K. GURUPRASAD RAO

v.

STATE OF KARNATAKA AND OTHERS

(Civil Appeal No. 4823 of 2013)

JULY 01, 2013

[G.S. SINGHVI AND RANJANA PRAKASH DESAI, JJ.]

Ancient Monuments and Archaeological Sites and Remains Act, 1958/ Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1961 – Rules framed under – Mining operations – In the protected area around 'Protected Monuments' declared under the Central and the State Acts – Permissibility – Extent of – Writ petition in public interest praying for cancellation of mining lease and stopping of mining operations within a radius of one kilometer from Jambunatha Temple which was declared as a protected monument under State Act – Objection to the petition on the ground that the mining operation was in terms of the Mines and Minerals (Development and Regulation) Act, 1957 and the Rules framed thereunder – Petition dismissed by High Court – Appeal to Supreme Court – Constitution of Expert Committee by the Court – The Committee gave a finding that the mining activities using blasting operations at a distance of less than 200 meters from the temple has already caused irreparable damage to the temple – The Committee made suggestions that the area surrounding the temple should be divided into two zones, i.e., Core Zone and Buffer Zone and there shall be total ban on mining within the Core Zone while mining be permitted in the Buffer Zone under the supervision of an expert body/agency – Held: Mining operations in the vicinity of protected ancient and historical monuments and archaeological sites are regulated by 1958 Act (Central Act) or the State Act (1961 Act) and Rules made thereunder, and not by 1957 Act or the rules

made thereunder – In the present case mining operations were without permission under 1958 and 1961 Acts and the Rules framed thereunder – Hence cannot be allowed to operate mines in the protected/regulated area – Recommendation of Expert Committee accepted and State Government directed to implement the recommendations – Direction to Expert Committee to undertake similar exercise, as in the present case, in respect of other protected monuments in the State, having mining operations in their vicinity and submit its report to State Government – Central Government also directed to appoint an Expert Committee to examine impact of mining on protected monuments under 1958 Act – Ancient Monuments and Archaeological Sites and Remains Rules, 1959 – r. 10 – Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Rules, 1966 – rr. 11 to 15 – Mines and Minerals (Development and Regulation) Act, 1957 – Mineral Concession Rules, 1961 – Mineral Conservation and Development Rules, 1988 – Constitution of India – Directive Principles – Art. 49.

Protection of Ancient Monuments – Mining activities around protected ancient monuments – Ban on – Effect of – On right to development – Held: Right to developmental includes whole spectrum of civil, cultural, economic, political and social process for the improvement of people's well being and realization of their full potential – In view of the principle of sustainable development, the protection of ancient monuments has necessarily to be kept in mind, while carrying out development activities – Principle of sustainable development.

Public Interest Litigation – Power of Supreme Court – To issue directions, which may appear to be contrary to the statutes – Scope of.

Res Judicata – Applicability of – Held: In absence of

record of the previous proceedings, principle of res judicata cannot be applied in the present case.

Jambunatha Temple, which was built in the year 1540 on Jambunath Hill in the State of Kerala, was declared as a 'Protected Monument' by the Government of Karnataka u/s. 4 of Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1961. By a Notification dated 13.9.1991 an area of 9 acres 12 cents on all four sides of the Temple was declared as a 'Protected Area'. By another Notification dated 7.12.1996, the State Government declared an area within the radius of 200 meters from the periphery and precincts of the Temple a 'Safe Zone' where no mining activity could be conducted. The Director of Ancient Monuments after inspecting the Temple in 2003, found that mining activity was causing damage to the structure of the Temple. Thereafter, notice was issued by Asstt. Commissioner Endowments to Respondent No. 4, (mining lease-holder) to stop mining activities within a radius of one kilometer from the temple. On the other hand Ministry of Environment and Forests, of Central Government accorded permission to respondent No. 4 to increase the production of ironore from 0.6 million tonnes per annum to 1.5 million tonnes.

The appellant filed writ petition before High Court in public interest and prayed for cancellation of mining lease granted to respondent No. 4 and for issuing mandamus to the official respondent to stop mining activity within a radius of one kilometer from the temple. He also sought for direction to the official of Archaeological Survey of India (respondent No.9) to take steps for restoration of the Temple to its original state.

Respondent No. 4 filed objection stating that the petition was barred by *res judicata* as a writ petition with similar prayer was dismissed by the High Court and that

order had attained finality. He further took the plea that no blasting operations were being conducted within 200 meters radius of the temple and precautionary measures were taken to prevent any damage to the temple. High Court directed official respondents to submit a report as to whether the area on which respondent No. 4 was carrying on mining operation was located within the prohibitory distance of 200 meters. The report was submitted stating that no mining was done within 200 meters radius of the Temple. The High Court, accepting the report, dismissed the writ petition. Hence the present appeal.

Objections were filed in the appeal that the mining was being done as per the provisions of the Mines and Minerals (Development and Regulations) Act, 1957, the Mineral Concession Rules, 1961 and Minerals Conservation and Development Rules, 1988.

During pendency of the appeal, the Court directed respondent No. 9 to inspect the site of the temple. After inspection of the site on behalf of respondent No. 9, Inspection report was submitted showing damage caused to the Temple due to mining activities. The Court also ordered impleadment of the Superintending Archaeologist of the State of Karnataka, and other mining industries doing mining operations in the area and stayed the mining operations within a radius of 2 kilometers from the temple.

The Court further appointed an Expert Committee. The Committee further took help from Central Institute of Mining and Fuel Research for determination of safe blasting parameters to avoid damage to the Temple, and National Institute of Technology, Karnataka for assessment of the impact of the blasting operations carried out in iron-ore mines on the Temple and safe

limiting distance for blasting activity in mines. The two institutes after carrying out scientific investigations submitted their reports to the Expert Committee. Thereafter the Committee submitted its report to the Court. The objections to the report of the Expert Committee were also filed.

Allowing the appeal, the Court

HELD: 1. There is no valid ground to entertain the objection of res judicata because the official and private respondents have not filed the pleadings of Writ Petition on the same issue, which is said to have been dismissed by the High Court and without going through the same, it is not possible for this Court to record a finding that the appellant should be non-suited because a similar petition had been dismissed by the High Court. [Para 63] [662-G-H]

2.1. None of the provisions contained in the Mines and Minerals (Development and Regulations) Act, 1957 and the Rules framed thereunder regulate mining operations/activities in the vicinity of ancient and historical monuments and archaeological sites. This subject is exclusively governed by the Ancient Monuments and Archaeological Sites and Remains, Act, 1957 and similar enactments made by the State Legislatures including the Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1961. Like the 1958 Act, the Karnataka Act also provides for declaration by the Government of any ancient monument as a "Protected Monument". Both the Central Government and the State Government have framed rules for grant of permission/licence in the prescribed form to undertake any mining operations in a protected and/or regulated area. Rule 10 of the Ancient Monuments and Archaeological Sites and Remains Rules,1959 which has been framed under Section 38 of the 1958 Act and Rules 11 to 15 of the Karnataka Ancient

and Historical Monuments and Archaeological Sites and Remains Rules, 1966 provide that no person shall undertake any mining operations in a regulated area other than on the strength of a licence granted by the competent authority, i.e., the Director. The material placed on record of this appeal does not show that the private respondents have obtained such licence under the Karnataka Rules for permission to undertake mining operations within the prohibited and/or regulated area. Therefore, they cannot be allowed to operate mines in the protected and/or regulated area. [Para 68] [665-B-E]

2.2. The plea of the private respondents that the report of the Expert Committee should not be accepted because the same is contrary to the recommendations made by the two expert bodies i.e. Central Institute of Mining and Fuel Research (CIMFR) and National Institute of Technology, Karnataka (NIT) is not acceptable because the Committee had thoroughly scrutinised the reports sent by the two expert bodies, then decided that the area surrounding the temple should be divided into two zones, i.e., Core Zone and Buffer Zone and there shall be total ban on mining within the Core Zone while mining be permitted in the Buffer Zone under the supervision of an expert body/agency. [Para 69] [665-F-H; 666-A]

2.3. The Expert Committee availed the services of Indian National Trust for Arts and Cultural Heritage (INTACH), Bangalore, Karnataka Remote Sensing Application Centre, ISRO, CIMFR, Dhanbad and NIT. In paragraph IV of its report under the heading DISCUSSIONS, the Committee unanimously agreed that the mining operations carried out using blasting operations at a distance of less than 200 meters from the temple have already caused irreparable damage to the temple and the eco-environs of its immediate neighbourhood. The Committee n

submitted by Karnataka Remote Sensing Application Centre, ISRO, Bangalore dealt with the mining activities carried out within a radius of one kilometer and two kilometers and illustrated the damage caused to the temple and its immediate environs. The Committee then discussed the conservation plan prepared by INTACH, Bangalore and observed that a sum of Rs.3,43,19,160 would be required for bringing the temple to its original condition so that the same may regain its past glory. The Committee then noted that the investigating agencies, i.e., CIMFR, Dhanbad and NIT had conducted experimental blasts beyond 200 meters whereas Karnataka Remote Sensing Application Centre had indicated that one of the mines exists within a horizontal distance of 55 meters from the temple premises on the eastern side and, thus, the impact of blasting operation cannot be fully understood and assessed scientifically by the present investigation. The Committee also observed that many of the trial blasts conducted by the investigating agencies had locations having free faces of the working benches and opined that the result of such investigation would show minimum or no impact on architecturally sensitive temple. The Committee finally declined to accept the suggestions given by CIMFR, Dhanbad and NIT to restrict the mining operations/activities only up to a distance of 200 to 300 meters from the temple because the data recorded by the expert bodies were based on experimental blasts conducted at individual sites and there was no evaluation/assessment of the cumulative or compounded impact of multiple blasting at different places and altitudes. The Committee noted that the mining operations involving multiple blasting by different leaseholders had already caused substantial damage to the protected monument and the surrounding environment. [Para 87] [688-G-H; 689-A-H]

2.4. The detailed reasons recorded by the Committee,

for not accepting the recommendations of the expert bodies about the distance up to which mining should not be allowed are correct and those recommendations cannot be relied upon for accepting the plea that the recommendations made by the Expert Committee should be rejected. [Para 88] [690-A-B]

2.5. The Committee's recommendations are not in conflict with the provisions of the 1957 Act and the Rules framed thereunder. The 1959 Rules and the Karnataka Rules provide for grant of permission/licence for mining in the prohibited/regulated/protected area but the documents produced before this Court do not show that the competent authority had granted permission/licence to any of the private respondents for undertaking mining operations which have the effect of damaging the temple in question. That apart, the distance criteria prescribed in the 1958 Act, the Karnataka Act and the Rules framed thereunder has little or no bearing on deciding the question of restricting the mining operations near the protected monument which has already suffered extensive damage due to such operations. [Para 88] [690-C-E]

2.6. The plea that ban on mining operations/activities in the Core Zone would adversely impact iron ore supply and will also cause financial loss to the leaseholders as well as the State is liable to be rejected, keeping in view larger public interest and the interest of future generations. This Court has often used the principle of sustainable development to balance the requirement of development and environmental protection and issued several directions for protection of natural resources including air, water, forest, flora and fauna as also wildlife. The Court has also recognized that the right to development includes the whole spectrum of civil, cultural, economic, political and so

improvement of peoples well being and realization of their full potential. [Para 89] [690-F-H; 691-A]

Indian Council for Enviro-Legal Action vs. Union of India **(1996) 5 SCC 281: 1996 (1) Suppl. SCR 507;** *Vellore Citizens' Welfare Forum vs. Union of India* **(1996) 5 SCC 647: 1996 (5) Suppl. SCR 241;** *Amritlal Athubhai Shah vs. Union Government of India* **(1976) 4 SCC 108: 1977 (1) SCR 372 – relied on.**

2.7. Thus, the protection of ancient monuments has necessarily to be kept in mind while carrying out development activities. The need for ensuring protection and preservation of the ancient monuments for the benefit of future generations has to be balanced with the benefits which may accrue from mining and other development related activities. Therefore, the recommendations and suggestions made by the Expert Committee for creation of Core Zone and Buffer Zone appropriately create this balance. While mining activity is sure to create financial wealth for the leaseholders and also the State, the immense cultural and historic wealth, not to mention the wealth of information which the temple provides cannot be ignored and every effort has to be made to protect the temple. [Para 91] [693-G-H; 694-A-B]

2.8. The plea that mining can be permitted beyond the distance of 300 meters from the temple by using Ripper Dozer and Rock Breaker machines (as the use of Ripper Dozer and Rock Breaker will not produce vibration which may cause harm to the temple), is not liable to be accepted. The Expert Committee has already indicated that mining in the Buffer Zone may be permitted with controlled blasting or without blasting by using Ripper Dozer/Rock Breaker or any other machinery and taking adequate measures towards generation, propagation, suppression and deposition of airborne dust to be closely monitored by experts. [Para 92] [694-C-E]

2.9. The report of the Expert Committee is accepted and the State Government is directed to implement the recommendations contained in Part V thereof including the recommendation relating to creation of Corpus Fund of Rs.3,43,19,160 which shall be utilized for implementing the conservation plan for the temple. However, it is made clear that respondent No.18 shall be free to operate the Beneficiation plant, subject to the condition that it shall procure raw material only through E-auction mode. [Para 93] [694-F-G]

3.1. With a view to ensure that other protected monuments in the State do not suffer the fate of the temple, it is directed that the Expert Committee appointed by this Court shall undertake similar exercise in respect of other protected monuments in the State, in whose vicinity mining operations are being undertaken and submit report to the State Government within a maximum period of nine months. The State Government shall release a sum of Rs.30 lacs in favour of the Committee to meet the expenses of survey, investigation etc. The report submitted by the Committee shall be considered by the Government within next two months and appropriate order be passed. [Para 94] [694-H; 695-A-C]

3.2. Government of India will also appoint an expert committee/group to examine the impact of mining on the monuments declared as protected monuments under the 1958 Act and take necessary remedial measures. [Para 95] [695-D]

Bandhua Mukti Morcha vs. Union of India **(1984) 3 SCC 161: 1984 (2) SCR 67;** *Rural Litigation and Entitlement Kendra vs. State of U.P* **(1985) 2 SCC 431: 1985 (3) SCR 169;** *State of Bihar vs. Murad Ali Khan* **(1988) 4 SCC 655: 1988 (3) Suppl. SCR 455;** *Tarun Bharat Sangh vs. Union of India* **1992 Supp (2) SCC 448;** *M.C. Mehta vs. Union of India* **(1996) 8 SCC 462: 1996 (2) Suppl. S** *a*

(Taj Trapezium Matter) vs. Union of India **(1997) 2 SCC 353: 1996 (10) Suppl. SCR 973;** *M.C. Mehta (Taj Trapezium Pollution) vs. Union of India* **(2001) 9 SCC 235;** M.C. Mehta vs. Union of India ***(2004) 12 SCC 118*: 2004 (3) SCR 128;** *Ambica Quarry Works vs. State of Gujarat* **(1987) 1 SCC 213: 1987 (1) SCR 562;** *M.C. Mehta vs. Union of India* **(2009) 6 SCC 142;** *Supreme Court Bar Association vs. Union of India* **(1998) 4 SCC 409: 1998 (2) SCR 795;** *M.C. Mehta vs. Union of India* **(1987) 1 SCC 395: 1987 (1) SCR 819;** *Orissa Mining Corporation Ltd. vs. Ministry of Environment and Forest* **2013 (6) SCC 476 – relied on.**

Essar Oil Ltd. vs. Halar Utkarsh Samiti **(2004) 2 SCC 392: 2004 (1) SCR 808 – referred to.**

Case Law Reference:

2004 (1) SCR 808	**Paras 70, 73**
1996 (1) Suppl. SCR 507	**Para 71**
1996 (5) Suppl. SCR 241	**Para 72**
1984 (2) SCR 67	**Para 74**
1985 (3) SCR 169	**Para 75**
1988 (3) Suppl. SCR 455	**Para 76**
1992 Supp (2) SCC 448	**Para 77**
1996 (2) Suppl. SCR 806	**Para 78**
1996 (10) Suppl. SCR 973	**Para 79**
(2001) 9 SCC 235	**Para 80**
2004 (3) SCR 128	**Para 81**
1987 (1) SCR 562	**Para 81**
(2009) 6 SCC 142	**Para 82**

1998 (2) SCR 795	**Para 84**
1987 (1) SCR 819	**Para 85**
2013 (6) SCC 476	**Para 90**
1977 (1) SCR 372	**Para 90**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4823 of 2013.

From the Judgment & Order dated 06.08.2009 of the High Court of Karnataka at Bangalore in WP No. 9512 of 2009.

U.U. Lalit, G.V. Chandrashekar, N.K. Verma, Sandeep Narain, Balaji Srinivasan, Jaikriti S. Jadeja, A.D.N. Rao, Anitha Shenoy, Kiran Suri, S.J. Amith, Nakibur Rahman Barbhuiya, Ranjana Narayan, Gaurav Sharma, S.K. Kulkuarni, Ankur S. Kulkarni for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

2. With the hope of their immortalization, several Emperors, Kings and other rich people got built temples, churches, mosques and other buildings in different parts of the world including India. Many of these structures are not only marvels of architecture, but also represent the culture and heritage of the particular place and period. With the passage of time, these structures acquired the status of historical monuments, the preservation and protection of which has become a herculean task for successive generations.

Legislations in other countries

3. The issue of preservation and protection of ancient and historical monuments has been a matter of concern for the Governments and private individuals alike. In his work titled Preserving Archaeological Sites and

Cleere, World Heritage Coordinator, International Council on Monuments and Sites, Paris and Visiting Professor, Institute of Archaeology UCL, London has mentioned that the first law on the subject was enacted in Sweden in 1666 and professional agencies were set up to implement the same. Several other countries enacted similar legislative instruments in 17th and 18th centuries. The United Kingdom enacted first Ancient Monuments Protection Act in 1882. France did so in 1913. The earliest Japanese legislation, the Law for the Preservation of Ancient Temples and Shrines, was enacted in 1897 and the United States waited until 1906 before its Federal Antiquities Act came into force. Their pre-hispanic civilizations were highly symbolic for the cultural identities of the countries that emerged after the independence struggles in Latin America during the first half of the nineteenth century, just as its Hellenic past grandeur was the material expression of Greek national identity. It is therefore not surprising that preservation of the remains of these cultures was given a high priority by the new nations. In 1821, Mexico passed the first law to preserve and protect the country's archaeological heritage. In the same year Peru shook itself free from Spanish rule and in 1822 a Supreme Decree was published, forbidding any trade in ancient relics.

4. By the outbreak of World War I in 1914 almost every European country (with the notable exception of Belgium) and most of the major countries around the world had some form of antiquities protection and preservation legislation. Legislation had also been introduced by European colonial powers in many of their overseas territories; in some cases, such as France, the metropolitan statutes were enforced in their colonies.

5. The Treaty of Versailles saw more new nations being created in Europe, and here once again preservation legislation was introduced soon after their constitutions had been approved, usually based on the systems of the major

countries such as Austria-Hungary from which they had been formed.

6. The inter-war period saw legislative protection being progressively amended and expanded in many parts of the world. New antiquities laws were enacted in Denmark, Greece, and the United Kingdom in the 1930s. Two major statutes, covering the protection of the cultural and natural heritage respectively, were promulgated in Italy by the Fascist regime just before the outbreak of World War II; interestingly, both are still force in 2001.

7. The 1897 Japanese law was extended to all "national treasures" in 1929. The current legislation relating to the cultural heritage in Peru stems from a basic law passed in 1929, and a 1927 law covers the cultural heritage of Bolivia.

8. The creation of the USSR and the introduction of a socialist constitution led to state ownership of all cultural property being declared in a fundamental law of October 1918. (Unlike the laws of countries emerging from colonial domination, this was motivated for ideological reasons rather than in the interests of cultural identity.) The antiquities legislation of all the countries of the post-World War II socialist bloc of central and eastern Europe, as well as that of other socialist countries such as the People's Republic of China, North Korea, Vietnam, and Cuba, were modeled on the basic Soviet legislation.

9. The former colonial territories of Africa and Asia introduced protective legislation, often modeled on that of their former overlords, as soon as they achieved independence. The former British colonies in particular adopted similar laws, based on what became known as the "Westminster Model" constitution. The legislation of the British Raj was retained until improved legislative protection of the cultural heritage of India was introduced.

10. The second half of the twentieth century witnessed a continuous process of extending and improving heritage legislation across the globe. New or amended laws have been adopted by national legislatures of at least one country each year. At the international level work began between the two World Wars by the League of Nations which resulted in organization by the United Nations Educational, Scientific and Cultural Organization (UNESCO) of two important international conventions designed to protect and preserve the cultural heritage, whether cultural, natural, or portable. Regional bodies such as the Council of Europe prepared similar conventions.

11. In 1972, UNESCO held the World Heritage Convention. One of the decisions taken in that convention was to appoint World Heritage Committee with the task of identifying the World Heritage Sites which were in danger. This was intended to increase the international awareness about the threat posed to certain World Heritage Sites and to encourage counteractive measures. In the case of natural sites, ascertained dangers include the serious decline in the population of an endangered or other valuable species or the deterioration of natural beauty or scientific value of a property by man-made activities such as logging, pollution, human settlement, mining, agriculture and major public works. Ascertained dangers for cultural properties include serious deterioration of materials, structure, ornaments or architectural coherence and the loss of historical authenticity or cultural significance. Potential dangers for both cultural and natural sites include development projects, armed conflicts, insufficient management systems or changes in the legal protective status of the property. In the case of cultural sites gradual changes due to geology, climate or environment can also be potential dangers.

12. In India, the legal regime dates back to 18th century. The Governments of Bengal, Hyderabad, Madras and Mysore enacted the Bengal Regulation XIX of 1810, the Hyderabad

Ancient Monuments Preservation Act VIII of 1337 Fasli, the Madras Regulation VII of 1817 respectively. In the 19th century, the Government of Mysore enacted the Mysore Ancient Monuments Preservation Act, 1925. The extent and reach of these statutes were obviously limited to the territories of the concerned States.

13. In 1898, the question of antiquarian exploration and research, and the necessity of taking steps for the protection of monuments and relics of antiquity within the territory controlled by the British, received the attention of the then Government. After consulting the Local Governments, the competent legislature enacted the Ancient Monuments Preservation Act, 1904 (for short, 'the 1904 Act'). The anxiety of the Government to protect monuments which were under its control and also those which were in the hands of private owners is reflected in paragraph 3 of the Statement of Objects and Reasons contained in the Bill which led to the enactment of the 1904 Act. The same reads as under:

> "3. The first portion of the Bill deals with protection of "Ancient monuments" an expression which has been defined in clause 2 (now section 2). The measure will apply only to such of these as are from time to time expressly brought within its contents though being declared to be "protected monuments". A greater number of more famous buildings in India are already in possession or under the control of the Government; but there are others worthy of preservation which are in the hands of private owners. Some of these have already been insured or are fast falling into decay. The preservation of these is the chief object of the clause of the Bill now referred to and the provisions of the Bill are in general accordance with the policy enunciated in section 23 of the Religious Endowments Act, 1863 (20 of 1863), which recognises and saves the right of the Government "to prevent injury to and preserve buildings remarkable in their antiquity and

architectural value or required for the convenience of the public". The power to intervene is at present limited to cases to which section 3 of the Bengal Regulation 19 of 1810 or section 3 of the Madras Regulation VII of 1817 applies. In framing the present Bill the Government Has aimed at having the necessity of good will and securing the cooperation of the owners concerned and it hopes that the action which it is proposed to take may tend rather to the encouragement than to the suppression of private effort. The Bill provides that the owner or the manager of the building which merits greater care than it has been receiving may be invited to enter into an agreement for its protection and that in the event of his refusing to come to terms the collector may proceed to acquire it compulsorily or take proper course to secure its application. It has been made clear that there is to be no resort to compulsory acquisition in the case the monument is used in connection with religious observances or in other case until the owner has had an opportunity of entering into an agreement of the kind indicated above; and it is expressly provided that the monument maintained by the Government under the proposed Act, shall not be used for any purpose inconsistent with its character or with purpose of its foundation, and that, so far as is compatible with the object in view the public shall have access to it free of charge. By the 4th proviso of clause 11 (now section 10) it is laid down that in assessing the value of the monument for the purpose of compulsory acquisition under the Land Acquisition Act, 1894 (1 of 1894) its archaeological, artistic or historical merits shall not be taken into account. The object of the Government as purchaser being to preserve at the public expense and for the public benefit an ancient monument with all its associations, it is considered that the value of those associations should not be paid for."

14. Under the Government of India Act, 1935 the subject

"Ancient and historical monuments; archaeological monuments; archaeological sites and remains" was included in Entry 15 of the Federal List. This was done keeping in view the provisions of the 1904 Act which was applicable to all ancient monuments and objects of archaeological, historical or artistic interest.

15. The members of the Constituent Assembly, which was entrusted with the task of drafting the Constitution, were very much aware of the necessity of protecting the monuments and places/objects of artistic or historic importance but they were also conscious of the fact that the Central Government alone may not be in a position to take measures for the protection of ancient and historical monuments across the vast territory of the country. Therefore, it was decided that the States should be burdened with the responsibility of protecting the ancient and historical monuments within their territories. This is the reason why the subject relating to ancient monuments and archaeological sites and remains has been distributed into three different entries:

1. Entry 67 of the Union List - Ancient and historical monuments and records, and archaeological sites and remains, declared by or under law made by Parliament to be of national importance.

2. Entry 12 of the State List - Ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.

3. Entry 40 of the Concurrent List - Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance.

16. By incorporating Article 49 in the Directive Principles of State Policy, the framers of the Constitution made it obligatory

for the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

17. Since the 1904 Act governed all ancient monuments whether falling in the Central field or the State field and all executive powers were vested in the Central Government, it was felt that a separate legislation should be enacted by Parliament to exclusively deal with ancient monuments of national importance falling under Entry 67 of List I of the Seventh Schedule and the archaeological sites and remains falling under Entry 40 of List III. For achieving this object, Parliament enacted the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (for short, 'the 1958 Act), the preamble of which reads thus:

> "An act to provide for the preservation of ancient and historical monuments and archaeological sites and remains of national importance, for the regulation of archaeological excavations and for the protection of the sculptures, carvings and other like objects."

18. Sections 2(a), (i), (j), (4) and 38(1), (2)(a) of the 1958 Act read as under:

> "2. Definitions- In this Act, unless the context otherwise requires—
>
> (a) "ancient monument" means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock, sculpture, inscription or monolith, which is of historical, archaeological or artistic interest and which has been in existence for not less than one hundred years, and includes—
>
> (i) the remains of an ancient monument,

> (ii) the site of an ancient monument,
>
> (iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and
>
> (iv) the means of access to, and convenient inspection of an ancient monument.
>
> (i) "protected area" means any archaeological site and remains which is declared to be national importance by or under this Act.
>
> (j) "protected monument" means any ancient monument which is declared to be of national importance by or under this Act.
>
> 4. Power of Central Government to declare ancient monument, etc., to be of national importance—(1) Where the Central Government is of opinion that any ancient monument or archaeological site and remains not included in section 3 is of national importance, it may, by notification in the Official Gazette, give two months' notice of its intention to declare such ancient monument or archaeological site and remains to be of national importance, and a copy of every such notification shall be affixed in a conspicuous place near the monument or site and remains, as the case may be.
>
> (2) Any person interested in any such ancient monument or archaeological site and remains may, within two months after the issue of the notification, objects to the declaration of the monument, or the archaeological site and remains, to be of national importance.
>
> (3) On the expiry of the said period of two months, the Central Government may, after considering the objections, if any, received by it, declare by no[illegible]al

Gazette, the ancient monument or the archaeological site and remains, as the case may be, to be of national importance.

(4) A notification published under sub-section (3) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the ancient monument or archaeological site and remains to which it relates is of national importance for the purposes of this Act.

38. Power to make rules-(1) The Central Government may, by notification, in the Official Gazette and subject to the condition of previous publication, make rule for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the prohibition or regulation by licensing or otherwise of mining, quarrying, excavating, blasting or any operation of a like nature near a protected monument or the construction of buildings on land adjoining such monument and the removal of unauthorised buildings."

19. In exercise of the powers conferred by Section 38 of the 1958 Act, the Central Government made the Ancient Monuments and Archaeological Sites and Remains Rules, 1959 (for short, 'the 1959 Rules'). Rules 2(f), 10, 31 to 35 of the 1959 Rules read as under:

"2(f) "prohibited area" or "regulated area" means an area near or adjoining a protected monument which the Central Government has, by notification in the Official Gazette, declared to be a prohibited area, from as the case may be, a regulated area, for purposes of mining operation or construction or both.

10. Permission required for construction etc. (1) No person shall undertake any construction or mining operation with a protected area except under and in accordance with a permission granted in this behalf by the Central Government.

(2) Every application for permission under sub-rule (1) shall be made to the Central Government in Form I at least three months before the date of commencement of the construction or operation.

31. Notice or intention to declare a prohibited or regulated area—(1) Before declaring an area near or adjoining a protected monument to be a prohibited area or a regulated area for purposes of mining operation or construction or both, the Central Government shall, by notification in the Official Gazette, give one month's notice of its intention to do so, and a copy of such notification shall be affixed in a conspicuous place near the area.

(2) Every such notification shall specify the limits of the area which is to be so declared and shall also call for objection, if any, from interested persons.

32. Declaration of prohibited or regulated area—After the expiry of one month from the date of the notification under rule 31 and after considering the objectio9ns, if any, received within the said period, the Central Government may declare, by notification in the official Gazette, the area specified in the notification under rule 31, or any part of such area, to be a prohibited area, or as the case may be, a regulated area for purposes of mining operation or construction or both.

33. Effect of declaration of prohibited or regulated area—No person other than an archaeological officer shall undertake any mining operation or any construction

(a) in a prohibited area, or

(b) in a regulated area except under and in accordance with the terms and conditions of a licence granted by the Director-General.

34. Application for licence-Every person intending to undertake any mining operation or any construction in a regulated area shall apply to the Director-General in Form VI at least three months before the date of commencement of such operation or construction.

35.Grant or refusal of licence—(1) On receipt of an application under rule 34 the Director-General may grant a licence, or, if he is satisfied that the licence asked for should not be granted, may for reasons to be recorded, refuse to grant a licence.

(2)Every licence granted under sub-rule (1) shall be in Form VIII and be subject to the following conditions, namely—

(a) the licence shall not be transferable.

(b) It shall be valid for the period specified therein, and

(c) Any other condition relating to the manner of carrying out the mining operation or the construction which the Director-General may specify in the licence for ensuring the safety and appearance of, and the maintenance of the approach and access to the protected monument."

20. The legislatures of various States including the State of Karnataka enacted separate legislations for protection and preservation of ancient monuments falling under Entry 12 of List II of the Seventh Schedule. The Karnataka Act is titled as "The Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1961 (for short, 'the Karnataka Act'). The Statement of Objects and Reasons

contained in the Bill which led to enactment of the Karnataka Act reads as under:

"STATEMENT OF OBJECTS AND REASONS

(Karnataka Act No. 7 of 1962)

Karnataka Gazette, Extraordinary, dated 1-11-1959

In the new State of Mysore, the following Acts relating to protection and preservation of ancient monuments, etc., are in force:—

(1) The Hyderabad Ancient Monuments Preservation Act, 1337F (Hyderabad Act VIII of 1337 Fasli) is in force in the Hyderabad Area;

(2) The Mysore Ancient Monuments Preservation Act, 1925 (Mysore Act IX of 1925) is in force in the Mysore Area; and

(3) The Ancient Monuments Preservation Act, 1904 (Central Act VII of 1904) is in force in all the areas of the new State of Mysore.

The Government of India have advised the State Governments not to take advantage of the provisions of the aforesaid Central Act to protect and preserve monuments and to enact their own laws on the subject.

Recently, the Government of India have enacted the Ancient Monuments and Archaeological Sites and Remains Act, 1958 covering matters falling under Entry 67 in the Union List and Entry 40 in Concurrent List of the Seventh Schedule to the Constitution of India.

The present Bill seeks to bring about uniformity in the laws relating to protection and preservation of ancient monuments falling under Entry 12 i[illegible]s,

ancient and historical monuments other than those declared by or under law made by Parliament to be of national importance.

The provisions of the Bill are on the lines of the corresponding provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958."

21. The preamble of the Karnataka Act and Sections 2(1), (10), 4, 31(1) and (2)(a), which have bearing on the disposal of this appeal read as under:

Preamble

"An act to provide for the preservation of ancient and historical monuments and Archaeological sites and remains and for the protection of sculptures, carvings and other like objects in the State of Karnataka.

Whereas, it is expedient to provide for the preservation of ancient and historical monuments and archeological sites and remains in the State of Karnataka other than those declared by or under law made by Parliament to be of national importance, and for the protection of sculptures, carvings and other like objects;"

2. Definitions.—In this Act, unless the context otherwise requires,—

(1) "Ancient monument" means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archeological or artistic interest and which has been in existence for not less than one hundred years, and includes.—

(i) the remains of an ancient monument;

(ii) the site of an ancient monument;

(iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument; and

(iv) the means of access to, and convenient inspection of, an ancient monument;

xxxx xxxx xxxx

(10) "Protected monument" means an ancient monument which is declared to be protected by or under this Act.

4. Power of Government to declare ancient monuments to be protected monuments.—(1) Where the Government is of opinion that any ancient monument should be declared as a protected monument, it may, by notification in the Official Gazette, give two months' notice of its intention to declare such ancient monument to be a protected monument and a copy of every such notification shall be affixed in a conspicuous place near the monument.

(2) Any person interested in any such ancient monument may within two months after the issue of the notification, object to the declaration of the monument to be a protected monument.

(3) On the expiry of the said period of two months, the Government may, after considering the objections, if any, received by it, declare by notification in the Official Gazette, the ancient monument to be a protected monument.

(4) A notification published under sub-section (3) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the ancient monument to which it relates is a protected monument for the purposes of this Act.

31. Power to make rules.—(1) The Government may, by notification in the Official Gazett[illegible]e

condition of previous publication, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the prohibition or regulation by licensing or otherwise of mining, quarrying, excavating, blasting or any operation of a like nature near a protected monument or the construction of buildings on land adjoining such monument and the removal of unauthorised buildings;

xxxx xxxx xxxx"

22. In exercise of the powers conferred by Section 31 of the Karnataka Act, the State Government framed the Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Rules, 1966 (for short, 'the Rules'). Rules 2(b), (f) and (g), 11, 12, 13, 14 and 15 of the Rules read as under:

"**2.Definitions. –** In these rules, unless the context otherwise requires. –

(a) xxxx xxxx xxxx

(b) "Construction" of any structure includes additions to or alterations of an existing building;

(f) "Mining operation" means any operation for the purpose of searching for or obtaining minerals and includes quarrying, excavating minerals and includes quarrying, excavating, blasting and any operation of the like nature;

(g) "prohibited area" or "Regulated area" means an area near or adjoining a protected monument which the State Government has, by notification in the Official Gazette, declared to be a prohibited area, or, as the case may be , a regulated area, for purposes of mining operation or

construction or both;

xxxx xxxx xxxx

11. Notice of intention to declare a prohibited or regulated area. - (1) before declaring an area near or adjoining a protected monument, to be a prohibited area or a regulated area for purposes or mining operation or construction or both, the Government shall, by notification in the Official Gazette, give one month's notice of its intention to do so, and a copy of such notification shall be affixed in a conspicuous place near the area.

(2) Every such notification shall specify the limit of the area which is to be so declared and shall also call for objections, if any, from interested persons.

12. Declaration of prohibited or regulated area. - After the expiry of one month from the date of the notification under rule 11 and after considering the objections, if any, received within the said period, the Government may declare, by notification in the Official Gazette, the area specified in the Notification in the under rule 11 or any part, of such area, to be a prohibited area or, as the case may be, a regulated area for purposes of mining operation or construction or both.

13. Effect of declaration of prohibited or regulated area. - No person other than the Director shall undertake any mining operation or any construction. –

(a) in a prohibited area, or

(b) in a regulated area, except under and in accordance with the terms and conditions of licence granted by the Director.

14. Application for licence. - Eve

undertake any mining operation or any construction in a regulated area shall apply to the Director in Form II at least three months before the date of commencement of such operation or construction.

15. Grant or refusal of licence. - (1) On receipt of an application under Rule 14, the Director may grant a licence or, if he is satisfied that the licence asked for should not be granted, may for reasons to be recorded, refuse to grant a licence.

(2) Every licence granted under sub-rule (1) shall be in form III and be subject to the following conditions, namely:-

(a) the licence shall not be transferable;

(b) it shall be valid for the period specified therein; and

(c) any other condition relating to the manner of carrying out the mining operation or the construction which the Director may specify in the licence for ensuring the safety and appearance of, and the maintenance of approach and access to , the protected monument."

23. Unfortunately, the greed of the present generation has taken toll not only of various national assets including historical and ancient monuments and like many wild life species, a number of monuments have become extinct because of unregulated mining activities/operations in the vicinity of such monuments and buildings representing heritage and culture of the past.

The facts

24. Jambunatheshwara Temple or Jambunatha Temple for whose protection the appellant has been making efforts for last many years was built in 1540 on Jambunath Hill which falls in Hospet Taluk, District Bellary (Karnataka). The temple was built

with massive granite blocks in typical trabeate system, characterized by the predominant use of columns and beams as main load bearing members. It is situated 4.5. kilometers southeast of Taluk Hospet, District Bellary (Karnataka) on a hillock at a height of 800 ft. and is surrounded by a range of hillocks rich in good iron-ore. The main temple facing east, consists of a garbhagriha, a sukanasi and an antarala surrounded by a closed ambulatory passage, a navaranga with two entrance mandapas and a maha ranga mandapa all enclosed by a high parakara. The temple rises over a high double adhishthana with ornate mouldings which is typical of Vijayanagara style and period. The wall of the garbhagriha and antarala is decorated with kumuda panjaras set between a pair of pilasters. The ornate eave is decorated with kudu with human heads and kirtimukhas at the top. The sanctum houses a sivalinga over a circular peetha. There are several subsidiary structures surrounding the main temple. There are modern structures built around the temple for the sake of pilgrims and devotees. To the south of the temple are two sub-shrines dedicated to Veerabhadra and Brahma respectively in front of which is a well which gets water through a perennial source from the hillock and serves the needs of the temple and pilgrims. The water from this well is believed to have medicinal and curative properties and hence considered very sacred by the pilgrims. The temple has superstructure built of brick and lime mortar over its sanctum and entrance mandapas. The pillars in the navaranga and maha ranga mandapas are typical of Vijayanagara period with their cubical mouldings depicting carvings of various divinities of Saiva, Sakta and other sects, besides social themes.

