by fraud practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power

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to recall its order. (See: Benoy Krishna Mukherjee vs. Mohanlal Goenka AIR 1950 Cal. 287; Gajanand Sha & Ors. vs. Dayanand Thakur AIR 1943 Patna 127; Krishna Kumar vs. Jawand Singh AIR 1947 Nagpur 236; Devendra Nath Sarkar vs. Ram Rachpal Singh ILR (1926) 1 Lucknow 341 = AIR 1926 Oudh 315; Saiyed Muhammad Raza vs. Ram Saroop & Ors. ILR (1929) 4 Lucknow 562 = AIR 1929 Oudh 385 (FB); Bankey Behari Lal & Anr. vs. Abdul Rahman & Ors. ILR (1932) 7 Lucknow 350 = AIR 1932 Oudh 63; Lekshmi Amma Chacki Amma vs. Mammen Mammen, 1955 Kerala Law Times 459.) The Court has also the inherent power to set aside a sale brought about by fraud practised upon the Court (Ishwar Mahton & Anr. vs. Sitaram Kumar & Ors. AIR 1954 Patna 450) or to set aside the order recording compromise obtained by fraud. (Bindeshwari Pd. Chaudhary vs. Debendra Pd. Singh & Ors. AIR 1958 Patna 618; Smt. Tara Bai vs. V.S. Krishnaswamy Rao AIR 1985 Karnataka 270).

24. We may now turn to the next and allied questions; what is forgery, whether forgery is a fraud and whether in the instant case, forgery and fraud are proved?

25. Forgery has its origin in the French word "Forger", which signifies:

"to frame or fashion a thing as the smith doth his worke upon the anvill. And it is used in our law for the fraudulent making and publishing of false writings to the prejudice of another mans right (Termes de la Ley) (Stroud's judicial Dictionary, Fifth Edition Vol. 2).

26. In Webster Comprehensive Dictionnary, International Edition, "Forgery" is defined as :

"The act of falsely making or materially altering, with intent to defraud; any writing which, if genuine, might be of legal efficacy or the foundation of a legal liability."

27. This Definition was adopted in Rembert vs. State 25 Am. Rep. 639. In another case, namely, State vs. Phelps 34 Am. Dec. 672, it was laid down that forgery is the false making of any written instrument, for the purpose of fraud or deceit. This decision appears to be based on the meaning of forgery as set out in Tomlin's Law Dictionary.

28. From the above, it would be seen that fraud is an essential ingredient of forgery.

29. Forgery under the Indian Penal Code is an offence which has been defined in Section 463, while Section 464 deals with the making of a false document. Section 465 deals with the making of a false document. Section 465 prescribes punishment for forgery. "Forged document" is defined in Section 470 while Section 471 deals with the crime of using as genuine, the forged document.

30. Forgery and Fraud are essentially matters of evidence which could be proved as a fact by direct evidence or by inferences drawn from proved facts.

31. The Privy Council in Satish Chandra Chatterjee vs. Kumar Satish Kantha Roy & Ors. Air 1923 PC 73, laid down as under:

"Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who made them-- proved by established facts r inferences legitimately drawn from

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those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused or fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so many a clever and dexterous knave would escape.

32. The above principle will apply not only to court of law but also to statutory tribunals which, like the Commission, are conferred power to record evidence by applying certain provisions of the Code of Civil Procedure including the power to enforce attendance of the witnesses and are also given the power to receive evidence on affidavits. The Commission under the Consumer Protection Act, 1986 decides the dispute by following the procedure indicated in Section 22 read with Section 13(iv) and (v) of the Act.

33. Sub-section (iv) of Section 13 which has been made applicable to the proceeding before the Commission lay down to the proceeding before the Commission lay down that it shall have the same powers as are vested in a Civil Court under the Code Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:-

- (i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;
- (ii) the discovery and production of any document and production of any document of other material object producible as evidence;
- (iii) the reception of evidence on affidavits.
- (iv) -----
- (v) issuing of any commission for the examination of any witness; and
- (vi) -----

The commission has, thus, jurisdiction not only to examine a witness on oath but also to receive evidence in the form of affidavits.

34. The parties, in the instant case, have filed their affidavits annexing therewith a host of documents. These affidavits and documents were treated as evidence in the case. It was on the basis of this evidence that the main case, as also the Review Petition, were decided by the Commission.

35. Since the evidence of the parties is already on record and all vital facts either stand admitted or proved, we proceed now to consider whether forgery and fraud are established. This we are doing in view of the facts and circumstances of this case otherwise we would have either remanded the case to the Commission or directed the respondent to approach the Civil Court.