25. The temple was declared as a Protected Monument by the Government of Karnataka under Section 4 of the Karnataka Act. By notification dated 13.9.1991, an area of 9 acres 12 cents in Survey No.198 surrounded by Survey No.115-B on all four sides of the ten

'Protected Area'. By another notification dated 7.12.1996, the State Government declared an area within the radius of 200 meters from the periphery and precincts of Jambunatheswara temple as 'Safe Zone' where no mining activity could be conducted.

26. On 5.4.1952, Shri R. Gangadharappa was granted a mining lease for an area measuring 182.45 hectares near Jambunatheswara temple for extraction of iron ore for a period of 30 years. The lease was renewed on 4.2.1982 for a further period of 30 years in the name of his legal heir Sri R.Pampapathy. During the currency of lease (extended period), Sri R. Pampapathy died and his wife R.Mallamma was permitted to carry on the mining operations in the name of M/s. Aarpee Iron Ore Mines, Bellary (respondent No.4). The lessee was also granted permission under Section 2 of the Forest (Conservation) Act, 1980 (for short, 'the 1980 Act') to undertake mining operations over forest measuring 101.51 hectares.

27. In May, 2003, the Director of Ancient Monuments inspected the temple in the presence of Senior Geologist, Department of Mines and Geology, Karnataka and found that the mining activity was causing damage to the structure of the temple. Thereupon he wrote letter dated 15.7.2003 to the Assistant Commissioner, Endowments to take action for stopping the mining activities within a radius of one kilometer from the temple. Accordingly, the Assistant Commissioner sent letter dated 29.9.2003 to respondent No.4. He also issued notice dated 16.1.2004 to respondent No.4 informing the latter that if the needful is not done, action will be taken under Section 133 Cr.P.C.

28. While the officers of the Karnataka Government entrusted with the task of protecting ancient monuments were taking steps to curb the mining activities within a radius of one kilometer from the temple, the Ministry of Environment and

Forests, Government of India accorded permission to respondent No.4 to increase the production of iron ore from 0.6 million tonnes per annum to 1.5 million tonnes per annum.

29. The appellant, who is an Advocate by profession and is practicing at Hospet, Bellary, felt that unless mining activities are stopped in the vicinity of the temple, a centuries old ancient monument may be totally destroyed. Therefore, he filed Writ Petition No.9512/2009 before the Karnataka High Court in public interest and prayed for cancellation of the mining lease granted to respondent No.4 and for issue of a mandamus to the official respondents to stop mining activity within one kilometer from the temple. He further prayed for issue of a direction to Superintending Archaeologist, Archaeological Survey of India (respondent No.9) to take steps for restoration of the temple to its original state. In paragraphs 1, 2, 5 and 6 of the writ petition, the appellant made the following averments:

"1. The fourth respondent herein was granted permission for mining in Sy. No 115 in Jambhunathahalli, Hospet by the Director of Mines and Geology, the second respondent herein. In January, 2008 the Ministry of Environment and Forest has given permission for expansion of mining activity. The lease area of the mine is about 101.51 hectares. Copy of the mining lease is produced at ANNEXURE-A. The central Government has given environmental clearance for the mining operations on the basis of wrong information furnished by the third respondent. Copy of the permission given by the Ministry of Environment and Forests and for renewal of the mining lease is produced at ANNEXURE- B.

2. The fourth respondent also obtained permission for adopting a system of deep hole blasting for the mining area from the Directorate General of Mines Safety. Copy of the permission letter is produce[illegible]n

January 2008, the fourth respondent also obtained clearance for enhancement of production capacity of iron ore production from the Ministry of Environment and Forests. Copy of the permission is produced at ANNEXURE-D.

5. The mining operation conducted by the fourth respondent among others consists of blasting, which is done by wagon blasting even though permission is given for "opencast and mechanized blasting". The lessee in question has been using wagon blasting. This type of blasting is not being used and is not in vogue. The wagon blasting results in loud explosion with a deafening sound. The dust spreads to all the nearby places. On account of this, the temple has suffered the most. The column of the outer walls of the temple has turned brown on account of the soil residue settling on the walls. The explosion also causes tremors, which is felt as far as Hospet. The residents of Hospet also feel the intensity of the tremor. Needless to say, the temple, which is almost 100 meters from the mining area is bearing the brunt of these activities. The walls of the temple have cracked and may collapse if mining activities continue.

6. Inside the temple, there is a well. The water in the well is said to contain many medicinal properties. In fact, devotees throng to the temple to collect the water. However, in recent years, the water has turned brown because of the dust. The number of devotees who come to visit the temple has also been reduced to a large extent on account of mining activities and the dust pollutes the nearby areas."

30. Respondent No.4 filed objections and pleaded that the writ petition should not be entertained because Writ Petition No.27067/1998 filed with similar prayer was dismissed by the High Court on 7.8.2000 and that order has become final. It was

further pleaded that no blasting operations were being conducted within 200 meters radius of the temple and precautionary measures have been taken to prevent any damage to the temple. An additional plea taken by respondent No.4 was that the writ petition was highly belated.

31. After taking cognizance of the averments contained in the writ petition, the Division Bench of the High Court directed respondent Nos.2, 3, 8, 10, 12 and 13 (in the writ petition) to submit a report as to whether the area on which respondent No.4 is carrying on mining operation was located within the prohibitory distance of 200 meters specified in the notification issued by the State Government under the Karnataka Act. The concerned respondents inspected the site and submitted a report stating therein that no mining was being done within 200 meters from the temple. The relevant portions of the report are extracted below:

"Sub:- Brief report regarding mining activities of M/s. R. Mallamma M.L.No.1806 Hospet Taluk, Bellary District.

Ref: Head Office Telephone Message Dt. 28.05.2009.

With reference to above subject as per the directions inspected M.L.No. 1806 area along with J.E of this Office on 28.05.2009.

At time of inspection assistance mines Manager Sri. Phanikumar present on this spot. It is observed that mining lease area of M.LNo. 1806 is just running adjust to the periphery of Sri. Jambunatheshwar Temple. (Sy.No. 198). It is also observed at the time of inspection there was no mining activity in a mining pit which is located at 130 Mtr. from the temple. At present in the said lease mining operation are going on at about 1 Km. away towards East from the temple.

After verifying available recor e

Government order NO.CI.65.MMM.96 Dt. 07.12.1996 state that mining operations should beyond 200 meters away from the periphery of the temple.(Copy enclosed)

It further submitted that on 12.10.2007 this Office in the presence of revenue department and police department carried out joint inspection of M/s. R. Mallamma leased area and issued a notice to the said lease stating that they should not carry out any mining activity within 300 Mtrs. from the periphery of the temple.

Further, according to the direction from the Director of Mines and Geology vide letter No. Department of Mines and Geology/ML/1806/Permit/2007-08/6481 dated 22.02.2008 inspection was carried out and report was submitted stating that said lessee is carrying out mining activity 1.7 km. away from the periphery of the temple, (copy enclosed).

Again it is submitted that on 30.08.2008 notice was issued to the said lessee. (Copy enclosed).

This report is submitted for your kind information and further necessary action."

32. The High Court accepted the report and dismissed the writ petition without dealing with any of the issues raised by the appellant.

33. The appellant has questioned the order of the High Court primarily on the ground of non-consideration of the factual assertion made by him about the mining activity of respondent No.4 within 200 meters of the temple by Wagon Blasting Method. He has also pointed out that as per the report submitted before the High Court, respondent No.4 had dug mining pit at 130 meters from the temple resulting in erosion of the soil in and around the temple.

34. Notice of the special leave petition out of which this appeal arises was issued on 9.7.2010 and respondent Nos.1 to 3 and 6 to 8 were directed to ensure that no mining activity is undertaken or continued at the site in question.

35. In the statement of objections filed on behalf of respondent No.4, the plea of *res judicata* raised before the High Court has been reiterated and it has been averred that no mining activity is being conducted within the Safe Zone declared by the State of Government. According to respondent No.4, the mining lease deed executed in its favour restricts mining operation within a distance of 50 meters from any public structure and in the absence of any other prohibition under the Mines and Minerals (Development and Regulation) Act, 1957 (for short, 'the 1957 Act'), the Mineral Concessions Rules, 1960 or the Mineral Conservation and Development Rules, 1988, the Court cannot prohibit the carrying on of the mining operations within a radius of one kilometer from the temple in question. Respondent No.4 pointed out that several other leaseholders are carrying operation within a distance of one kilometer from the temple. Respondent No.4 also relied upon report dated 9.4.2007 prepared by Deputy Director of Mines and Geology who had inspected the site and pleaded that no damage was done to the temple due to mining operations. Respondent No.4 denied that it was doing mining by the Wagon Blasting Method and emphasized that it had employed controlled blasting method.

36. After hearing the learned counsel for the parties, this Court passed order dated 8.11.2010 and directed respondent No.9 to personally inspect the site of the temple and the area in which mining activities were going on prior to 9.7.2010 and submit a report indicating whether such activities had affected the temple. In compliance of that order, respondent No.9 made reference to M/s. CIVIL-AID Technoclinic Private Limited, Bangalore to assess the structural stability of the monument due to surrounding mining activities. Thereu[illegible]t

detailed inspection along with concerned officials in November and summarised the outcome of inspection in the following words:

"**PHYSICAL OBSERVATIONS**

Main Temple Structure:

1. Visible settlement of foundation system was observed alround the temple at various locations.
2. Non alignment was observed in plinth level stone beams in most of the locations.
3. Wide gaps were observed between the stone panel joints in most of the locations.
4. Cracks were observed in stone panels at isolated locations.
5. Wide gaps were observed in stone members at beam bearing regions in most of the locations.
6. Non alignment was observed in stone beams between the spans at ceiling level in most of the locations.
7. Cracks were observed in stone capital below the beam bearing region at various locations.
8. The wide gaps between the stone members were observed to be filed with cement mortar.
9. It is observed that recently stone members were observed to be cleaned with chemical wash.
10. WPC over the roof slab was observed to be severely deteriorated in the form of hapazardous cracks.

11. Wide cracks were observed along the stone beam line over the roof slab.
12. Severe undulations were observed over the roof slab in most of the locations.
13. Accumulation of dead leaves and growth of vegetation was observed over the roof slab at various locations.
14. No visible abnormalities was observed in well."

"Peripheral structures:

1. Absence of plinth protection was observed alround the building.
2. Severe growth of vegetation was observed alround the building.
3. Inclined cracks were observed in masonry wall at various locations.
4. Severe separation cracks were observed at the interface of wall and slab junction.
5. Debonding and spalling of plaster was observed in masonry wall at various locations.
6. Damp patches were observed in masonry walls at various locations.
7. Deterioration of WPC was observed over the roof slab."

"Inferences:

Following inferences are drawn, based on the detailed inspection:

1. The visible distress observed of

structure is essentially due to one or the combination of following factors:

- Prolonged age effect.
- Disturbance caused to the structure due to nearby mining activities.
- Inadequate/ineffective maintenance over a period of time.

2. Severe cracks observed in peripheral structures are mainly due to disturbances caused by surrounding mining activities and inadequate maintenance over a period of time."

"Recommendations:

Following recommendations are made, based on the above inferences:

1. In view of the severity of the structural/functional distress and considering structural type of temple structure, it is recommended to carryout mining activities away from temple, atleast 1 km radius around the temple to minimize the possible vibration.

   Further, it is recommended to take up the appropriate restoration of the structure, considering long term durability and safety of the structure after carrying out detailed scientific study of the structure.

2. The deteriorated WPC over the roof slab shall be removed and replaced with appropriate light weight waterproof treatment in order to relieve the loads.

3. The possible endanger to temple structure due to water storage depression in nearby in mining area shall be avoided by creating suitable drainage facility with appropriate benching and pitching to avoid possible collapse of disturbed hillock towards temple structure.

4. Periodic maintenance of the temple structure shall be adhered regularly."

The report prepared by respondent No.9 is accompanied by several photographs which provide visual evidence of the damage caused to the temple due to mining activities.

37. On 14.1.2011, the Court ordered impleadment of the Superintending Archaeologist of the State of Karnataka as a party and directed him to file an affidavit on the present status of the temple specifying therein whether the mining activities have already damaged the same. Simultaneously, respondent No.9 was directed to indicate whether other lessees were carrying on mining operations in the vicinity of the temple and disclose their names.

38. By an order dated 11.3.2011, the Court ordered impleadment of M/s. Mysore Minerals Ltd., Smt.R. Mallamma, Sri R.J. Pattabhiramaih, Sri Allam Basavaraj, M/s. R.B.S.S.N. Das, Sri R. Charuchandra, Sri H.N. Prem Kumar and M/s Kariganur Mineral Mining Industries as parties and also stayed mining operations within a radius of 2 kilometers from the temple.

39. After service of notice, respondent No.4 filed statement of objections on 31.8.2010, respondent Nos. 1 to 3 and 5 filed their objections on 24.9.2011, respondent No.9 filed affidavit dated 2.10.2010, respondent No.7 filed counter affidavit dated 5.1.2011, respondent No.14 filed affidavit dated 17.2.2011 and respondent No.18 filed counter affidavit dated 15.4.2011.

40. In the statement of objections filed on behalf of respondent No.4, the maintainability of the appeal has been questioned on the ground that similar i

before the High Court in Writ Petition No. 27027 of 1998 and the same was dismissed vide order dated 7.8.2000. Respondent No.4 has also accused the appellant of seeking the Court's intervention after a long time gap of 27 years. On merits, the case of respondent No.4 is that mining activity is being done strictly in accordance with the provisions of the 1957 Act, the Mineral Concession Rules, 1960 and the Mineral Conservation and Development Rules, 1988 and they do not contain any prohibition on mining operations within a radius of one kilometer from the temple. Respondent No.4 has also relied upon report dated 9.4.2007 prepared by Deputy Director of Mines and Geology and averred that no damage has been caused to the temple due to mining operations. It is also the case of respondent No.4 that mining is being done by controlled blasting and not by Wagon Blasting Method.

41. The thrust of the objections, affidavits and counter affidavits filed by other respondents is that mining is being done as per the provisions of the 1957 Act and the Rules framed thereunder and there is no legal justification for imposing any restriction in violation of that Act and the Rules.

42. One significant aspect of the pleadings which deserves to be mentioned at this stage is that the State of Karnataka and its officers have taken contradictory stands on the issue of the nature of mining operations undertaken by respondent No.4. While respondent Nos. 1 to 3 and 5 have claimed that respondent No.4 has been carrying out mining by controlled blasting in accordance with the permission granted by the Director General of Mines Safety and not by the Wagon Blasting Method, in affidavit dated 14.2.2011 filed by him, Shri B.M. Chikkamaregowda, Deputy Director, Department of Archaeology and Museums, Kamalapur, Hospet Taluk, Bellary District has unequivocally contradicted this by making the following statement:

"4. I further humbly submit that, during the inspection, it was

observed that the mining activity has been carried out to the east south-east of the temple at a distance of less than 100 meters from the periphery of the temple and extending further to the east and south-east Plate IV (a) & (b). It appears that initially the mining was carried out nearer to the temple continually over a period of decades which has resulted in the formation of a huge crater at about a distance of 100 meters from the temple on the east and later on the mining activity has been extended further east clearly indicated by the stepped terrace formation in a semi-circular pattern surrounding the crater Plate V (a) & (b). Now only a high and narrow ridge divides the temple and the crater. Due to continuous mining, the depth of the crater has reached almost the level of the temple foundation and has become the source of accumulation of rain water as well as rise in sub-soil water level. This has resulted in the underground seepage of water towards the temple which is evidenced by dampness in some of the subsidiary shrines on the southern side.

5. I further submit that as per the Gazette Notification, an area of 9 aces 12 cents in Survey Number 198 surrounded by on all four sides by Sy.No.115-B, has been declared as protected area and in the absence of clear demarcation of the protected boundary, it could not be ascertained whether the mining activity encroached the protected area also. However, it is certain that the mining activity was carried out in the prohibited area within a distance of 80. As per the provisions of the Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1991 (Karnataka Act of 1962), under Section 20, no construction or mining, quarrying, excavating, Wasting or any operation of a like nature is permitted without the permission of the Government. The Director, Department of Archaeology and Museums, Government of Karnataka who was present during the inspection has informed that no suc[illegible]n

given by the Department for carrying out mining operation within the notified zones. As per the records made available by the State, Department of Archaeology, as early as 3rd March 2004, the Deputy Director, Department of Archaeology and Museums, Government of Karnataka, posted at Kamalapura had written to his Directorate office in Mysore that during his spot inspection along with Shri T.M. Manjunathaiah, Technical Assistant, on 27th February 2004 witnessed the mining activity going on in the vicinity of the temple by using explosives (wagon blasting). He also informed that the felt tremors due to the explosion in the temple while he was inspecting the temple. He also noticed cracks on the walls and roof due to the impact of the explosion. He reported that the lessee who was carrying out the mining was doing repairs in the form of plastering and cement coating to cover up the cracks on the ancient temple. He informed the temple priests about the damage being caused due to such unscientific methods of repair which had affected the architectural style of the ancient temple and asked them to stop at once such works. He has recorded in his letter that the temple is getting seriously damaged due to mining activity and the temple is wholly discoloured.

6. I further humbly state that this discoloration is obviously due to the accumulation of the deposit of the mineral dust which was seen by the visiting team on 29th November 2010. However, since the temple administration had done major repairs to the temple proper in the form of chemical cleaning and applying coat of warmish on pillars and walls, the discoloration was seen only in the superstructures over the sanctum and entrance mandapas as well as in patches inside the temple.

7. I further submit that a close inspection of various parts of the temple by Respondent No.9 along with Shri M.V.

Visveswara, Deputy Superintending Archaeologist cum Site Manager, World Heritage Site, Hampi revealed that the temple has suffered:

1. Settlement in its foundation in the Navaranga and Maha Ranga Mamlapa portions;
2. A few pillars have gone out of plumb-Plate VI(a);
3. Concussion fractures in the capital portion of the pillar in Maha Ranga Mandapa Plate VI (b);
4. Extended arms of the capital and beams have broken at some places Plate VII (a) and (b);
5. Widening of joints on the wall portions both horizontal and vertical:
6. Discoloration of the stucco of the superstructure over the entrance mandapas and sanctum Plate VIII and IX;
7. Development of cracks over the roof and the longitudinal as well as peripheral ridge, especially near the joints Plate X (a) and (b);
8. Dampness due to seepage of water capillary action and due to growth of vegetation;
9. Development of cracks over the roof and the longitudinal as well as peripheral ridge, especially near the joints;
10. Dampness due to seepage of water capillary action and due to growth of vegetation.

8. I respectfully submit that again in the month of June 2007 on 16th a joint inspection by Tahsildar, Hospet, Deputy Director, Mines and Geology, Government of Karnataka; Deputy Director, State Archaeo of

Karnataka; Revenue Inspector, Hospet; Taluk Surveyor inspected the temple in Survey Number 198 and mining activities in Survey Number 115 as per the instructions of the Deputy Commissioner, Bellary, was carried out and they have confirmed and recorded in their joint inspection report that (i) the cracks were developed in the temple due to mining; (ii) mining activities was carried out in the near proximity of the temple and the (iii) if temple is not conserved and mining activities are not stopped, the temple may get affected severely.

9. I further humbly submit that Shri Subramanian, Senior Geologist, Geological Survey of India, Bangalore, who visited the site along with Respondent No.9, who viewed the site from geological point of view, has opined that because of intense mining activity fine dust particles are deposited on south, south east and north gopuras of the temple and the mining activity has led for the dumping of the mine waste on the eastern and north eastern part of the temple which has led for artificial drainage on the eastern boundary of the temple. One of the benches of the mine on the north eastern part of the nala (drainage) has led for flooding and soil erosion in and around the temple. As the temple is in lower elevation, the mine is in the upper elevation, road cutting on the upper elevation has lead for debris movement on the southern part of the temple.

10. I further humbly submit that the Principal Design Engineer, Shri Mohan Kumar, BE (Civil); ME (structure), MIE, CH. Eng who was accompanying the team has opined from the point of view of structural engineering, that the visible distress observed in stone members of structure is essentially due to one or the combination of following factors namely Prolonged age effect: Disturbance caused to the structure due to nearby mining activities; Inadequate/ Ineffective maintenance over a period of time.

11. I further humbly submit that since the mining has been stopped for quite some time, the actual impact of the blasting/mining on the temple, intensity of the explosion, tremor and vibration as also the precise dust accumulation by using appropriate scientific instruments could not be ascertained. However, even in the absence of above data, the onsite condition clearly brings out the following.

(a) The present condition of the temple which was constructed in around 1500 AD, using massive granite blocks, in trabeate system, is attributed to several factors which are as under;

(b) Aging and lack of periodic maintenance by the concerned department;

(c) Constructional methodology of trabeate system which is having inheritant weakness of yielding to tremors and shocks

(d) As repeatedly pointed out by the Deputy Director of State Archaeology Department, Government of Karnataka and other local authorities and also as observed by the Respondent and other officials, mining activities using explosives in the close proximity of the protected temple has also contributed to a extent for it& present detracted condition."

43. On 26.4.2011, the Court appointed a Committee of Experts with a direction that it shall inspect the site of the temple, the area where mining activities were being carried out and submit its report. The relevant portions of that order are extracted below:

"For the purpose of undertaking a comprehensive exercise for evaluation of the damage, if any, caused on Jambunatheswara temple due to mining activities undertaken before passing of stay n

09.07.2010 and 18.02.2011, the Committee comprising the following is constituted:

1	The Director, Directorate of Archaeology & Museums, Government of Karnataka, Karnataka Exhibition Authority Complex, Mysore570 010.	Convenor
2	The Superintending Archaeologist, Archaeological Survey of India, Bangalore Circle, 5th Floor, 'F' Wing, Kendriya Sadan, Koramangala, Bangalore 560 034. (Along with the team of experts from ASI)	Member
3	Geological Survey of India, State Unit of Karnataka & Goa, Vasudha Bhavan, Kumaraswamy Layout, Bangalore 560 078.	Member
4	Shri A.B.Morappanavar, IFS, Dept. of Ecology & Environment, Regional Director and Deputy Conservator of Forest, #01, Charanti Matt Building, Shivalaya Road, Sadashivanagar, Belgaum 590001.'	Member
5	Deputy Director, Department of Mines & Geology, Government of Karnataka, College Road, Hospet 583 201 (Dist.Bellary)	Member
6	Prof.C.S.Vadudevan, Asst. Professor, Department of Ancient History & Archaeology, Kannada University, Hampi(Vidyaranya) -583 276 (Hospet Taluk, Bellary Dist.)	Member
7	Sri Pankaj Modi, Conservation Architect, Indian National Trust for Art & Cultural Heritage, Karnataka Chapter, 166, Kattariguppe Water Tank Road, 4th Cross, 4th Block, 3rd Phase, Banashankari III stage, Bangalore 560 085.	Member
8	The Deputy Director, Directorate of Archaeology & Museums, Government of Karnataka, Kamalapuram 583221. (Hospet Taluk, Bellary Dist.)	Member Secretary
9	A representative of Directorate General of Mines Safety (DGMS), Dhanbad, Jharkhand	For mine safety
10	A representative of Indian Bureau of Mines, Nagpur, Maharashtra	For Mining technology

The Committee shall inspect the site of the temple and the area where mining activities were being carried out, evaluate the impact of the mining activities on the temple from all possible angles keeping in view the relevant statutory provisions including the Environment Protection Act, 1986, the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981."

44. The Court appointed Committee (for short, 'the Committee') held meetings on 6.6.2011 at Hospet, on 8.7.2011 at Mysore and on 27.2.2011, 16.11.2011 and 26.12.2011 at Bangalore. During one of these meetings, the Committee decided to avail of the services of Central Institute of Mining and Fuel Research (CIMFR), Dhanbad, Jharkhand for DETERMINATION OF SAFE BLASTING PARAMETERS TO AVOID DAMAGE TO THE TEMPLE and National Institute of Technology, Karnataka, Surathkal (hereinafter referred to as 'NIT') for ASSESSMENT OF THE IMPACT OF BLASTING OPERATIONS CARRIED OUT IN IRON-ORE MINES ON JAMBUNATHESWARA TEMPLE AND SAFE LIMITING DISTANCE FOR BLASTING ACTIVITY IN MINES.

45. CIMFR, Dhanbad carried out scientific investigations from 9th to 13th November, 2011. Du[illegible]t

experimental trial blasts were conducted at four different mines viz. Shankalapuram Iron Ore Mine of M/s. R.B. Seth Shreeram Narsingdas (RBSSN) (Respondent No.18), Aarpee Iron Ore Mine of Smt. R. Mallamma (respondent No.4), Jambunatheswara Iron Ore Mine of M/s. Mysore Minerals Limited (respondent No.15) and Kariganaur Iron Ore Mine of M/s. KMMI. Blast-induced ground vibrations and air overpressure/noise generated during the experimental blasts were monitored using five seismographs. Two seismographs were placed near the Jambunatheswara Temple whereas the remaining three seismographs were placed near the blasting sites. In two rounds of trial blasts conducted nearest to the temple (i.e. in Aarpee Iron Ore Mine of Smt. R. Mallamma), a Sony-make Handycam video camera was used to observe any occurrence of fly rock from the blasts.

46. After conducting experimental trial blasts, CIMFR, Dhanbad sent a detailed report to the Committee along with photographs. The Executive Summary of that report reads as under:

"**EXECUTIVE SUMMARY**

This report relates to the scientific investigations carried out by the Blasting Department, Central Institute of Mining and Fuel Research (CIMFR), Dhanbad for the safety of the Jambunatheswara Temple, situated in Hospet, karnataka from blasting impacts produced by the surrounding mines during operation. The objective of the scientific study was to assess the impact of opencast blasting on the Jambunatheswara Temple and determination of a safe radial distance from the temple up to which all blasting operations should be banned and the area in which controlled blasting operations can be permitted along with details of safe blast design parameters. The field investigation was carried out during 9th - 13th November, 2011. During the field investigation, eight experimental trial blasts were conducted at different mines situated nearby

the temple. Ground vibrations and air overpressure/noise generated during the experimental blasts were monitored at various locations using five seismographs. The results of the study, conclusions and recommendations made in the report are summarized below.

1. Eight trial blasts were conducted during the period of the field investigation. Two blasts were conducted at Shankalapuram Iron Ore Mine of M/s R. B. Seth Shreeram Narsingdas (RBSSN), three blasts at Aarpee Iron Ore Mine of Smt. R. Mallamma, two blasts at Jambunatheswara Iron Ore Mine of M/s Mysore Mineral Limited (MML) and another one blast at Karinaganur Iron Ore Mine of M/s KMMI.

2. All the trial blasts were conducted beyond 200 m distance from the Jambunatheswara Temple. The distances of the blasting locations from the temple varied between 290 and 1920.

3. The trial blasts were conducted as per the blast design parameters normally practiced in each mine. The total number of holes in the blasting rounds varied from 6 to 10. Depth of holes varied betwin 7.0 and 10.0 m and blasthole diameter in all the blasts was 115 mm. The total explosive charge varied between 106.20 and 407.50 kg. The maximum explosive charge per delay varied from 17.67 kg to 40.75 kg. Shock tube (Nonel) initiation system was used for both in-hole and surface hole-to-hole initiation in all the blasts.

4. Five seismographs were used for monitoring of blast-induced ground vibrations and air overpressures. In all the eight trial blasts conducted, two seismographs were always fixed at the Jambunatheswara Temple. The rest of the three seismographs were placed nearer to the blasting locations, directed towards the ter[illegible]of

the vibration monitoring stations from the blasting locations varied between 290 and 1920.

5. In total, twenty-two ground vibration data were recorded from the eight experimental trial blasts conducted at the four different mines. The recorded magnitude of ground vibration data varied betwin 0.325 and 6.68 mm/s. The maximum magnitude of ground vibration recorded was 6.68 mm/s at a distance of 200 m from the blasting source.

6. The magnitude of ground vibration data recorded at the Jambunatheswara Temple varied between 0.325 and 1.13 mm/s. The highest magnitude of ground vibration data recorded from all the experimental trial blasts at the temple site was 1.13 mm/s at a distance of 290 m from the blast site. It was recorded near the Eastern Gate of the temple. The trial blast was conducted at the 2nd Bench (Nishant Pit), Aarpee Iron Ore Mine of Smt. R. Mallama (3rd Trial Blast). The total quantity of explosives detonated in the blasting round was 205.02 kg whereas the maximum explosives charge per delay was 34.17 kg.

7. When the trial blasts were conducted beyond 845 m from the Jambunatheswara Temple, no vibration data was recorded by the seismographs which were fixed near the temple. The triggering levels of the instruments were set at sensitive mode viz. 0.30 mm/s.

8. The Fast Fourier Transform (FFT) analysis of vibration data revealed that the dominant frequency of vibration waves varied between 7.5 and 31.8 Hz. In most of the cases, the frequencies were higher than 8 Hz. Only in a very few cases the dominant frequencies were found to be less than 8 Hz.

9. The safe level of peak particle velocity (PPV) for the Jambunatheswara Temple was taken as 2.0 mm/s as per

the DGMS Standard (Technical Circular Number 7 of 1997). This value has been taken into account, considering the importance and structural sensitivity of the temple.

10. The recorded magnitudes of ground vibration waves measured inside the Jambunatheswara Temple premises, from all the eight experimental trial blasts conducted during 10th - 13th November, 2011, are well within the safe limits.

11. The levels of air overpressure recorded from the different trial blasts varied between 97.5 and 117.8 dB (L). When the trial blasts were conducted beyond 845 m distance from the temple, no blasting sound could be heard or noticed physically. The levels of air pressure/noise produced due to blasting were well within the safe limits.

12. No flyrock were observed in any of the eight experimental trial blasts conducted during the field investigation.

13. On the basis of the data recorded as well as observations made during the experimental trials, it may be said, technically and scientifically, that blasting may be carried out beyond 200 m distance from the Jambunatheswara Temple without causing any structural damages, provided that controlled blasting method is strictly adhered to (Tables 3 & 4).

14. Based on the field observations, ground vibration and air overpressure data recorded as well as their subsequent analysis, the following zones are classified for conducting blasting operations surrounding the Jambunatheswara Temple.

200 - 300 m from the Jambunatheswara Temple

300 - 500 m from the Jambunathe

Beyond 500 m distance from the Jambunatheswara Temple

15. Within the distance of 200 - 300 m from the temple, controlled blasting with 6m blasthole depth and 115 mm blasthole diameter is recommended. Within300 - 500 m, blasthole depth of 6 - 8 m and 115 mm diameter is recommended. Beyond 500 m distance from the temple, the maximum recommended blasthole depth is 10 m for 115 drill hole diameter.

16. The recommended blast design parameters, controlled measures for ground vibration, flyrock, noise/air overpressure for the safety of the Jambunatheswara Temple are prescribed in Sections 7 & 8. The recommendations should be followed strictly, in letter and spirit.

17. In the present condition, the altitudes (Reduced Level/ RL) of the working benches of the different iron ore mines located near the Jambunatheswara Temple are in a higher level than the temple. Most of the mines are also having free faces of the working benches facing towards the temple. However, when the altitudes of these mines become on the same level or lower than the temple in future, it is recommended to reassess the impact of blast-induced ground vibration on the temple."

47. NIT undertook scientific investigation to assess the impact of blasting operations carried out in surrounding iron ore mines on the stability of Jambunatheswara temple. The objectives of the study undertaken by NIT are enumerated hereunder:

(a) To study the blasting operations carried out in iron ore mines in the surroundings of the Jambunatheswara Temple.

(b) To monitor blast vibrations.

(c) To establish the ground vibrations propagation equation.

(d) To determine the Safe Radial Distance from the Temple up to which blasting activity may be permitted.

(e) To specify the blast design parameters and pattern to be followed, with details like,

- Maximum explosive charge per hole
- Type of initiation and the detonators to be used
- Maximum number of holes per round
- Maximum explosive charge per delay, to ensure PPV to be below 2mm/s for the Historical Temple as per the DGMS Technical Circular-7 of 1997.
- Type of muffling to control fly rock
- Methods of limiting the air blast (noise)
- Any other measures.

48. The investigation conducted by NIT covered Aarpee Iron Ore Mines, Shankalapuram Iron Ore Mine of M/s. RBSSN, Jambunatheswara Iron Ore Mine of M/s. Mysore Mineral Limited and Kariganur Iron Ore Mine. In all 13 blasts were conducted in these mines in the presence of their representatives and these blasts were monitored at least at two different locations by using blast vibration monitors, MINIMATE DS-077 and MINIMATE PLUS. On the basis of these investigations, NIT suggested that mining activity with drilling and blasting could be permitted up to a distance of 300 meters from Jambunatheswara temple with a cap on usage of

maximum explosive charge delay of 44 kg. Dr. V. R. Sastry, Professor of Mining Engineering, NIT submitted a detailed report to the Committee along with a number of photographs. The conclusions and recommendations contained in that report are reproduced below:

"CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Based on the investigations carried out on blasting operations in iron ore mines around Sri Jambunatheswara Temple, the following conclusions are drawn:

Studies were carried out in four iron ore mines, namely Smt. R. Mallamma, ARPEE Iron Ore Mines. Sankalapuram Iron Ore Mine - RBSSN, Jambunatha Halli Iron Mine - Mysore Minerals Ltd., and Kariganur Iron Ore Mine - KMMI.

In total, 13 blasts were carried out in four mines.

Blasts were conducted in different benches and locations, representing different strata conditions.

Diameter of blastholes used in all the blasts was 110mm.

Depth of the blastholes was varying from 6m to 10m.

Number of Blastholes varied from 6 to 14.

Explosive charge per hole varied from 21.75kg to 40.56kg. Total explosive charge per blast varied from 208.2kg to 570.5kg.

Shock tube system of initiation was used for achieving down the hole initiation and also the surface delays.

Hole to Hole initiation was provided in all the blasts.

Sri Jambunatheswara Temple is an ancient Temple and,

therefore, a Peak Particle Velocity of 2mm/s was considered as the Threshold value, to maintain stability of the Temple.

Ground vibrations and noise levels from each blast were monitored using five (5) units of Blast Vibration Monitors, MNIMATE-007 and MINIMATE PLUS of Instantel, Canada, at six (6) different locations.

Three monitors were used to record blast vibrations at East entrance. North entrance, and West side of Sri Jambunatheswara Temple.

The recordings indicated ground vibrations of less than 2mm/s Peak Particle Velocity near the Temple.

There was no sign of any fly rock (occurring from any of the 13 blasts) at the Temple.

Ground Vibrations Propagation Equation was established (combined for all mines) for the site as V = 598.2(D/VW)151

Based an the investigations carried out it could be concluded that a safe distance of 300m be maintained from Sri Jambunatheswara Temple for carrying out blasting operations.

Maximum explosive charges per delay to be used for conducting the blasts at various distances from the Temple are provided in Table-9.

Individual blasthole to blasthole delay system, as practiced presently, should be continued to maintain safety of the Temple.

Recommendations

Proper blast design results in lowe

The depth of blastholes may be maintained as 8-12m. Shorter benches of less than 8m result in higher ground vibration levels, as stiffness of bench increases.

Each blast should be conducted with a clear free face, to avoid confinement of blasts.

It is recommended to continue the bottom hole initiation as practiced.

Blast layouts should be planned in such a way that the progress of initiation in the blast round is away (opposite) from the Temple structure.

It is recommended to use a maximum of eight (8) blastholes per round, when the blast site is 300m away from the Temple.

It is advisable to continue the system of muffling by covering all the blastholes in the blast round with 25kg sand bags, to minimize the fly rock problem.

It is advisable to implement smaller, meticulously planned and safer blasts, rather than bigger blasts without having much control on the fragmentation process, leading to higher intensity of ground vibrations.

Care should be taken to avoid over confinement blastholes by applying sufficient delay time between blastholes in the blast round. It is advisable to provide a clear delay of 8ms/m between blastholes in the blast layout.

It is recommended to follow the following blast pattern at 300m distance or more from the Temple:

Bench height : 8m

Depth of holes : 8.5-9m

Burden	: 2.5 -3.5m
Spacing	: 3m - 4.5m
Pattern of holes :	Rectangular
Initiation	:Straight line pattern/V- pattern
No. of rows	: 2
No. of holes	: 8
Width of blast area	: With single row-2.5-3.5m
Length of blast area	: 24 - 36m
In-Hole initiation	: Shock Tube System
Delay system	: Shock Tube system
Charge per hole	: 44kg (Maximum)
Max. charge / delay	: 44kg
Initiation Pattern:	: Straight line pattern
	V-pattern
	Diagonal pattern (in case free end available)

The layouts of the blasts conducted during the investigations may be continued, with hole to hole individual delays, as shown in Fig. 29."

49. The Committee analysed the aforesaid reports, considered the recommendations made therein and submitted its report to this Court in two volumes. Parts IV and V of the main report, which contain discussions and recommendations read as under:

"IV. DISCUSSIONS:

The Committee unanimously agrees that the mining operations carried out using blasting operations in the near proximity, at a distance of less than 200 m from the Subject temple, have already caused irreparable damages to the temple and the eco-environs of its immediate neighborhood as enumerated in detail in Annexure-I (A), (B), (C) and (D) and expresses its serious concern towards the need of addressing all the issues responsible for such an adverse impact and resorting to make sincere efforts required so that the temple and its immediate environs regain their original aesthetic and architectural grandeur, sanctity and pristine eco-environs. In the light of the above, the Technical Reports submitted by the various agencies are reviewed and discussed as a prerequisite for making specific recommendations.