36. Paragraphs 2, 3, 4, 5, and 6 of the Review Application filed by the appellant before the Commission are as under:

"2. In brief, the case of the complainant before this Hon'ble

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Commission was that it had by its letter of the 26th August, 1991, which letter enclosed the bills of exchange in question, gave specific instruction to the Opposite Party -- the Bank -- for securing a co-acceptance by Societe Lyonnaise de Banque (the French Bank) before handing over the documents of title to the goods. Based upon this letter, the veracity of which was not questioned by the Opposite Party at that stage in the circumstances indicated hereinafter, this Hon'ble Commission was pleased to hold that the Opposite Party was responsible for not carrying out the instructions contained in the letter dated 26th August, 1991, (Exhibit A to the Complaint) and thereby liable in damages caused to the Complainant. It is correct that the complainant had annexed a copy of the letter dated 26th August, 1991 with this Complainant. However, the Opposite Party- the bank failed to notice that this letter so annexed was not the same as the letter on 26.8.1991 as a covering, however with a vital difference that the body of the letter did not contain the material instruction regarding co-acceptance by the French Bank.

3. The letter produced before this Hon'ble commission bears the same date as the letter actually given to the Bank purports to be a covering letter (as also was the letter given to the Bank) and bears a reference No. 2776 the Bank is 2775. Due to these apparent similarities, whilst drawing up the pleadings of the material alterations made to the contents of the letter were over looked. The Opposite Party states that the letter as produced before this Hon'ble Commission was not a true copy of the letter given to the Bank.

4. One of the reasons why this lapse occurred is because the true significance and import of the letter was not understood and appreciated. After receiving a copy of the order of this Hon'ble Commission, it was found that the whole case had turned against the bank based upon the letter of the Complainant produced before the Commission. It is thereafter when the copy of the letter which is with the Bank was perused, it was found that there is a material

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variation between that copy which was given to the Bank and its purported true copy which was produced by the Complainant before this Hon'ble Commission. However, to eliminate the possibility as to whether, in addition to the letter given to the Bank bearing reference No. 2775, another letter having reference No. 2776 of a same dated was also given to the Bank, a through search was made of the records of the Bank at the Napean Sea Road and other connected Branches including the head office. The search has revealed that the Bank has not received the letter bearing reference No. 2776 of 26th August, 1991 the contents of which are as the purported copy produced by the Complainant before this Hon'ble Commission. What was given by the complaint to the Bank as a covering letter was a letter being reference No. 2775, a copy of which is annexed hereto and marked as Annexure I and the original of which shall be produced at the time of hearing. Affidavit of the then manager of the said branch confirming that the said letter dated 26th August, 1991 annexed as Exhibit "A" to the Complaint was not received by the Bank is annexed hereto and marked Annexure "II".

5. A perusal of this letter shows that the material instructions in relation to co-acceptance by the French Bank are absent in this letter. The Opposite Party is advised to stated that considering the fact that a letter dated 26th August, 1991, bearing REF:SF:E:2775 was given as a covering letter to the Bank, it is inconceivable that a second letter also as a covering letter would be given to the Bank. The letter of 26th August, 1991 stated that it is "....enclosing fresh set of drafts....". There are some other discrepancies between this letter and the letter produced by the Complainant, as hereafter set out.

6. The Opposite Party further submit that the xerox copy of the purported letter produced before this Hon'ble Commission by the Complainant purports to bear and initial on the right-hand side of the letter. The Opposite Party submits that this initial is not of any of the officials of the Napean Sea Road Branch of the bank at the relevant time. The Opposite Party

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is, therefore, advised to submit that this letter is a forgery created by the Complainant for the purpose of the present case."

37. The respondent filed a reply to the Review Application in paragraph 4 by which he stated as under:

(a) The Complainant by its letter dated 26th August 1991 bearing reference No.SF: E: 2775 forwarded to the Opponent fresh set of Drafts with a request to present the aid documents to the buyer (vis. M/s STE Kolori) through M/s. Societe Lyonnaise De Banque, Lyon, France. The copy of the said letter which is on the file of the said letter which is on the file of the Complainant is annexed hereto as market Exhibit 'A'.

(b) The said letter dated 26th August 1991 bearing Reference No. EF:E: 2775 though delivered to the Opponent, the carbon copy of the said letter available with the Complainant, does not bear any acknowledgement of receipt. The said letter is also mentioned in the Outward Register maintained by the Complainant. Hereto annexed and market Exhibit 'B' is a copy of the relevant page of the Outward Register of the Complainant. The Complainant craves leave to refer to and rely upon the Outward Register maintained by it for the relevant period when produced.

(c) After the delivery of the said letter dated 26th August 1991 bearing Reference No. SF:E: 2775 the Complainant noticed that the said letter did not request the Opponent to have the said Bills of Exchange co-accepted by the Foreign Bank viz. Societe Lyonnaise De Banque, Lyon, France. In the circumstances, the Complainant immediately addressed another letter to the Opponent also dated 26th August 1991 bearing Reference No.SF:E: 2775 wherein they gave specific instructions to the Opponent to have to the said Bills of Exchange accepted by the buyer viz. M/s STE Klori and co-accepted by the Foreign Bank viz. Societe Lyonnaise De Banque. The said letter has been annexed as Exhibit 'A' to the plaint and has also been annexed hereto as Exhibit 'C'. The said letter was delivered to the Opponent and the same bears the initials of the persons who received the said letter in the Opponent and the same bears the

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initials of the person who received the initials of the person who received the said letter also bears the rubber stamp of the Opponent.