1. The Study on Jambunatheswara Temple Surroundings - submitted by Karnataka Remote Sensing Application Centre, ISRO, Bangalore (Annexure-IV) deals with the mining activities carried out in a radius of 1km and 2km. It also illustrates the damage caused to the subject temple and its immediate environs. The agency has used the imageries of 2008. It would have been prudent if it had compared the 2008 imageries with the present/latest one. The agency could have also offered valuable data and comments on two of the very significant issues viz.

(1) Compare the vegetation of 2008 *vis-a-vis* 2011, and

(2) Specific disturbances to drainage system in the area, caused due to mining.

In spite of these short comings, the study by the KSRSAC has clearly brought out some significant facts. It emphatically establishes that the mining area is located

within a horizontal distance of 55 m from the temple premises on the eastern side. There are also mining areas in the south and west of the temple within one Km radius. The effects recorded under "Mining" (page 1-2) of the Report (Annexure-IV) highlights that the mining and related activities have undoubtedly affected the architecturally sensitive temple and its eco-environs. Data provided in the table indicates that more than l/4th (89.66 hectares out of 314.12 hectares) of the area within 1 Km radius and l/5th of the area (275.26 hectares out of 1256.56 hectares) within 2 Km radius have been directly affected due to mining and related activities, thus seriously affecting the land use pattern. It has also brought to light the intentional measures taken by the mining authorities to divert rain water due to the disturbed drainage system to avoid further damage to the subject temple resulting in erosion of the sub-soil during the post monsoon period. Loss of vegetation cover as also dried up tanks due to disturbances caused to the natural drainage system is also highlighted.

Thus, the Report substantiates the statements of Respondent no. 9 (Annexure-I) in so far as

(1) The mining activities have been conducted from a distance of 55 m from the subject temple in dire violation of the provisions of Section 20 of the Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1961 and subsequent amendment in 1991 which prohibits mining and construction activities within the Prohibited and Regulated Areas;

(2) The mining activities have adversely affected the temple and

(3) They have also adversely affected the immediate environs of the temple to a

2. The Conservation Plan for Jambunatha Temple prepared by Indian National Trust for Art and Cultural Heritage, Bangalore Chapter (Annexure-III) substantiates in its entirety the observations made by Respondent No. 9 in the Technical Report (Annexure-I(A), (B) and (C) and the subsequent Affidavit (Annexure-I(D) with regard to the damages caused to the subject temple due to mining and related activities. The deteriorations caused as observed during the comprehensive survey inspection have been enumerated under three broad categories, as stated below:

(1) defects due to movements and vibrations, deflection of beam and plinth stone members, tilts of columns, bulging of walls, cracked stone members, material failure and missing parts;

(2) changes to surfaces, finishes, moisture problem, rising dampness, water seepage, human inflicted problem, lost or missing details, material deterioration, drainage systems, presence of fungi, algae, termites and insects, vegetation growth, changes to surrounding condition and missing portions due to deterioration;

(3) space dimensions and configurations, additions, blocking of openings, false facade, changes to basic plan, topography of the surrounding land, bad re-pointing, bad cleaning techniques, insensitive and out of context additions and finishes (Annexure-III - Chapter III, page 30-100).

In Chapter IV of the said report (Annexure-III - pages 101-109), a further analysis of the deteriorations are enumerated along with the inferences drawn based on which, the Report has suggested detailed conservation plan under short-term measures (immediate measures), long term measures and the requisite budgetary estimate

for an amount of Rs.3,43,19,160 (Rupees three crore forty three lakhs, nineteen thousand, one hundred and sixty) only for executing the same in order to bring the temple to its original condition so as to regain its past glory (Chapter V, pp. 110-114).

3. The Reports submitted by Central Institute of Mining and Fuel Research, Dhanbad (Annexure-V) and National Institute of Technology, Karnataka, Surathkal (Annexure-VI), based on Technical field investigations conducted during the 2nd and 3rd weeks of November, 2011, are very helpful in arriving at the safe blasting parameters to avoid damage to Jambunatheswara temple situated near Hospet, Karnataka. However, these reports only partially contribute to understand and assess the damages caused to the subject temple due to the mining activities that have already taken place in the immediate neighborhood of the temple. In this connection, it is submitted that, the site inspection by the Respondent No. 9 and subsequently by the Committee, have established beyond any doubt that damages have been caused to the Jambunatha Temple due to the impact of the mining using blasting operations in the near proximity. In view of the sensitive nature of the temple, which has already suffered significantly, it was suggested that it was not advisable to conduct any more blasting vibration monitoring tests in the near vicinity of the temple.

It was further suggested that conducting any such blasting vibration monitoring tests in a far of place quite away from the temple, will in no way establish any new scientific proof regarding the impact of mining using blasting operations on the Jambunatha temple.

The mining operations carried out using blasting operations in the near proximity of the subject temple within a distance of less than 200 M have alread e

damages and need to be addressed on priority.

In the above context, the investigating agencies have admittedly conducted all these experimental blasting beyond two hundred meters whereas the study conducted by Karnataka Remote Sensing Application Centre, ISRO, Bangalore (Annexure-IV) has indicated that one of the mines exists within a horizontal distance of 55 meters from the temple premises on the eastern side. Thus, the impact of mining with blasting operations which have already been carried out at a distance between 55 meters and 200 meters (290 meters as in case of the nearest blasting conducted by CIMFR, Dhanbad) cannot be fully understood and assessed scientifically by the present investigations.

These trial blasts have been conducted as per the blast design parameters normally practiced in each mine which are as per the specifications stipulated by the controlling authorities, viz., Indian Bureau of Mines and other agencies and appear to have been conducted under ideal laboratory conditions. Many of the trial blasts have been conducted at locations having free faces of the working benches. Obviously, the results of the investigations show minimum or no impact on the architecturally sensitive temple especially when the blasts are conducted at locations having no 'free surface'. On the basis of the data recorded as well as observations made during the experimental blasts, it is said, "technically and scientifically that blasting may be carried out beyond 200 meters distance from Jambunatheswara temple without causing any structural damages provided that controlled blasting method is strictly adhered to (Annexure-V - Tables 3 and 4) and 'follow the following blast pattern at 300 meters or more from the temple (Annexure-VI - page 88). The data recorded as well as observations made during the experimental blasts, admittedly and essentially are based on individual blasts and the investigating agencies

have not either considered or evaluated cumulative or compounded impact of the multiple blastings taking place simultaneously at varying distances and altitudes. It is a matter of common perception that the collective impact of many less/non harmful individual entities could be severe and lethal in effect, probably not requiring any scientific or technical confirmation.

The CIMFR Report (Annexure-V - page 7) significantly adds that "in the present condition, the altitudes (Reduced Level/RL) of the working benches of the different iron ore mines located near Jambunatheswara temple are in a higher level than the temple. Most of the mines are also having free surfaces of the working benches facing towards the temple. However, when the altitudes of these mines become on the same level or lower than the temple in future, it is recommended to reassess the impact of blast-induced ground vibration on the temple". By this, it may be construed that one cannot assess the impact of blast-induced ground vibrations on the temple when such blasts are made on the same level or lower than the level of the temple which have already been done as observed by the Respondent No. 9 and the members of the Committee during their field visits respectively.

Another significant aspect of the Report of the CIMFR, Dhanbad is that in the very introductory page (Annexure-V - page 1) it has added a Note stating that "It is hoped that the recommendations will be implemented to get the optimum results without hampering the production, productivity and safety. The recommendations are the guidelines, which should be implemented in letter and spirit.

"Since the day-to-day blasting operations are not under the control of CIMFR, the research team will not be

held responsible for any untoward incident caused by blasting".

This clearly indicates that nobody will ensure that these recommendations/ guidelines will be implemented in letter and spirit especially in the absence of a vigilant and effective management system to monitor the day-to-day mining operations. The ill- effects of the mining activities that have already taken place in the recent past in and around Jambunatha temple is a clear illustration reflecting this phenomenon.

The Committee opines that the spirit and sanctity of Jambunatheshwara temple, continuously being worshipped from the day of its consecration till today, lies as much in its location as in the form, design and ornamentation of the Structural complex constructed during the Vijayanagara Period in around 1540 A.D. The spirit and sanctity are enhanced due to the locational significance of the Subject temple which is of primary importance. Jambunatheshwara is but one of the thousand and odd names of the manifestations of Lord Shiva, who according to Hindu Mythology and belief, is Kailasanatha - the lord of Kailasa Mountains. For this reason, for a staunch believer of Hinduism, all the hilltops are but a replica of Kailasa Mountains. Any damage caused to the immediate pristine environs of a temple located amidst such picturesque lush green landscape of the hill ranges, affects the very sentiments and beliefs of the pilgrims and devotees thronging to the temple, as it adversely affects the very abode of the lord.

This significance of the location of the temple has yet another facet as it is situated in the Peripheral Zone of the Hampi World Heritage Site, which is included in the World Heritage List of UNESCO. The subject temple forms an integral part of the Vijayanagara architecture, hardly at a

distance of about 4.5 kms from Ananatasayana temple, a centrally protected monument. Integration of Natural Heritage with the Built Heritage is one of the criteria for enlisting Hampi in the List of World Heritage Sites. Jambunatha temple, with the backdrop of lush green hill ranges, is one fine example for such harmonious integration. It is mandatory on the part of the State and the Central Governments to maintain the integrity and authenticity of the Site as Signatories to the World Heritage Convention of the UNESCO.

Further, it is significant to note that most of the ambitious 16th Century Vijayanagara temple projects in and around Vijayanagara capital city which are distinguished by vast and lofty enclosures entered through towered gateways, approached by long and broad chariot streets or winding flight of steps following the natural contour of the hills, mandapas with elaborately ornamented pillars etc., are located on the hill tops. Hanuman temple on the Anjanadri Hill, Virabhadra temple on the Matanga Hill, Raghunatha temple on the Malyavanta Hill and the group temples of different periods on the Hemakuta Hill are only a few such examples within the Core Zone of the World Heritage Site. Sri Jambunatheshwara temple on the Jambunatha Hill and Sri Kumaraswamy temple near Sandur are other such temples in the peripheral area of the greater medieval Capital city of Vijayanagara. This place was also entry point to the Vijayanagarpattana, the capital of Vijayanagara empire. Location of such temples for the 'Guardian Deities' on strategically located hilly landmarks of the region endowed with tranquil, picturesque and serene atmosphere of high altitudes, considered as 'abodes of cosmic energy', is part of the very concept of designing 'Cosmic Cities embodying complex yet sacred geometry' derived from the canonical texts of the ancient lore.

Thus the immediate environs of the Subject temple, is pregnant with all the aesthetic, serene, sacred and multifaceted symbolic values.

The 'macro' studies by the high level panel set up by the Union Government and the Indian Council for Forestry Research and Education (ICFRE) and the Environmental Engineering Research Institute (NEERI), which have submitted their reports to the Hon'ble Apex Court in a separate Case pending before the Apex Court, have vividly brought out the adverse impact of mining and related activities in the entire State of Karnataka in general. In its Macro-Environment Impact Assessment report on Bellary, the ICFRE again has highlighted the environmental fall out of mining emphasizing the need to commission a feasibility study to bring in superior underground mining technologies to minimize the adverse impacts.

An overview of the multi-faceted hazardous impact of mining activities in the context of the Bellary District, State of Karnataka is illustrated in the following extract.

'Environmental Engineering Research Institute (NEERI) found that suspended air particles at many locations in the district were far above the national health standards. According to NEERI's report, the dust hanging in the air of Bellary due to rampant mining is a serious health hazard. The area has high incidence of lung infections, heart ailments and cancer. However, the Karnataka State Pollution Control Board (KSPCB) has been tardy in issuing notices to mine-owners under existing laws (including the Air Act, 1981 and the Water Act, 1974). Mining has adversely affected the forest areas, including the 'reserved' forest areas, in Bellary District. Dumping of waste material has caused erosion of the topsoil of the region. Species of wildlife such as the Egyptian vulture, yellow throated bulbul, white backed vulture and four-horned

antelopes have vanished due to depletion in the forest cover on account of mining. Rainwater that used to earlier flow down hillocks and replenishes underground aquifers now picks dust along the way, contaminating water and degrading soil, making farming difficult. Studies point towards a fast rate of siltation in the Tungabhadra reservoir due to the deposition of waste material generated from mining'.

The report on the 'Study of Jambunatheshwara temple Surroundings' by the Karnataka Remote Sensing Centre (KSRSAC), commissioned by the present Committee is a micro study addressing a similar issue concentrating mainly on the land use/land cover highlighting the area occupied by mining and mining related activities within the radius of 1 km and 2 km from the temple.

V. RECOMMENDATIONS:

In the light of the above observations and with due considerations to

(i) the historical, religious, architectural, sculptural and aesthetic values of the Subject temple, forming an integral part of the cultural Heritage of the Vijayanagara period (the masterpieces situated in the nearby Hampi in the same Taluk of Hospet which have been declared as 'World Heritage' in due recognition of their 'Out Standing Universal Values');

(ii) the utmost symbolic and spiritual significance of the immediate pristine environs with lush green landscape of the hill ranges amidst which the said temple is located;

(iii) as also the recommendatio e

blasting parameters to avoid damage to the temple,

(iv) the dire necessity of resorting to the ideology of sustainable mining and

(v) the absence of any vigilant and effective management systems to monitor the adverse impact of the mining activities,

the committee recommends as follows. For the purpose of convenience and easy apprehension of the Recommendations of the Committee, the area surrounding the Subject temple up to 2km has been divided into two Zones namely,

I. CORE ZONE: comprising the temple along with area protected under legal provisions in vogue and the area further beyond it in all directions up to a distance of 1km;

II. BUFFER ZONE: comprising the area further beyond the CORE ZONE in all directions up to a distance of 2 km from the protected area and 1 Km from the Core Zone.

I. CORE ZONE:

(1) Total ban of mining with or without blasting but permitting the mining companies to carry away ore already extracted from the area by using earth moving machineries, without causing any damage either to the temple or to the environs;

(2) Implementation of immediate conservation measures, initiation of short term conservation measures and arriving at time frame and phasing for long time conservation measures;

(3) Preparation and implementation of Mine Closure Plan and

(4) Depositing requisite funds.

II. BUFFER ZONE:

(1) Mining with blasting operations strictly following the recommendations/guidelines formulated by the investigating agencies (Annexures- V and VI) IN LETTER AND SPIRIT, implementing the Mine Closure Plan and attending to the long term conservation measures to the Subject Temple.

(2) Mining in this Zone shall be closely monitored and guided by the experts from Indian Bureau of Mines, Directorate General of Mines Safety, Department of Mines and Geology, Government of Karnataka, Forest Department, Karnataka State Pollution Control Board, Archaeologists, Conservation Architects, and any other scientific agency, if required, for avoiding any possible adverse impact on the Subject temple and its eco-environs in the long run.

Accordingly, the Honorable Apex Court may kindly consider the following:

1. The investigations by CIMFR and NIT (K) have suggested that, no blasting operations shall be carried within 300m radius of the Jumbunatheswara Temple. However, to prevent deposition of air borne dust on the temple causing discoloration, a 500m thick green cover (fast growing tall trees) has to be developed around 300m zone from the temple. Therefore, no mining activity shall be allowed in Core Zone (within I km radius) of the temple.

2. The existing haul road to the mines and all the vehicular traffic (other than those of tourists/pilgrims) shall be diverted away from the temple.

3. The mine managements may be directed to submit Mine Closure Plans (MCP) giving detailed and well phased scheme of back filling, plantation and diversion of drains from catchment area, building of necessary infrastructure in and around the temple and other measures required to bring the temple and its immediate environs to regain their original past glory. Before doing so, the Mining Companies may be permitted to carry away the ore already extracted in the Core Zone by using earth moving machineries.

4. A corpus fund may be created by collecting an amount of Rs. 3,43,19,160.00 (Rupees three crore forty three lakhs, nineteen thousand, one hundred and sixty) only from the mining companies operating within 2km radius from the temple. This fund may be utilized for the implementation of all the recommendations contained in the 'CONSERVATION PLAN for JAMBUNATHESHWARA TEMPLE, HOSPET' prepared and submitted by the INTACH, Bangalore Chapter (November 2011) towards the conservation, preservation, beautification etc., as an effort towards the restoration of the original features and the aesthetic values of the temple to the best possible extent besides ensuring that the original environment is restored as far as possible.

5. Pass an order directing M/s Aarpee Iron Ore Mines, No.24/151, Bellary Road, Hospet-583 201, Bellary (Dist) to fill the craters (Nishani Pits/ Mine Pits)

caused due to extensive mining in the immediate proximity of the temple up to the ridge level and plant saplings of trees following the local flora like Neem, Tamarind, Pungamia etc., in order to protect the environs of the temple in its original pristine condition within three years by preparing a detailed Mine Closure Plan.

6. Permitting mining with controlled blasting or without blasting using Ripper Dozer/ Rock-breaker or any other machinery and taking adequate measures towards generation, propagation, suppression and deposition of airborne dust in the Buffer Zone. Mining in this zone shall be closely monitored and guided by the experts from Indian Bureau of Mines, Directorate General of Mines Safety, Department of Mines and Geology, Government of Karnataka, Forest Department Karnataka State Pollution Control Board and any other scientific agency to avoid any further damage to the Subject temple and its immediate environs.

7. Pass such other order or orders, as this Hon'ble Court deems fit and proper in the facts and circumstances of the case."

(emphasis supplied)

50. After the Committee submitted its report, several affidavits were filed on behalf of the State of Karnataka. Shri Kaushik Mukherjee, Additional Chief Secretary to Government, Forest, Ecology and Environment Department, Karnataka filed affidavit dated 18.4.2012 stating that in compliance of the Court's order dated 11.3.2011, the State Government had prohibited all mining operations within a radius of 2 kilometers from Jambunatheswara temple. He then referred to order dated 5.8.2011 passed by this Court in SLP(C

– Government of A.P. and others v. M/s. Obalapuram Mining Company Limited for a macro level EIA study by the Indian Council of Forestry Research and Education in collaboration with the Wildlife Institute of India, Forest Survey of India and other experts and the steps taken for implementation of that order. In paragraph 8 of his affidavit, Shri Mukherjee has given the details of eight mining leases falling within the radius of 2 kilometres from Jambunatheswara temple and averred that four of them come in Category-A and the remaining four in Category-B, as pointed out by the Central Empowered Committee constituted by this Court in SLP(C) No.7366/2010 and Writ Petition (C) No.562/2009 – Samaj Parivartana Samudaya v. State of Karnataka. In paragraph 12, Shri Mukherjee has given the details of the actions taken by Karnataka State Pollution Control Board against the defaulting lessees. Shri G.B. Kongawad, Secretary to Government, Commerce and Industries Department filed affidavit on 18.4.2012. He has referred to report dated 18.12.2008 of Lokayukta, Karnataka who found that eight leaseholders were engaged in illegal mining or encroachment. He then averred that the issue of illegal mining in Karnataka is pending before this Court in Writ Petition(C) No.562/2009 and mining activities in Districts Bellary, Chitradurga and Tumkur will be resumed only after compliance of the conditions/directions which may be imposed/given keeping in view the macro level EIA study conducted by ICFRE and the recommendations of the Central Empowered Committee. Shri Anil Kumar Jha, Secretary to Government, Commerce and Industries Department filed affidavit dated 21.7.2012. According to Shri Jha, some portion of the leased area falls within 200 meters of Jambunatheswara temple and renewal of that portion will not be considered now and that respondent No.15 will also be asked to surrender the area which falls within 200 meters of Jambunatheswara temple. Shri Jha has also averred that lease No.1867 granted to one R.J. Pattabhiramaiah had expired on 28.2.2003 and in the absence of renewal application, that lease does not survive for

consideration. Shri Jha has claimed that as per the estimates prepared by Indian Bureau of Mines (IBM), about 61.14 million metric tonnes of high grade iron ore was available within the radius of 2 kilometers from the temple and if mining activity is not permitted, potential loss will further diminish the supply of iron ore in the State which is already under severe stress due to the ban on mining. In addition to these officers, Shri R. Sridharan, Principal Secretary to Government, Forest, Ecology and Environment Department and D.R. Veeranna, Additional Director (Minerals), Department of Mines and Geology have also filed their affidavits.

51. Respondent Nos.4, 15 and 18 filed objections to the report of the Committee. In the affidavit filed on behalf of respondent No.4, Smt. R. Mallamma w/o late Shri R. Rampapathy has expressed her willingness to participate in the conservation plan and to contribute to the estimated expenses. According to her, respondent No.4 will start closure operation of Nishani pit/Mine pit, which is adjacent to the temple, within 3 to 5 years as per the plan approved by IBM. She pleaded that the report submitted by the Committee should be discarded because it is contrary to the report submitted by the expert bodies, i.e., CIMFR, Dhanbad and NIT. She claimed that mining carried out beyond a distance of 200 meters from Jambunatheswara temple is not going to cause any structural damage to the temple. Smt. Mallamma has pleaded that the Core Zone suggested by the Committee is contrary to the provisions of the 1957 Act, Mineral Concession Rules, 1960 and Mineral Conservation and Development Rules, 1988 inasmuch as the scheme of these statutes does not contain any restriction on mining up to a distance of one kilometre from the temple. She has relied upon clause 5 in Part III of the Mining Lease Deed and pleaded that no distance restriction can be imposed over and above what has been prescribed in the statutes and the terms and conditions of lease.

52. In the objections filed on behal[illegible]5,

the particulars of the lease granted by the State Government have been given and it has been averred that litigation emanating from the lease is pending before the Civil Court at Bangalore and the Karnataka High Court. According to respondent No.15, the restriction suggested by the Committee will adversely affect the production of iron ore and will cause serious loss to the country. Respondent No.15 has also taken the plea that Section 20 of the Karnataka Act restricts mining activities only within the 'Protected Area' and not in other areas.

53. In the objections filed on behalf of respondent No.17, it has been averred that mining activities are being undertaken in accordance with the conditions imposed by the State Government and clearance granted by the Ministry of Environment and Forest, Government of India. According to respondent No.17, its mine is situated at a minimum distance of about 500 meters from Jambunatheswara temple and no damage can be caused to the temple due to mining operations. It is also the case of respondent No.17 that the recommendations made by the Committee for creating Core Zone and Buffer Zone should not be accepted because the two expert bodies engaged by it did not make any such suggestion and even otherwise this would be contrary to the provisions of the 1957 Act and the Rules framed thereunder.

54. Shri Ajay Saraf has filed affidavit on behalf of respondent No.18. He has given details of the mining leases awarded by the State Government to M/s. RBSSN Das and the permission accorded for operating the Beneficiation Plant. In paragraphs 15 to 18, Shri Saraf has averred as under:

> "15. I say that operation of the Applicant's Beneficiation Plant does not in any manner cause any damage whatsoever to the Shri Jambunatheshwara Temple or the environment. On the contrary, the Beneficiation Plant is advantageous to the country and the environment and ecology and is processing low grade Iron Ore of mines in

> the State of Karnataka and converting low grade Iron Ore, which would otherwise be wasted, into usable and valuable higher grade Iron Ore. I say that beneficiation is not mining nor a mining operation/process. After completion of mining operations the waste/unusable mined iron ore is made usable by beneficiation which is a separate benign process for recovery of Iron Fe from waste/unusable iron ore. Beneficiation may be done in situ in the mine or anywhere else. Beneficiation is the first step for manufacture of steel and iron ore pellatisation plants have Beneficiation plants or outsource the beneficiation.
>
> 16. I say that the Beneficiation Plant was expanded in the year 2010 at an additional cost of Rs.30 crores from 0.9. MTPA to 5.0 MTPA after due environment clearance from the Ministry of Forests and Environment & Forests (MOEF), Government of India and the Karnataka State Pollution Control Board (KSPCB). Hereto annexed and marked as Annexure R-5 and Annexure R-6 respectively, are true copies of the Orders dated 24.12.2009 passed by the MOEF and the Order dated 12.05.2010 by the KSPCB.
>
> 17. I say that the reliance by Respondent No.14 on the State Government's letter No. CI 135 EMM 76, dated 18.08.1978, to suggest that iron ore mining operations are prohibited within a radius of 2 kms near and around National Monuments of Archaeological importance is wholly erroneous. I say that it can never be assumed or countenanced that for 33 years, the State Government has repeatedly and continuously been illegally granting iron ore mining leases from the year 1978 till date in areas falling in a radius between 300 metres and 2 kms near and around National Monuments of Archaeological importance and/or that MOEF, Indian Bureau of Mines (IBM), Director of Mines and Geology, Director General of Mine Safety, Central Pollution Control Board, S[illegible]ol

Boards, Archaeological Survey of India have permitted mining leases and mining operations between 300 metres and 2 kms of the Shri Jambunatheshwara Temple and/or any other Temple in the State of Karnataka and/or India in contravention of such prohibition. These permissions have been in accordance with the consistent policy of MOEF, Indian Bureau of Mines (IBM), Director of Mines and Geology, Director General of Mine Safety, Central Pollution Control Board and Archaeological Survey of India, on iron ore and other mining in all states. Hereto annexed and marked as Annexure R-7 is a true copy of the State Government's letter No. CI 135 EMM 76, dated 18.07.1978.

18. Similarly, it cannot be assumed or countenanced that the State Government has itself violated its own letter No. CI 135 EMM 76, dated 18.08.1978. I say that the reliance by Respondent No. 14 viz the Director, Department of Archeology, on the State Government's decision in CI 135 EMM 76, dated 18.08.1978, by the then Under Secretary to all Deputy Commissioners of the Districts and Superintending Archaeologists, Archaeological Survey of India regarding the State Government decision not to grant mining lease and PL lease for removal of building stones near and around National Monuments of Archaeological importance within a radius of 2 kms is only in respect of mining of stones and not Iron Ore. For iron ore mining leases the prohibited zone is a radius of 100 metres and the restricted/regulated zone is a radius of 200 metres vide the Notification dated 16.06.1992 issued by the competent authority viz. the Department of Culture, Government of India and Archaeological Survey of India. Copy of the Notification, dated 16.06.1993 is hereto annexed as Annexure R-8."

Arguments

55. Shri G.V. Chandrashekar, learned counsel for the appellant argued that the recommendations made by the Committee should be accepted without any modification because the same are based on a comprehensive consideration of the reports of CIMFR, Dhanbad and NIT. Shri Chandrashekar referred to the discussion part of the report prepared by the Committee to show that experiments conducted by CIMFR, Dhanbad did not provide sound basis for determining the impact of blasting on the protected monument. He pointed out that CIMFR had prepared the report by conducting isolated blasts at different sites on different dates and argued that the impact of such blasts is insignificant and cannot help in deciding whether or not the temple has suffered damages on account of multiple blasts simultaneously conducted by different leaseholders. Shri Chandrashekhar also pointed out that the report prepared by NIT is inconclusive because the agency did not have the benefit of judging the impact of multiple blasting on Jambunatheshwara temple. Learned counsel pointed out that the report submitted by respondent No.9 clearly shows that extensive damage has been caused to the temple and its surroundings due to unabated blasting carried out by the leaseholders. Shri Chandrashekar submitted that the recommendations made by the Committee should be accepted because the same were made by the Committee after threadbare examination of the reports of CIMFR and NIT. In the end, the learned counsel argued that the restrictions prescribed under the 1958 Act and the Karnataka Act are not conclusive and the Court should accept the recommendations made by the Committee, as was done in *M.C. Mehta v. Union of India* (1996) 8 SCC 462 and other cases.

56. Ms. Anitha Shenoy, learned counsel appearing for the State of Karnataka relied upon notification dated 10/12.3.1998 issued under Section 4 of the Karnataka Act read with Rule 11(1) and (2) of the Karnataka Historic[illegible]al

Monuments and Archaeological Sites and Remains Rules, 1968 and argued that the Court should not accept the recommendations of the Committee because restriction on mining within 2 kilometres from Jambunatheswara temple will not only be *ultra vires* the statutory provisions contained in the 1957 Act and the Rules framed thereunder, but will also be highly detrimental to public interest. She extensively referred to the reports of CIMFR, Dhanbad and NIT and argued that the recommendations made by the two expert bodies should be accepted because the same are in consonance with the provisions of the 1957 Act and the terms and conditions on which leases were granted to the private respondents.

57. Shri A.D.N. Rao learned counsel appearing for the Ministry of Environment and Forests, Government of India and respondent No.9 argued that the Committee had rightly refused to base its recommendations on the reports of CIMFR, Dhanbad and NIT because the survey and trial blasts were conducted by the two bodies under ideal conditions and not conditions similar to those in which the lessees had simultaneously operated mines till the passing of interim orders by this Court. Shri Rao also referred to the affidavits dated 2.10.2010 and 17.2.2011 filed by respondent Nos. 9 and 14 respectively and argued that respondent No.4 was carrying on mining activities in the vicinity of temple by using Wagon Blasting Method which resulted in substantial damage to the temple.

58. Shri U.U. Lalit, learned senior counsel appearing for respondent No.18 relied upon the judgment in Samaj Parivartana Samudaya v. State of Karnataka 2013(6) SCALE 90 and argued that in view of the express permission granted by the three-Judge Bench for operation of mines in District Bellary subject to certain conditions, the appellant cannot seek any other restriction on mining activities beyond a distance of 200 meters from Jambunatheswara temple. He pointed out that the two leases granted to respondent No.18 are at a distance

of 790 meters and 1.09 kilometres respectively from the temple and the Beneficiation Plants are at a distance of 1.14 kilometres. He then submitted that respondent No.18 does not have blasting permission and only Ripper Dozer is employed for excavation of the mineral, which is then taken to the Beneficiation Plant through the conveyer belt. Shri Lalit emphasized that the reports submitted by respondent No.9 and the two expert bodies engaged by the Committee have not found respondent No.18 responsible for causing any damage to the structure of the temple and argued that it should be allowed to continue mining by Ripper Dozer and Rock Breaker. He placed before the Court the papers showing photographs of Ripper Dozer and Rock Breaker machines and submitted that mining by these machines will not cause any damage to the temple or surrounding environment. Shri Lalit also filed xerox copy of report prepared by Central Institute of Mining and Fuel Research, Regional Centre, Nagpur which was prepared at the instance of respondent No.18. He further submitted that building of the temple may have been damaged due to passage of time, lack of maintenance by the concerned government departments and agencies or due to use of explosives in its close proximity by respondent No.4 and others. He invited the Court's attention to paragraph 4 of the affidavit filed on behalf of the State Government to show that the Government of Karnataka has taken an in-principle decision not to renew any lease falling within 200 meters of the temple. Shri Lalit then highlighted the mechanism employed in the Beneficiation Plant and submitted that the operation of the plant will not affect the temple. Shri Lalit placed before the Court papers showing the photographs of Ripper Dozer and Rock Breaker.

59. Shri Altaf Ahmed, learned senior counsel appearing for respondent No.2 argued that his client does not have any objection to the acceptance of the recommendations made by the Committee, provided that the same is made applicable to all the lessees.

60. Shri Jaideep Gupta, learned senior counsel appearing for respondent No.15 advocated for acceptance of the report of the Committee subject to appropriate modification in the light of the recommendations made by the expert bodies. Shri Gupta invoked the principle of sustainable development and argued that the Court should strike a balance between the requirement of protecting the temple and the need of iron ore for the State and the country. Shri Gupta emphasised that any unreasonable restriction on mining activities in and around the temple premises will adversely impact the production of steel in the country. In support of his argument/submission, Shri Gupta relied upon the judgment in *N.D. Jayal v. Union of India* (2004) 9 SCC 362.

61. Ms. Kiran Suri, learned counsel appearing for respondent No.4 and respondent No.17, Allam Basavaraj relied upon report dated 27.5.2009 filed before the High Court to show that at the time of inspection, no mining activities were conducted in the mining pit located within 150 meters of the temple and in terms of G.O. No. 712/1996 issued by the Government of Karnataka, no mining was permitted within 100 meters of the temple. Learned counsel emphasized that at the time of inspection carried out pursuant to the direction given by the Director of Mines and Geology, it was found that respondent No.4 was carrying on mining at a distance of 1.4 kilometres from the temple. Ms. Suri relied upon the lease deeds executed in favour of respondent No.4, permission granted under Regulation 164(1)(b) of Metalliferous Mines Regulations, 1961, letter dated 11.4.2007 issued by the Department of Mines and Geology permitting respondent No.4 to continue the mining activities and argued that no further restriction should be imposed on its mining activities by relying upon the recommendations of the Committee. Ms. Suri laid considerable emphasis on the fact that respondent No.4 has not undertaken mining operations by using heavy explosives. Learned counsel also pointed out that on being directed by the

Department of Mines and Geology, respondent No.4 had constructed a protection wall around the temple and submitted that now there is no possibility of any damage to the temple on account of the blasting undertaken by respondent No.4. Ms. Suri argued that the recommendations made by the Committee are liable to be rejected because the same are contrary to the provisions of 1957 Act and the Rules made thereunder. As regards respondent No.17, Ms. Suri argued that mining activities were being undertaken as per the plan approved by IBM and there is no possibility of such activity causing any damage to the temple.

Consideration

62. We have given serious thought to the arguments/submissions of the learned counsel for the parties and carefully perused the records including the affidavits/objections filed in response to the recommendations made by the Committee. We have also gone through the written arguments filed by the appellant and some of the respondents.

63. Before dealing with the arguments/submissions of the learned counsel, we consider it proper to mention that even though in their counter affidavits some of the official respondents and respondent No.4 have raised an objection to the maintainability of the appeal on the ground that relief similar to the one prayed for by the appellant had been sought in Writ Petition No.27067/1998 filed before the High Court by way of public interest litigation, which was dismissed on 7.8.2000, the same was not pressed during the course of arguments. That apart, we do not find valid ground to entertain the objection of *res judicata* because the official and private respondents have not filed the pleadings of Writ Petition No.27067/1998 and without going through the same, it is not possible for this Court to record a finding that the appellant should be non-suited because a similar petition had been dismissed by the High Court.

64. The 1957 Act was enacted by Parliament to provide for development and regulation of mines and minerals under the control of Union. The backdrop in which the 1957 Act was enacted is discernible from the Statement of Objects and Reasons contained in the Mines and Minerals (Regulation and Development) Bill, which reads as under:

> "Under the Government of India Act, 1935, the subject "Ancient and historical monuments; archaeological monuments; archaeological sites and remains" fell within Entry 15 of the Federal List. Under the Constitution, this subject has been distributed under three different heads, namely,—
>
> Entry 67, Union List – Ancient and historical monuments and records, and archaeological sites and remains, declared by or under law made by Parliament to be of national importance.
>
> Entry 12, State List – Ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance, and
>
> Entry 40, Concurrent List – Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance."

65. Sections 4(1), 5(1) and 6(1) which postulate grant of prospecting licences and leases and contain certain restrictions read as under:

> "Section 4(1) of the Act prohibits any kind of mining or related activity in any area without a license for that regard under the Act and its rules. Section 4A also allows the Central government to terminate prospecting or mining leases in various circumstances.
>
> Section 5(1) provides that a state government can grant

> reconnaissance permit, prospecting licence or mining lease only to an Indian National or a company and only on satisfaction of rules made under the Act. Section 5(2) prohibits the state government from granting a mining license unless it is satisfied that there is evidence to show that the area for which the lease is applied for has been prospected earlier and there is a mining plan duly approved.
>
> Section 6(1) limits the maximum area for which one or more mining licences can be granted to one person to 10 sq. km, for prospecting license to 25 sq. km. and for reconnaissance permit to 10,000 sq. km. Section 7(1) provides that a reconnaissance permit or prospecting licence cannot be granted for more than 3 years and if renewed cannot exceed 5 years in total. Section 8(1) and 8(2) provide that a mining lease can be granted for a maximum of 30 years and can be renewed for a period not exceeding 20 years."

66. The Mineral Concession Rules, 1960 were framed by the Central Government under Section 13 of the 1957 Act. The provisions contained in Chapters II and III of these Rules regulate grant of reconnaissance permits and prospecting licences in respect of land in which the minerals vest in the government. Chapter IV contains provisions relating to grant of mining leases in respect of land in which the minerals vest in the government. Chapter V contains the procedure for obtaining a prospecting licence or mining lease in respect of land in which the minerals vest in a person other than the government. Chapter VIII contains miscellaneous provisions.

67. The Mineral Conservation and Development Rules, 1988 which were framed by the Central Government under Section 18 of the 1957 Act are divided into ten chapters. Chapter III of these Rules, which relate to mining operations, provide for submission of mining plan a y

the competent authority as a condition precedent for commencement of mining operations.

68. None of the provisions contained in the 1957 Act and the Rules framed thereunder regulate mining operations/ activities in the vicinity of ancient and historical monuments and archaeological sites. This subject is exclusively governed by the 1958 Act and similar enactments made by the State Legislatures including the Karnataka Act. Like the 1958 Act, the Karnataka Act also provides for declaration by the government of any ancient monument as a "Protected Monument". Both the Central Government and the State Government have framed rules for grant of permission/licence in the prescribed form to undertake any mining operations in a protected and/or regulated area. Rule 10 of the 1959 Rules, which has been framed under Section 38 of the 1958 Act and Rules 11 to 15 of the Karnataka Rules provide that no person shall undertake any mining operations in a regulated area other than on the strength of a licence granted by the competent authority, i.e., the Director. The material placed on record of this appeal does not show that the private respondents have obtained such licence under the Karnataka Rules for permission to undertake mining operations within the prohibited and/or regulated area. Therefore, they cannot be allowed to operate mines in the protected and/or regulated area.

69. The argument of learned counsel for the private respondents that the report of the Committee should not be accepted because the same is contrary to the recommendations made by the two expert bodies sounds attractive but, on a wholesome consideration, we do not find any merit in it because the Committee had thoroughly scrutinised the reports sent by the two expert bodies, i.e., CIMFR, Dhanbad and NIT and then decided that the area surrounding the temple should be divided into two zones, i.e., Core Zone and Buffer Zone and there shall be total ban on mining within the Core Zone while mining be permitted in the

Buffer Zone under the supervision of an expert body/agency.

70. At this stage, we may mention that in June 1972, the United Nations organised a conference on 'Human Environment' at Stockholm, Sweden. The declaration issued at the end of that conference, which is called as the Stockholm Declaration, has been aptly described by this Court in Essar Oil Ltd. v. Halar Utkarsh Samiti (2004) 2 SCC 392 as 'magna carta of our environment'. Some of the principles enunciated in the Stockholm Declaration are:

"Principle 2

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 4

Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development.

Principle 8

Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

Principle 11

The environmental policies of all States should enhance and not adversely affect the present

potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures."

Though the Stockholm Conference recognised the links between environment and development but little was done to integrate this concept for international action until 1987 when the Brundtland Report, *Our Common Future* was presented to the United Nations General Assembly. The Brundtland Report stimulated debate on development policies and practices in developing and industrialised countries alike and called for an integration of our understanding of the environment and development into practical measures of action. In 1992, Earth Summit was held in Rio de Janeiro, Brazil. The declaration issued at the end of the summit dealt with environmental needs, environmental protection, environmental degradation, etc. The World Summit on Sustainable Development was held in Johannesburg, South Africa in 2002 for the purpose of evaluating the results achieved after the Rio Summit. This summit gave an opportunity to build on the knowledge gained over the past decade and provided a new impetus for commitments of resources and specific action towards global sustainability.

71. In *Indian Council for Enviro-Legal Action v. Union of India* (1996) 5 SCC 281, this Court described the principle of sustainable development in the following words:

"While economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation; at the same time the necessity to preserve ecology and environment should not hamper economic and other developments. Both

development and environment must go hand in hand, in other words, there should not be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of environment."

72. In *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647, this Court acknowledged that the traditional notion of conflict between ecology and development is no longer acceptable and sustainable development is the answer.

73. In *Essar Oil Ltd. v. Halar Utkarsh Samiti* (supra) this Court referred to the Stockholm Declaration and observed:

"This, therefore, is the aim, namely, to balance economic and social needs on the one hand with environmental considerations on the other. But in a sense all development is an environmental threat. Indeed, the very existence of humanity and the rapid increase in the population together with consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, the filling up of lakes and pollution of water resources and the very air which we breathe. However, there need not necessarily be a deadlock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one can be sacrificed at the altar of the other."

74. We may now notice some of the judgments which have bearing on the scope of the Court's power to issue directions but which may appear to be contrary to the statutes operating in the particular field. In *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161, this Court considered whether a letter addressed to a Judge of this Court could be treated as a writ petition under Article 32 of the Constitution and whether directions could be issued for release of an indeterminate

number of citizens who were held as bonded labourers. While dealing with the scope of Article 32 of the Constitution, this Court observed:

> "..... It will be seen that the power conferred by clause (2) of Article 32 is in the widest terms. It is not confined to issuing the high prerogative writs of habeas corpus, mandamus, prohibition, certiorari and quo warranto, which are hedged in by strict conditions differing from one writ to another and which to quote the words spoken by Lord Atkin in *United Australia Limited v. Barclays Bank Ltd.* 1941 AC 1:(1939) 2 KB 53 in another context often "stand in the path of justice clanking their mediaeval chains". But it is much wider and includes within its matrix, power to issue any directions, orders or writs which may be appropriate for enforcement of the fundamental right in question and this is made amply clear by the inclusive clause which refers to in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. It is not only the high prerogative writs of mandamus, habeas corpus, prohibition, quo warranto and certiorari which can be issued by the Supreme Court but also writs in the nature of these high prerogative writs and therefore even if the conditions for issue of any of these high prerogative writs are not fulfilled, the Supreme Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress, but would have power to issue any direction, order or writ including a writ in the nature of any high prerogative writ. This provision conferring on the Supreme Court power to enforce the fundamental rights in the widest possible terms shows the anxiety of the Constitution-makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights. The Constitution-makers clearly intended that the Supreme Court should have the amplest power to issue whatever direction, order or writ may be

> appropriate in a given case for enforcement of a fundamental right. But what procedure shall be followed by the Supreme Court in exercising the power to issue such direction, order or writ? That is a matter on which the Constitution is silent and advisedly so, because the Constitution-makers never intended to fetter the discretion of the Supreme Court to evolve a procedure appropriate in the circumstances of a given case for the purpose of enabling it to exercise its power of enforcing a fundamental right. Neither clause (2) of Article 32 nor any other provision of the Constitution requires that any particular procedure shall be followed by the Supreme Court in exercising its power to issue an appropriate direction, order or writ. The purpose for which the power to issue an appropriate direction, order or writ is conferred on the Supreme Court is to secure enforcement of a fundamental right and obviously therefore, whatever procedure is necessary for fulfilment of that purpose must be permissible to the Supreme Court.
>
> .....It is for this reason that the Supreme Court has evolved the practice of appointing commissions for the purpose of gathering facts and data in regard to a complaint of breach of a fundamental right made on behalf of the weaker sections of the society. The report of the Commissioner would furnish prima facie evidence of the facts and data gathered by the Commissioner and that is why the Supreme Court is careful to appoint a responsible person as Commissioner to make an enquiry or investigation into the facts relating to the complaint. It is interesting to note that in the past the Supreme Court has appointed sometimes a District Magistrate, sometimes a District Judge, sometimes a professor of law, sometimes a journalist, sometimes an officer of the Court and sometimes an advocate practising in the Court, for the purpose of carrying out an enquiry or investigation and making report to the Court becau[illegible]er

appointed by the Court must be a responsible person who enjoys the confidence of the Court and who is expected to carry out his assignment objectively and impartially without any predilection or prejudice. Once the report of the Commissioner is received, copies of it would be supplied to the parties so that either party, if it wants to dispute any of the facts or data stated in the report, may do so by filing an affidavit and the court then consider the report of the Commissioner and the affidavits which may have been filed and proceed to adjudicate upon the issue arising in the writ petition. It would be entirely for the Court to consider what weight to attach to the facts and data stated in the report of the Commissioner and to what extent to act upon such facts and data."

(emphasis supplied)

75. In *Rural Litigation and Entitlement Kendra v. State of U.P* (1985) 2 SCC 431, this Court was called upon to consider whether there should be ban on lime stone quarries which had threatened life of the people residing in Mussoorie Hill range forming part of the Himalayas and surrounding environment. On 11.8.1983, the Court appointed a committee consisting of Shri D.N. Bhargav, Controller General, Indian Bureau of Mines, Nagpur, Shri M.S. Kahlon, Director General of Mines Safety and Col. P. Mishra, Head of the Indian Photo Interpretation Institute (National Remote Sensing Agency) for the purpose of inspecting the lime stone quarries referred to in the writ petition and the list submitted by the Government of Uttar Pradesh. The committee inspected most of the lime stone quarries and submitted three reports and divided the lime stone quarries into three categories, i.e., A, B and C. The committee noted that mining operations in the quarries categorised as A did not gravely impact the environment and life of the people whereas the quarries comprised in the other two categories had adversely impacted the environment. After taking into consideration the report of the Bhargav Committee, the Court

directed closure of all lime stone quarries in category C. As regards category B quarries, the Court appointed another committee headed by Shri D.Bandyopadhyay, Secretary, Ministry for Rural Development and issued several directions. While dealing with the question of hardship to the quarry owners, the Court observed:

"The consequence of this Order made by us would be that the lessees of lime stone quarries which have been directed to be closed down permanently under this Order or which may be directed to be closed down permanently after consideration of the Report of the Bandyopadhyay Committee, would be thrown out of business in which they have invested large sums of money and expended considerable time and effort. This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment."

(emphasis supplied)

76. In *State of Bihar v. Murad Ali Khan* (1988) 4 SCC 655, this Court observed:

"The state to which the ecological imbalances and the consequent environmental damage have reached is so alarming that unless immediate, determined and effective steps were taken, the damage might become irreversible. The preservation of the fauna and flora, some species of which are getting extinct at an alarming rate, has been a great and urgent necessity for the survival of humanity and these laws reflect a last ditch battle for the restoration, in part at least, a grave situation emerging from a long history of callous insensitiveness to the enormity of the risks to mankind that go with the deteriorati[illegible]e

tragedy of the predicament of the civilised man is that 'Every source from which man has increased his power on earth has been used to diminish the prospects of his successors. All his progress is being made at the expense of damage to the environment which he cannot repair and cannot foresee'. In his foreword to International Wild Life Law, H.R.H. Prince Philip, the Duke of Edinburgh said:

> 'Many people seem to think that the conservation of nature is simply a matter of being kind to animals and enjoying walks in the countryside. Sadly, perhaps, it is a great deal more complicated than that ….
>
> … As usual with all legal systems, the crucial requirement is for the terms of the conventions to be widely accepted and rapidly implemented. Regretfully progress in this direction is proving disastrously slow ….'

'Environmentalists' conception of the ecological balance in nature is based on the fundamental concept that nature is 'a series of complex biotic communities of which a man is an interdependent part' and that it should not be given to a part to trespass and diminish the whole. The largest single factor in the depletion of the wealth of animal life in nature has been the 'civilised man' operating directly through excessive commercial hunting or, more disastrously, indirectly through invading or destroying natural habitats."

77. In *Tarun Bharat Sangh v. Union of India* 1992 Supp (2) SCC 448, this Court considered whether mining in the area popularly known as 'Sariska Tiger Park', which was declared as Game Reserve under the Rajasthan Wild Animals and Birds Protection Act, 1951 as a reserve forest under Sections 29 and 30 of the Rajasthan Forest Act, 1953 and as a sanctuary under Section 35 of the Wildlife (Protection) Act, 1972 should be

banned because the same was impairing environment and wild life. At one stage, the Court thought of imposing total ban on mining activities but, keeping in view some technical difficulties, it was decided to constitute a Committee headed by former Chief Justice of Delhi High Court to ensure enforcement of the notifications issued under various statutes. Simultaneously, the Court passed an interlocutory order and directed that no mining operation of any kind shall be carried on within the protected area.

78. In *M.C. Mehta v. Union of India* (1996) 8 SCC 462, this Court considered the impact of mining operations on the ecologically sensitive areas of Badkal Lake and Surajkund in Haryana. After taking cognizance of the reports submitted by Haryana Pollution Control Board and an expert body, namely, National Environmental Engineering Research Institute (NEERI), the Court accepted the same with certain modifications. Paragraph 8 of the judgment which depicts consideration of the recommendations of NEERI reads thus:

> "We are, therefore, of the view that in order to preserve environment and control pollution within the vicinity of the two tourist resorts it is necessary to stop mining in the area. The question, however, for consideration is what should be the extent of the said area? NEERI in its report has recommended that 200 metre green belts be developed at 1 km radius all around the boundaries of the two lakes. It is thus obvious that 1200 metres are required for the green belts. Leaving another 800 metres as a cushion to absorb the air and noise pollution generated by the mining operations, we are of the view that it would be reasonable to direct the stoppage of mining activity within two km radius of the tourist resorts of Badkal and Surajkund. We, therefore, order and direct as under:
>
> 1. There shall be no mining activity within two km radius of the tourist resorts of Badkal a e

mines which fall within the said radius shall not be reopened.

2. The Forest Department of the State of Haryana and in particular the Chief Conservator and the District Forest Officer, Faridabad shall undertake to develop the green belts as recommended by NEERI with immediate effect. The NEERI has also suggested the development plan and the type of trees to be planted. We direct the Chief Conservator of Forests, Haryana, District Forest Officer, Faridabad and all other officers concerned of the Forest Department to start the plantation of trees for developing the green belts and make all efforts to complete the plantations of trees before the monsoons (1996).

3. We direct the Director, Mining and Geology, Haryana, the Haryana Pollution Control Board to enforce all the recommendations of NEERI contained in para 6.1 of its report (quoted above) so far as the mining operations in the State of Haryana are concerned. All the mine-operators shall be given notices to implement the said recommendations. Failure to comply with the recommendations may result in the closure of the mining operations.

4. We further direct that no construction of any type shall be permitted now onwards within 5 km radius of the Badkal lake and Surajkund. All open areas shall be converted into green belts.

5. The mining leases within the area from 2 km to 5 km radius shall not be renewed without obtaining prior "no objection" certificate from the Haryana Pollution Control Board as also from the Central Pollution Control Board. Unless both the Boards grant no objection certificate the mining leases in the said area shall not be renewed."

79. In *M.C. Mehta (Taj Trapezium Matter) v. Union of India* (1997) 2 SCC 353, this Court considered whether the foundries, chemical-hazardous industries and the refinery at Mathura should be closed down because they were threat to the very existence of Taj Mahal. In the course of judgment, the Court referred to the reports of various expert bodies including NEERI and the Central Pollution Control Board which unequivocally pointed out the damage caused to the monument by the industries and proceeded to order closure of industries, which were not in a position to make change over to the natural gas by recording the following observations:

> "The Taj, apart from being a cultural heritage, is an industry by itself. More than two million tourists visit the Taj every year. It is a source of revenue for the country. This Court has monitored this petition for over three years with the sole object of preserving and protecting the Taj from deterioration and damage due to atmospheric and environmental pollution. It cannot be disputed that the use of coke/coal by the industries emits pollution in the ambient air. The objective behind this litigation is to stop the pollution while encouraging development of industry. The old concept that development and ecology cannot go together is no longer acceptable. Sustainable development is the answer. The development of industry is essential for the economy of the country, but at the same time the environment and the ecosystems have to be protected. The pollution created as a consequence of development must be commensurate with the carrying capacity of our ecosystems.
>
> Based on the reports of various technical authorities mentioned in this judgment, we have already reached the finding that the emissions generated by the coke/coal consuming industries are air pollutants and have damaging effect on the Taj and the people living in the TTZ. The atmospheric pollution in TTZ has t y

cost. Not even one per cent chance can be taken when — human life apart — the preservation of a prestigious monument like the Taj is involved. In any case, in view of the precautionary principle as defined by this Court, the environmental measures must anticipate, prevent and attack the causes of environmental degradation. The "onus of proof" is on an industry to show that its operation with the aid of coke/coal is environmentally benign. It is, rather, proved beyond doubt that the emissions generated by the use of coke/coal by the industries in TTZ are the main polluters of the ambient air."

(emphasis supplied)

80. In *M.C. Mehta (Taj Trapezium Pollution) v. Union of India* (2001) 9 SCC 235, the Court considered the report of NEERI on the issue of pollution caused by the brick kilns operating in the Taj Trapezium and issued the following directions:

"(1) All licensed brick kilns within 20 km radial distance of Taj Mahal and other significant monuments in Taj Trapezium and Bharatpur Bird Sanctuary shall be closed and stop operating w.e.f. 15-8-1996. We direct the State of U.P. to render all possible assistance to the licensed brick kiln-owners in the process of relocation beyond Taj Trapezium, if the owners so desire. The closure order is, however, unconditional.

(2) We direct the District Magistrate and the Superintendent of Police concerned to close all unlicensed and unauthorised brick kilns operating in the Taj Trapezium with immediate effect. The U.P. Pollution Control Board (Board) shall file a compliance report within two months.

(3) No new licences shall be issued for the establishment of brick kilns within 20 km radial distance from Taj Mahal,

other monuments in Taj Trapezium and Bharatpur Bird Sanctuary."

81. In *M.C. Mehta v. Union of India* (2004) 12 SCC 118, the Court considered several interlocutory applications filed in the matter by which this Court had stopped mining operations near Badkal Lake and Surajkund. After considering various reports submitted by the expert bodies, the Court observed:

"The mining operation is hazardous in nature. It impairs ecology and people's right to natural resources. The entire process of setting up and functioning of mining operation requires utmost good faith and honesty on the part of the intending entrepreneur. For carrying on any mining activity close to township which has tendency to degrade environment and is likely to affect air, water and soil and impair the quality of life of inhabitants of the area, there would be greater responsibility on the part of the entrepreneur. The fullest disclosures including the potential for increased burdens on the environment consequent upon possible increase in the quantum and degree of pollution, has to be made at the outset so that the public and all those concerned including authorities may decide whether the permission can at all be granted for carrying on mining activity. The regulatory authorities have to act with utmost care in ensuring compliance of safeguards, norms and standards to be observed by such entrepreneurs. When questioned, the regulatory authorities have to show that the said authorities acted in the manner enjoined upon them. Where the regulatory authorities, either connive or act negligently by not taking prompt action to prevent, avoid or control the damage to environment, natural resources and people's life, health and property, the principles of accountability for restoration and compensation have to be applied.

Development and the protection o ot

enemies. If without degrading the environment or minimising adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable development, in that eventuality, development has to go on because one cannot lose sight of the need for development of industries, irrigation resources and power projects etc. including the need to improve employment opportunities and the generation of revenue. A balance has to be struck. We may note that to stall fast the depletion of forest, a series of orders have been passed by this Court in *T.N. Godavarman* case 1991 Supp (2) SCC 665 regulating the felling of trees in all the forests in the country. Principle 15 of the Rio Conference of 1992 relating to the applicability of precautionary principle, which stipulates that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation, is also required to be kept in view. In such matters, many a times, the option to be adopted is not very easy or in a straitjacket. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment."

The Court then referred to the provisions of the 1957 Act, the Rules framed thereunder as also the laws enacted by Parliament for protection of environment and forests and observed:

"The Aravallis, the most distinctive and ancient mountain

chain of peninsular India, mark the site of one of the oldest geological formations in the world. Heavily eroded and with exposed outcrops of slate rock and granite, it has summits reaching 4950 feet above sea level. Due to its geological location, the Aravalli range harbours a mix of Saharan, Ethiopian, peninsular, oriental and even Malayan elements of flora and fauna. In the early part of this century, the Aravallis were well wooded. There were dense forests with waterfalls and one could encounter a large number of wild animals. Today, the changes in the environment at Aravalli are severe. Though one finds a number of tree species in the hills, timber-quality trees have almost disappeared. Despite the increase of population resulting in increase of demand from the forest, it cannot be questioned nor has it been questioned that to save the ecology of the Aravalli mountains, the laws have to be strictly implemented. The notification dated 7-5-1992 was passed with a view to strictly implement the measures to protect the ecology of the Aravalli range. The notification was followed more in its breach.

In the aforesaid background, any mining activity on the area under plantation under the Aravalli Project cannot be permitted. The grant of leases for mining operation over such an area would be wholly arbitrary, unreasonable and illogical."

The Court then referred to the report prepared by the Central Mine Planning and Design Institute Limited on Aravalli and accepted the same. The Court finally referred to the judgment in *Ambica Quarry Works v. State of Gujarat* (1987) 1 SCC 213 and refused to modify order dated 6.5.2002 by which mining activities were banned but appointed a Monitoring Committee for suggesting recommencement of mining in individual cases.

82. In *M.C. Mehta v. Union of Ind*

this Court considered the question of whether in view of Section 4A of the 1957 Act, it would be appropriate to exercise power under Article 32 read with Article 142 for suspending mining operations in the Aravalli Hills. After taking cognizance of the fact that indiscriminate mining had resulted in large scale environmental degradation in the area and the arguments of the senior counsel appearing on behalf of the leaseholders, the Court observed:

> "44. We find no merit in the above arguments. As stated above, in the past when mining leases were granted, requisite clearances for carrying out mining operations were not obtained which have resulted in land and environmental degradation. Despite such breaches, approvals had been granted for subsequent slots because in the past the authorities have not taken into account the macro effect of such wide-scale land and environmental degradation caused by the absence of remedial measures (including rehabilitation plan). Time has now come, therefore, to suspend mining in the above area till statutory provisions for restoration and reclamation are duly complied with, particularly in cases where pits/quarries have been left abandoned.
>
> 45. Environment and ecology are national assets. They are subject to intergenerational equity. Time has now come to suspend all mining in the above area on sustainable development principle which is part of Articles 21, 48-A and 51-A(g) of the Constitution of India. In fact, these articles have been extensively discussed in the judgment in M.C. Mehta case (2004) 12 SCC 118 which keeps the option of imposing a ban in future open.
>
> 46. Mining within the principle of sustainable development comes within the concept of "balancing" whereas mining beyond the principle of sustainable development comes within the concept of "banning". It is a matter of degree.

> Balancing of the mining activity with environment protection and banning such activity are two sides of the same principle of sustainable development. They are parts of precautionary principle.
>
> 47. At this stage, we may also note that under Section 13(2)(qq) of the 1957 Act, rules have been framed for rehabilitation of flora and other vegetation destroyed by reason of any prospecting or mining operations. Under Section 18 of the 1957 Act, rules have been framed for conservation and systematic development of minerals in India and for the protection of environment by preventing or controlling pollution caused by prospecting or mining operations which also form part of the Mineral Concession Rules, 1960 and the Mineral Conservation and Development Rules, 1988.
>
> 48. Under Rule 27(1)(s)(i) of the Mineral Concession Rules, 1960 every lessee is required to take measures for planting of trees not less than twice the number destroyed by mining operations. Under the Mineral Conservation and Development Rules, 1988, vide Rule 34, mandatory provisions for reclamation and rehabilitation of lands are made for every holder of prospecting licence or mining lease to be undertaken and that work has to be completed by the lessee/licensee before abandoning the mine or prospect.
>
> 49. Similarly, under Rule 37 of the Mineral Conservation and Development Rules, 1988 the lessee/licensee has to calibrate the air pollution within permissible limits specified under the EP Act, 1986 as well as the Air (Prevention and Control of Pollution) Act, 1981. Under the said Rules of 1988, the most important guidelines are Guidelines 25.26.3, 25.26.4, 25.26.5 and 25.26.6. These guidelines deal with reclamation, planning and implementation, restoration strategy, principle[illegible],

rehabilitation of mined-out sites and methods of reclamations (see Handbook of Environment & Forest Legislations, Guidelines and Procedures in India by Ravindra N. Saxena and Sangita Saxena at pp. 1555-62). It may be noted that there are two steps to be taken in the method of reclamation, namely, technical reclamation and biological reclamation. The most important aspect of the above guidelines is making of a rehabilitation plan.

Conclusion

50. None of the above provisions have been complied with. In the circumstance, by the present order, we hereby suspend all mining operations in the Aravalli hill range falling in the State of Haryana within the area of approximately 448 sq km in the districts of Faridabad and Gurgaon, including Mewat till the reclamation plan duly certified by the State of Haryana, MoEF and CEC is prepared in accordance with the above statutory provisions contained in various enactments enumerated above as well as in terms of the rules framed thereunder and the guidelines. The said plan shall state what steps are needed to be taken to rehabilitate (including reclamation) followed by status reports on steps taken by the authorities pursuant to the said plan."

(emphasis supplied)

83. In *N.D. Jayal v. Union of India* (supra), on which reliance was placed by Shri Jaideep Gupta, this Court considered the issues relating to safety and environmental protection arising out of the construction of Tehri Dam. Some of the observations made in that judgment are extracted below:

"Before adverting to other issues, certain aspects pertaining to the preservation of ecology and development have to be noticed. In *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647 and in *M.C. Mehta v.*

Union of India (2002) 4 SCC 356 it was observed that the balance between environmental protection and developmental activities could only be maintained by strictly following the principle of "sustainable development". This is a development strategy that caters to the needs of the present without negotiating the ability of upcoming generations to satisfy their needs. The strict observance of sustainable development will put us on a path that ensures development while protecting the environment, a path that works for all peoples and for all generations. It is a guarantee to the present and a bequeath to the future. All environment-related developmental activities should benefit more people while maintaining the environmental balance. This could be ensured only by strict adherence to sustainable development without which life of the coming generations will be in jeopardy.

The right to development cannot be treated as a mere right to economic betterment or cannot be limited as a misnomer to simple construction activities. The right to development encompasses much more than economic well-being, and includes within its definition the guarantee of fundamental human rights. The "development" is not related only to the growth of GNP. In the classic work, Development As Freedom, the Nobel prize winner Amartya Sen pointed out that "the issue of development cannot be separated from the conceptual framework of human right". This idea is also part of the UN Declaration on the Right to Development. The right to development includes the whole spectrum of civil, cultural, economic, political and social process, for the improvement of peoples' well-being and realization of their full potential. It is an integral part of human rights. Of course, construction of a dam or a mega project is definitely an attempt to achieve the goal of wholesome development. Such works could very well be treated as integral component for development."

84. In *Samaj Parivartana Samudaya v. State of Karnataka* (supra), this Court was called upon to consider whether all mining and other related activities undertaken in the forest areas of Andhra Pradesh and Karnataka in violation of order dated 12.12.1996 passed in W.P.(C) No.202/1995 and the 1980 Act should be stopped. After entertaining the writ petition filed under Article 32, the Court appointed a committee known as the Central Empowered Committee and asked it to submit a report on the allegations of illegal mining in Bellary region of the State by M/s. Bellary Iron Ore Pvt. Ltd., M/s. Mahabaleswarapa and Sons, M/s. Ananthapur Mining Corporation and M/s. Obulapuram Mining Company Pvt. Ltd. Subsequently, the scope of inquiry of the Central Empowered Committee was extended to all the mining activities in District Bellary. In furtherance of Court directions, the Central Empowered Committee filed various reports. During the course of hearing, the leaseholders raised several objections to the reports of the Central Empowered Committee including the one that in view of the scheme of the 1957 Act, the 1980 Act and the Environment (Protection) Act, 1986, the Central Empowered Committee could not have recommended taking of any step or measure beyond what is contemplated by the scheme of these statutes. Their argument was controverted by the learned Amicus who pointed out that the reports of the Central Empowered Committee revealed mass destruction of forest wealth and plundering of scarce natural resources which resulted in irreparable ecological and environmental damage and destruction and such activities need consideration by the Court beyond the limitations set out in the statutes. After considering the rival arguments and adverting to the judgments in *Bandhua Mukti Morcha v. Union of India* (supra), *M.C. Mehta v. Union of India* (1987) 1 SCC 395, *Taj Trapezium Pollution (supra), Supreme Court Bar Association v. Union of India* (1998) 4 SCC 409, the Court observed:

"The mechanism provided by any of the Statutes in

question would neither be effective nor efficacious to deal with the extraordinary situation that has arisen on account of the large scale illegalities committed in the operation of the mines in question resulting in grave and irreparable loss to the forest wealth of the country besides the colossal loss caused to the national exchequer. The situation being extraordinary the remedy, indeed, must also be extraordinary. Considered against the backdrop of the statutory schemes in question, we do not see how any of the recommendations of the CEC, if accepted, would come into conflict with any law enacted by the legislature. It is only in the above situation that the Court may consider the necessity of placing the recommendations made by the CEC on a finer balancing scale before accepting the same. We, therefore, feel uninhibited to proceed to exercise our constitutional jurisdiction to remedy the enormous wrong that has happened and to provide adequate protection for the future, as may be required."

(emphasis supplied)

In paragraph 41, the Bench dealt with the question whether the recommendations of the Central Empowered Committee with regard to categorization, reclamation and rehabilitation (R&R) plans, reopening of categories 'A' and 'B' mines with conditions and continued closure of category 'C' mines should be accepted and answered the same in the following words:

"In the light of the discussions that have preceded sanctity of the procedure of laying information and materials before the Court with regard to the extent of illegal mining and other specific details in this regard by means of the Reports of the CEC cannot be in doubt. Inter-generational equity and sustainable development have come to be firmly embedded in our constitutional jurisprudence as an integral part of the fundamental rights conferred by Article 21 of the Constitution. In enforcing such rights of a large number of citizens who are bound to [illegible] d

by environmental degradation, this Court cannot be constrained by the restraints of procedure. The CEC which has been assisting the Court in various environment related matters for over a decade now was assigned certain specified tasks which have been performed by the said body giving sufficient justification for the decisions arrived and the recommendations made. If the said recommendations can withstand the test of logic and reason which issue is being examined hereinafter we will have no reason not to accept the said recommendations and embody the same as a part of the order that we will be required to make in the present case."

However, the three-Judge Bench did not deal with the issue relating to impact of mining operations on ancient monuments. As a matter of fact, vide order dated 3.9.2012, the Bench made it clear that the direction given by it for operation of 'Category A' mines will be subject to any order passed in Jambunathahalli Temple case.

85. Although, the aforesaid judgments were rendered on the petitions filed under Article 32 of the Constitution, we have no hesitation to hold that the ratio thereof can be aptly applied for deciding the appeals arising out of the petitions filed under Article 136 of the Constitution. In two of these cases, i.e., *Bandhua Mukti Morcha v. Union of India* (supra) and *M.C. Mehta v. Union of India* (1987) 1 SCC 395, this Court evolved an innovative mechanism for enforcing the fundamental rights of bonded labourers and those who became victims of the operation of hazardous industries. In the next three cases filed by Mr. M.C. Mehta, the Court considered the impact of mining on national assets like water bodies (Badkal Lake and Surajkund in Haryana), the Taj Mahal and the Aarvali Hills, availed the services of expert bodies and accepted their reports for issuing directions to check pollution and environmental degradation. In the second case, the Court ordered closure of all licensed brick kilns operating within a 20

kilometers radial distance of the Taj Mahal, Taj Trapezium and Bharatpur Bird Sanctuary. The law which regulated the brick kilns did not contain any such restriction, but in larger public interest, namely, protection of a national monument and a bird sanctuary, this Court used its power to order closure of all the licensed brick kilns. In the third case, the Court considered and unequivocally rejected the plea that the mines which were operating under the licences granted in accordance with the 1957 Act and the Rules framed thereunder cannot be closed under the Court's order and held that all mining operations in the Aarvali Hills shall be suspended. In the last mentioned case, which relates to the mines operating in three districts of Karnataka, the Court gave multiple directions for protecting the environment, ecology and forest wealth.

86. The affidavit filed by respondent No.14 on 14.2.2011 gives a vivid description of the mining activities taking place in the vicinity of the temple by using Wagon Blasting Method. Shri T.M. Manjunathaiah (Technical Assistant) reported that during the course of inspection of the temple, he felt tremors due to the explosion and also noticed cracks on the walls and roof due to the impact of the explosion and that the lessee was doing repairs in the form of plastering and cement coating to cover up the cracks on the temple. Respondent No.14 also referred to two inspections carried out by Superintending Archaeologist, Archaeological Survey of India and a team of officers of the Government of Karnataka, who noticed large scale damage to the structure of the temple. This affidavit totally belies the stand of respondent No.4 that mining was done by Controlled Blasting and not by Wagon Blasting Method.

87. On its part the Committee availed the services of INTACH, Bangalore Chapter, Karnataka Remote Sensing Application Centre, ISRO, CIMFR, Dhanbad and NIT. In paragraph IV of its report under the heading DISCUSSIONS, the Committee unanimously agreed that the mining operations carried out using blasting operations at n

200 meters from the temple have already caused irreparable damage to the temple and the eco-environs of its immediate neighbourhood. The Committee noted that the study submitted by Karnataka Remote Sensing Application Centre, ISRO, Bangalore dealt with the mining activities carried out in a radius of one kilometer and two kilometers and illustrated the damage caused to the temple and its immediate environs. The Committee then discussed the conservation plan prepared by Indian National Trust for Arts and Cultural Heritage, Bangalore and observed that a sum of Rs.3,43,19,160 would be required for bringing the temple to its original condition so that the same may regain its past glory. The Committee then noted that the investigating agencies, i.e., CIMFR, Dhanbad and NIT had conducted experimental blasts beyond 200 meters whereas Karnataka Remote Sensing Application Centre had indicated that one of the mines exists within a horizontal distance of 55 meters from the temple premises on the eastern side and, thus, the impact of blasting operation cannot be fully understood and assessed scientifically by the present investigation. The Committee also observed that many of the trial blasts conducted by the investigating agencies had locations having free faces of the working benches and opined that the result of such investigation would show minimum or no impact on architecturally sensitive temple. The Committee finally declined to accept the suggestions given by CIMFR, Dhanbad and NIT to restrict the mining operations/activities only up to a distance of 200 to 300 meters from Jambunatheswara temple because the data recorded by the expert bodies were based on experimental blasts conducted at individual sites and there was no evaluation/assessment of the cumulative or compounded impact of multiple blasting at different places and altitudes. The Committee noted that the mining operations involving multiple blasting by different leaseholders had already caused substantial damage to the protected monument and the surrounding environment.

88. In our view, the detailed reasons recorded by the Committee, which have been extracted hereinabove, for not accepting the recommendations of the expert bodies about the distance up to which mining should not be allowed are correct and those recommendations cannot be relied upon for accepting the argument of the learned counsel for the State and the private respondents that the recommendations made by the Committee should be rejected. We may hasten to add that the Committee's recommendations are not in conflict with the provisions of the 1957 Act and the Rules framed thereunder. The 1959 Rules and the Karnataka Rules provide for grant of permission/licence for mining in the prohibited/regulated/protected area but the documents produced before this Court do not show that the competent authority had granted permission/licence to any of the private respondents for undertaking mining operations which have the effect of damaging the temple in question. That apart, the distance criteria prescribed in the 1958 Act, the Karnataka Act and the Rules framed thereunder has little or no bearing on deciding the question of restricting the mining operations near the protected monument which has already suffered extensive damage due to such operations.

89. The argument of learned counsel for the State and the private respondents that ban on mining operations/activities in the Core Zone would adversely impact iron ore supply and will also cause financial loss to the leaseholders as well as the State appears quite attractive but, keeping in view larger public interest and the interest of future generations, we do not think that this would be a very heavy price to be paid by some individuals and the State. This Court has often used the principle of sustainable development to balance the requirement of development and environmental protection and issued several directions for protection of natural resources including air, water, forest, flora and fauna as also wildlife. The Court has also recognized that the right t[illegible]s

the whole spectrum of civil, cultural, economic, political and social process, for the improvement of peoples well being and realization of their full potential.

90. In *Orissa Mining Corporation Ltd. v. Ministry of Environment and Forest* (Writ Petition (C) No.180/2011) decided on 18.4.2013, this Court recognized the customary and cultural rights of indigenous people living in Kalahandi and Rayagada Districts of Orissa. While considering challenge to order dated 24.8.2010 passed by the Ministry of Environment and Forests whereby the application made by the petitioner for grant of permission for diversion of 660.749 hectares of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in two Districts of the State was rejected, the three Judge Bench extensively referred to Saxena Committee report, which covered several issues including violation of the rights of tribal groups including primitive tribal groups and the dalit population and proceeded to observe:

> "The customary and cultural rights of indigenous people have also been the subject matter of various international conventions. International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No.107) was the first comprehensive international instrument setting forth the rights of indigenous and tribal populations which emphasized the necessity for the protection of social, political and cultural rights of indigenous people. Following that there were two other conventions ILO Convention (No.169) and Indigenous and Tribal Peoples Convention, 1989 and United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007, India is a signatory only to the ILO Convention (No. 107).
>
> Apart from giving legitimacy to the cultural rights by 1957 Convention, the Convention on the Biological Diversity (CBA) adopted at the Earth Summit (1992) highlighted

> necessity to preserve and maintain knowledge, innovation and practices of the local communities relevant for conservation and sustainable use of bio-diversity, India is a signatory to CBA. Rio Declaration on Environment and Development Agenda 21 and Forestry principle also encourage the promotion of customary practices conducive to conservation. The necessity to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands."

The Bench then referred to the provisions of the Forest Rights Act, 2006, the rules framed thereunder as also the guidelines issued by the Ministry of Tribal Welfare, referred to the judgment of this Court in *Amritlal Athubhai Shah v. Union Government of India* (1976) 4 SCC 108, which recognized the power of the State Government to reserve any particular area for bauxite mining for a public sector corporation, and observed:

> "Religious freedom guaranteed to STs and the TFDs under Articles 25 and 26 of the Constitution is intended to be a guide to a community of life and social demands. The above mentioned Articles guarantee them the right to practice and propagate not only matters of faith or belief, but all those rituals and observations which are regarded as integral part of their religion. Their right to worship the deity Niyam-Raja has, therefore, to be protected and preserved.
>
> Gram Sabha has a role to play [illegible] e

customary and religious rights of the STs and other TFDs under the Forest Rights Act. Section 6 of the Act confers powers on the Gram Sabha to determine the nature and extent of "individual" or "community rights". In this connection, reference may also be made to Section 13 of the Act coupled with the provisions of PESA Act, which deal with the powers of Gram Sabha. Section 13 of the Forest Rights Act reads as under:

> "13. Act not in derogation of any other law. – Save as otherwise provided in this Act and the provisions of the Panchayats (Extension of the Scheduled Areas) Act, 1996 (40 of 1996), the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."

PESA Act has been enacted, as already stated, to provide for the extension of the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. Section 4(d) of the Act says that every Gram Sabha shall be competent to safeguard and preserve the traditions, customs of the people, their cultural identity, community resources and community mode of dispute resolution. Therefore, Grama Sabha functioning under the Forest Rights Act read with Section 4(d) of PESA Act has an obligation to safeguard and preserve the traditions and customs of the STs and other forest dwellers, their cultural identity, community resources etc., which they have to discharge following the guidelines issued by the Ministry of Tribal Affairs vide its letter dated 12.7.2012."

91. When seen in this light, the protection of ancient monuments has necessarily to be kept in mind while carrying out development activities. The need for ensuring protection and preservation of the ancient monuments for the benefit of future generations has to be balanced with the benefits which

may accrue from mining and other development related activities. In our view, the recommendations and suggestions made by the Committee for creation of Core Zone and Buffer Zone appropriately create this balance. While mining activity is sure to create financial wealth for the leaseholders and also the State, the immense cultural and historic wealth, not to mention the wealth of information which the temple provides cannot be ignored and every effort has to be made to protect the temple.

92. Before concluding, we may deal with the submission of Shri Lalit that mining can be permitted beyond the distance of 300 meters from the temple by using Ripper Dozer and Rock Breaker machines. According to the learned senior counsel, the use of Ripper Dozer and Rock Breaker will not produce vibration which may cause harm to the temple. In our view, this submission does not merit acceptance because in paragraph 6 of the suggestions made by it, the Committee appointed by the Court has already indicated that mining in the Buffer Zone may be permitted with controlled blasting or without blasting by using Ripper Dozer/Rock Breaker or any other machinery and taking adequate measures towards generation, propagation, suppression and deposition of airborne dust to be closely monitored by experts from IBM etc.

93. In the result, the appeal is allowed and the impugned order is set aside. The report of the Committee is accepted and the State Government is directed to implement the recommendations contained in Part V thereof including the recommendation relating to creation of Corpus Fund of Rs.3,43,19,160 which shall be utilized for implementing the conservation plan for Jambunatheswara temple. However, it is made clear that respondent No.18 shall be free to operate the Beneficiation plant subject to the condition that it shall procure raw material only through E-auction mode.