(d) The said letter dated 26th August 1991 bearing Reference No. SF:E: 2775 is also mentioned in the Outward Register maintained by the Complainant. Exhibit 'B' hereto which is the relevant page of the Outward Register not only shows the entry of the said letter bearing Reference No. SF:F: 2775 but also the entry of the aforesaid letter bearing SF:E: 2776.

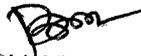
(e) From the aforesaid it is evident that there were two letters both dated 26th August, 1991 which were addressed by the Complainant to the Opponent.

(f) The Complainant says that pursuant to the filing of the original complaint, the Complainant's Advocates gave inspection of the documents, referred to and relied upon by the Complainant, to the Opponent's Advocate. The said inspection was taken on 14th October, 1992 and at the said time the carbon copy of the letter dated 26th August, 1991 bearing Reference No. SF:E: 2776 was inspected by the Opponent's Bank. The fact of the inspection having been taken has been recorded by the Opponent's Advocate in their letter by the dated 16th October, 1992 which is annexed hereto and marked Exhibit 'D'.

(g) The Complainant states that after the said Review Application was served upon the Complainant, the Complainant's Advocate addressed a letter dated 28th December, 1993 to the Opponent's Advocate pointing out that the said Review Application was totally false and misconceived inasmuch as the said letter dated 26th August, 1991 bearing Reference No. SF:E: 2776 was not a fabricated letter and bore the rubber stamp of the Opponent as also the initials of the person who received the same in the Opponent Bank. The Complainant's Advocate by the said letter also requested for inspection of the letter dated 26th August, 1991 bearing Reference No. SF:E: 2775 and the Inward Register maintained by the Opponent Bank. Hereto annexed and marked Exhibit 'E' is a copy of the said Complainant's Advocate's letter dated 28th December, 1993.

(h) The opponent by their

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Advocates' letter dated 20th December, 1993 appointed time for inspection of the said letter. The Opponent Advocates by the said letter also stated that their client had not entered the said letter bearing Reference No.SF:E:2775 in their Inward Register as as the Inward Register was formerly only maintained in respect of registered letters which were entered therein. Hereto annexed and marked Exhibit 'F' is a copy of the said dated 29th December, 1993.

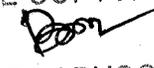
(i) Pursuant to the appointment fixed in that regard the Complainant and their Advocates attended the Office of the Opponents Advocates on 3rd January, 1994 and took inspection of the said letter dated SF:E; 2775. The Complainant at the said time also gave inspection of the carbon copies of the letter bearing Reference No. SF:E:2775 and SF:E:2776 available on the file of the Complainant. Inspection of the Outward Register of the Complainant was also given to the Opponent and its Advocates. The given and taking of the said inspection was recorded by the Opponent Advocates in their letter dated 4th January, 1994 (Exh. 'D' hereto) and also by the Complainant in their Advocates letter also dated 4th January, 1994. Hereto annexed and marked Exhibit 'G' is a copy of the aforesaid letter dated 4th January, 1994.

38. Other relevant paras of the respondent's reply are paragraph 7 to 15.

39. The Respondent's denial that it had fabricated the letter No. 2776 is also contained in various other paras of its reply.

40. The appellant filed a rejoinder affidavit before Commission. Paras 3,7,12,21 are quoted below-

"3. It is only after having perused the Reply of the Complainant that the Opposite Party has further realised that the Complainant has played a calculated fraud with an intention to secure an order from this Hon'ble Commission. the Complainant has all along played a fraud on this Hon'ble Commission in making it believe that the Bills of Exchange have been forwarded by the alleged letter dated 26th August, 1991 bearing No. 2776 annexed as Exhibit "A" to the Complaint. Having now read the tenor of the Reply of Complainant, the Opposite party has

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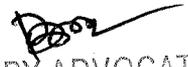
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realised that the Complainant has with mischievous and malafide intent in its pleadings before this Hon'ble Commission cleverly avoided making reference to the different letters said to have been delivered to the Opposite Party and the aforesaid fact is clear and evident by the language of he pleadings. The Opposite Party further submits that after going through the said reply of the complaint to the Review Petition it has become very clear that the Complainant has deliberately played a fraud and now put forward a false case in the said reply to further perpetrate the said fraud. The Opposite Party submits the letter bearing No. 2775 dated 26th August, 1991 and the said letter bearing No. 2776 dated 26th August, 1991, both purport to enclose therewith set of Bills of Exchange. It is an admitted position that only one set of Bills were forwarded for the purpose of forwarding the same to the foreign party for its acceptance. The fact that both letters set out that Bills of Exchanges are forwarded therewith itself indicates that they were not meant for substitution. Even the language of both letters belies the false case of substitution now put up by the complainant. It is thus clear that the Complainant has misguided this Hon'ble Commission by relying upon a letter bearing ref. No. 2776 dated 26th August, 1991 purporting to suggest that by the said letter, the said Bills of Exchange were forwarded for the purpose of acceptance, whereas in fact the said letter bearing No. 2776 dated 26th August, 1991 was never received by the Opposite party.

7. With reference to paragraph 4(c) of the said Reply, the Opposite Party denies that after delivery of the said letter dated 26th August delivery of the said letter dated 26th August, 1991 bearing No. 2775 the Complainant noticed that the said letter did not contain a request to the Opposite party to have the said Bills of Exchange co-accepted by the foreign Bank and therefore addressed another letter to the Opposite Party also dated 26th August, 1991 bearing NO. 2776 wherein the complainant give specific instructions to the

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Opposite party to have the said Bills of Exchange accepted by the Buyer and co-accepted by the foreign Bank. The Opposite Party says and submits that the alleged letter dated 26th August, 1991 bearing No. 2776 is not genuine letter. The Opposite Party craves leave to refer to the Outward Register allegedly maintained by the complainant, when produced. The Opposite party submits that the Outward Register maintained by the Complainant does not appear to be genuine Outward Register as the same has entries containing references to letters of a later date bearing outward number of an earlier date. The Opposite Party says and commits that no reliance can be placed upon the said alleged Outward Register alleged to have been maintained by the Complainant. The opposite party says and submits that the alleged initials of the person who received he said letter is not initial led by any officer/staff member of Indian Bank working in its Nepean Seas Road Branch at the relevant time. The Opposite Party says that prior to the filling of the Review Application the Opposite Party obtained verification from the officers and staff members attached to the Nepean Sea Road Branch of the Opposite Party who certified and stated that the alleged initial on the alleged office copy of the Complainant is not their initial. The Opposite Party states and submits that the mere fact that a rubber stamp appears on the alleged letter cannot be itself confer any authenticity. It is pertinent to note that the Complainant has obtained and alleged acknowledgment on the officer copy of the alleged letter 26th Aug. 1991 bearing reference No. 2776 when, in fact no such letter was delivered by the Complainant to the Opposite Party. It is further pertinent to note that the Complainant did not think it fit or necessary to obtain any acknowledgement on office copy of letter dated 26th August, 1991 bearing No. 2775 when the original documents i.e. the Bills of Exchange were delivered to the Opposite Party therewith but the complainant has allegedly obtained and acknowledgement on the alleged letter dated 26th August, 1991 bearing No. 2776. Copy of Statement

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signed by the Officers and staff members at the Nepean Sea Road Branch of the Opposite Party certifying that the alleged initials on the on alleged acknowledgement does not belong to any of them in hereto annexed and marked Annex "I".

12. With reference to paragraph 7 of the said Reply, the Opposite Party denies the contention of the Complainant that the letter dated 26th August, 1991 bearing No. 2775 was not disclosed by the Complainant before this Hon'ble Commission as the said letter was substituted by the alleged or at all. The Opposite Party submits that it is for the first time that the Complainant has pleaded substitution. This plea of substitution has been pleaded only after the fraud has been detected by the Opposite Party and brought to the notice of this Hon'ble Commission. If the plea of substitution is to be believed, the Complainant would have withdrawn the letter dated 26th August, 1991 bearing No. 2775 at that point of time itself since the Complainant had taken no acknowledgement for the same. The Opposite Party denies the contention of the Complainant that the nondisclosure was not with a view to suppressing information, as alleged or otherwise. The Opposite Party further denies the contention of the Complainant that the nondisclosure was inadvertent as alleged at all. The Opposite Party states that the second letter dated 26th August, 1991 bearing No. 2776 was never delivered by the Complainant to the Opposite Party.

15. With reference to paragraph 10 of the said Reply, the opposite party states that it is pertinent to note that despite Complainant having accepted the fact that letter dated 26th August, 1991 bearing No. 2775 was addressed to the Opposite Party and the Opposite Party would act on the instructions contained therein. The Complainant ought to have drawn refernce to the letter No. 2775, if assuming with out admitting that the alleged letter No. 2776 was in fact delivered. The Opposite Party states that, it is admitted by the Complainant that the two letters both dated 26th August, 1991 bearing Nos. 2775 and 2776 are materially different from each