94. With a view to ensure that other

in the State do not suffer the fate of Jambunatheswara temple, we direct that the Committee appointed by this Court vide order dated 26.4.2011 shall undertake similar exercise in respect of other protected monuments in the State in whose vicinity mining operations are being undertaken and submit report to the State Government within a maximum period of nine months. The State Government shall release a sum of Rs.30 lacs in favour of the Committee to meet the expenses of survey, investigation etc. The report submitted by the Committee shall be considered by the Government within next two months and appropriate order be passed.

95. We hope and trust that the Government of India will also appoint an expert committee/group to examine the impact of mining on the monuments declared as protected monuments under the 1958 Act and take necessary remedial measures.

K.K.T. Appeal allowed.

JAGDISH PRASAD SHARMA ETC. ETC.
v.
STATE OF BIHAR & ORS.

(Civil Appeal Nos. 5527-5543 of 2013)

JULY 17, 2013

[ALTAMAS KABIR, CJI., SURINDER SINGH NIJJAR AND J. CHELAMESWAR, JJ.]

Education/Educational Institutions – Service conditions – A composite Scheme framed by University Grants Commission in exercise of powers under Regulations framed under University Grants Commission Act, 1956 – To revise the pay of teachers and connected staff of the State Universities and educational institutions and to increase their age of superannuation from 62 to 65 – The States were required to accept the Scheme in composite form, but the acceptance thereof was left to the discretion of the States – States were unwilling to accept the Scheme in its composite form – Giving rise to present litigations – Held: Education being List III subject of VII Schedule of the Constitution, States are at liberty to frame their own laws on this subject and the same will have primacy if it does not encroach upon jurisdiction of Parliament – In absence of any such legislation by the Central Government under Entry 25 of List III, the Regulations framed by way of delegated legislation, has to yield to the jurisdiction of the State – The States, therefore, were not bound to accept or follow the regulations framed by UGC – But if they wish to adopt the Regulations, the States will have to abide by the Conditions laid down by the Commission – There can be no automatic application of the recommendations made by the Commission, without any conscious decision being taken by the State in this regard – Constitution of India, 1950 – VII Schedule List III, Entry 25 – University Grants Commission Act, 1956.

The Pay Review Committee set up by the University Grants Commission, submitted its report relating to the revision of pay scales of teachers, qualification for appointment, service and working conditions and promotional avenues of teachers in Universities and Colleges. It recommended that the age of superannuation throughout the country should be 65 years, whether in the State or Central University. Thereafter the Commission in exercise of its powers u/s. 26 of University Grants Commission Act, 1956 framed a Scheme. The Scheme indicated that in case the State Governments opted to revise the pay scales of teachers and other equivalent cadres covered under the Scheme, financial assistane from Central Government to such State Governments would be to the extent of 80% of the additional expenditure involved in the implementation of the revision; and that such financial assistance would be provided from 1.1.2006 to 31.3.2010 and thereafter the entire liability on account of revision of pay scales would have to be taken over by the State Government. The Central assistance for implementing the Scheme was subject to the conditions that the entire Scheme of revision, together with all the conditions to be laid down by the Commission, by way of Regulations and other guidelines, would have to be implemented by the State Government and Universities and Colleges coming under their jurisdiction, as a composite Scheme, without any modification. The condition also included the enhancement of the age of superannuation of such teachers to 65 years. However, the acceptance of the composite Scheme was made discretionary. While most of the States were willing to adopt the Scheme, but not in its composite forms i.e. they were not agreeable to increase in retirement age to 65 and also wanted to shift the liability on Central Government with regard to the increase in pay-scales even after 1.4.2010.

The questions, therefore, in the present appeals, writ petitions and transferred cases were whether the Scheme would automatically apply to Centrally-founded institutions, State Universities and educational institutions and also private institutions at the State level; and that in the process of framing regulations, whether the Commission could alter the service conditions of the employees which were entirely under the control of the States.

Disposing of the appeals, petitions and transferred cases, the Court

HELD: 1. Education being a List III subject of the VII Schedule to the Constitution, the State Government is at liberty to frame its own laws relating to education in the State and is not, therefore, bound to accept or follow the Regulations framed by the UGC. It is only natural that if the States wish to adopt the Regulations framed by the Commission under Section 26 of the University Grants Commission Act, 1956, they will have to abide by the conditions as laid down by the Commission. [Para 59] [739-B-C]

2. The question which is special to the State of Bihar, i.e., the effect of Section 67(a) introduced into the Bihar State Universities Act, 1976, by the Bihar State University (Amendment) Act, 2006, and the corresponding amendments made in the Patna University Act, 1976. While, on the one hand, it has been mentioned that notwithstanding anything to the contrary contained in any Act, Rules, Statutes, Regulation or Ordinance, the date of retirement of a teaching employee of the University or of a College shall be the date on which he attains the age of 62 years, the confusion is created by the next sentence which further provides that the date of retirement of a teaching employee would be the same which would be decided by the UG[illegible]d

that the said provision clearly contemplates that in the event of an alteration resulting in an upward revision of the age of superannuation, the same would automatically apply to all such teachers and staff, without any further decision of the State and its authorities in that regard. In other words, what has been sought to be urged is that when in regard to Centrally-funded universities, colleges and educational institutions, the age of superannuation has been increased to 65 years by the University Grants Commission, the same has to uniformly apply to all universities and colleges throughout the country, without any discrimination. The same did not necessitate any separate decision to be taken by the State and its authorities regarding the applicability of the decision taken by the University Grants Commission. [Para 60] [739-D-H; 740-A-B]

3. On mere communication, the revision of the pay of teachers and increase in the age of superannuation would not automatically become effective and that, in any event, the right to alter the terms and conditions of service of the State universities and colleges were within the domain of the State Government and till such time as it decided to adopt the same, the same would have no application to the teachers and staff of the different educational institutions in the State. In the amended provisions of Section 67(a) it has been categorically stated that the age of superannuation of non-teaching employees would be 62 years and, in no case, should the period of service of such non-teaching employees be extended beyond 62 years. A difference had been made in regard to the teaching faculty whose services could be extended up to 65 years in the manner laid down in the University Statutes. There is no ambiguity that the final decision to enhance the age of superannuation of teachers within a particular State would be that of the State itself. The right of the Commission to frame

Regulations having the force of law is admitted. However, the State Governments are also entitled to legislate with matters relating to education under Entry 25 of List III. So long as the State legislation did not encroach upon the jurisdiction of Parliament, the State legislation would obviously have primacy over any other law. If there was any legislation enacted by the Central Government under Entry 25 List III, both would have to be treated on a par with each other. In the absence of any such legislation by the Central Government under Entry 25 List III, the Regulation framed by way of delegated legislation has to yield to the plenary jurisdiction of the State Government under Entry 25 of List III. [Paras 63 and 64] [741-C-H; 742-A-B]

4. The situation where a composite scheme has been framed by the UGC, whereby the Commission agreed to bear 80% of the expenses incurred by the State if such scheme was to be accepted, subject to the condition that the remaining 20% of the expense would be met by the State and that on and from 1st April, 2010, the State Government would take over the entire burden and would also have enhanced the age of superannuation of teachers and other staff from 62 to 65 years. There being no compulsion to accept and/or adopt the said scheme, the States are free to decide as to whether the scheme would be adopted by them or not. There can be no automatic application of the recommendations made by the Commission, without any conscious decision being taken by the State in this regard, on account of the financial implications and other consequences attached to such a decision. The case of those Petitioners who have claimed that they should be given the benefit of the scheme dehors the responsibility attached thereto, must, therefore, fail. [Para 65] [742-B-F]

5. However, within this class of institutions there is a separate group where the S s

themselves have taken a decision to adopt the scheme. In such cases, the consequences envisaged in the scheme itself would automatically follow. [Para 66] [742-F-G]

6. So far as the States of Kerala and U.P. are concerned, they have their own problems which are localised and stand on a different footing from the other States, none of whom who appear to have the same problem. [Para 59] [739-B]

7. The persons who have continued to work on the basis of the interim orders passed by this Court or any other Court, shall not be denied the benefit of service during the said period. The Appeals and Petitions having been dismissed, both the State Authorities and the Central Authorities will be at liberty to work out their remedies in accordance with law. [Para 67] [743-B-C]

University of Delhi vs. Raj Singh **(1994) Suppl 3 SCC 516: 1994 (3) Suppl. SCR 217;** *Ramkrishnaiah vs. Union of India* **(1989) 2 SCC 541: 1989 (2) SCR 92;** *B.N. Nagarajan vs. State of Mysore* **(1966) 3 SCR 682;** *Sant Ram Sharma vs. State of Rajasthan* **(1968) 1 SCR 111;** *Ramachandra Shankar Deodhar vs. State of Maharashtra* **(1974) 1 SCC 317: 1974 (2) SCR 216;**

Gujarat University, Ahmedabad vs. Krishna Ranganath Mudholkar **1963 Suppl 1 SCR 112;** *Dr. Preeti Srivastava vs. State of M.P.* **(1999) 7 SCC 120: 1999 (1) Suppl. SCR 249;** *Pavai Ammal Vaiyapuri Education Trust vs. Government of Tamil Nadu* **(1994) 6 SCC 259: 1994 (3) Suppl. SCR 738;**

B. Bharat Kumar and Ors. vs Osmania University and Ors. **(2007) 11 SCC 58: 2007 (6) SCR 168;** *Synthetic and Chemicals Ltd. and Ors. vs. State of U.P. and Ors.* **(1990) 1 SCC 109: 1989 (1) Suppl. SCR 623;** *Annamalai University vs. Secretary to Govt. Information and Tourism Department & Ors.* **(2009) 4 SCC 590: 2009 (3) SCR 355;** *Prem Chand Jain vs. R.K. Chhabra* **(1984) 2 SCC 302: 1984 (2) SCR 883;** *S.R. Bommai vs. Union of India* **(1994) 3 SCC 1** *T.P. ; George vs State of Kerala* **1992 Supp (3) SCC 191: 1992 (2) SCR 311;** *All India Sainik Schools Employees' Association vs. Defence Minister-cum-Chairman Board of Governors, Sainik Schools Society, New Delhi* **1989 Supp 1 SCC 205: 1988 (3) Suppl. SCR 398;** *Javed vs. State of Haryana* **(2003) 8 SCC 369: 2003 (1) Suppl. SCR 947 – cited.**

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1963 Suppl 1 SCR 112	**cited**	**Para 28**
1999 (1) Suppl. SCR 249	**cited**	**Para 37**
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1989 (1) Suppl. SCR 623	**cited**	**Para 43**
2009 (3) SCR 355	**cited**	**Para 44**
1984 (2) SCR 883	**cited**	**Para 44**
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1992 (2) SCR 311	**cited**	**Para 49**
1988 (3) Suppl. SCR 398	**cited**	**Para 49**
2003 (1) Suppl. SCR 947	**cited**	**Para 49**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5527-5543 of 2013.

From the Judgment & Order dated 18.05.2010 in LPA Nos. 117, 280, 282, 285, 287, 289, 293, 294, 354, 384, 416, 519, 526, 574, 578, 580 and 592 of 2010 of the High Court of Patna.

WITH

C.A. No. 5544, 5545, 5546, 5547, 5548, 5549-5551, 5552, 5553, 5554, 5555, 5556, 5557, 5558, 5559-5560 of 2013, WP(C) No. 348 of 2011, C.A. No. 5561 of 2013, W.P.(C) No. 442 of 2011, C.A. No. 5562, 5563, 5564-5566, 5567, 5569-5573, 5574 of 2013, C.P. (C) 425 of 2011 in C.A. No. 5555 of 2013, C.A. No. 5575, 5576, 5577, 5578, 5579, 5580 of 2013, C.P. (C) 316 of 2011 in C.A. No. 5548 of 2013, C.P. (C) 57 of 2012 in C.A. No. 5548 of 2013, C.A. No. 5581, 5582 of 2013, W.P.(C) No. 61 of 2012, C.A. No. 5583, 5584-5592, 5593, 5594-5606, 5607, 5608-5610, 5611-5615, 5616, 5617, 5618, 5619, 5620, 5621-5629, 5630-5653, 5654, 5655-5658, 5659-5660, 5661, 5562, 5663, 5664, 5665, 5666, 5667-5668, 5669, 5670, 5671, 5672, 5673, 5674, 5675, 5676, 5677, 5678, 5679, 5680-5682, 5683, 5684, 5685, 5686, 5687, 5688, 5689-5690 of 2013, T.C. (C) No. 100-106 of 2013, C.A. No. 5691, 5692, 5693, 5694, 5695, 5696, 5697, 5698, 5699, 5700, 5701, 5702, 5703, 5704, 5705, 5706, 5707, 5708 of 2013, W.P. (C) No. 88 of 2012, C.A. Nos. 5709-5773, 5774-5788, 5789-5790, 5791, 5792, 5793, 5794, 5795, 5796, 5797, 5798, 5799, 5800, 5801, 5802-5803, 5804-5805, 5806-5809 of 2013, T.C.(C) No. 27 of 2013, C.A. No. 5810, 5811, 5812 of 2013, W.P.(C) No. 83 of 2013, C.A. No. 5813, 5814 of 2013, W.P. (C) No. 53 of 2013, C.A. No. 5815, 5816, 5817, 5818 of 2013.

Rakesh K. Khanna, Sidharth Luthra, ASGs, P.S. Patwalia, J.S. Attrim, Dinesh Dwivedi, R.S. Sodhi, Vijay Hansaria, R. Venkataramani, Rakesh Dwivedi, R.P. Kabilan, B.S. Patil, Sanchar Anand, Manjit Singh, Dr. Manish Singhvi, AAGs, Devashish Bharuka, Jasneet Kaur, Rameshwar Prasad Goyal, Renjith B. Marar, T.G. Narayanan Nair, Senthil Jagadeesan,

D.N. Dubey, Pradeep Kumar Dwivedi, Sandeep Kumar Dwivedi, Asha Gopalan Nair, Anupam Dwivedi, Mohit Kumar Gupta, Suresh Chandra Tripathi, Sarla Chandra, Mukesh Verma, Pawan Kumar Shukla, Yash Pal Dhingra, Rohit Pandey, Garvesh Kabra, Adarsh Upadhyay, Shakil Ahmed Syed, Hari Kumar V., P.I. Jose, K. Vinod Kumar, Kumar Ranjan, Priyanka Bhariok, Tapesh Kumar Singh, Jetendra Singh, Priyanka Singh, S.K. Sabharwal, Chiraranjan Addey, C.S.N. Mohan Rao, Prateek Dwivedi, Anuvrat Sharma, Alka Sinha, Mohit Kumar Gupta, Manisha Bhandari, S.K. Bhattacharya, Debasis Misra, Aishwarya Bhati, Pawan Kumar Saini, Jatinder Kumar Bhatia, Ajai Kumar, K.P. Dubey, V. Lakshmi Narayana, Sharan Thakur, D.K. Garg, Abhishek Garg, Naveen, S. Gowthaman, Nishe Rajen Shonker, A. Venayagam Balan, Raj Kumar Mehta, Jatinder Kumar Bhatia, Mukesh Verma, Dr. Vipin Gupta, Delhi Law Chambers, Dr. Aman Hingorani, Hingorani & Associates, Rahul Kaushik, Arjun Garg, Dr. Kailash Chand, Harish Pandey, P.N. Puri, Aftab Ali Khan, M.P. Shorawala, J.S. Wad & Co., Shree Pal Singh, Kedar Nath Tripathy, P.K. Jayakrishnan, V. Lakshminaryan, Sharan Thakur, Dr. Sushil Balwada, Shekhar G. Devasa, K.B. Muralidhar, Adrash Upadhyay, S.N. Bhat, Guntur Prabhakar, D. Bharathi Reddy, Dinesh Kumar Garg, Harsh Vardhan Surana, Mohit Kumar Gupta, Mridula Ray Bharadwaj, Delhi Law Chambers, V.K. Sidharthan, Madhu Moolchandani, Rajesh K. Singh, Nikhilesh R., Manoj K. Mishra, Shiv Pati, B. Pandey, B. Rajesh, Ranbir Yadav, Anzu K. Varkey, Padama Laxmi Nigam, Ravindera Kumar Verma, Sushma Suri, Gopal Singh, Chandan Kumar, Rajesh Prasad Singh, Atul Jha, Dharmendra Kumar, Rajiv Shankar Dvivedi, Amitesh Kumar, Chandra Shekhar Singh, Navin Prakash, Sansriti Pathak, Gopal Singh, Ugra Shankar, Prasad Neeraj Shekhar, Ashutosh Thakur, Dr. B. Kalaivannan, Bankey Bihari, Aishwarya Bhati, Pawan Kumar Saini, B.S. Prasad, V.N. Raghupathy, M.T. George, Navin Prakash, Rohit Kumar Singh, M.P. Vinod, Bina Madhavan, Renjith B., Vimla Sinha, Gopal Singh, C.D. Singh, S. Chandra Shekhar, Sanjay Kumar V[illegible]r

Mishra, Tulika Prakash, Sandhya Goswami, Anurag Bisaria, Sarvesh Bisaria, P.C. Sharma, Manu Kant Sharma, S. Usha Reddy, Lakshmi Raman Singh, S.S. Khanduja, Y.P. Dhingra, Dr. P. Nandan, R. Shai, Sanjay Jain, G. Ramakrishna Prasad, G.N. Reddy, Neeraj Shekhar, Ashwani Bhardwaj, Abhinav Mukerji, Mohan Pandey, Vivekta Singh, Tarjit Singh, Anil Anti, Kamal Mohan Gupta, Vibha Datta, Makhija, Archi Agnihotri, Amit Lubhaya, Irshad Ahmad, Manoj Sarup & Co., Pragati Neekhara, Dr. Monika Gosain, Sanjai Kumar Pathak, Radha Shyam Jena, Shibashish Misra, Praveen Swarup, Ramesh Babu M.R., Vivek Vishnoi, R.K.S. Yadav, M.R. Shamshad, S.S. Ray, Vaibhav Gulia, Rakhi Ray, N. Gupta, Tarun Gupta, S. Janani, M.K. Ghosh, S.S. Nehra, Jagjit Singh Chhabra, Ajay Pal, Vishal Yadav, Umang Shankar, Ravi Prakash Mehrotra, Deepti R. Mehrotra, Vibhu Tiwari, Himinder Lal, Kuldip Singh, Jatinder Kumar Bhatia, Ajai Kumar Bhatia, Krishana Prakash Dubey, Satyapal Khushal Chand Pasi, Abhishek Atrey, Garima Prashad, Shrish Kumar Misra, Sanjay Sharawat, Ashok Panigrahi, Dr. Kailash Chand, K.V. Bharathi Upadhyaya, B.D. Sharma, Ashok Kumar Sharma for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, CJI. 1. Leave granted in the Special Leave Petitions, which were taken up along with the Writ Petitions and Transferred Cases, as they all involve common questions of law and fact.

2. The common thread running through all these various matters is the question as to whether certain regulations framed by the University Grants Commission had a binding effect on educational institutions being run by the different States and even under State enactments.

3. The University Grants Commission Act was enacted by Parliament in 1956 *inter alia* with the object of making provision for the coordination and determination of standards in

Universities and for that purpose, to establish a University Grants Commission, hereinafter referred to as the "Commission". Under the University Grants Commission Act, 1956, hereinafter referred to as the "UGC Act", the Commission is required to take, in consultation with the Universities or other concerned bodies, all such steps as it may think fit for the promotion and coordination of University education and for the determination and maintenance of standards of teaching, examination and research in Universities.

4. Section 12 of the UGC Act *inter alia* empowers the Commission to inquire into the financial needs of the Universities, allocate and disburse grants to Universities established or incorporated by or under a Central Act, out of the Funds of the Commission for the maintenance and development of such Universities or for any other general or specified purpose. The Commission was also empowered to allocate and disburse, out of such Funds, such grants to other Universities, as it may deem necessary or appropriate for the development of such Universities or for the maintenance or development or for any other general or specified purpose. The Commission was further empowered to allocate and disburse, such grants to institutions deemed to be Universities, as it deemed necessary, for similar purposes.

5. Section 25 of the UGC Act empowers the Central Government to make Rules to carry out the purposes of the Act by notification in the Official Gazette, with regard to the formation and the functioning of the Commission. Section 26 empowers the Commission to make Regulations consistent with the provisions of the Act and the Rules made thereunder, by notification in the Official Gazette *inter alia* in regard to defining the qualifications that should ordinarily be required of any person to be appointed to the teaching staff of the University having regard to the branch of education in which he or she is required to give instructions and to

standards of instructions for the grant of any degree by any University. In keeping with their statutory character, the Rules and Regulations framed by the Central Government and the Commission are required to be placed before each House of Parliament, while it is in session, for a total period of 30 days.

6. Section 20 of the UGC Act, particularly, provides that in the discharge of its functions under the said Act, the Commission is to be guided by such directions on questions of policy relating to national purposes, as may be given to it by the Central Government.

7. On 24th December, 1998, the Commission issued a Notification on revision of pay scales, minimum qualification for appointment of teachers in Universities, colleges and other measures for the maintenance of standards. In Clause 5 of the Notification, it was specified that the Commission expected that the entire scheme of revision of pay scales, together with all conditions attached to it, would be implemented by the State Governments, as a composite scheme without any modifications, except for the date of implementation and the scales of pay, as indicated in the Government of India Notifications dated 27.7.1998, 22.9.1998, and 6.11.1998. Clause 16 of the Notification also indicated that the teachers will retire at the age of 62 years, but it would be open to a University or a college to re-employ a superannuated teacher. Subsequently, the Commission, in exercise of the powers conferred upon it under Section 26(1)(e) and (f) of the UGC Act, framed the University Grants Commission (Minimum Qualifications required for the appointment and career advancement of teachers in Universities and institutions affiliated to it) Regulation, 2000. The said Regulation does not, however, provide for the age of superannuation.

8. On 23rd March, 2007, the Government, in its Ministry of Human Resource Development, Department of Higher Education, wrote to the Secretary of the Commission on the

question of enhancement of the age of superannuation from 62 years to 65 years for teaching positions in Centrally funded institutions, in higher and technical education. In the said communication, it was mentioned that at the time of revision of pay scales of teachers in Universities and colleges, following the revision of pay scales of Central Government employees, on the recommendations of the Fifth Central Pay Commission, it had been provided *inter alia* in the Ministry's letter dated 27th July, 1998 that the age of superannuation of teachers in University and schools would be 62 years and, thereafter, no extension in service should be given. However, the power to re-employ the superannuated teacher up to the age of 65 years would remain open to a University or a college, according to the existing guidelines, framed by the Commission. In the letter, it was also indicated that the matter had been reviewed by the Central Government, in the light of the existing shortage in teaching positions in the Centrally-funded institutions in higher and technical education under the Ministry and, in that context, it had been decided that the age of superannuation of all persons who were holding posts as on 15.3.2007, in any of the Centrally funded higher and technical education under the Ministry, would stand increased from 62 to 65 years. It was also decided that persons holding such regular teaching positions, but had superannuated prior to 15.3.2007, on attaining the age of 62 years, but had not attained the age of 65 years, could be re-employed against vacant sanctioned teaching positions, till they attained the age of 65 years, in accordance with the guidelines framed by the Commission. It was lastly indicated that the enhancement of retirement age and the provisions for re-employment would only apply to persons in teaching positions against posts sanctioned in Centrally-funded higher and technical education institutions, in order to overcome the shortage of teachers.

9. The most important development, at the relevant time, however, was the issuance of a l[illegible]al

Government in its Ministry of Human Resource Development, Department of Higher Education, to the Secretary, University Grants Commission on 31st December, 2008, regarding a scheme of revision of pay of teachers and other equivalent cadres in all the Central universities and colleges and Deemed Universities, following the revision of pay scales of the Central Government employees on the recommendation of the Sixth Central Pay Commission, subject to all the conditions mentioned in the letter and the Regulations. The State Governments were given an option to adopt the scheme in its composite form.

10. While generally dealing with matters relating to appointment and promotion, it was reiterated that in order to meet the situation arising out of shortage of teachers in Universities and in other teaching institutions and the consequent vacant positions, age of superannuation of teachers in Centrally-funded institutions had already been enhanced to 65 years. It was mentioned in the said letter that after taking into consideration the recommendations made by the Commission based on the decisions taken at its meeting, held on 7th and 8th October, 2006, the Government of India had decided to revise the pay scales of teachers in the Central Universities. It was further stipulated that the revision of pay scales of teachers would be subject to various provisions of the Scheme of revision of pay scales, as contained in the said letter and Regulations to be framed by the Commission in this behalf. Paragraph 8 of the Scheme deals with other terms and conditions, apart from those already mentioned and Clause (p)(i) thereof, which deals with the applicability of the Scheme and relevant for our purpose is extracted hereinbelow:

"(p) **Applicability of the Scheme:**

(i) This Scheme shall be applicable to teachers and other equivalent cadres of Library and Physical Education in all the Central Universities and Colleges there-under and the

Institutions Deemed to be Universities whose maintenance expenditure is met by the UGC. The implementation of the revised scales shall be subject to the acceptance of all the conditions mentioned in this letter as well as Regulations to be framed by the UGC in this behalf. Universities implementing this Scheme shall be advised by the UGC to amend their relevant statutes and ordinances in line with the UGC Regulations within three months from the date of issue of this letter."

11. Clause (p)(v) of the said paragraph, which is equally relevant, is also extracted hereinbelow:

"(p)(v) This Scheme may be extended to universities, Colleges and other higher educational institutions coming under the purview of State legislatures, provided State Governments wish to adopt and implement the Scheme subject to the following terms and conditions:

(a) Financial assistance from the Central Government to State Governments opting to revise pay scales of teachers and other equivalent cadre covered under the Scheme shall be limited to the extent of 80% (eighty percent) of the additional expenditure involved in the implementation of the revision.

(b) The State Government opting for revision of pay shall meet the remaining 20% (twenty percent) of the additional expenditure from its own sources.

(c) Financial assistance referred to in sub-clause (a) above shall be provided for the period from 1.01.2006 to 31.03.2010.

(d) The entire liability on account of revision of pay scales etc. of university and college teachers shall be taken over by the State Government opting for revision of pay scales with effect from 1.04.2010.

(e) Financial assistance from the Central Government shall be restricted to revision of pay scales in respect of only those posts which were in existence and had been filled up as on 1.01.2006.

(f) State Governments, taking into consideration other local conditions, may also decide in their discretion, to introduce scales of pay higher than those mentioned in this Scheme, and may give effect to the revised bands/ scales of pay from a date on or after 1.01.2006; however, in such cases, the details of modifications proposed shall be furnished to the Central Government and Central assistance shall be restricted to the Pay Bands as approved by the Central Government and not to any higher scale of pay fixed by the State Government(s).

(g) Payment of Central assistance for implementing this Scheme is also subject to the condition that the entire Scheme of revision of pay scales, together with all the conditions to be laid down by the UGC by way of Regulations and other guidelines shall be implemented by State Governments and Universities and Colleges coming under their jurisdiction as a composite scheme without any modification except in regard to the date of implementation and scales of pay mentioned herein above."

12. Paragraph 8(f) of the aforesaid Scheme deals with the age of superannuation, which has already been dealt with hereinbefore. In substance, it provides that in order to meet the situation arising out of shortage of teachers and also to attract people to the teaching profession, it had been decided to retain the services of teachers till the age of 65 years, as already intimated to all universities and colleges by the letter dated 23.3.2007, issued by the Department of Higher Education, in the Ministry of Human Resource Development, Government of India.

13. Following the recommendations of the Sixth Pay Commission, the Bihar Legislature passed the Bihar State Universities (Amendment) Act, substituting Section 67 of the Bihar State Universities Act, enhancing the age of superannuation to 62 years. Since the said Amendment also has a definite bearing in the appeals filed by Prof. (Dr.) Jagdish Prasad Sharma, the amended provision, namely, Section 67(a) is extracted hereinbelow:

"(a) Notwithstanding anything to the contrary contained in any Act, Rules, Statutes, Regulation or Ordinance, the date of retirement of a teaching employee of the University or of a college shall be the date on which he attains the age of sixty two years. The date of retirement of a teaching employee will be the same which would be decided by the University grants Commission.

The date of retirement of non-teaching employee (other than the inferior servants) shall be the date on which he attains the age of sixty two years:

Provided that the University shall, in no case, extend the period of service of any of the teaching or non-teaching employee after he attains the age of sixty two years as the case may be.

Provided further also that re-appointment of teachers after retirement may be made in appropriate cases up to the age of sixty five years in the manner laid down in the Statutes made in this behalf in accordance with the guidelines of the University Grants Commission."

14. Similarly, Section 64(a) of the Patna University Act was also amended on similar basis. Since the decision of the Ministry of Human Resource Development, as conveyed in its letter of 23.3.2007, was not being implemented, Writ Petitions, being CWJC Nos. 4823 and 5390 of 2008, were filed by some

teachers seeking enhancement of the age of superannuation from 62 to 65 years, based upon the aforesaid decision of the Ministry of Human Resource Development. Both the Writ Petitions were dismissed by the High Court on the ground that there was no **conscious decision** taken by UGC with regard to teachers working in State Universities since the enhancement was confined to Centrally-funded Universities.

15. On 3.10.2008, the Pay Review Committee set up by the Commission submitted its Report to the Commission relating to the revision of pay scales of teachers, qualification for appointment, service and working conditions and promotional avenues of teachers in Universities and colleges, and at clause 5.4.2, it recommended that the age of superannuation throughout the country should be 65 years, whether in a State or Central University, as also in a college or in a University. In its 452nd meeting, the Commission took a **conscious decision** and recommended the Report of the Pay Review Committee for acceptance by the Central Government. Pursuant to the said decision and recommendation of the Commission, the Ministry of Human Resource Development published a Scheme on 31.12.2008, which has already been referred to hereinbefore.

16. As no action was taken even thereafter, the Appellants filed Writ Petition, being CWJC No. 2330 of 2009, before the Patna High Court. The said matter was heard along with several other similar Writ Petitions, wherein claims were made by the Petitioners under the amended provisions of the Patna University Act and Bihar State Universities Act.

17. On 6.10.2009, the learned Single Judge allowed the Writ Petitions and held that the State Government had no discretion as they were statutorily bound by the decision of the Commission to enhance the age of superannuation. Letters Patent Appeal No. 117 of 2010 and other connected LPAs were filed by the State of Bihar challenging the aforesaid

judgment of the learned Single Judge. On 18.5.2010, a Division Bench of the Patna High Court allowed LPA No. 117 of 2010, filed by the State of Bihar. It is against the said judgment of the Division Bench that SLP(C) Nos. 18766-18782 were filed by the Appellants herein in June, 2010. On 30.6.2010, the Commission framed the Regulations of 2010.

18. This brings us to the substantial challenge, in these appeals and connected Writ Petitions and Transferred Cases, as has been set out in paragraph 2 of the impugned judgment of the Division Bench of the Patna High Court, which is, whether in view of the decision contained in the letter dated 31.12.2008 issued by the Department of Higher Education, Ministry of Human Resource Development, Government of India, in the context of Section 64(a) of the Patna University Act, 1976 and Section 67(a) of the Bihar State Universities Act, the age of superannuation of teachers working in different Universities and colleges of Bihar would automatically be enhanced to 65 years. The focus is, therefore, on whether in view of the Scheme mentioned in the aforesaid letter of 31.12.2008, not only the Central Universities and colleges, which were bound by the UGC Regulations, but the different States and institutions situated therein would be bound to accept the Scheme, as set out in the said letter of 31.12.2008. As has been mentioned hereinbefore, the Scheme envisaged in 31.12.2008, in no uncertain terms, indicates that in case the State Governments opted to revise the pay scales of teachers and other equivalent cadres covered under the Scheme, financial assistance from the Central Government to such State Governments would be to the extent of 80% of the additional expenditure involved in the implementation of the revision. The Scheme also indicates that the State Government which opted for revision of pay scales would have to meet the remaining 20% of the additional expenditure from its own sources. The third consideration is that such financial assistance would be provided for the period from 1.1.2006 to 31.3.2010, and that, thereafter, the [illegible]ity

on account of revision of pay scales of the University and college teachers would have to be taken over by the State Government with effect from 1.4.2010. The fourth and the most important condition stipulated by the Commission was that payment of Central assistance for implementing the Scheme was subject to the conditions that the entire Scheme of revision of pay scales, together with all the conditions to be laid down by the UGC, by way of Regulations and other guidelines, would have to be implemented by the State Government and Universities and Colleges coming under their jurisdiction, **as a composite scheme**, emphasis supplied, **without any modification** except in regard to the date of implementation and scales of pay mentioned hereinabove. This entailed and included the enhancement of age of such teachers to 65 years. In other words, along with the enhancement of pay, of which 80% would be borne by the Commission, the other condition of the Commission was that the age of the teachers would be enhanced to 65 years, and that the balance 20% of the expenditure would have to be borne by the State from its own resources till 31.3.2010, and, thereafter, the entire burden of expenditure would have to be borne by the State.

19. It appears that the States of West Bengal, Uttar Pradesh, Haryana, Punjab and Madhya Pradesh implemented the Scheme without waiting for the UGC Regulations, which were framed only on 30.6.2010, whereas the said Scheme was implemented by the aforesaid States long before the said date. It is when the reimbursement of 80% of the expenses was sought for from the Central Government, that the problems arose, since in keeping with the composite scheme, the concerned States had not enhanced the age of superannuation simultaneously. The Central Government took the stand that since the Scheme in its composite form had not been given effect to by the States concerned, the question of reimbursement of 80% of the expenses did not arise. This is

one of the core issues, which has arisen in these cases for decision.

20. The ripple effect of the stand taken by the Central Government was felt all over the country and, accordingly, matters were moved before different High Courts which have ultimately come up to this Court for hearing on such common issues.

21. The lead case, however, is that of Prof. (Dr.) Jagdish Prasad Sharma, who has moved against the judgment of the Division Bench of the Patna High Court on several grounds, including the grounds indicated hereinabove. One of the other grounds taken as far as the Patna cases are concerned, is in regard to the interpretation of Section 64(a) of the Patna University Act, 1976, introduced by the Amendment Act of 2006, and Section 67(a) of the Bihar State Universities Act, 1976, introduced by the Bihar State Universities (Amendment) Act, 2006, which has been reproduced hereinabove. Learned counsel for the Appellants has claimed that although in the first part of the two amended provisions, it has been indicated that the date of retirement of a teaching employee of the University or college would be the date on which he attains the age of 62 years, the said condition was purportedly watered down by the addition of the further condition that the date of retirement of a teaching employee would be the same, which would be decided by the University Grants Commission in future. It has been contended that on a construction of the aforesaid provision, it is amply clear that though when the amendment was effected it was the intention of the Legislature that the age of superannuation should be 62 years, no finality was attached to the same, since the final decision regarding superannuation lay with any decision that might be taken by the University Grants Commission in future. It has been contended that since a decision had been taken by the Ministry of Human Resource Development as far back on 23.3.2007 to enhance the age of superannuation from 62 to 65 yea[illegible]o

subsequently recommended by the Commission in its 452nd meeting, where a conscious decision was taken to implement the Report of the Pay Review Committee recommending the age of superannuation to 65 years throughout the country whether in a State or central University or whether in a college or in a University, it was incumbent on the State Government to implement the said recommendation of the University Grants Commission, subsequently endorsed by the Department of Higher Education, Ministry of Human Resource Development, Government of India.

22. Appearing for the Appellants, Mr. Ajit Kumar Sinha, learned Senior Advocate, submitted that Section 11 of the UGC Act provides that all orders and decisions of the Commission are to be authenticated by the signature of the Chairman. It was submitted that Section 12 of the UGC Act made further provision that it would be the general duty of the Commission to take, in consultation with the University or other concerned bodies, all such steps as it thought necessary for the promotion and coordination of University education and for the determination and maintenance of standards of teaching, examination and research in the Universities. Mr. Sinha submitted that it would thus be apparent that the Commission could take decisions which were independent of its power to frame Regulations under Section 26 or to issue Notifications under Section 3 of the Act. Mr. Sinha submitted that the State of Bihar was, therefore, bound to acknowledge the age of superannuation as 65 years with effect from 31.12.2010 for the Appellants.

23. Mr. Ranjit Kumar, learned Senior Advocate, who appeared in some of the matters, reiterated the submissions made by Mr. Sinha and re-emphasized the fact that on 7.2.2011, the Government of Bihar had accepted the enhancement of age from 62 to 65 years for those who were in service on 30.6.2010. Mr. Ranjit Kumar submitted that the judgment of the Division Bench impugned in these proceedings

does not suffer from any infirmity and, therefore, did not warrant any interference.

24. The next set of cases related to the State of Kerala with Mr. K.K. Venugopal, learned Senior Advocate, appearing for the Appellants in Civil Appeals arising out of SLP(C) Nos. 12990-12992 of 2011. Mr. Venugopal's stand was different from those of Mr. Ajit Kumar Sinha and Mr. Ranjit Kumar, learned Senior Advocates, and supported the action of the Commission. Mr. Venugopal submitted that the Kerala University Act, 1974, and the Mahatma Gandhi University Statutes, 1997, *inter alia* provided for the age of superannuation at 60 years. In the affiliated colleges, the age of superannuation was fixed at 55 years. Mr. Venugopal submitted that the stand taken by the State of Kerala was a little different from the stand taken by the other States, since there were a large number of qualified and eligible persons who were unemployed and were waiting for employment, who would ultimately fall prey to frustration if the services of those who had superannuated at the age of 62 years were to be continued, thereby depriving eligible candidates waiting to be employed. In such circumstances, the State of Kerala was not interested in increasing the age of superannuation from 62 years to 65 years. Referring to the letter of the Ministry of Human Resource Development, Government of India, dated 31.12.2008, Mr. Venugopal contended that in all Centrally-funded institutions a general direction had been given that the age of superannuation would be 65 years in place of 62 years.