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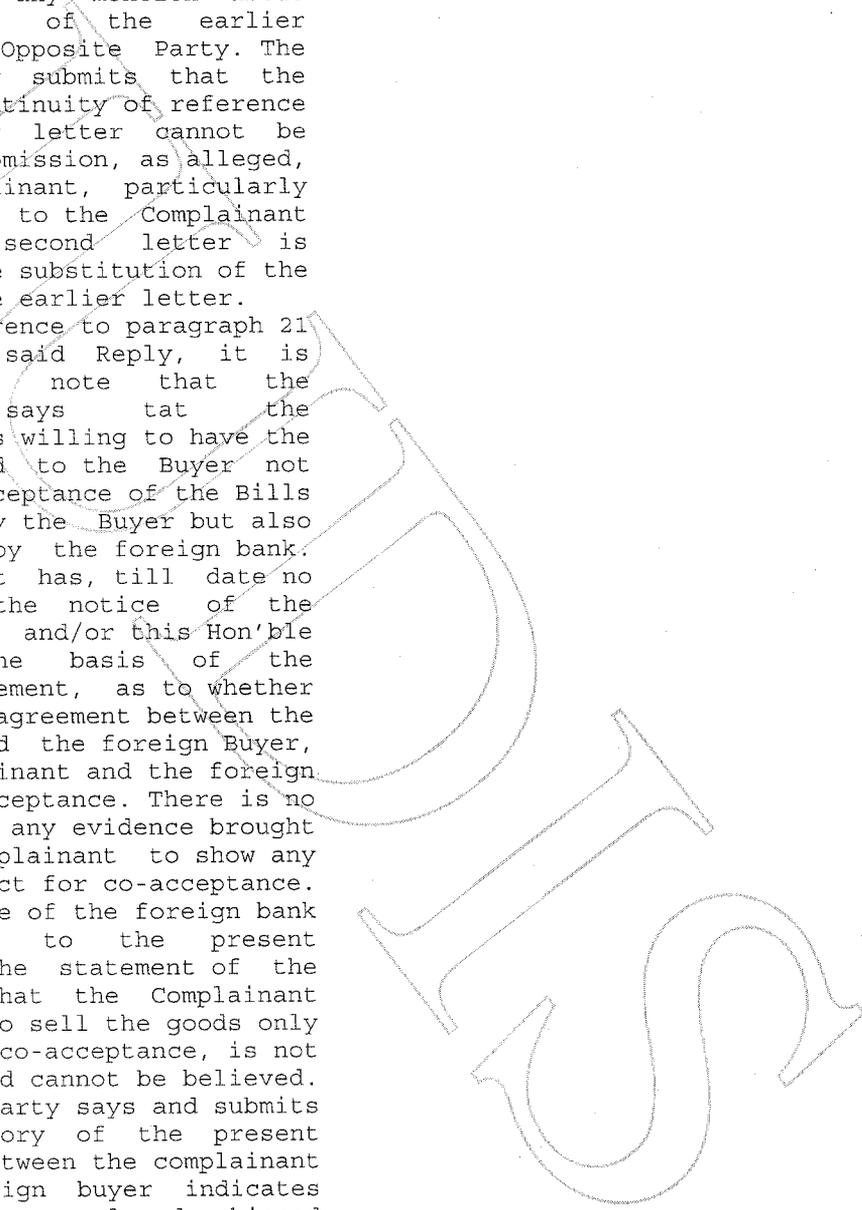
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other. The Opposite Party states that the Complainant has not explained in any part of the replay as to what warranted the submission of the alleged letter dated 26th August, 1991 bearing No. 2776 on the same dated after submission of a letter on the same subject, also dated 26th August, 1991 bearing No. 2775 without providing for any reference to the earlier letter or without making any mention about the submission of the earlier letter to the Opposite Party. The Opposite Party submits that the absence of continuity of reference to the earlier letter cannot be termed as an omission, as alleged, by the Complainant, particularly who, according to the Complainant itself the second letter is intended to be substitution of the contents of the earlier letter.

21. With reference to paragraph 21 to 24 of the said Reply, it is pertinent to note that the Complainant says that the Complainant was willing to have the goods delivered to the Buyer not only letter acceptance of the Bills of Exchange by the Buyer but also co-acceptance by the foreign bank. The Complainant has, till date no brought to the notice of the Opposite Party and/or this Hon'ble Commission the basis of the aforesaid statement, as to whether there is any agreement between the complainant and the foreign Buyer, or the Complainant and the foreign bank for co-acceptance. There is no documentary or any evidence brought in by the Complainant to show any alleged contract for co-acceptance. In the absence of the foreign bank being party to the present proceedings, the statement of the Complainant that the Complainant was willing to sell the goods only if there was co-acceptance, is not sustainable and cannot be believed. The Opposite Party says and submits that the history of the present transaction between the complainant and the foreign buyer indicates that the goods were already shipped in June, 1990 prior to the forwarding of the said Bills of the Exchange for acceptance in August, 1991. The Opposite Party denies that the Opposite Party has been negligent in that the Bills of Exchange are to be accepted as per tenor of the instrument. The Opposite Party denies that the



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Complainant is entitled to sue the Opposite Party and recover from the Opposite Party the amount of Bills of Exchange with interest, as alleged or otherwise. The Opposite Party says that the only claim which the Complainant has is against the foreign Buyer and / or foreign bank and not against the Opposite Party. It is foreign pertinent to note that the Complainant states that there is no privity of contract between the foreign bank and the Complainant. If the aforesaid statement is to be believed, then the question of the foreign bank being required to co-accept the Bills of Exchange cannot and does arise."

41. We have also gone through other affidavits and documents, filed either in this Court or before the Commission, which have been brought on record here.

42. We must say immediately that the circumstance, in the instant case, are glaring and the intrinsic evidence available on the record is clinching, so much so, that no other inference is possible except to hold that the letter No. 2776 of 26th August, 1991 was forged by the respondent in order to obtain a decree from the Commission for a huge amount of French Francs 4,10,000/- It will appear that -

(i) The respondent does not deny that it had sent and issued letter No. 2775 dated 26th August, 1991 to appellant:

(ii) The respondent does not deny that this letter does not contain any direction to the appellant to obtain co-acceptance from the French Bank:

(iii) The respondent says that it had issued letter NO. 2776 dated 26th August, 1991 in substitution of the earlier no. 2775 of the event dated;

(iv) the fact that this letter was sent in substitution of letter No. 2775 dated 26th August, 1991 is not mentioned in the letter itself:

(v) The respondent does to say that the letter NO. 2775 dated 26th August, 1991 should be treated as cancelled;

(vi) The respondent had corresponded with the appellant and had even given a notice dated 26.3.92 through its counsel to the appellant claiming the amounts due under the Bill of Exchange on the ground of negligence but nowhere does the respondent says that the letter No. 2776 dated 26th August, 1991 was substitution of letter No. 2775 of that date:

(vii) Even the original complaint filed before the Commission, the respondent does not say anywhere

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that they had issued letter No. 2776 of 26th August, 1991 in substitution of the letter NO. 2775 of that date.

(viii) The plea that letter NO. 2776 was issued in substitution of letter no. 2775 was asserted by respondent for the first time in review proceedings when the appellatant filed this letter before the commission. The respondent's silence still the stage, therefore, becomes eloquent indicating that this letter was not in existence till then:

(ix) What was the mode of payment agreed upon between the respondent and the buyer in France has not been indicated. Nor has any correspondence, or for that matter, any agreement in writing between the respondent and the buyer, been filed or brought on record to indicate the terms of contract or agreement or, at least, to indicate the mode of payment, was specifically mentioned by it in its "Collection Order" to the appellatant.

(x) The respondent and already come to the know that the buyer was under liquidation as the liquidator himself had written to the respondent to file its claim in respect of the goods supplied by it to the Buyer.

(xi) There was some correspondence with French Bank and the French Bank wrote to the appellatant, which was also brought to the notice of the respondent, that co-acceptance by a French Bank was not permitted under French Law and that, if insistence for co-acceptance by the French Bank meant furnishing of bank guarantee, the French Bank would have refused to furnish that guarantee even if it was required of it in the letter accompanying the Bills of Exchange. (this assertion by the French Bank is in consonance with the Preamble of ICC Rules which says that "these provisions apply to all Collections... Unless contrary to the provisions of a national state or local law and/or regulation which cannot be departed from.")

It was, thus, apparent to the respondent that there was little hope the entire amount covering the goods supplied by it to the French Buyer would be paid and therefore, it acted in a dexterous and sophisticated manner to fasten

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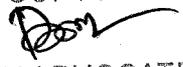
the liability on the appellant by branding it as negligent is not writing specifically to the French Buyer for co-acceptance in spite of its letter NO. 2776 of 26.8.91 and to support this plea by evidence, it forged the letter in question forgetting that there existed another letter NO. 2775 of that date in which the requirement of co-acceptance by French Bank was indicated. Indeed, the Persian saying that "DAROGH GO RA HAFIZA NA BASHAD" (A LIAR HAS NO MEMORY) is the still the time tested truth.

In the face of overwhelming evidence, the entry in the respondent's record indicating that letter NO. 2776 was issued cannot be accepted. Significantly, the copy of the disputed letter bears and endorsement of "Receipt and Rubber Stamp" allegedly of the appellant but the copy of the admitted letter No. 2775 does not bear any endorsement of receipt which the respondent had acted.

43. In view of the above, and if the letter No. 2776 (forged by the respondent) is excluded from the evidence, there remains only the letter No. 2775 of 26.8.1991 in which is was not indicated by the respondent to the appellant to write to the French Bank to deliver the documents only on co-acceptance by it. The appellant, in the circumstances, was justified in not mentioning co-acceptance by the French Bank. The case of the respondent being false and based on fabricated evidence has to be dismissed.

The appeals are consequently allowed, and both the judgments of the Commission, namely judgments dated 16.11.1993 and 13.12.1994 are set aside and the Original Complaint of the respondent is dismissed with costs quantified at Rs. 25,000/-.

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Annexure-R/11/Fseries.