25. Mr. Venugopal further urged that the Regulations made by the Commission were applicable to Centrally-funded institutions and also included by reference the entirety of the Scheme of 31.12.2008, as part of the Regulations and made it applicable to State institutions. Mr. Venugopal urged that the UGC Regulations being Central legislation under Entry 66 List I of the Seventh Schedule to the Constitution, they would have

primacy over the executive and State laws and the Government Order dated 10.12.2010 was liable to be struck down.

26. While referring to the scope of Entry 66, List I of the Seventh Schedule to the Constitution, Mr. Venugopal referred to the decision of this Court in the *University of Delhi Vs. Raj Singh* [(1994) Suppl 3 SCC 516], wherein it was held that the Regulations of the Commission in the said case would not be binding on the University of Delhi being recommendatory and did not impinge upon the University's power to select its teachers. However, if the University chose not to accept the UGC Regulations, it would lose its grant from the UGC.

27. During the course of his submissions, Mr. Venugopal referred to the order issued by the Government of Kerala in the Higher Education (C) Department on 10.12.2010 for implementation of the UGC Regulations 2010 on minimum qualifications for appointment of teachers, other academic staff in Universities and colleges and measures for the maintenance of standards in higher education. The Government Order further provided that the matter had been examined in detail and the Government was, therefore, pleased to approve and to implement the Regulations as such. The Regulations, therefore, were to come into force from 18.9.2010 on the date of their publication in the Government of India Gazette. All the Universities were directed to incorporate the UGC Regulations in their Statutes and Regulations, within one month from the date of the Order. Mr. Venugopal joined issue with the contents of paragraph 6 of the said Order, which provides that where there were any provisions in the Regulations inconsistent with the provisions in the Government Order, read as the first paper, the said Government Order would override the provisions in the Regulations to the extent of such inconsistency. Mr. Venugopal submitted that executive directions cannot override the statutory provisions and it was the statutory provisions which would prevail over such executive directions. Consequently, the UGC Regulations would, in these cases, prevail over the Orders of

the Executive government. In this connection, Mr. Venugopal referred to the decision of this Court in *Paluru Ramkrishnaiah Vs. Union of India* [(1989) 2 SCC 541], wherein relying on two earlier decisions of this Court in *B.N. Nagarajan Vs. State of Mysore* [(1966) 3 SCR 682] and *Sant Ram Sharma Vs. State of Rajasthan* [(1968) 1 SCR 111], a Constitution Bench of this Court in *Ramachandra Shankar Deodhar Vs. State of Maharashtra* [(1974) 1 SCC 317], held that in the absence of legislative Rules it was competent for the State Government to take a decision in the exercise of its executive power under Article 162 of the Constitution. Therefore, an executive instruction could make provision only for a matter which was not covered by the Rules and such executive instructions could not override any of the provisions of the Rules. Accordingly, the learned counsel submitted that the Government Order dated 10.12.2010 was liable to be struck down.

28. Mr. Venugopal also referred to the decision of this Court in the case of *the Gujarat University, Ahmedabad Vs. Krishna Ranganath Mudholkar* [1963 Suppl 1 SCR 112], wherein it was *inter alia* observed as follows:

> "The State has the power to prescribe the syllabi and courses of study in the institutions named in Entry 66 (but not falling within entries 63 to 65) and as an incident thereof it has the power to indicate the medium in which instruction should be imparted. But the Union Parliament has an overriding legislative power to ensure that the syllabi and courses of study prescribed and the medium selected do not impair standards of education or render the co-ordination of such standards either on an All India or other basis impossible or even difficult. Thus, though the powers of the Union and of the State are in the Exclusive Lists, a degree of overlapping is inevitable. It is not possible to lay down any general test which would afford a solution for every question which might arise on this head. On the' one hand, it is certainly within the p e

Legislature to prescribe syllabi and courses of study and, of course, to indicate the medium or media of instruction. On the other hand, it is also within the power of the Union to legislate in respect of media of instruction so as to ensure co-ordination and determination of standards, that is to ensure maintenance or improvement of standards. The fact that the Union has not legislated, or refrained from legislating to the full extent of its powers does not invest the State with the power to legislate in respect of a matter assigned by the Constitution to the Union. It does not, however, follow that even within the permitted relative fields there might not be legislative provisions in enactments made each in pursuance of separate exclusive and distinct powers which may conflict. Then would arise the question of repugnancy and paramountcy which may have to be resolved on the application of the "doctrine of pith and substance" of the impugned enactment. The validity of the State legislation on University education and as regards the education in technical and scientific institutions not falling within Entry 64 of List I would have to be judged having regard to whether it impinges on the field reserved for the Union under Entry 66. In other words, the validity of State legislation would depend upon whether it prejudicially affects co-ordination and determination of standards, but not upon the existence of some definite Union legislation directed to achieve that purpose. If there be Union legislation in respect of co-ordination and determination of standards, that would have paramountcy over the State law by virtue of the first part of Art. 254(1); even if that power be not exercised by the Union Parliament the relevant legislative entries being in the exclusive lists, a State law trenching upon the Union field would still be invalid."

Mr. Venugopal, therefore, contended that the UGC Regulations would have an overriding effect over the Government Order dated 10.12.2010 and, in any event, the

U.G.C. could not abdicate its authority regarding higher education to the States.

29. Learned counsel appearing for the Appellants in Civil Appeals arising out of SLP (C) Nos. 10765-69 of 2011 and learned counsel appearing on behalf of other Appellants, in relation to the matters relating to the State of Kerala, adopted Mr. Venugopal's submissions and it was pointed out by Mrs. V.P. Seemanthini that there was a marked difference between the 2000 Regulations framed by the Commission and the subsequent Regulations of 2010. It was submitted by her that while the 2000 Regulations did not provide for any age of superannuation, in the 2010 Regulations, there is a mandate to the State Government to follow the same.

30. However, appearing for the Appellants in Civil Appeal arising out of SLP(C) No. 23275 of 2010, Dr. K.P. Kylasanatha Pillay, learned Senior Advocate, took a different stand from that of Mr. Venugopal. He pointed out that the Appellants were all Selection Grade Lecturers and Readers of Sree Narayana College, Kollam, an aided institution situated in the State of Kerala. Referring to the Scheme formulated by the Central Government, which also included the question relating to age of superannuation, Dr. Pillay reiterated that in order to meet a situation arising out of shortage of teachers in Universities and other teaching institutions, the age of superannuation for teachers in Central educational institutions had already been enhanced to 65 years. Dr. Pillay urged that the benefits of the package scheme which was implemented with effect from 1.1.2006, relating to enhancement of age of superannuation to 65 years, should also be made available to the Appellants. Dr. Pillay submitted that so long as the Appellants had been excluded from the Pay Revision of the State Government, as governed by the UGC Scheme, they had been placed in a disadvantageous position.

31. Appearing for the State of Keral n,

learned Advocate, contended that under Article 309 of the Constitution, the State Government is empowered to frame its own Rules and Regulations in regard to service conditions of its employees. Furthermore, Section 2 of the Kerala Public Service Commission Act, 1968, empowers the State Government to make Rules either prospectively or retrospectively to regulate the recruitment and conditions of service for persons appointed to the Public Services and posts in connection with the affairs of the State of Kerala. Ms. Madhavan submitted that under the Kerala Service Rules, 1958, enacted by the State Government under the proviso to Article 309 of the Constitution, the age of retirement of teachers in colleges has been fixed to be 55 years. Subsequently, however, by G.O.P. No.170/12/Fin. dated 22.3.2012, the age of compulsory retirement was enhanced to 56 years and the age of superannuation has been enhanced to 60 years. Ms. Madhavan urged that having regard to the UGC Regulations dated 30.6.2010, a decision was taken to revise the scales of pay and other service conditions, including the age of superannuation in Central Universities and other institutions maintained and funded by the University Grants Commission, strictly in accordance with the decision of the Central Government. However, the revised scales of pay and age of superannuation, as provided under paragraph 2.1.10 and under paragraph 2.3.1, will also be extended to Universities, colleges and other higher educational institutions coming under the purview of the State legislature and maintained by the State Governments, subject to the implementation of the Scheme as a composite one as contemplated in the Regulations.

32. Ms. Madhavan contended that the State Governments were not under any compulsion to adopt the UGC Scheme, but could do so if they wanted to. Ms. Madhavan emphasized that neither the pay scales nor the age of superannuation stood revived automatically, without the Scheme being accepted by the State Government. Ms. Madhavan also urged that Section

26 of the University Grants Commission Act, 1956, which empowers the Commission to make Regulations, does not authorize the Commission to make Regulations in regard to service conditions of teaching staff in the Universities, including the age of retirement. According to learned counsel, the role of the UGC is only to prescribe academic standards, qualifications required for the teaching staff, facilities required in a higher education institutions, etc. Hence, it can in no circumstances be contended that the rule making power of the Commission empowered it to prescribe conditions of service in relation to State Government employees, which is the prerogative of the State Government.

33. Ms. Madhavan also urged that in its affidavit filed in SLP (C) No.10783 of 2011, the Commission had clearly stated that it would be open to the State Government or other competent authority to adopt the decision or to take any decision as it considered appropriate in respect of the superannuation of the teachers in higher and technical education institutions under their purview, with the approval of the appropriate competent authority. As a result, there was no repugnancy between the Regulations framed by the Commission and the Rules framed by the State Government. Referring to Section 20 of the UGC Act, Ms. Madhavan contended that the same provided that the Commission, in discharge of its functions under the Act, shall be guided by such directions on questions of policy relating to national services, as may be given to it by the Central Government and if any dispute arose between the Central Government and the Commission as to whether a question is or not a question of policy relating to national policy, the decision of the Central Government shall be final. Ms. Madhavan also urged that the Central Government had by its letter dated 14th August, 2012, clarified the position and had made it clear that the question of enhancement of the age of retirement is exclusively within the domain of the policy-making p

Governments and that the condition of enhancement of the age of superannuation to 65 years, as mentioned in the Ministry's letter dated 31.12.2008, may be treated as withdrawn for the purpose of seeking reimbursement of the Central share of arrears to be paid to the State University and College teachers. According to Ms. Madhavan, the Central Government had itself clarified that the Scheme is not a composite one and the word 'composite' is with regard to financial assistance provided by the Central Government and was not connected with the age of superannuation which was incidental to the Scheme.

34. The other learned counsel appearing for the different Universities and educational institutions generally adopted Mr. Venugopal's submissions, but while doing so, added one or two points of their own.

35. Mr. S.R. Singh, learned Senior Advocate, who appeared for the Appellants in Civil Appeal arising out of SLP (C) No.16523 of 2011, reiterated Mr. Venugopal's submissions relating to Entry 66 List I and Entry 25 in List III and urged that the powers under Entry 66 List I were vested in the Central Government and could not be sub-delegated to the States under Entry 25 in List III, which, in any event, was not permissible in law. Mr. Singh contended that the same would be evident on a reading of Section 12(j) and Section 27 of the UGC Act, 1956, which made the Commission the repository of powers for advancing the cause of higher education in India.

36. Mr. S. Chandra Shekhar, learned Advocate, who appeared for the University in Civil Appeal arising out of SLP(C) No.16523 of 2011 and other batch matters, urged that the University Statutes provided 62 years as the age of superannuation and there was no right available to the Appellants which could be enforced by a writ of mandamus. Mr. Chandra Shekhar also submitted that the Commission had no power to enhance the age of superannuation as a condition of service.

37. Mr. P.S. Patwalia, learned Senior Advocate, who appeared in SLP(C)Nos.9198-9221/2011 and other matters relating to the State of Punjab and the Union Territory of Chandigarh, while adopting Mr. Venugopal's submissions regarding the binding nature of the UGC Regulations, relied upon the Constitution Bench decision of this Court in the case of *Dr. Preeti Srivastava Vs. State of M.P.* [(1999) 7 SCC 120], wherein it was observed that when there was an existing Central legislation, the same would be binding in the absence of any other legislation by the States. Mr. Patwalia also urged that the Scheme was a composite scheme and ought to have been accepted in its totality and despite the fact that the State Government had accepted the grant of 80% of the expenses, which was part of the composite scheme, it ought to have also accepted the other part of the Scheme relating to enhancement of the age of teachers in the different Universities in Punjab, from 62 to 65 years. By not doing so, the State had caused severe prejudice to the teachers who would have otherwise been entitled to retire at the age of 65 years and not 62 years. Mr. Patwalia submitted a copy of the Report of the Task Force on Faculty Shortage and Design of Performance Appraisal System published by the Ministry of Human Resource Development, Government of India, in July, 2011, and pointed out that generally across the country on an average about 35% of the posts of teachers in the different Universities and Colleges were lying vacant, which was one of the reasons for the deterioration of standards of education across the board. Mr. Patwalia urged that the aforesaid vacancies would indicate that there was an urgent need for appointment of teachers in the different schools and colleges across the country, including the State of Punjab.

38. The same sentiments were expressed by Dr. Aman Hingorani, learned Advocate appearing in Civil Appeal arising out of SLP(C) No.7392 of 2011. Dr. Hingorani reiterated Mr. Patwalia's submissions that the compos[illegible]d by the University Grants Commission c[illegible]o

by the States, and independent of the control of the Central Government, the College in question has to abide by the UGC Regulations as the same was funded by the Commission. Dr. Hingorani also urged that the Appellant, Susan Anand, was made to retire at the age of 60 while the UGC Notification provided that the age of superannuation would be 62 years. Dr. Hingorani urged that as was held by this Court in *Pavai Ammal Vaiyapuri Education Trust Vs. Government of Tamil Nadu* [(1994) 6 SCC 259], since the institution accepted the UGC Regulations, it came under its discipline, which fact had not been taken into consideration in *B. Bharat Kumar & Ors. Vs Osmania University & Ors.* [(2007) 11 SCC 58]. Dr. Hingorani also urged that though the Appellant's SLP was dismissed and the Appellant had attained the age of superannuation, under the orders of the High Court, she was allowed to rejoin her duties in the college. It was submitted that her case was required to be treated separately from the others on account of the special facts involved and that having continued in service by virtue of the Court's orders, she was entitled to the benefits of any order that may be passed in favour of enhancement of the age of superannuation from 62 to 65 years.

39. Appearing for the State of Haryana, Dr. Monika Gosain, learned Advocate, restated what had been stated by the other learned counsel that the State of Haryana was not bound by the UGC scheme as it had not accepted the "composite scheme" of the Commission. Supplementing Dr. Gosain's submissions, Mr. P.S. Patwalia, learned Senior Advocate, appearing for the State of Punjab, submitted that the letter from the Government of India to all the States made it clear that unless the composite scheme as offered by the UGC was accepted, the payment of money under the Scheme would not be forthcoming. It was, however, submitted that in some cases, the Government of Haryana had voluntarily enhanced the age of superannuation to 65 years and notified to the colleges recognized under Section 2(f).

40. As far as the Civil Appeal arising out of SLP(C)No.1631 of 2012 and four connected matters are concerned, Mr. C.S.N. Mohan Rao, learned Advocate, appearing for the Appellants, adopted the submissions made by Mr. K.K. Venugopal and reiterated the position that despite having accepted the composite package, the State had not accepted the enhancement of age from 62 to 65 years, causing severe prejudice to the Appellants and others similarly situated.

41. Similarly, Ms. Aishwarya Bhati, learned Advocate, appearing for the Appellants in Civil Appeals arising out of SLP(C) Nos.6915-6923 of 2012, adopted Mr. Venugopal's submissions and also relied on the decision in the case of *B. Bharat Kumar* (supra). Ms. Bhati submitted that on behalf of the State of Rajasthan a letter had been written to the Registrar of all the Universities in the State of Rajasthan, indicating that considering the huge problem of unemployment of youth in the State, the State had decided not to increase the age of superannuation of teachers beyond 60 years. Ms. Bhati referred to the Report of the Chaddha Committee, wherein the aforesaid stand had been refuted and the said Committee recommended that the age of superannuation of teachers should be 65 years on a uniform basis throughout the country, whether working in a State or Central University or College. Learned counsel urged that the benefits which had been conferred by the UGC Regulations, could not be taken away by a subsequent legislation. In the other cases relating to the State of Rajasthan, the Petitioner adopted not only Mr. Venugopal's submissions, but also those made by Ms. Bhati.

42. Learned counsel appearing in Civil Appeals arising out of SLP(C) Nos.18218-18226 of 2012 and 21396 of 2012 from Odisha, also adopted the submissions made by Mr. K.K. Venugopal and submitted that the UGC scheme having been conceived under Entry 66, List I of the Seventh Schedule to the Constitution, would have an overriding effect over the State legislation.

43. Mr. Dinesh Dwivedi, learned Senior Advocate, who appeared for the State of Uttrakhand, submitted that the conditions of service in State universities could not be controlled by the University Grants Commission and even on receipt of 80% of the expenses to be incurred by the Colleges the State's powers under the statutes were not taken away. Mr. Dinesh Dwivedi submitted in detail with regard to the ramifications of Entry 66 List I as also Entry 11 of List II prior to the 42nd Amendment and its substitution by way of Entry 25 in List III. The ultimate result of Mr. Dwivedi's submission is that the statute does not use two different words to denote the same thing. Besides the language in the Constitution has to be understood in a common sense way and in common parlance, as was observed in the case of *Synthetic and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors.* [(1990) 1 SCC 109]. Learned counsel also submitted that in the present case, when the dominant Legislature has legislated, any incidental encroachment has to give way. Moreover, no incidental or ancillary powers could be read into Entry 66 as Entry 32 was already occupying the filed. Mr. Dwivedi submitted that the 2000 Regulations framed by the UGC were not applicable to the Pant Nagar University, since being an agricultural institution, the standards and norms of the Indian Council of Agricultural Research would apply. Mr. Dwivedi lastly contended that in regard to the provisions of Secions 12, 14, 25 and 26 of the UGC Act, the said provisions could not be read so widely as to enable the Commission to ride rough shod over the State laws. Mr. Dwivedi submitted that the regulations, in so far as they seek to prescribe conditions of service, including age of retirement, are illegal and beyond the legislative powers of the Union or the Commission, in the event they relate to the teachers and staff of the State university and institutions. The 2010 Regulations as framed by the UGC could not, therefore, be enforced on unwilling States in view of the federal structure of our Constitution.

44. Mr. R. Venkataramani, learned Senior Counselm who appeared for the Babajan Badesab Nandyal and others, the Appellants in Civil Appeals arising out of SLP(C) Nos.32748-762 of 2011, submitted that the impugned order was contrary to the law as laid down by this Court in the case of *Annamalai University Vs. Secretary to Govt. Information and Tourism Department & Ors.*[(2009) 4 SCC 590] and the *University of Delhi Vs. Raj Singh* [1994 Supp. 3 SCC 516], in which this Court had held that the provisions of the UGC Act were binding on all the Universities and the Regulations framed by the UGC in terms of clauses (e), (f), (g) and (h) of sub-section (1) of Section 26 which were of wide amplitude and were mandatory in nature. He also urged that the Division Bench of the High Court had failed to notice that the Government of India letter dated 31.12.2008 had been included as 'Appendix-I' to the UGC Regulations, 2010, which made the Scheme provided therein as statutory and binding. It was also urged that the High Court had not really considered the provisions of Section 26(g) of the above Act which empowered the Commission to regulate the maintenance of standards and the coordination of work or facilities in Universities. Learned counsel submitted that all factors relevant for the purpose of nourishing, sustaining and enhancing the quality of human resource have been duly taken note of by the Commission. Mr. Venkataramani submitted that the question of fixing the date of retirement of a teacher were restricted within the framework of University legislation, since the age of retirement was intrinsically related to establishment and realization of higher standard and quality of imparting eduction and could not be confined to parochial aspirations. Mr. Venkataramani submitted that the UGC Regulations, 2010, are binding on the State Governments and the Universities to enhance the age of superannuation of teachers to 65 years. Relying on the decision of this Court in the *Annamalai University* case (supra), Mr. Venkataramani urged that the provisions of the UGC Act were binding on all Universities, whether conventional or open. It's pow[illegible]d

the Regulations framed by it under Section 26 were of wide amplitude and even as subordinate legislation they became part of the UGC Act having been validly made. Learned counsel also referred to the decision of this Court in *Prem Chand Jain Vs. R.K. Chhabra* [(1984) 2 SCC 302], wherein this Court held that it was well settled that entries incorporated in the Lists covered by Schedule Seven are not powers of legislation, but "field" of legislation.

45. In Civil Appeal arising out of SLP(C) No.36126 of 2011, Mr. Jagjit Singh Chhabra, learned Advocate appearing for the State of Punjab, referred to the letter dated 23.3.2007 written on behalf of the Government of India to the Commission regarding enhancement of the age of the teachers from 62 to 65 years and urged that the said Scheme was voluntary and not binding on the State and that when a sufficient number of teachers were available, it would be counterproductive to insist that the State should be compelled to accept the UGC's option in its totality when the same has been left to the discretion of the State by the Regulations themselves. Mr. Chhabra urged that the conditions of service of teachers in a State were completely within the jurisdiction of the State and such jurisdiction could not be overridden by the UGC Regulations, without the consent of the State.

46. In reply to the submissions made on behalf of the Petitioners and the Appellants in these cases, Mr. Rakesh Dwivedi, learned Senior Advocate, appearing for the UGC, submitted that after the letter written by the Central Government on 27.7.1998, informing the States regarding the revision of pay scales and the provision of financial assistance to the extent of 80% of the additional expenditure for the period 1.1.1996 to 31.3.2000, whereafter the entire liability would have to be taken over by the State Governments, it was upto the State Governments to take recourse to the scheme as framed. By another letter dated 27.7.1998, the UGC was informed that the Central Government had revised the pay scales of teachers

in the Central Universities on the recommendations of UGC that the scheme was of a composite nature and all the conditions of the scheme would have to be fulfilled if the States were to avail of the offer of financial assistance to the extent of 80% of the additional expenditure for the period indicated hereinabove. However, although, the State of Kerala had issued an order dated 21.12.1999, accepting the revised pay scales, it continued to adopt the existing Rules of the State Government, wherein the age of retirement remained 55 years. Mr. Dwivedi reiterated that following the recommendations of the 5th Central Pay Commission, the Central Government had, by its order dated 23.3.2007, revised the age of superannuation of teachers to 65 years and even reemployment was permitted upto the age of 70 years. The only catch was that such change would apply to centrally-funded higher and technical educational institutions coming under the purview of the Ministry of Human Resource Development and the Notification would be issued by the Commission.

47. While reiterating the submissions made on behalf of the Petitioners relating to the UGC Regulations, 2010 and Clause 2.1 of the Annexures thereto, Mr. Dwivedi urged that the provisions of the UGC Act, particularly Section 12 thereof, are not confined to coordination and determination of standards in institutions for higher education and research but that the powers vested in the Commission contemplated a larger role in regard to the promotion of university education. It was further urged that the Commission was empowered to give grants, as it might deem necessary or appropriate, for the development of Universities and could also recommend measures necessary for their improvement. Mr. Dwivedi contended that the UGC Act is not entirely confined to Entry 66, List I, but it was also entitled to act under Entry 25 of the Concurrent List of the Seventh Schedule to the Constitution. Mr. Dwivedi urged that since Parliament was competent to legislate both in terms of Entry 66, List I and Entry 25, List III, it could in[illegible]of

legislation. Mr. Dwivedi submitted that a competent legislature could draw sustenance from more than one entry while legislating. However, the aforesaid question was not required to be gone into since the Commission had made an offer in the Scheme, which was left to the State to adopt or not to adopt. Mr. Dwivedi further submitted that with regard to the Concurrent field, there was no compulsion either on the Parliament or the authority created under Central Statutes to exhaustively legislate or to exercise the enabling power with regard to the Concurrent field. It would be open to the Parliament or the Commission either to enforce a particular scheme in the State or leave it open for them to adopt the scheme through their laws and executive orders. In such cases, the State Governments and State Legislatures exercise plenary powers to decide whether the Scheme was to be adopted or not. Mr. Dwivedi submitted that it is also settled law that unless the enabling power is completely expanded, the legislative field in the Concurrent List remains available to the States.

48. Mr. Dwivedi further urged that different legislations by different States are inherent in a federal exercise of power. The differences arising as a result of federal distribution of power by the Constitution and exercise of such power by States, cannot be a ground to allege discrimination. As was held in *S.R. Bommai Vs. Union of India* [(1994) 3 SCC 1], federalism is a basic feature of the Constitution. In the present case, the UGC Act and the Regulations of 2010 and the Scheme of the Central Government have been made applicable to all the States uniformly. In fact, no age of retirement has also been fixed by the Commission. Even for Central Universities, the pay scales have been revised by the Central Government and the age of superannuation has been revised to 65 years by the said Government. The Scheme was also finalized by the Central Government and it was also the decision of the Central Government that the State should take their own decisions as to whether the Scheme prepared by it should be adopted. Mr.

Dwivedi reiterated that the UGC Regulations of 2010 have notified the Scheme of the Central Government and it has been left to the discretion of the State Governments to adopt or not to adopt the same for its Universities, colleges and other institutions. The only challenge which had occurred is the order of the Central Government, vide its letter dated 14.8.2012, in its Ministry of Human Resource Development, which delinked the financial assistance from the requirement to adopt the Central Scheme. The Central Government took a decision that the discretion of the State Government should not be fettered by the extension of the financial incentive. Accordingly, any difference which might arise on account of any decision of the State Government would be on account of the federal scheme of the Constitution and not on account of any decision either of the Central Government or the Commission.

49. Mr. Dwivedi submitted that the cases relied upon by the Petitioners and Appellants were all based on geographical discrimination, which had no bearing with the facts of these cases and neither the UGC Act nor the Regulations of 2010, nor the Scheme of the Central Government, suffers from any such infirmity. In this regard, Mr. Dwivedi also placed reliance on the decision of this Court in *T.P. George Vs State of Kerala* [1992 Supp (3) SCC 191] and in the *All India Sainik Schools Employees' Association Vs. Defence Minister-cum-Chairman Board of Governors, Sainik Schools Society, New Delhi* [1989 Supp 1 SCC 205]. Learned counsel submitted that each State has its own sovereign plenary power with respect to its territory and the laws of one State could not be held to be discriminatory with reference to laws of another State. In this regard, Mr. Dwivedi referred to and relied upon the decision of this Court in *Javed Vs. State of Haryana* [(2003) 8 SCC 369], where the said principle was considered and the application of Article 14 of the Constitution was negated.

50. Mr. Dwivedi concluded on the note that the age of retirement has varied from State to Sta[illegible]c

employment in State services and this Court has always upheld the power of the State to fix the age of superannuation in the light of conditions prevalent in the States and the provision of jobs to youth has been upheld to be a valid consideration, as in the State of Kerala.

51. On behalf of Govind Ballabh Pant University in SLP(C) No.8153 of 2012, Mr. Vijay Hansaria, learned Senior Advocate, submitted that Section 28(r) of the UGC Act permits the University to frame Rules with regard to service conditions of its staff, including the Rules for retirement. Apart from the above, it was also pointed out that the grants which are received by the University are not from the UGC, but from the Indian Council of Agricultural Research (ICAR).

52. Lastly, coming to the submissions made on behalf of the State of Rajasthan and the State of U.P., on behalf of both the States it was sought to be urged that the UGC Regulations could not control the power of the State Governments and/or the service conditions of its employees as the same are to be exclusively decided by the Union or the State, as provided in Article 309 of the Constitution. It was submitted that it had also been held in the *Osmania University* case (supra) that the fixation of the age of superannuation by the State Government is well within its jurisdiction and neither the Scheme of the Central Government nor the UGC Regulations have any binding effect.

53. Though, at first blush, the scope of the appeals seemed to be limited and confined to the question as to whether the Regulations framed by the University Grants Commission under Section 26 of the University Grants Commission Act, 1956, were binding on the States and State-funded and other Universities and colleges being run therein, as the hearing progressed, several other ancillary issues also came to be raised.

54. As has been indicated hereinbefore, the Central Government enacted the UGC Act in 1956 to coordinate and determine standards in universities and towards that end, to establish a University Grants Commission for taking all steps, as it thought fit, for the promotion of university education and for determination and maintenance of standards of teaching and research in universities. On 24th December, 1998, the Commission issued a Notification relating to revision of pay scales and other service conditions. Thereafter, after the expressions of a series of views regarding the enhancement of the age of superannuation from 60 to 62 and from 62 to 65 years, the Central Government in its Department of Higher Education, wrote to the Secretary, UGC, on 31st December, 2008, with regard to a scheme for revision of pay-scales of teachers and other equivalent cadres in all the Central universities and Colleges and Deemed Universities, following the revision of pay scales of the Central Government employees on the recommendation of the Sixth Central Pay Commission.

55. One of the common submissions made on behalf of the Respondents was whether the aforesaid scheme would automatically apply to centrally-funded institutions, to State universities and educational institutions and also private institutions at the State level, on account of the stipulation that the scheme would have to be accepted in its totality. As indicated hereinbefore in this judgment, the purport of the scheme was to enhance the pay of the teachers and other connected staff in the State universities and educational institutions and also to increase their age of superannuation from 62 to 65 years. The scheme provides that if it was accepted by the concerned State, the UGC would bear 80% of the expenses on account of such enhancement in the pay structure and the remaining 20% would have to be borne by the State. This would be for the period commencing from 1st January, 2006, till 31st March, 2010, after which the entire liability on account of revision of pay-sc[illegible]e

taken over by the State Government. Furthermore, financial assistance from the Central Government would be restricted to revision of pay-scales in respect of only those posts which were in existence and had been filled up as on 1st January, 2006. While most of the States were willing to adopt the scheme, for the purpose of receiving 80% of the salary of the teachers and other staff from the UGC which would reduce their liability to 20% only, they were unwilling to accept the scheme in its composite form which not only entailed acceptance of the increase in the retirement age from 62 to 65 years, but also shifted the total liability in regard to the increase in the pay-scales to the States, after 1st April, 2010.

56. Another anxiety which is special to certain States, such as the State of Uttar Pradesh and Kerala, has also come to light during the hearing. In both the States, the problem is one of surplus-age and providing an opportunity for others to enter into service. On behalf of the State of Kerala, it had been urged that there was a large number of educated unemployed youth, who are waiting to be appointed, but by retaining teachers beyond the age of 62 years, they were being denied such opportunity. As far as the State of U.P. is concerned, it is one of job expectancy, similar to that prevailing in Kerala. The State Governments of the said two States were, therefore, opposed to the adoption of the UGC scheme, although, the same has not been made compulsorily applicable to the universities, colleges and other institutions under the control of the State authorities.

57. To some extent there is an air of redundancy in the prayers made on behalf of the Respondents in the submissions made regarding the applicability of the scheme to the State and its universities, colleges and other educational institutions. The elaborate arguments advanced in regard to the powers of the UGC to frame such Regulations and/or to direct the increase in the age of teachers from 62 to 65 years as a condition precedent for receiving aid from the UGC, appears to have little

relevance to the actual issue involved in these cases. That the Commission is empowered to frame Regulations under Section 26 of the UGC Act, 1956, for the promotion and coordination of university education and for the determination and maintenance of standards of teaching, examination and research, cannot be denied. The question that assumes importance is whether in the process of framing such Regulations, the Commission could alter the service conditions of the employees which were entirely under the control of the States in regard to State institutions. The authority of the Commission to frame Regulations with regard to the service conditions of teachers in the centrally- funded educational institutions is equally well established. As has been very rightly done in the instant case, the acceptance of the scheme in its composite form has been left to the discretion of the State Governments. The concern of the State Governments and their authorities that the UGC has no authority to impose any conditions with regard to its educational institutions is clearly unfounded. There is no doubt that the Regulations framed by the UGC relate to Entry 66 List I of the Constitution in the Seventh Schedule to the Constitution, but it does not empower the Commission to alter any of the terms and conditions of the enactments by the States under Article 309 of the Constitution. Under Entry 25 of List III, the State is entitled to enact its own laws with regard to the service conditions of the teachers and other staff of the universities and colleges within the State and the same will have effect unless they are repugnant to any central legislation.

58. However, in the instant case, the said questions do not arise, inasmuch as, as mentioned hereinabove, the acceptance of the scheme in its composite form was made discretionary and, therefore, there was no compulsion on the State and its authorities to adopt the scheme. The problem lies in the desire of the State and its Authorities to obtain the benefit of 80% of the salaries of the teachers and other s[illegible],

without increasing the age of retirement from 62 to 65 years, or the subsequent condition regarding the taking over of the scheme with its financial implications from 1st April, 2010.

59. As far as the States of Kerala and U.P. are concerned, they have their own problems which are localised and stand on a different footing from the other States, none of whom who appear to have the same problem. Education now being a List III subject, the State Government is at liberty to frame its own laws relating to education in the State and is not, therefore, bound to accept or follow the Regulations framed by the UGC. It is only natural that if they wish to adopt the Regulations framed by the Commission under Section 26 of the UGC Act, 1956, the States will have to abide by the conditions as laid down by the Commission.

60. That leaves us with the question which is special to the State of Bihar, i.e., the effect of Section 67(a) introduced into the Bihar State Universities Act, 1976, by the Bihar State Universities (Amendment) Act, 2006, and the corresponding amendments made in the Patna University Act, 1976. Section 67(a) has been extracted hereinbefore in Paragraph 13. While, on the one hand, it has been mentioned that notwithstanding anything to the contrary contained in any Act, Rules, Statutes, Regulation or Ordinance, the date of retirement of a teaching employee of the university or of a college shall be the date on which he attains the age of 62 years, the confusion is created by the next sentence which further provides that the date of retirement of a teaching employee would be the same which would be decided by the UGC. It has been urged that the said provision clearly contemplates that in the event of an alteration resulting in an upward revision of the age of superannuation, the same would automatically apply to all such teachers and staff, without any further decision of the State and its authorities in that regard. In other words, what has been sought to be urged is that when in regard to Centrally-funded universities, colleges and educational institutions, the age of superannuation has

been increased to 65 years by the University Grants Commission, the same has to uniformly apply to all universities and colleges throughout the country, without any discrimination. The same did not necessitate any separate decision to be taken by the State and its authorities regarding the applicability of the decision taken by the University Grants Commission.

61. The said submission, in our view, is not acceptable on account of the fact that in the first paragraph of the said Section it has been categorically stated that the age of superannuation would be 62 years. The second paragraph of the said section makes it even more clearer, since it reiterates that the date of retirement of non-teaching employees, other than the inferior servants, shall be the date on which he attains the age of 62 years. The first proviso also indicates that the university shall, in no case, extend the period of service of any of the teaching or non-teaching employee after he attains the age of 62 years. The second proviso, however, states that even after retirement, teachers may be reappointed in appropriate cases up to the age of 65 years in the manner laid down in the Statutes made in this behalf in accordance with the guidelines of the Commission.

62. As against the above, certain writ petitions have been filed in the Patna High Court which rejected the contention of the Petitioners and dismissed the writ petitions on the ground that the Commission had not taken any conscious decision with regard to teachers and staff, except for those which were Centrally-funded. Subsequently, however, since in its 452nd meeting the Commission took a conscious decision and recommended that the Report of the Pay Review Committee recommending the enhancement of age of superannuation from 62 to 65 years be made applicable throughout the country, fresh writ petitions were filed in the Patna High Court, including CWJC No.2330 of 2009, filed by the Appellants herein. The learned Single Judge allowed the writ petitions upon holding that once the Commission had recomm of

superannuation be accepted as 65 years, the State Governments had no discretion but to enhance the age of superannuation in line with the recommendations made by the Commission. The Division Bench subsequently reversed the finding of the learned Single Judge, resulting in these Special Leave Petitions (now Appeals).

63. Learned Standing Counsel for the State of Bihar, Mr. Gopal Singh, had in his submissions reiterated the views of the High Court, i.e., that on mere communication, the revision of the pay of teachers and increase in the age of superannuation would not automatically become effective and that, in any event, the right to alter the terms and conditions of service of the State universities and colleges were within the domain of the State Government and till such time as it decided to adopt the same, the same would have no application to the teachers and staff of the different educational institutions in the State.

64. We are inclined to agree with such submission mainly because of the fact that in the amended provisions of Section 67(a) it has been categorically stated that the age of superannuation of non-teaching employees would be 62 years and, in no case, should the period of service of such non-teaching employees be extended beyond 62 years. A difference had been made in regard to the teaching faculty whose services could be extended up to 65 years in the manner laid down in the University Statutes. There is no ambiguity that the final decision to enhance the age of superannuation of teachers within a particular State would be that of the State itself. The right of the Commission to frame Regulations having the force of law is admitted. However, the State Governments are also entitled to legislate with matters relating to education under Entry 25 of List III. So long as the State legislation did not encroach upon the jurisdiction of Parliament, the State legislation would obviously have primacy over any other law. If there was any legislation enacted by the Central Government

under Entry 25 List III, both would have to be treated on a par with each other. In the absence of any such legislation by the Central Government under Entry 25 List III, the Regulation framed by way of delegated legislation has to yield to the plenary jurisdiction of the State Government under Entry 25 of List III.

65. We are then faced with the situation where a composite scheme has been framed by the UGC, whereby the Commission agreed to bear 80% of the expenses incurred by the State if such scheme was to be accepted, subject to the condition that the remaining 20% of the expense would be met by the State and that on and from 1st April, 2010, the State Government would take over the entire burden and would also have enhanced the age of superannuation of teachers and other staff from 62 to 65 years. There being no compulsion to accept and/or adopt the said scheme, the States are free to decide as to whether the scheme would be adopted by them or not. In our view, there can be no automatic application of the recommendations made by the Commission, without any conscious decision being taken by the State in this regard, on account of the financial implications and other consequences attached to such a decision. The case of those Petitioners who have claimed that they should be given the benefit of the scheme *dehors* the responsibility attached thereto, must, therefore, fail.

66. However, within this class of institutions there is a separate group where the State Governments themselves have taken a decision to adopt the scheme. In such cases, the consequences envisaged in the scheme itself would automatically follow.

67. We, therefore, see no reason to interfere with the impugned judgment and order of the Division Bench of the High Court in all these matters in the light of the various submissions made on behalf of the respective parties[illegible]s,

Writ Petitions and the Transferred Case, which involve the same questions as considered in this batch of cases, are all dismissed. However, the Appeals filed by the State of Uttarakhand and Civil Appeals arising out of SLP(C) Nos. 6724, 13747 and 14676 of 2012 are allowed. As far as the Transfer Petition Nos. 1062-1068 OF 2012 are concerned, the same are allowed and the Transferred Cases are dismissed. The Contempt Petitions are disposed of by virtue of this judgment. However, persons who have continued to work on the basis of the interim orders passed by this Court or any other Court, shall not be denied the benefit of service during the said period. The Appeals and Petitions having been dismissed, both the State Authorities and the Central Authorities will be at liberty to work out their remedies in accordance with law.

68. Having regard to the nature of the facts involved in these case, parties shall bear their own costs.

K.K.T. Matters disposed of.

RAGHBIR CHAND & ORS.
v.
STATE OF PUNJAB
(Criminal Appeal No. 2028 of 2009)

AUGUST 05, 2013

[P. SATHASIVAM, CJI AND RANJAN GOGOI, JJ.]

Penal Code, 1860:

ss. 302, 324 and 323 r/w. s. 34 – Prosecution under – Of 4 accused – 3 injured eye-witnesses to the incident – Conviction by courts below – On appeal, held: The prosecution case is established by the evidence of injured eye-witnesses which was corroborated by medical evidence – Conviction of all the accused u/ss. 324 and 323 r/w. s. 34 is affirmed – But as regards conviction u/s. 302/34, in the facts of the case, accused No.4 alone can be held responsible for the death of the deceased and not accused Nos. 1, 2 and 3 – Hence, conviction of accused No. 4 u/s. 302 is affirmed and conviction of accused Nos. 1, 2 and 3 is set aside.

s. 34 – Liability under – Invocation of – Held: Liability u/s. 34 is a matter of inference to be drawn from the facts and circumstances of each case.

Appellants-accused (accused Nos. 1, 2, 3 and 4) were charged u/ss. 302, 324 and 323 r/w. s. 34 IPC. The prosecution case was that the accused assaulted PWs 2 and 4 (brothers) and when during the assault, their brothers (PW 5 and the deceased) came to their rescue, they were also assaulted. The deceased, the eye-witnesses (PWs 2, 4 and 5) as well as the accused Nos. 1, 2 and 3 were medically examined. The trial court convicted the accused u/ss. 302, 324 and 323 r/w. s. 34 IPC and sentenced them to life imprisonment for the

offence u/s. 302 and for 2 years and 1 year RI for the offences u/ss. 324 and 323 respectively. High Court confirmed their conviction. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1. The evidence of PWs 2, 4 and 5, i.e. the injured eye-witnesses, appear to be consistent and have remained largely unshaken in cross-examination. The aforesaid 3 witnesses have clearly and categorically narrated the sequence of events alleged by the prosecution and the assault committed by the accused persons on them as well as on the deceased with the weapons that they were armed with. The evidence of PWs 2, 4 and 5 stands fully corroborated by the evidence of PW-1 who found as many as 4 punctured injuries in the abdomen of the deceased and also lacerated and incised injuries on PWs 2, 4 and 5. Taking into account the consistency in the version of the injured witnesses and the corroboration of their testimonies by the medical evidence of PW-1, it can be safely held that the incident as narrated by the prosecution had taken place and the involvement of the accused persons, as alleged, have been duly proved. [Para 4] [750-D-G]

2. Common intention which is the gist of the principle of vicarious liability enshrined by Section 34 of the Penal Code can be the result of a premeditated decision between several co-accused or in a given case such common intention can very well develop on the spur of the moment or at the scene of the crime. What is of importance and, therefore, must be ascertained is the meeting of minds of the co-accused that the particular criminal act should be committed. Once the court can consider it safe to come to such a conclusion only then apportionment of liability amongst the co-accused would be permissible with the aid of Section 34 of the Penal Code. Liability of an accused under Section 34, therefore,

is a matter of inference to be drawn from the facts and circumstances of each case. [Para 8] [752-D-F]

Sripathi vs. State of Karnataka **(2009) 11 SCC 660: 2009 (5) SCR 309;** *Abdul Mannan vs. State of Assam* **(2010) 3 SCC 381: 2010 (2) SCR 1030;** *Abdul Sayeed vs. State of M.P.* **(2010) 10 SCC 259: 2010 (13) SCR 311– relied on.**

3. The facts of the case cannot constitute a safe and sufficient basis to come to the conclusion that an inference of common intention of all the four accused to cause the death of the deceased can be safely made so as to hold the accused 1, 2 and 3 vicariously liable for the death of the deceased. Therefore, the conviction of the accused-appellants 1, 2 and 3 under Section 302 read with section 34 requires interference. Accordingly, the said conviction and sentence imposed on the accused-appellants No. 1, 2 and 3 is set aside. However, the evidence of PWs 2, 4 and 5 having established the assault on the injured eye-witnesses by the aforesaid accused–appellants 1, 2 and 3 hence the conviction of the said appellants under Section 324 read with Section 34 and Section 323 should be maintained. Therefore, the said part of the judgment of the High Court along with the sentences imposed is affirmed. [Para 9] [759-D-G]

4. There can be no manner of doubt that the death of the deceased was occasioned by the assault committed by the accused-appellant No.4 in the abdominal region of the deceased with a knife. A person inflicting 4-5 knife blows on a vital part of the body i.e. abdomen cannot but be attributed with the requisite intention to cause death or alternatively with the intention of causing such bodily injury as is likely to cause the death of the victim. [Para 12] [762-D-H]

5. While there can be no doubt that the assault on the deceased was committed without an

also in a sudden fight and even if it is assumed that the said act was in the heat of passion, what cannot be lost sight of is the infliction of 4-5 knife blows in the abdominal region of the deceased. Had the appellant No. 4 dealt a single blow on the deceased, perhaps, it would have been open for this Court to seriously consider the applicability of the latter part of the 4th exception to Section 300 to the present case, namely, that the appellant had not taken undue advantage or had not acted in a cruel or unusual manner. In the present case, no such conclusion can be reasonably reached in view of the repeated blows inflicted by accused-appellant No. 4 on a vital part of the body of the deceased. In the facts and circumstances of the case, the correct conclusion would be that the accused-appellant No. 4 had the requisite intention if not of causing death, at least, of causing such bodily injury which was likely to cause death. The acts attributable to the accused-appellant No.4 do not also attract any of the exceptions enumerated under Section 300 IPC. Therefore, the conviction and the sentence of the accused-appellant No. 4 under Section 302 is affirmed. Insofar as the conviction of the said accused-appellant for the offences under Sections 324 and 323 read with Section 34 is concerned, the same is also affirmed. [Para 12] [763-B-G]

State of Andhra Pradesh vs. Rayavarapu Punnayya and Anr. **(1976) 4 SCC 382: 1977 (1) SCR 601;** *Ghelabhai Jagmalbhai Bhawad and Ors. vs. State of Gujarat* **(2008) 17 SCC 651 – relied on.**

Case Law Reference:

2009 (5) SCR 309	**relied on**	**Para 8**
2010 (2) SCR 1030	**relied on**	**Para 8**
2010 (13) SCR 311	**relied on**	**Para 8**

1977 (1) SCR 601	**relied on**	**Para 11**
(2008) 17 SCC 651	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2028 of 2009.

From the Judgment & Order dated 28.03.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 35-DB of 1999.

K.L. Janjani, Raj Singh Rana, Pankaj Kumar Singh, Ankit Gaur, Avinash Jain for the Appellants.

V. Madhukar AAG, Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Aggrieved by the affirmation of the conviction and sentence of the appellants made by the High Court of Punjab & Haryana this appeal has been filed upon grant of special leave under Article 136 of the Constitution. Specifically, the appellant No. 4 Kamal Kumar has been convicted under Section 302, Section 324 and Section 323 read with Section 34 of the Indian Penal Code. He has been sentenced to undergo RI for life for the offence under Section 302 IPC whereas for the offences under Sections 324 and 323/ 34 IPC he has been sentenced to undergo RI for 2 years and 1 year respectively. Insofar as appellants 1, 2 and 3 are concerned, they have been found guilty of the offence under Section 302 read with Section 34 of the Indian Penal Code and sentenced to undergo RI for life. The aforesaid accused appellants have also been found guilty of the offences under Section 324 read with Section 34 and Section 323 of the Indian Penal Code and have been sentenced to undergo RI for 2 years and 1 year respectively.

2. The prosecution case, which has been held to be established by the learned courts below

14.1.1991 at about 7.00 a.m. when PW-2 Ram Singh and PW-4 Surinder Kumar (brothers) had gone to the fields to answer the call of nature, in front of the house of the appellant No. 1 Raghbir Chand, the four accused persons had assembled. According to the prosecution, while the appellant No.1, Raghbir Chand, was armed with a Dang, appellant No.2, Varinder Kumar, was armed with an iron rod whereas appellants 3 and 4, Vijay Kumar and Kamal Kumar, were armed with an iron fork and a knife respectively. According to the prosecution, appellant No. 1 Raghbir Chand exhorted the other accused that PW-2 Ram Singh and PW-4 Surinder Kumar should be taught a lesson for having abused the appellant Raghbir Chand the previous evening. Thereupon, according to the prosecution, appellant No. 2 Varinder Kumar gave a blow from the iron rod in his hand which was aimed at the head of PW-4 Surinder Kumar. Appellant No. 4 Kamal Kumar is alleged to have given a knife blow on the left flank of PW-4 whereas appellant No. 1 Raghbir Chand, it is alleged, gave a dang blow on the right elbow of PW-2 Ram Singh. It is further alleged that appellant No. 4 Kamal Kumar gave a knife blow on the head of PW-2 Ram Singh. The further case of the prosecution is that at this stage deceased Rajinder Kumar and PW-5 Sushil Kumar (brothers of PW-2 and PW-4) came to the place of occurrence whereupon the appellant No. 4 gave 4-5 knife blows in the abdomen of deceased Rajinder Kumar who fell down on the ground. The prosecution had further alleged that appellant No. 3 Vijay Kumar gave blows from the iron fork on the forehead of PW-5 Sushil Kumar whereas appellant no.1 Raghbir Chand gave fist blow on the left eye of PW-5. Appellant No. 2 Varinder Kumar is alleged to have assaulted PW-5 Sushil Kumar on the left leg with the iron rod. Thereafter, according to the prosecution, the appellants left the spot alongwith their weapons. The injured were reportedly taken to the Civil Hospital, Pathankot from where Rajinder Kumar was referred to S.G.T.B. Hospital Amritsar. However, Rajinder Kumar died on the way to the hospital at Amritsar on 14.1.1991.

3. Of the 9 witnesses examined by the prosecution, PW-2 Ram Singh, PW-4 Surinder Kumar and PW-5 Sushil Kumar are the injured eye witnesses. PW-1 Dr. R.K. Khanna, SMO, Civil Hospital, Pathankot had examined and treated the deceased Rajinder Kumar and the injured eye witnesses. The reports of medical examinations prepared and signed by the aforesaid PW-1 have been exhibited by the prosecution. Also exhibited are the medical reports prepared by PW-1 upon examination of appellants No. 1, 2 and 3 who were also found to have sustained injuries. The aforesaid medical examination of the deceased, injured eye witnesses as well as the appellants No. 1, 2 and 3 were conducted on the same day, i.e., 14.1.1991. It will also be necessary to notice the evidence tendered by PW-6 Dr. N.K. Aggarwal who had conducted the postmortem of the deceased Rajinder Kumar.

4. The evidence of PWs 2, 4 and 5, i.e. the injured eye witnesses, appear to be consistent and have remained largely unshaken in cross-examination. The aforesaid 3 witnesses have clearly and categorically narrated the sequence of events alleged by the prosecution and the assault committed by the accused persons on them as well as on the deceased with the weapons that they were armed with. The evidence of PWs 2, 4 and 5 stands fully corroborated by the evidence of PW-1 who found as many as 4 punctured injuries in the abdomen of the deceased and also lacerated and incised injuries on PWs 2, 4 and 5. Taking into account the consistency in the version of the injured witnesses and the corroboration of their testimonies by the medical evidence of PW-1, it can be safely held that the incident as narrated by the prosecution had taken place and the involvement of the accused persons, as alleged, have been duly proved.

5. Learned counsel for the appellants has, however, urged that even if the prosecution case, as alleged, it taken to have been proved and established the conviction of the accused-appellants 1, 2 and 3 under Section 302 [illegible]n

34 of the Indian Penal Code is legally unsustainable. Insofar as appellant No. 4 Kamal Kumar is concerned, learned counsel has urged that the facts proved and established, at best, would go to show the commission of the offence under Section 304 Part I and not the offence under Section 302 IPC. The injuries suffered by the accused-appellants 1, 2 and 3 as proved by PW-1 have also been highlighted by the learned counsel to contend that a mutual fight between the parties had occurred. Learned counsel has further pointed out that while the appellant No.1, Raghbir Chand, had served a period of nearly 2-1/2 years in custody, the appellants 2 and 3 have undergone over 7 years of custody whereas appellant No. 4 is in jail for more than 10 years.

6. Mr. V. Madhukar, learned Addl. Advocate General appearing for the State of Punjab on the other hand submits that the evidence of PWs 2, 4 and 5 clearly establishes that the accused-appellants were acting in concert and one of the victims of the crime Rajinder Kumar had died in the course of the incident. According to learned counsel, there is no way as to how the appellants can escape their liability under Section 34 of the Indian Penal Code. Learned counsel has also pointed out that the injuries suffered by the accused-appellants, as evident from the deposition of PW-1, are superficial and the same being capable of being self-inflicted, the Court has to understand the said injuries in the above manner.

7. A close reading of the evidence of the injured eye witnesses makes it clear that on the day of occurrence while PW-2 Ram Singh and PW-4 Surinder Kumar were going to the fields to answer the call of nature they were accosted by the four accused-appellants who assaulted them with the different weapons in their possession. While the aforesaid assault was being committed the deceased and PW-5 Sushil Kumar came to the spot to rescue their brothers PW-2 Ram Singh and PW-4 Surinder Kumar. It was at this point of time that the appellant No. 4 Kamal Kumar inflicted 4-5 knife blows in the abdomen

of the deceased which eventually led to his death. The evidence of prosecution witnesses would go to show that after the deceased had fallen to the ground while the other appellants had assaulted PW-5 Sushil Kumar none of them had committed any assault on Rajinder Kumar, i.e., the deceased who was lying on the ground. The evidence on record would also go to show that the deceased was initially treated in the Civil Hospital at Pathankot by PW-1 Dr. R.K. Khanna and was thereafter referred to the S.G.T.B. Hospital, Amritsar on the same day. The evidence of Dr. N.K. Aggarwal PW-6 indicate that in the course of postmortem stitch wounds were found on the person of the deceased. The said fact would show that the deceased had received surgical treatment while he was in the Civil Hospital, Pathankot.

8. Common intention which is the gist of the principle of vicarious liability enshrined by Section 34 of the Indian Penal Code can be the result of a premeditated decision between several co-accused or in a given case such common intention can very well develop on the spur of the moment or at the scene of the crime. What is of importance and, therefore, must be ascertained is the meeting of minds of the co-accused that the particular criminal act should be committed. Once the court can consider it safe to come to such a conclusion only then apportionment of liability amongst the co-accused would be permissible with the aid of Section 34 of the Indian Penal Code. Liability of an accused under Section 34, therefore, is a matter of inference to be drawn from the facts and circumstances of each case. The above are the principles that have been laid down in a long line of decisions of this Court, few of which can be illustratively referred to hereinbelow.

This Court in the case of *Sripathi v. State of Karnataka*[1] observed as under:

1. (2009) 11 SCC 660.

9. "*5*. Section 34 has been enacted on the principle of joint liability in the [commission] of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar* v. *State of* Punjab [1977 (1) SCC 746] the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

6. The section does not say 'the common intentions of all' nor does it say 'an intention common to all'. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention

animating the accused leading to the [commission] of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Chinta Pulla Reddy* v. *State of A.P.* [1993 (Supp 3) SCC 134] Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused." [As observed in *State of M.P.* v. *Deshraj*, (2004) 13 SCC 199]

In *Abdul Mannan v. State of Assam*[2] in paragraphs 19 and 20 this Court made the following observations :

"19. The High Court placed reliance on *Sheoram Singh v. State of U.P.*[(1973) 3 SCC 110] in which this Court observed as under: (SCC p. 114, para 6)

"*6*. … It is undeniable that common intention can develop during the course of an occurrence, but there has to be cogent material on the basis of which the court can arrive at that finding and hold an accused vicariously liable for the act of the other accused by invoking Section 34 of the Penal Code."

20. Reliance was also placed on *Joginder Singh* v. *State of Haryana* [AIR 1994 Supreme Court 461] in which this Court has observed:

2. (2010) 3 SCC 381.

"*7*. It is one of the settled principles of law that the common intention must be anterior in time to the commission of the crime. It is also equally settled law that the intention of the individual has to be inferred from the overt act or conduct or from other relevant circumstances. Therefore, the totality of the circumstances must be taken into consideration in order to arrive at a conclusion whether the accused had a common intention to commit the offence under which they could be convicted. The prearranged plan may develop on the spot. In other words, during the course of commission of the offence, all that is necessary in law is, the said plan must proceed to act constituting the offence."

Taking into consideration all the previous decisions, this Court in *Abdul Sayeed v. State of M.P.*[3] summed up the law in the following terms:

"48. The aforesaid conclusion takes us to the issue raised by the appellants as to whether the appellants could be convicted with the aid of Section 34 IPC.

49. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit the offence. The phrase "common intention" implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different

3. (2010) 10 SCC 259.

sense from the "same intention" or "similar intention" or "common object". The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (See *Mohan Singh v. State of Punjab [AIR 1963 SC 174.*)

50. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention. (Vide *Krishnan v. State of Kerala* [1996 (10) SCC 508] and *Harbans Kaur v. State of Haryana* [2005 (9) SCC 195)

51. Undoubtedly, the ingredients of Section 34 i.e. that the accused had acted in furtherance of their common intention is required to be proved specifically or by inference, in the facts and circumstances of the case. (Vide *Hamlet v. State of Kerala [2003 (10) SCC 108)*, *Pichai v. State of T.N.* [2005 (10) SCC 505] and *Bishna* v. *State of W.B. [2005 (12) SCC 657*)

52. In *Gopi Nath v. State of U.P.* [2001 (6) SCC 620] this Court observed as under:

"*8*. … Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action—be it that it was not overt or was only a covert act or merely an omission constituting an illegal omission. The section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way [illegible]f

them participated and engaged themselves in furtherance of the common intention which might be of a preconcerted or prearranged plan or one manifested or developed on the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case."

53. In *Krishnan v. State [2003 (7) SCC 56]* this Court observed that applicability of Section 34 is dependent on the facts and circumstances of each case. No hard-and-fast rule can be made out regarding applicability or non-applicability of Section 34.

54. In *Girija Shankar v. State of U.P. [2004 (3) SCC 793]* it is observed that Section 34 has been enacted to elucidate the principle of joint liability of a criminal act:

"*9*. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. *Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances*."

55. In *Virendra Singh v. State of M.P. [2010 (8) SCC 407]*

this Court observed that:

"*42*. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a prearranged and premeditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the premeditation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34."

56. Section 34 can be invoked even in those cases where some of the co-accused may be acquitted, provided it can be proved either by direct evidence or inference that the accused and the others have committed an offence in pursuance of the common intention of the group. (Vide *Prabhu Babaji Navle v. State of Bombay [AIR 1956 SC 51]*)

57. Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who act in furtherance of the common intention of all the members of the party or it is not possible to prove exactly what part was played by each of them. In the absence of common intention, the criminal liability of a member of

according to the mode of the individual's participation in the act. Common intention means that each member of the group is aware of the act to be committed."

9. In the present case, as already noticed, deceased Rajinder Kumar had arrived at the spot after the incident of assault by the accused on PW-2 and PW-4 had commenced. Immediately on arrival of Rajinder Kumar, appellant No. 4 Kamal Kumar, according to the prosecution, gave 4-5 blows in the abdomen of the deceased as a result of which he fell down. The prosecution evidence also demonstrates that after the deceased had fallen down on the ground none of the other accused-appellants had assaulted him. The above facts, in our considered view, cannot constitute a safe and sufficient basis for us to come to the conclusion that an inference of common intention of all the four accused to cause the death of Rajinder Kumar can be safely made so as to hold the accused 1, 2 and 3 vicariously liable for the death of Rajinder Kumar. We, therefore, are of the opinion that the conviction of the accused-appellants 1, 2 and 3 under Section 302 read with section 34 requires interference. We, accordingly, set aside the said conviction and sentence imposed on the accused-appellants No. 1, 2 and 3. However, the evidence of PWs 2, 4 and 5 having established the assault on the injured eye witnesses by the aforesaid accused–appellants 1, 2 and 3 we are of the view that the conviction of the said appellants under Section 324 read with Section 34 and Section 323 should be maintained. We, therefore, affirm the said part of the judgment of the High Court along with the sentences imposed.

10. This will take us to a consideration of the case of the appellant No. 4 Kamal Kumar. The evidence of PWs 2, 4 and 5 has already been held by us to be credible and

acceptable. We will, therefore, have to proceed on the basis that the said appellant had inflicted 4-5 knife blows on the abdomen of the deceased. Learned counsel for the appellant has contended that even if the said evidence is accepted in its entirety no offence under Section 302 IPC is made out against the 4th accused-appellant. In this regard, learned counsel for the appellants has tried to persuade us that in the totality of the facts of the present case, the 4th exception to Section 300 IPC would come into operation so as to make the said appellant liable to the lesser offence under Section 304 IPC. The 4th exception to Section 300 IPC is in the following terms:

"Exception 4- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation – It is immaterial in such cases which party offers the provocation or commits the first assault."

11. A decision of this Court of somewhat old vintage (*State of Andhra Pradesh Vs. Rayavarapu Punnayya & Anr.*[4]) may be re-noticed to remember what would be the correct approach in dealing with the question whether an offence is murder or culpable homicide not amounting to murder. The following passages from the aforesaid decision may be usefully noticed hereunder:

"21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder,' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the

4. (1976) 4 SCC 382.

accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code is reached. This is [the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third Clause of Section 299 is applicable. If this question is found in the positive, but the case comes, within any of the Exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of Section 304, Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so inter-twined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."

It appears that the aforesaid view in *Rayavarapu Punnayya* (supra) has been reiterated in *Ghelabhai Jagmalbhai Bhawad & Ors. Vs. State of Gujarat*[5] wherein it is observed thus:

"6. Murder is considered to be an aggravated form of

5. (2008) 17 SCC 651.

culpable homicide and to render it a murder the case must come within the four clauses of Section 300. Consequently, it needs consideration at the threshold as to whether any of the accused has done any act by which he has caused the death of another person. Incidentally, it requires a consideration as to whether such act(s) amounted to culpable homicide, as envisaged under Section 299. If the evidence on record could evoke a positive answer in affirmation, the stage for consideration of the applicability or otherwise of Section 300 in the light of the clauses elucidating the offence as well as the exceptions engrafted therein arise. If the facts proved by the prosecution do not satisfy any one of the clauses contained in Section 300, it would only be a case of culpable homicide not amounting to murder, punishable under Section 304, the further question as to under which part of the said provision depending upon the nature of evidence and the necessary ingredients proved to attract one or the other clauses of Section 300 is satisfied, yet if the evidence could establish that the case falls under any one of the exceptions still the offence said to have been committed would only be culpable homicide not amounting to murder punishable under Section 304 of the Penal code. Thus, culpable homicide will not also amount to murder if the case falls within any of the exceptions in Section 300 and only by such process of reasoning and elimination, a case for murder can be held proved."

12. We have given our anxious consideration to the contention raised on behalf of the accused-appellant. There can be no manner of doubt that the death of Rajinder Kumar was occasioned by the assault committed by the accused-appellant No.4 in the abdominal region of the deceased with a knife. A person inflicting 4-5 knife blows on a vital part of the body i.e. abdomen cannot but be attributed with the requisite intention to cause death or alternatively with the intention of causing such bodily injury as is likely to cause the dea g

reached the aforesaid conclusion, the next question that has to be determined is whether the act of the accused-appellant will come under any of the exceptions enumerated under Section 300, particularly the 4th exception, as contended by the learned counsel for the appellant. While there can be no doubt that the assault on the deceased was committed without any premeditation and also in a sudden fight and even if it is assumed that the said act was in the heat of passion, what cannot be lost sight of is the infliction of 4-5 knife blows in the abdominal region of the deceased. Had the appellant No. 4 dealt a single blow on the deceased, perhaps, it would have been open for us to seriously consider the applicability of the latter part of the 4th exception to Section 300 to the present case, namely, that the appellant had not taken undue advantage or had not acted in a cruel or unusual manner. In the present case, no such conclusion can be reasonably reached in view of the repeated blows inflicted by accused-appellant No. 4 on a vital part of the body of the deceased. Having carefully weighed the facts and circumstances of the case and the options and conclusions that the said facts would reasonably admit, we are of the opinion that the correct conclusion in the present case would be that the accused-appellant No. 4 had the requisite intention if not of causing death, at least, of causing such bodily injury which was likely to cause death. The acts attributable to the accused-appellant No.4 do not also attract any of the exceptions enumerated under Section 300 IPC. We, therefore, affirm the conviction and the sentence of the accused-appellant No. 4 under Section 302. Insofar as the conviction of the said accused-appellant for the offences under Sections 324 and 323 read with Section 34 is concerned, we will have no hesitation in affirming the same.

13. Consequently, the appeal is partly allowed. The conviction of appellants No. 1, 2 and 3 under Section 302 read with Section 34 IPC is set aside while their conviction under Section 324 with the aid of Section 34 IPC and Section 323

and the sentences imposed upon them are maintained. The conviction of the appellant No. 4 under Sections 302 and 324 and 323/34 IPC as well as the sentences imposed are maintained. If the accused-appellants 1, 2 and 3 have already undergone the sentence imposed on them for the offences under Section 324 read with Section 34 IPC and Section 323 IPC they be set at liberty unless their custody is required in connection with any other case.

K.K.T. Appeal Partly allowed.

STATE OF RAJASTHAN
v.
SANTOSH SAVITA
(Criminal Appeal No. 1303 of 2006)

AUGUST 06, 2013

[A.K. PATNAIK AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Penal Code, 1860 – s. 304 (Part II) – Prosecution for murder – Conviction u/s. 302 by trial court and acquittal therefrom by the High Court – On appeal, held: In view of the two dying declarations implicating the accused, and the same having been corroborated by the circumstantial evidence regarding the recovery of articles and evidence of PWs 2, 3 and 8, the prosecution case is proved – However, in absence of proof regarding intention of the accused for causing death, the accused can be held guilty of culpable homicide not amounting to murder – His conviction altered to one u/s. 304 (Part II) – His sentence, in the circumstances of the case, reduced to period already undergone i.e. six years with fine of Rs. 2000/- – Evidence Act, 1872 – s. 32 – Dying declaration.

The respondent-accused was prosecuted u/s. 302 IPC. The prosecution case was that the deceased who was allegedly burnt by the accused had given two dying declarations to the doctors in the hospital in which she was admitted. In both the dying declarations, the deceased had mentioned that the accused poured kerosene on her and lighted her saree with a matchstick. Accused also produced defence witnesses, who stated that the deceased had burnt herself. Trial court convicted the accused u/s. 302 IPC and sentenced him to life imprisonment and fine of Rs. 2000/-. High Court reversed

the order of trial court and acquitted him. Hence the present appeal by the State.

Allowing the appeal, the Court

HELD: 1.1. In the present case, the deceased has made two dying declarations (Ext. P-4 and Ext. P-10) and has consistently named the respondent as the person for the cause of her burn injuries and the two dying declarations are corroborated both by circumstantial evidence and direct evidence. Hence, even though the Magistrate was not requisitioned for recording the dying declarations, the High Court ought not to have discarded the dying declarations. [Para 19] [780-G-H; 781-A]

1.2. The dying declaration (Ext. P-4) was recorded by PW-9, within two to three hours of the incident. This dying declaration was recorded in the presence of Medical Jurist (PW-4) when the deceased was in a condition to make a statement. The High Court appears to have doubted this dying declaration because PW-4 has stated in his cross-examination that the deceased told him that she had got burnt on her own and he has also made a note in the injury report (Ext.P-3) that the deceased had got burnt on her own. The High Court lost sight of the fact that PW-4 has conducted the medical examination of the deceased at the hospital and, as has been stated by PW-4 in his evidence, the injury report (Ext. P-3) had been prepared before the dying declaration (Ext.P-4) was recorded. It is perhaps for this reason that in Ext.P-3, after the deceased gave her statement (Ex. P-4) to PW-9 in the presence of PW-4 that PW-4 corrected the injury report (Ext.P-3) by scoring out the words "by herself". In other words, after PW-4 came to know later from the statement of the deceased recorded by PW-9 in his presence that the deceased did not get burnt by herself, he corrected the injury report (Ext.P-3). The High

appreciate the evidence in this light. [Para 13] [777-F-H; 778-A-C]

1.3. In the second dying declaration (Ext.P-10) also the deceased has named the respondent as having quarreled with her and as a result she has suffered the burn injuries. It is also found from the evidence of PW-11 that the deceased was in a condition to make the dying declaration. It is true that in patient case-sheet (Ext. P-13) of the deceased, PW-11 has written that it is a case of homicidal burns while she was preparing meal on stove four days back, but on a reading of Ext.P-13 it is found that it is also mentioned "her husband's younger brother, (respondent), quarrel with her". The High Court was, therefore, not right in coming to the finding that there were inconsistencies in the two dying declarations (Ext.P-4 and Ext.P-10). [Para 14] [778-D-G]

1.4. The two dying declarations of the deceased, Ex. P-4 and Ex.P-10, are corroborated by recovery of a plastic can with some kerosene oil, burnt pieces of saree, blouse and bangles as well as the broken matchsticks from the room (khaprail) where the incident took place. PW-2, PW-3 and PW-8 have not seen what actually had happened inside the room (khaprail) because the door of the room was closed, but they had seen the respondent coming out of the room and the deceased was in a burnt condition. PW-2, PW-3 and PW-8, therefore, have corroborated the statements of the deceased in the two dying declarations (Ext.P-4 and Ext.P-10) that none other than the respondent-accused was in the room in which the incident took place. [Para 15] [778-H; 779-A-B]

1.5. Section 32(1) of the Evidence Act, 1872 makes it clear that when a statement, written or verbal, is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death

comes into question, such statement is relevant. Hence, Exts. P-4 and P-10 are relevant for deciding as to what was the exact cause of the death of the deceased in the present case. [Para 16] [779-C-D]

2.1. Under first clause of s. 300 IPC, if the act by which the death is caused is done with the intention of causing death, the act amounts to murder. Under the second clause, if the act is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, the act amounts to murder. Under the third clause, if the act is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, the act amounts to murder. In each of the three clauses, intention to cause death or to cause the bodily injury is an essential ingredient of the offence of murder. Under the fourth clause, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury, he is said to have committed murder. Hence, under the fourth clause, knowledge of the act committed by the accused that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, is a necessary ingredient for the offence of murder. [Para 21] [781-G-H; 782-A-C]

2.2. In the facts of the present case, PW-2, PW-3 and PW-8 have not seen what exactly happened inside the room (khaprail) in which the incident took place. From the two dying declarations (Ext.P-4 and Ext.P-10), therefore, it is difficult to record a finding that the respondent had any intention to cause death of the deceased or had any intention to cause any bodily injury. From the two dying declarations, it is also difficult to co

the respondent committed the act knowing that it is so imminently dangerous that it must, in all probability, cause death of the deceased. As found by the High Court, there was some delicate relationship between the respondent and the deceased and it was difficult to believe that the respondent had any intent to cause death or bodily injury to the deceased. Rather, it appears that the death of the deceased has been caused by a reckless act, of the respondent with the knowledge that it is likely to cause death and for this act, the respondent is guilty of culpable homicide not amounting to murder under Section 304, Part-II, IPC. [Para 22] [762-D-E, F-G; 783-A]

2.3. The respondent has undergone imprisonment of approximately six years and the incident is of the year 1997. In the peculiar facts and circumstances of the case, the period of imprisonment already undergone by the respondent-accused and a fine of Rs.2,000/- are sufficient punishments under Section 304 Part-II, IPC. [Para 22] [783-B]

Laxman vs. State of Maharashtra **(2002) 6 SCC 710 – followed.**

State of Kerala vs. Nazar **(2005) 9 SCC 246;** *Shri Gopal and Anr. vs. Subhash and Ors.* **(2004) 13 SCC 174: 2004 (1) SCR 1085 – distinguished.**

Paniben vs. State of Gujarat **(1992) 2 SCC 474: 1992 (2) SCR 197; Bhajju** *Alias Karan Singh vs. State of Madhya Pradesh* **(2012) 4 SCC 327: 2012 (5) SCR 37;** *Surendra Singh vs. State of Uttaranchal* **(2006) 9 SCC 531: 2006 (1) Suppl. SCR 490;** *State of Rajasthan vs. Maharaj Singh and Anr.* **(2004) 13 SCC 165;** *State of Uttar Pradesh vs. Banne @ Baijnath and Ors.* **(2009) 4 SCC 271;** *State of Andhra Pradesh vs. S. Swarnalatha and Ors.* **(2009) 8 SCC 383: 2009 (12) SCR 289 – referred to.**

Case Law Reference:

1992 (2) SCR 197	referred to	Para 8
2012 (5) SCR 37	referred to	Para 8
2006 (1) Suppl. SCR 490	referred to	Para 11
(2004) 13 SCC 165	referred to	Para 11
(2009) 4 SCC 271	referred to	Para 12
2009 (12) SCR 289	referred to	Para 12
(2005) 9 SCC 246	distinguished	Para 18
2004 (1) SCR 1085	distinguished	Para 18
(2002) 6 SCC 710	followed	Para 19

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1303 of 2006.

From the Judgment & Order dated 10.04.2003 of the High Court of Judicature for Rajasthan at Jaipur bench, Jaipur in D.B. Criminal Appeal No. 660 of 1998.

Dr. Manish Singhvi, AAG, Amit Lubhaya, Milind Kumar for the Appellant.

K.L. Janjani, Pankaj Kumar Singh, Ankit Gaur, M. Dubey for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution against the judgment dated 10.04.2003 of the Division Bench of the Rajasthan High Court, Jaipur Bench, in D.B. Criminal Appeal No. 660 of 1998.

Facts:

2. The facts very briefly are that on 05.03.1997 Sudesh, wife of Gopal, was admitted at Bed No. 19 in Female Surgical Ward of General Hospital, Dholpur, because of burns and she gave a statement to the police that she

for about 10-12 years and she did not have any dispute with her mother-in-law, father-in-law, elder brother-in-law and younger brother-in-law and they had never harassed her. She, however, stated that Santosh, son of her uncle-in-law, used to frequently irritate her by joking with her and between 11.30 a.m. to 12.00 Noon he came to her and took her inside a room holding her hand and said that he will not leave her alive. In her statement, she also stated that Santosh had a kerosene oil can in his hand and he poured the kerosene on her by lifting the container and ignited fire to her *saree* with a matchbox and when she shouted, her mother-in-law and her younger sister, Suman, who was married to her brother-in-law, came running to her and Santosh ran away after igniting the fire. In her statement, she further stated that due to fire, her clothes and she herself got burnt badly and her mother-in-law brought her for treatment. Pursuant to this statement, an FIR was registered under Section 307 of the Indian Penal Code (for short 'IPC') by ASI Shyam Lal against the respondent. Subsequently, Sudesh was shifted to the Kamla Raja Hospital, Gwalior where she died on 10.03.1997. After investigation, charge-sheet was filed against the respondent under Section 302, IPC.

3. As the respondent denied the charge, he was tried by the Additional District and Sessions Judge, Dholpur, in Sessions Case No. 53 of 1997. At the trial, amongst other witnesses examined on behalf of the prosecution, Rakesh Kumar, who visited the place of occurrence and prepared the site plan and seized the plastic can, pieces of bangles, burnt *saree*, blouse, string and broken matches from the site of occurrence and prepared the seizure memo was examined as PW-1; Pinki, who was the sister of the husband of the deceased, was examined as PW-2; Shyamo, mother-in-law of the deceased was examined as PW-3; Dr. R.C. Goyal, who was the Medical Jurist in General Hospital, Dholpur, and conducted the medical examination of the deceased and prepared the injury report (Ext. P-3) was examined as PW-4; Shyam Lal, ASI,

who recorded the statement of the deceased at the hospital at Dholpur, was examined as PW-9; Dr. J.N. Soni, who conducted the postmortem on the body of the deceased was examined as PW-10 and Dr. R. Gurmukhi, who recorded the dying declaration of the deceased (Ext. P-10) at the hospital at Gwalior, was examined as PW-11. The respondent also examined defence witnesses DW-1, Ashok Kumar Sharma, said that the deceased had burnt herself. DW-2, Kalpana Tiwari, who was residing in the neighbourhood, said that the deceased told her that her mother-in-law has lit fire, DW-3, Mahendra Kumar, Compounder of the General Hospital, Dholpur, said that the deceased told Dr. R.C. Goyal that she burnt herself by pouring kerosene oil and DW-5, Bhagwan, said that the doctor told him that the deceased died by burning herself. The trial court rejected the defence story and convicted the respondent under Section 302, IPC and imposed sentence of life imprisonment and fine of Rs.2,000/- on the respondent.

4. Aggrieved, the respondent filed D.B. Criminal Appeal No. 660 of 1998 before the High Court. In the impugned judgment, the High Court found that there was a delicate relationship between the deceased and the respondent. The High Court also found that when the deceased was initially examined by Dr. Goyal on 05.03.1997, she had told him that she herself set her aflame and she died five days thereafter, but no attempt was made by the Investigating Officer to get her statement recorded by any Magistrate. In her dying declaration (Ext. P-10), however, she stated that the respondent had poured kerosene oil and set her aflame and there were therefore inconsistencies in the first statement of the deceased and her dying declaration. The High Court further found that DW-1 and DW-2, who were residing in the neighbourhood of the deceased, had deposed that the mother-in-law of the deceased told the *mohallawalas* that the deceased set herself aflame and DW-3 and DW-5 had deposed that in their presence, the deceased had told Dr. Goyal that she

The High Court, therefore, held that the prosecution had not been able to establish beyond reasonable doubt that it was the respondent who had poured kerosene oil and acquitted the appellant of the charge under Section 302, IPC.