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **RC. REV.No. 148/2011**

+ **Date of Decision: 12th September, 2011**

SONAL MANSINGH **....Petitioner**
! **Through: Mr. Manoj Tyagi & Mr. Dinesh Rastogi, Advocates**

Versus

\$ **BEENA OM PRAKASH** **....Respondent**
Through: Mr. Ravinder Sethi, Sr. Advocate with Mr. Arun K. Sharma , Advocate

CORAM:

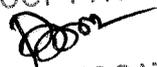
* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. **Whether Reporters of local papers may be allowed to see the judgment?(No)**
2. **To be referred to the Reporter or not? (No)**
3. **Whether the judgment should be reported in the digest? (No)**

ORDER

P.K BHASIN,J:

In this petition under Section 25-B(8) of the Delhi Rent Control Act, 1958 the petitioner-tenant, who claims herself to be a recipient of Padma Bhushan and Padma Vibhushan awards has questioned the legality and

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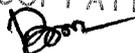
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ANNEXURE R/11/F series.

propriety of the order passed by the Additional Rent Controller directing her eviction from the ground floor of a residential property in Defence Colony which she has been occupying as a tenant since the year 1976. The eviction order has been passed in an eviction petition under Section 14(1)(e) filed by her landlady, the respondent herein, on the ground that she required the premises in the occupation of the petitioner-tenant *bona fide* for her own use and which, according to the respondent-landlady, should have been voluntarily vacated by the petitioner-tenant accepting her *bona fide* requirement because of her ailments as also of her 78 years old husband.

2. The eviction order has been impugned by the petitioner-tenant since it has been passed without any opportunity to her to defend the eviction petition. The trial Court record shows that on 06-06-09 when the eviction petition was taken up for the first time after it had been filed the trial Court had ordered issuance of summons of the petition as prescribed under Third Schedule of the Delhi Rent Control Act by ordinary process as well by registered post, acknowledgement due returnable for 26-08-09. On 26-08-09 the trial Court recorded that the summons sent by ordinary process had not been served while that sent by registered post had been received back with the report of the

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postman that the respondent (petitioner-tenant herein) had refused to take the summons on 18-08-09. In view of that report of the postman the trial Court recorded that the tenant was deemed to have been served with the summons on 18-08-09 but adjourned the case to 24-09-09 since by that time the prescribed period of fifteen days for filing leave to contest application by the tenant was not over. On 24-09-09 eviction order was passed against the petitioner-tenant because of her failure to apply for leave to defend the eviction petition within the prescribed period of fifteen days from 18th August, 2009.

3. The petitioner-tenant claims that she came to know about the eviction petition filed against her and the eviction order dated 24-09-2009 only on 20-07-10 when the bailiff came to the tenanted premises to get its possession delivered to the landlady which he was persuaded not to do that day. Then she approached the trial Court with an application under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure on 21-07-10 for the setting aside the eviction order on the ground that no summons were tendered to her and so there was no question of her refusing to accept the same. That application, however, was rejected by the trial Court vide its order

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dated 06.04.11 on the ground that application Order IX Rule 13 CPC was not maintainable for setting aside the eviction order in view of the judgments of the Hon'ble Supreme Court in "*Prithipal Singh vs Satpal Singh*",(2010) 2 SCC 15 and "*Om Parkash vs Ashwani Kumar Bassi*", (2010) 9 SCC 183. The trial Court thus did not go into the merits of the plea of the petitioner-tenant that she was never tendered the summons and thereby the doors of justice were shut for her. Hence, she has knocked the doors of this Court for getting justice, which she claims to have been denied to her by the learned Rent Controller.

4. As far as the two decisions of the Supreme Court relied upon by the learned trial Court while refusing to set aside the eviction order are concerned they are not applicable in the present case since in both those cases the tenant had undisputedly received the summons of the eviction petition of the landlord filed on the ground of *bona fide* requirement of the tenanted premises but the application for leave to defend was filed beyond the prescribed period along with an application for condonation of delay in moving the leave application. In those circumstances the Supreme Court had held that the Rent Controller has no jurisdiction to entertain the leave application after condoning the delay

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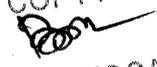
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in filing the same. However, in the case in hand, no condonation of delay was sought by the petitioner-tenant in moving the leave to defend application but setting aside of the eviction order was sought on the ground that she had not been served at all with any summons of the eviction petition and she had come to know about the eviction order only when the bailiff had come to the tenanted premises to execute the same.

5. The trial Court has, however, not gone into this plea of the petitioner-tenant. Whenever, this kind of a plea is taken by the litigants in judicial proceedings the Courts normally hold an enquiry during which opportunity is given to the litigant claiming that he/she had never refused to accept the summons to substantiate that plea. However, no such enquiry was conducted by the learned Additional Rent Controller in the present case. During the course of hearing of this petition it was put to Shri Ravinder Sethi, learned senior counsel for the respondent – landlady, whether a litigant facing an eviction order on the basis of a report of the postman that he had refused to accept the postal article containing the summons cannot plead at all that the report of the postman was not correct, as is the plea taken here by the petitioner – tenant, the counsel very fairly did not claim that a litigant would

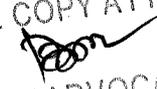
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be without any remedy and the plea that the summons were never tendered by the postman can be gone into but at the same time he contended that in the facts and circumstances of the present case no fault can be found with the decision of the learned Additional Rent Controller in accepting the postman's report of refusal by the petitioner – tenant to accept the summons sent to her by registered post.

6. I am also of the view that no litigant can be rendered without any remedy in such a situation in which the petitioner in the present case is finding herself. I am also of the view that to go into the question whether or not the petitioner – tenant had refused to accept the summons when tendered to her by the postman should have been gone into by the trial Court itself and this Court need not go into that question in this revision petition as was contended by Mr. Sethi. There is no doubt that when the learned trial Court had before it the report of the postman that the petitioner herein had refused to accept the postal article it could have come to the conclusion that the summons had been duly served upon the petitioner – tenant, as has actually been done in the present case. However, this presumption of due service of summons upon the petitioner – tenant was a rebuttable presumption which could be rebutted by

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the petitioner – tenant in the event of her getting an opportunity for that purpose from the trial Court and that opportunity should have been given to her by the trial Court and if thereafter also it had come to the conclusion that there was a valid service of summons upon the petitioner – tenant the eviction order could have been maintained but in case the Court had given the finding that postman's report was false then it would clearly have been a case of a manipulated report, as is being contended by the petitioner here in her revision petition. Such kind of manipulations are covered under the expression 'fraud' and it is now well settled that fraud vitiates even judicial orders which can be re-called on fraud being established even by the Court which had passed the same. Thus, the trial Court's view that it had no jurisdiction to go into the said plea of the petitioner – tenant was, therefore, not the correct view to be taken.

7. At this stage, a useful reference can be made to a decision of the Supreme Court in "United India Insurance Co. Ltd. v. Rajendra Singh and Ors."; (2000)3SCC581, wherein it was held that if a litigant claims before any Court that the opposite side had obtained some order from the Court by playing fraud then no Court or Tribunal can be regarded as powerless to recall

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its own order if it is satisfied that fraud had actually been played in the matter.

The relevant observations of the Supreme Court are to be found in paras no. 2

to 4, 12, 13 and 17 which are reproduced below:

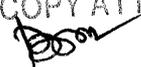
"2. If what the appellant-Insurance Company now says is true, then a rank fraud had been played by two claimants and wangled two separate Awards from a Motor Accident Claims Tribunal for a bulk sum. But neither the Tribunal nor the High Court of Allahabad, before which the Insurance Company approached for annulling the awards, opened the door but expressed helplessness even to look into the matter and hence the Insurance Company has filed these appeals by Special leave.

3. Fraud and justice never dwell together." (Franc et jus nunquam cohabitant) is a pristine maxim which has never lost its temper over all these centuries. Lord Denning observed in a language without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for, fraud unravels everything" (Lazarus Estae Ltd. v. Beasley 1956 (1) QB 702

4. For a High Court in India to say that it has no power even to consider the contention that the awards secured are the byproducts of stark fraud played on a Tribunal, the plenary power conferred on the High Court by the Constitution may become a mirage and people's faith in the efficacy of the High Courts would corrode. We would have appreciated if the Tribunal or at least the High Court had considered the plea and found them unsustainable on merits, if they are meritless. But when the Courts preempted the Insurance Company by slamming the doors against them, this Court has to step in and salvage the situation.

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12. Thus the Tribunal refused to open the door to the appellant Company as the High Court declined to exercise its writ jurisdiction which is almost plenary for which no statutory constrictions could possibly be imposed. If a party complaining of fraud having been practised on him as well as on the Court by another party resulting in a decree, cannot avail himself of the remedy of review or even the writ jurisdiction of the High Court, what else is the alternative remedy for him? Is he to surrender to the product of the fraud and thereby became a conduit to enrich the imposter unjustly? Learned single Judge who indicated some other alternative remedy did not

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unfortunately spell out what is the other remedy which the appellant Insurance Company could pursue with.

13. No one can possibly fault the Insurance Company for persistently pursuing the matter up to this Court because they are dealing with public money. If they have discovered that such public fund, in a whopping measure, would be knocked off fraudulently through a fake claim, there is full justification for the Insurance Company in approaching the Tribunal itself first. At any rate the High Court ought not have refused to consider their grievances. What is the legal remedy when a party to a judgment or order of Court later discovered that it was obtained by fraud?

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17. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No Court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

(emphasis laid)

8. I am, therefore, of the view that this petition deserves to be allowed.

The impugned order of the learned Additional Rent Controller refusing to entertain the petitioner's application for recalling of the eviction order dated 24th September, 2009 is set aside. The matter is remanded back to the trial Court for disposal of the petitioner's application on merits after giving opportunity to the parties to adduce necessary evidence in support of their respective pleas.

9. The parties shall now appear before the trial Court on 26th September, 2011 at 2 p.m. Till the disposal of the petitioner – tenant's application for

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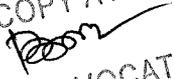
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recalling of the eviction order, which was rejected by the trial Court vide its order dated 06.04.11, the execution proceedings shall remain in abeyance.

P.K. BHASIN, J

September 12, 2011
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