Contentions of the learned counsel for the parties:

5. Dr. Manish Singhvi, learned counsel appearing for the State of Rajasthan, submitted that there were two dying declarations of the deceased, one (Ex.P-4) recorded by ASI, Shyam Lal, (PW-9) at 2.30 p.m. on 05.03.1997 in the hospital at Dholpur in presence of Dr. R.C. Goyal and the other (Ex.P-10) recorded by Dr. R. Gurmukhi (PW-11) recorded on 08.03.1997 soon after her admission in the hospital at Gwalior and in both these dying declarations, the deceased clearly named the respondent Santosh as having poured kerosene on her and ignited fire on to her *saree* with a match. He further submitted that Dr. R.C. Goyal (PW-4) has stated in his evidence that at the time of recording the statement of the deceased her condition was critical but she was not unconscious and an injury report (Ex.P-3) recorded at 1.45 p.m. on 05.03.1997 would also show that she was not unconscious. He further submitted that Dr. R. Gurmukhi (PW-11) has similarly stated in his evidence that on 08.03.1997 the condition of the deceased was not good and she was not in a position to put a signature and therefore he got her thumb impression on the dying declaration (Ex.P-10) recorded on 08.03.1997. He submitted that Dr. R. Gurmukhi (PW-11) has also stated in his evidence that the deceased was in full senses and she became unconscious and stopped talking only one hour prior to her death on 10.03.1997.

6. Dr. Singhvi further submitted that the two dying declarations of the deceased to the effect that the respondent Santosh had poured kerosene on her and ignited the fire on to her *saree* with a match box had been corroborated by eye-witness accounts of Pinki (PW-2), Shyamo (PW-3-mother in law) and Suman (PW-8-sister and sister in law of the

deceased). He submitted that from the evidence of PW-2, PW-3 and PW-8 it will be clear that there was some relationship between the deceased and the respondent and the deceased was spurning the overtures of the respondent because of which the respondent got angry and burnt the deceased. He submitted that the deceased died due to extensive burns as would be evident from *post mortem* report (Ex.P-9) and the injury report (Ex.P-3) prepared at the hospital at Dholpur at 1.45 p.m. would show that there was smell of kerosene from the clothes of the deceased when she was brought to the hospital. He argued that, therefore, it is not a case of fire accident. On the contrary, recovery of plastic can, kerosene, pieces of burnt *saree*, blouse and strings, pieces of broken bangles and broken match sticks from the spot (Ex.P-1) are circumstances which corroborate the dying declarations as well as the evidence of PW-2, PW-3 and PW-8.

7. Dr. Singhvi vehemently argued that considering the overwhelming evidence to establish beyond reasonable doubt that the respondent was responsible for pouring kerosene on the deceased and lighting the fire to the *saree* of the deceased, the High Court could not have acquitted the respondent only on the statement of Dr. R.C. Goyal (PW-4) that the deceased had told him that she got burnt herself. He submitted that the High Court should not have placed reliance on the evidence of the defence witnesses DW-1 and DW-5 who had never witnessed the incident inside the house where the deceased was burnt and arrived at the spot only after the incident had taken place. He submitted that the High Court ought not to have also placed any reliance on the evidence of PW-3 who was a Compounder at the general hospital at Dholpur, when the deceased herself gave a statement (Ext.P-4) on the cause of her death.

8. Dr. Singhvi submitted that the two dying declarations of the deceased (Ex.P-4 and Ex.P-10) were relevant under Section 32 of the Indian Evidence Act on the issue of the cause of death of the deceased. He submitte rt

could not have discarded the dying declarations only on the ground that they were not recorded in the presence of Magistrate. In support of his evidence, he cited the decision of this Court in *Laxman v. State of Maharashtra* [(2002) 6 SCC 710] for the proposition that there is no requirement of law that the dying declaration is made to the Magistrate. He also cited the decision in *Paniben v. State of Gujarat* [(1992) 2 SCC 474] wherein this Court has culled out various principles governing dying declarations. He submitted that if the principles of dying declaration are taken into consideration, it is a fit case in which this Court should rely on the two dying declarations and restore the conviction of the respondent by the trial court. In this context, he also referred to the decision of this Court in *Bhajju Alias Karan Singh v. State of Madhya Pradesh* [(2012) 4 SCC 327] for the proposition that a dying declaration is a substantive piece of evidence and the conviction of the accused can also be based solely on the dying declaration.

9. Learned counsel for the respondent, Mr. K.L. Janjani, on the other hand, submitted that the deceased was admitted in the hospital on 05.03.1997 and her injuries were examined by Dr. R.C. Goyal (PW-4) and an injury report (Ex.P-3) was prepared and Ex.P-3 has an endorsement that deceased herself got burnt with kerosene oil but the word "herself" was subsequently erased and this fact has been admitted by PW-4 in his cross examination. He further submitted that PW-4 has also deposed that he had asked the deceased as to how she got burnt and she had told him that she had herself got burnt. He submitted that the dying declaration (Ex.P-4) was recorded by PW-9, ASI, Shyam Lal without obtaining any certificate from Dr. R.C. Goyal with regard to the condition of the deceased and therefore the dying declaration (Ex.P-4) cannot be relied upon.

10. Mr. Janjani next submitted that immediately before the dying declaration (Ex.P-10) was recorded on 08.03.1997 an entry was made in the patient case sheet of the deceased in the hospital in Gwalior (Ext.P-13) that a homicidal incident took

place while she was preparing meal on stove. He submitted that both Ex.P-13 and the dying declaration (Ex.P-10) has been recorded by Dr. R. Gurmukhi (PW-11) and yet Ex.P-10 and Ex.P-13 contained different versions about the incident in which the deceased was burnt. He also argued that the cross-examination of Dr. Gurmukhi would show that the deceased was in a bad condition on 08.03.1997 and her blood pressure was below 40% and she was drowsy and unconscious and hence she could not have given the statement in Ex.P-10. He argued that PW-12 who was in-charge of the deceased at the Gwalior hospital denied knowledge of any statement of the deceased having been recorded by PW-11.

11. Mr. Janjani further submitted that in fact the evidence of PW-2, PW-3 and PW-8 was that the door of the room in which the deceased got burnt was closed from inside by lathi and stones and hence none of the prosecution witnesses PW-2, PW-3 and PW-8 could have seen as to how actually the deceased got burnt. He submitted that therefore there is no proof of the intent of the respondent to cause the death of the deceased and the respondent cannot be held guilty of the offence of murder under section 302, IPC and he could only be punished for the offence under Section 304, IPC. He submitted that PW-3 has clearly stated that prior to the incident which took place on 05.03.1997 she had not noticed any mischievous act on the part of respondent. In this context, he submitted that the respondent has already undergone imprisonment for six years which may be sufficient punishment for the offence under Section 304, IPC. He further submitted that the respondent is a married person and has three grown up daughters and will suffer immense hardship if he is sent back for life imprisonment. In support of this submission, he relied on the decision of this Court in *Surendra Singh v. State of Uttaranchal* [(2006) 9 SCC 531] and *State of Rajasthan v. Maharaj Singh and Another* [(2004) 13 SCC 165] in which this Court has taken a view on similar facts that the offe

accused was one under Section 304, IPC and not under Section 302, IPC.

12. Mr. Janjani, relying on *State of Uttar Pradesh v. Banne @ Baijnath & Others.* [(2009) 4 SCC 271] and *State of Andhra Pradesh v. S. Swarnalatha and Others* [(2009) 8 SCC 383], finally submitted that the scope of interference by this Court under Article 136 of the Constitution in a judgment of acquittal passed by the High Court is very limited. He submitted that this is a case where two possible views on the evidence are possible, one that the respondent is guilty and the other that the respondent is not guilty and in such cases this Court has held that if the High Court has taken a view in favour of the accused and has acquitted him of the charges, this Court should not interfere with the same. In support of his proposition, he relied on *State of Kerala vs. Nazar* [(2005) 9 SCC 246] and *Shri Gopal and Another vs. Subhash and Others* [(2004) 13 SCC 174].

Findings of the Court:

13. We have perused the first dying declaration (Ext. P-4) and we find therefrom that the deceased has clearly stated that the respondent Santosh poured kerosene on her from a can and ignited the fire by a match stick on her *saree* and as a result she got burnt. The dying declaration (Ext. P-4) was recorded by ASI, PW-9, within two to three hours of the incident at 2.30 p.m. on 05.03.1997 at the Female Surgical Ward General Hospital. This dying declaration (Ext.P-4) was recorded in the presence of Dr. R.C. Goyal, Medical Jurist (PW-4) when the deceased was in a condition to make a statement. The High Court appears to have doubted this dying declaration because PW-4 has stated in his cross-examination that the deceased told him that she had got burnt on her own and he has also made a note in the injury report (Ext.P-3) that the deceased had got burnt on her own. The High Court lost sight of the fact that PW-4 has conducted the medical examination of the deceased at

the hospital at 1.45 p.m. and, as has been stated by PW-4 in his evidence, the injury report (Ext. P-3) had been prepared before the dying declaration (Ext.P-4) was recorded at 2.30 p.m. It is perhaps for this reason that in Ext.P-3, after the deceased gave her statement (Ex. P-4) to PW-9 in the presence of PW-4 that PW-4 corrected the injury report (Ext.P-3) by scoring out the words "by herself". In other words, after PW-4 came to know later from the statement of the deceased recorded by PW-9 in his presence that the deceased did not get burnt by herself, he corrected the injury report (Ext.P-3). The High Court has failed to appreciate the evidence in this light.

14. On a reading of the second dying declaration (Ext.P-10) recorded by Dr. R. Gurmukhi, PW-11, at the hospital at Gwalior, to which the deceased was shifted, we find that the deceased reiterated that there was a quarrel between her and the respondent and the respondent poured kerosene oil on her and ignited the fire and as a result she got burnt. We also find from the evidence of PW-11 that the deceased was in a condition to make the dying declaration on 08.03.1997. It is true, as has been submitted by the learned counsel for the respondent that in patient case sheet (Ext. P-13) of the deceased, PW-11 has written that it is a case of homicidal burns while she was preparing meal on stove four days back, but we find on a reading of Ext.P-13 that it is also mentioned "her husband's younger brother, Santosh, quarrel with her". Hence, in the second dying declaration (Ext.P-10) also the deceased has named the respondent Santosh as having quarreled with her and as a result she has suffered the burn injuries. The High Court was, therefore, not right in coming to the finding that there were inconsistencies in the two dying declarations (Ext.P-4 and Ext.P-10).

15. The two dying declarations of the deceased, Ex. P-4 and Ex.P-10, are corroborated by recovery of a plastic can with some kerosene oil, burnt pieces of *saree*, blouse and bangles as well as the broken matchsticks fro

where the incident took place. PW-2, PW-3 and PW-8 have not seen what actually had happened inside the room (*khaprail*) because the door of the room was closed, but they have seen the respondent coming out of the room and the deceased was in a burnt condition. PW-2, PW-3 and PW-8, therefore, have corroborated the statements of the deceased in the two dying declarations (Ext.P-4 and Ext.P-10) that none other than Santosh was in the room in which the incident took place.

16. Section 32(1) of the Indian Evidence Act, 1872 makes it clear that when a statement, written or verbal, is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, such statement is relevant. Hence, Exts. P-4 and P-10 are relevant for deciding as to what was the exact cause of the death of the deceased in this case. In this case, Exts. P-4 and P-10 were also corroborated by both circumstantial evidence regarding the recovery of plastic can with some kerosene oil, burnt pieces of *saree*, blouse and bangles and broken matchsticks from the place of occurrence as well as the direct evidence of PW-2, PW-3, PW-4 and PW-8, who had seen the respondent coming out of the room where the incident took place. In our view, therefore, the High Court could not have acquitted the respondent by the impugned judgment.

17. In *State of Kerala v. Nazar* [(2005) 9 SCC 246], cited by the learned counsel for the respondent, this Court found that the conclusion of the High Court was based on the evidence on record and there was no error in the appreciation of the evidence by the High Court and for this reason this Court did not interfere with the decision of the High Court saying that the view was a reasonable one taken on the basis of the evidence on record. In this case, on the other hand, we have found that the High Court could not have taken the view that the respondent was not guilty at all when there were two dying declarations of

the deceased corroborated by both circumstantial and direct evidence.

18. In *Shri Gopal & Another v. Subhash & Others.* [(2004) 13 SCC 174] relied on by the learned counsel for the respondent, this Court found that there were certain discrepancies in the prosecution case because of which the High Court had doubts with regard to the participation of the accused persons and this Court took the view that a possible view has been taken by the High Court, which should not be interfered with by this Court under Article 136 of the Constitution. In this case, on the other hand, we have found that the view taken by the High Court was not a possible one when the name of the respondent is taken in the two dying declarations of the deceased as the cause of the fire in which the deceased was burnt and the dying declarations were corroborated by both circumstantial and direct evidence.

19. The High Court has taken a view in the present case that the Magistrate should have been requisitioned for recording the dying declaration and has considered this lapse on the part of the prosecution as a reason for not believing the dying declaration. The Constitution Bench of this Court in *Laxman v. State of Maharashtra* (supra) has, on the other hand, held that there is no requirement of law that a dying declaration must necessarily be made to a Magistrate and what is essentially required is that the person who records the dying declaration must be satisfied that the deceased was in a fit state of mind. In this case, the Constitution Bench, however, has held that what evidential value or weight is to be attached to a dying declaration necessarily depends on the facts and circumstances of each particular case. In this case, as we have found, the deceased has made two dying declarations (Ext. P-4 and Ext. P-10) and has consistently named the respondent as the person for the cause of her burn injuries and the two dying declarations are corroborated both by circumstantial evidence and direct evidence. Hence, even thou s

not requisitioned for recording the dying declarations, the High Court ought not to have discarded the dying declarations.

20. The only other question which remains to be decided in this case is whether the respondent should be held guilty of the offence under Section 302, IPC, or Section 304 IPC. A person could be held to be guilty of offence under Section 302, IPC, if he commits murder. The relevant portion of Section 300, IPC, which defines "murder" is extracted hereunder:

> **"300. Murder.—** Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-
>
> *Secondly*- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-
>
> *Thirdly*- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-
>
> *Fourthly*,- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. Under first clause, if the act by which the death is caused is done with the intention of causing death, the act amounts to murder. Under the second clause, if the act is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, the act amounts to murder. Under the third clause, if the act is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted

is sufficient in the ordinary course of nature to cause death, the act amounts to murder. In each of the three clauses, intention to cause death or to cause the bodily injury is an essential ingredient of the offence of murder. Under the fourth clause, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid, he is said to have committed murder. Hence, under the fourth clause, knowledge of the act committed by the accused that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, is a necessary ingredient for the offence of murder.

22. In the facts of the present case, PW-2, PW-3 and PW-8 have not seen what exactly happened inside the room (*khaprail*) in which the incident took place. The deceased has, however, stated in the two dying declarations (Ext.P-4 and Ext.P-10) that the respondent poured kerosene on the deceased and ignited fire on the *saree* of the deceased. The two dying declarations (Ext.P-4 and Ext.P-10) are very sketchy and do not narrate the details as to how the incident took place except stating that there was a quarrel between the deceased and the respondent. From the two dying declarations (Ext.P-4 and Ext.P-10), therefore, it is difficult to record a finding that the respondent had any intention to cause death of the deceased or had any intention to cause any bodily injury. From the two dying declarations (Ext.P-4 and Ext.P-10), it is also difficult to come to a finding that the respondent committed the act knowing that it is so imminently dangerous that it must, in all probability, cause death of the deceased. As found by the High Court, there was some delicate relationship between the respondent and the deceased and it is difficult to believe that the respondent had any intent to cause death or bodily injury to the deceased. Rather, it appears to u[illegible]e

deceased has been caused by a reckless act of the respondent with the knowledge that it is likely to cause death and for this act the respondent is guilty of culpable homicide not amounting to murder under Section 304, Part-II, IPC. The respondent has undergone imprisonment of approximately six years and the incident is of the year 1997. In the peculiar facts and circumstances of the case, the period of imprisonment undergone by the respondent-accused and a fine of Rs.2,000/- are sufficient punishments under Section 304 Part-II, IPC.

23. The appeal of the State is allowed. The impugned judgment of the High Court is set aside and the respondent-accused is held guilty of the offence under Section 304 Part-II, IPC, and is sentenced for a period of six years undergone by him and a fine of Rs.2,000/- to be paid within two months from today, failing which he will be liable for imprisonment for a further period of two months.

K.K.T. Appeal allowed.

ALAKNANDA HYDRO POWER CO. LTD.
v.
ANUJ JOSHI & ORS.
(Civil Appeal No. 6736 of 2013)

AUGUST 13, 2013

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Hydroelectric Power Project – Environmental and Forest clearance for – Granted to project developer – Writ petition filed objecting to the clearance – High Court directing the Ministry of Environment and Forest to hold public hearing – On appeal, held: The project in question is ongoing project, environmental clearance and forest clearance wherefor were granted way back in 1985 and 1987 – 95% work is already over and nearly 4,000/- crores been spent on the project – No purpose would be achieved by way of public hearing at this stage – Now the safety and security of the dam and the people is of paramount importance – Directions issued to the authorities concerned and to the project developer to give effect to recommendations made by the Technical experts.

Environmental Law – Mushrooming of large number of hydroelectric projects in the state of Uttarakhand and its impact on Alaknanda and Bhagirathi river basins – Cumulative impact of those project components on eco-system – Direction to Ministry of Environment and Forest to constitute expert body to make detailed study as to the effect of the projects on environmental degradation – Till then MoEF as well as State Government directed not to grant any hydroelectric power project – Disaster Management Authority of the State also directed to submit its report to the Supreme Court as to whether they had any disaster management plan for combating unprecedented tragedy in the State of Uttarakhand.

The Srinagar Hydro Electric Project (SHEP), which was basically run-of –the-river Scheme, was given Techno-Economic approval for 200 MW by Central Electricity Authority in 1982, subject to environmental clearance. After being segregated from other Ganga Valley Projects, a separate Environment Impact Assessment (EIA) of the Project was made in 1985. A temple (Dhari Devi Temple) which was likely to be submerged in water, it was suggested in the Assessment that the height of the same would be raised. The Ministry of Environment and Forest also granted environmental clearance for the Project. Later the capacity of the Project was enhanced to 330 MW in 1987, which was duly approved and Planning Commission also accorded investment approval. However, effective progress was not made in the Project due to paucity of funds.

Pursuant to liberalisation policy, the State invited private investment in the Project and MOU was entered into with a private company. The State Government requested Ministry of Environment and Forest to transfer the environmental clearance to the private company and the clearance was transferred for 330 MW in the year 1999. Techno-Economic clearance for implementation of the project was also issued to the private company. The Project, therefore, was transferred to the appellant-company and environmental clearance was transferred in its favour in the year 2006.

Respondent No.1 filed writ petition challenging the decision as to environmental clearance for the increased capacity of generation i.e. 330 MW. Ministry of Environment and Forest by its letter dated 3.8.2011 clarified that transfer in favour of the appellant-Company was for 330 MW. High Court disposed of the petition directing the appellant-Company to place the document before Ministry of Environment and Forest and further

directed the Ministry to hold public hearing. Hence, the present appeals.

Certain litigation had also been initiated before National Green Tribunal on the issue. The proceedings before the Tribunal have also been transferred to this Court.

Disposing of the appeal and transferred cases, the Court

HELD: 1.1. Srinagar Hydro Electric Project is an ongoing project for which environmental clearance was granted as early as in the year 1985 and forest clearance in the year 1987. Further, about 95 % of the work is already over and nearly Rs.4,000 crores has been spent. If public hearing is found necessary then the same should have been held before granting environmental clearance. The purpose of public hearing is to know the concerns of the affected people and to incorporate their concerns appropriately into the Environment Management Plan and it is after incorporation of the concerns and revision/modifying plan, the final Environment Management Plan would be submitted to the Ministry of Environment and Forest for granting environmental clearance. No purpose would be achieved by way of a public hearing at this stage. The various Committees' reports and the report dated 3.5.2013 that the members of the Committee had met the Dhari Devi temple trustees, priests and residents of the locality, they had not raised any objection for not holding a public hearing. Further, the State of Uttarakhand has also never canvassed for a public hearing nor any complaint was received by the temple authorities or the worshippers raised any complaint of not holding any public hearing there. Therefore, the direction given by the High Court directing the MoEF to hold a public hearing, is set aside. [Para 18] [800-H; 801-A-E]

1.2. Das Committee, Chaturvedi and Joint Team constituted on the basis of direction of this Court have, therefore, fully endorsed the views made by Indian National Trust for Art and Cultural Heritage (INTACH) on *Dhari Devi* Temple. There is no reason to differ from the views expressed by the expert committee, which was submitted hearing all the affected parties, including the Trustees of the Temple, devotees, *Pujaris* etc. Committee reports to that extent stand accepted. [Para 32] [834-E-F]

1.3. It is also not correct to say that by accepting the suggestions of all the expert committees to raise the temple as such to a higher place, would wound the religious feelings of the devotees or violate the rights guaranteed under Article 25 of the Constitution. Sacred rock on which the temple exits is still kept intact and only the height of the temple is increased so that the temple would not be submerged in the water. [Para 33] [834-G-H; 835-A]

2. Dam safety and security is a matter of paramount importance, failure of which can cause serious environmental disaster and loss of human life and property. Proper surveillance, inspection, operation and maintenance of dams is essential to ensure for safe functioning of the Dams. The Central Water Commission (CWC) is a premier technical organisation of India in the field of water resources. The Commission is also entrusted with the general responsibilities of initiating, coordinating and furthering, in consultation with the State Governments concerned, schemes for control, conservation and utilisation of water resources throughout the country for the purpose of flood control, irrigation, drinking water supply and water power development. Safety of dams is the principal concern of the State Government. The State Government has also to carry out investigation, planning, design, construction

and operation. The appellant-Company says, so far as SHEP is concerned, engineering and technical parameters of the dam are clearly narrated in the detailed project report which, in turn, are assessed by Central Electricity Authority (CEA) in consultation with the CEC and GSI. The norms and regulations laid down by the concerned authorities, and whether those are strictly followed or not, have to be assessed and monitored by the Nodal Agency, CEA/Ministry of Power as well as the GSI. [Para 35] [835-E-H; 836-A]

3.1. Safety and security of the people are also of paramount importance when a hydro electric project is being set up and it is vital to have in place all safety standards in which public can have full confidence to safeguard them against risks which they fear and to avoid serious long term or irreversible environmental consequences. The question as to whether the recent calamities occurred at Uttrakhand on 16.6.2013 and, thereafter, due to cloud burst, Chorabari Lake burst due to unprecedented rain and consequent flooding of Alaknanda river etc. has affected the safety of SHEP has also to be probed by the MoEF, State of Uttarakhand and Dam Safety Authority etc. [Para 36] [836-B-D]

3.2. Construction of the project involving excavation of earth and rock has generated large quantum and with the objective to protect the disposal areas from further soil erosion and develop the surrounding areas in harmony with the environment, the muck disposal plan is formulated. Muck disposal plan gives quantification of muck, identifies location and activities wherein muck is generated, during excavation and blasting operation and quantifies muck generated from the activities with relevance to disposal areas. The Das Committee visited the project site and submitted a status report on 29-30 August, 2012 which has dealt with m

of the Joint Committee dated 03.05.2013 also refers to the appellant-Company's action plan regarding muck management and disposal and recommended that remaining work, particularly, of the permanent site No.8 and 9 be carried out at the earliest. The appellant-Company has given the details of the work carried out for muck disposal. Failure of removal of muck from the project site may also cost flooding of the project areas, causing destruction to the environment and to the life of property of the people. MoEF and State Government and all other statutory authorities would see that the appellant-Company takes proper action and steps for muck management and disposal. [Para 37] [836-E-H; 837-A-B]

3.3. Catchment Area Treatment (CAT) is required to be carried out by the project developer along with R & R and greenbelt activities, primarily to mitigate the adverse environmental impact created by the project construction. CAT is also resorted to reduce the inflow of silt and prevent sedimentation of reservoirs. CAT management involves steps to arrest soil erosion, rehabilitation of degraded forest areas through afforestation, controlling landslide and rockfalls through civil engineering measures and long time maintenance of afforestation areas. Silt inflows in river water not only result in reduction in storage capacity of dams, but also lead to increased wear and tear of turbines. Therefore, CAT is of crucial importance with regard to hydro electric projects. CAT plan has been prepared by the Uttarakhand Forest Department and the Project Proponent has paid the estimated amount of Rs.22.30 crores to the State Forest Department towards implementation of CAT Plan. [Para 38] [837-C-F]

3.4. Appellant-Company has deposited first year budget of Rs.203.6 lakhs to the State Forest Department for green belt rim of the reservoir in August 2012.

Although green belt area is earmarked, the technical documents based on the maximum flood level in the reservoir, the rim of the reservoir, could only be determined and developed after reservoir is impounded. Proper steps would be taken by the Forest Department of Uttarakhand to carry out the green belt development area in question. The MoEF, the State Government etc. would see that the proper steps would be taken by all the authorities including the appellant-Company to give effect to the directions given by the Joint Team. [Para 41] [838-F-H]

3.5. Going through the reports of Das Committee, Chaturvedi Committee as well as the Joint Team and after perusing the affidavits filed by the parties, there is no reason to hold up the project which is almost nearing completion. MoEF, the appellant-Company, Government of Uttarakhand, Forest Department would take immediate steps to comply with all the recommendations made by Joint Team in the report dated 03.05.2013 and also oversee whether appellant-Company is complying with those directions as well. [Para 42] [839-A-B]

4.1. The Court is, however, very much concerned with the mushrooming of large number of hydroelectric projects in the State of Uttarakhand and its impact on Alaknanda and Bhagirathi river basins. Various studies also indicate that in the upper-Ganga area, including Bhagirathi and Alaknanda rivers and their tributaries, there are large and small hydro power dams. The cumulative impact of those project components like dams, tunnels, blasting, power-house, muck disposal, mining, deforestation etc. on eco-system, is yet to be scientifically examined. The AHEC Report has not made any indepth study on the cumulative impact of all project components like construction of dam, tunnels, blasting, power-house, Muck disposal, mini

by the various projects in question and its consequences on Alaknanda as well as Bhagirathi river basins so also on Ganga which is a pristine river. [Paras 44 and 46] [839-D-F; 840-E-F]

4.2. The above mentioned Reports would indicate the adverse impact of the various hydroelectric power projects on the ecology and environment of Alaknanda and Bhagirathi river basins. The cumulative impact of the various projects in place and which are under construction on the river basins have not been properly examined or assessed, which requires a detailed technical and scientific study. [Para 50] [844-C-D]

4.3. The MoEF as well as State of Uttarakhand is directed not to grant any further environmental clearance or forest clearance for any hydroelectric power project in the State of Uttarakhand, until further orders. MoEF is directed to constitute an Expert Body consisting of representatives of the State Government, WII, Central Electricity Authority, Central Water Commission and other expert bodies to make a detailed study as to whether Hydroelectric Power Projects existing and under construction have contributed to the environmental degradation, if so, to what extent and also whether it has contributed to the present tragedy occurred at Uttarakhand in the month of June 2013. MoEF is directed to examine, as noticed by WII in its report, as to whether the proposed 24 projects are causing significant impact on the biodiversity of Alaknanda and Bhagirath River basins. The Disaster Management Authority, Uttarakhand would submit a Report to this Court as to whether they had any Disaster Management Plan is in place in the State of Uttarakhand and how effective that plan was for combating the present unprecedented tragedy at Uttarakhand. [Para 51] [844-G-H; 845-A-D]

Narmada Bachao Andolan vs. Union of India and Ors. **(2000) 10 SCC 664: 2000 (4) Suppl. SCR 94** *Lafarge Umiam Mining (P) Ltd. vs. Union of India* **(2011) 7 SCC 338: 2011 (7) SCR 954;** *Orissa Mining Corporation vs. MoEF* **(2013) 6 SCC 476 – referred to.**

Case Law Reference:

2000 (4) Suppl. SCR 94	**referred to**	**Para 14**
2011 (7) SCR 954	**referred to**	**Para 15**
(2013) 6 SCC 476	**referred to**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6736 of 2013.

From the Judgment & Order dated 03.11.2011 of the High Court of Uttarakhand at Nainital in WP (PIL) No. 68 of 2011.

WITH

C.A. No. 6746-6747 of 2013, T.C. Nos. 55,56 &57 of 2013.

Himanshu Shekhar, Pukhrambam Ramesh Kumar, Petitioner-in-Person for the Appellant.

Santosh Singh, B. Krishna Prasad, Rachana Srivastava, Himanshu Shekhar for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. Srinagar Hydro Electric Project (SHEP) located in Tehri / Pauri Garhwal district of Uttar Pradesh was a project envisaged by the then Uttar Pradesh State Electricity Board (UPSEB) on river Alaknanda, which was basically run-of-the-river scheme.

3. The Techno-Economic approval of the scheme was granted for 200 MW by the Central Electricity Authority (CEA), a competent authority exercising powe of

the Electricity (Supply) Act, 1948, in its meeting held on 6.11.1982, subject to the environmental clearance from the Ministry of Environment. SHEP was later segregated from twenty two other Ganga Valley projects. A separate Environment Impact Assessment (EIA) was made on the SHEP on 9.2.1985. No adverse affect had been noticed on environment in that assessment on setting up of the Project. On the contrary, it was felt that such a scheme would add to the richness of the scenic beauty by creation of beautiful lakes attracting more tourists and also meet the energy requirements of the State and could be completed within a short span of five years. *Dhari Devi* Temple, it was noticed, was likely to be submerged in water, therefore was also considered while considering the Environmental Impact Assessment (EIA). It was suggested that temple would be raised and created with a pleasing architecture suiting the surroundings.

4. The Ministry of Environment and Forest (MoEF) granted Environmental Clearance for the project to UPSEB vide its letter dated 03.05.1985 subject to certain safeguards. The project involved diversion of forest land to the extent of 338.38 hectares which was cleared by the Forest Department vide proceeding No. 8-227/86-PC dated 15th April, 1987, in accordance with Section 2 of the Forest (Conservation) Act, 1980. The Project involved construction of concrete gravity dam affording a gross storage of 8 Mcum water conductor system designed for 660 cumecs and a power house with an installation of six units of 55 MW each. UPSEB later carried out a detailed study and submitted a report stating that taking into consideration the peaking capacity, the installed capacity of the project would be increased from 200 MW to 330 MW. CEA approved and granted the Techno-economic clearance in the enhanced capacity of 330 MW vide its letter dated 18.12.1987. Planning Commission vide its letter dated 29.01.1988 accorded the investment approval. UPSEB started the work but due to the

paucity of funds the project could not make any effective progress.

5. The Government of India, in the meanwhile, had liberalized the policy to encourage private participation in power development. Consequently, the UP Government following the above mentioned policy decided to invite private investment in the development of energy sector especially with regard to the Srinagar Hydro Electric Project. Consequently, the State Government had entered into a Memorandum of Understanding (MOU) with M/s Duncan Industries Ltd. on 27th August, 1994 for development of the project and in terms of the MOU, M/s Duncan Industries Ltd. had established a generating company 'Duncan North Hydro Power Co. Ltd.'. The project was an ongoing project and most of the infrastructure required for the execution of the project had already been arranged by the State Government. The Department of Energy and Government of Uttar Pradesh then wrote to the MoEF by letter dated 04.09.1997 to transfer the environmental clearance earlier granted to the UPSEB to the Duncans so that the safeguards against environmental degradation while clearing the project might be implemented by the Duncans.

6. M/s Duncan submitted a revised EIA report and DPR to the MoEF on 25.01.1996 and it was also conveyed that the project of the enhanced capacity of 330 MW had to be transferred to the Duncans. MoEF following the letters dated 25.01.1996 and 18.06.1998 on the subject transferred environmental clearance to Duncans for 330 MW on 27.07.1999 subject to the condition that the conditions stipulated in the environmental clearance already granted and any other conditions, if stipulated in future for protection of the environment would be fulfilled by Duncans. CEA also issued the Techno Economic clearance for implementation of the Project vide it letter dated 14.06.2000 to Duncans.

7. The Duncans had also given up t g

out some work and in its place came the appellant - Alaknanda Hydro Power Company Ltd. (AHPCL). Request was then made to the MoEF by AHPCL for transfer of the environmental clearance granted to 330 MW Srinagar Hydro Electric Project in its favour. Request was favourably considered by the MoEF and vide communication J-12011/6/96/ IA-I dated 27th March 2006 MoEF transferred the environmental clearance in favour of AHPCL stating that it was with the approval of the competent authority.

8. First respondent along with few others filed Writ Petition (PIL) No. 137/2009 before the High Court of Uttarakhand at Nainital to quash the above mentioned order and sought a CBI inquiry relating to the enhanced capacity of 330 MW mentioned in the letters dated 27.07.1999 and 27.03.2006. Direction was also sought for against AHPCL to stop the construction of the Hydro Power Project and also for other consequential reliefs. Writ Petition was disposed of on 19.04.2011 with a direction to AHPCL to approach the MoEF for a specific decision as to the clearance for increased capacity of generation and increased height of the dam. The MoEF was directed to take a decision within a period of three months. Court, however, noticed that the clearance had already been given by the MoEF in the year 1985 which stood transferred in favour of AHPCL for construction of the dam for generation of 200 MW of electricity and 63 metre height of the dam. The Court also ordered that the construction of dam for the said height and for generation capacity of 200 MW would not be stopped but the construction beyond that limit could be proceeded only after clearance is sought from the MoEF.

9. MoEF as directed by the High Court considered the entire matter afresh and rendered a specific decision dated 03.08.2011clarifying that transfer letter dated 27.03.2006 in favour of AHPCL was for 330 MW. The operative portion reads as follows:-

"The matter has been reviewed by the Ministry and it is to clarify that while transferring the environment clearance dated 3rd May, 1985 of the Project in the name of Uttar Pradesh State Electricity Board (UPSEB) to M/s. Duncans North Hydro Power Company Limited vide this Ministry's letter No. 12011/6/96-IA-I dated 27.7.1999 (copy enclosed), the Ministry had reviewed that increased capacity from 200 MW (4X50 MW) to 330 MW (5X66 MW) and associated parameters like change in dam height from 73m to 90m from the deepest foundation and FRL from EL 604.0m to 605.5m. The Ministry also noted that there was a change in the submergence from 300 ha to 324.074 ha, however Forest land remained the same i.e. 338.36 ha dated 15th April, 1987 which will be the final Forest Land for the Project. Therefore, the final parameters for the project are as follows:-

(i) Submergence area – 324.074 ha

(ii) Forest land for diversion – 338.86 ha

(iii) Capacity – 330 MW (4X82.5 MW)

(iv) Dam height from the deepest foundation – 90 m

(v) Dam height for the river bed level – 66 m

(vi) FRL – EL 605.5 m

(vii) MDDL – EL 603.0 m

(viii) Dam top Road level – 611.0 m

In view of the above, I am directed to clarify that the transfer of environment clearance from DHPCL to Alaknanda Hydro Power Company Limited (AHPCL) vide this Ministry's letter No. J-12011/6/96-IA_I dated 27th March, 2006 is of 330 MW capacity with the above mentioned parameters. The Ministry has furth[illegible]n

the units from 6X55 MW to 4X82.5MW, as approved by CEA.

This has approval of the Competent Authority."

10. MoEF though clarified the position as directed by the High Court, the first respondent herein along with one Dr. Bharat Jhunjhunwala preferred Writ Petition (PIL) No. 68 of 2011 before the High Court of Uttarakhand at Nainital on 09.08.2011 challenging the order dated 03.08.2011.

11. Writ Petition was disposed of by the High Court directing AHPCL to place the documents mentioned in Schedule IV to the Notification dated 27.01.1994 before MoEF and the Ministry was directed to take steps to hold a public hearing as envisaged in the Notification. Further, it was also ordered that the notice should mention that the public hearing would be given at *Dhari Devi* Temple premises and that the Commissioner, Pauri Garhwal to be present at the public hearing. Further, Court also noticed that the construction work had progressed to a great extent and at no stage, there was any objection to the construction of the project having a capacity of 200 MW and, therefore, did not stop the construction, however, it was made clear that the same would be subject to the decision taken by the MoEF.

12. AHPCL, aggrieved by the above mentioned judgment, has preferred this appeal by raising the core issue with regard to the applicability of EIA Notification dated 27.01.1994 in a case where the project had been granted environmental clearance for 200 MW on 3.05.1985 and thereafter for 330 MW by the MoEF on 15.4.1987 and approved by CEA on 18.12.1987, followed by the sanction accorded by the Planning Commission on 29.1.1988.

13. Respondents 1 and 2 in Civil Appeal arising out of SLP (Civil) No. 362 of 2012 also filed SLP (Civil) Nos. 5849-

5850 of 2012 challenging the order of the High Court dated 3.11.2011 and the order dated 5.12.2011 passed on the review petition contending that the finding recorded by the High Court that they had not questioned the environmental clearance for 200 MW, was incorrect. They also wanted the stoppage of the project till the procedure laid in the EIA Notification 2006 is complied with including the holding of a public hearing.

14. Mr. M.L. Lahoty, learned counsel appearing for the appellant – AHPCL submitted that EIA Notification dated 27.01.1994 (as submitted upto 07.07.2004) would operate only prospectively and that too only to those projects which are either 'new' or 'expansion or modernisation' of the existing project is proposed after 1994 Notification. Learned counsel made reference to the judgment of this Court in *Narmada Bachao Andolan v. Union of India and Others* (2000) 10 SCC 664 and submitted that the Notification would operate only prospectively. Learned counsel pointed out that public hearing was expressly excluded by para 4 of the Explanatory Note to the Notification in respect of projects like Srinagar Hydro Project where neither large displacement is involved nor is there severe environment ramification. Further, it was also pointed out that the expansion of the project from 200 MW to 330 MW was granted in the year 1987 prior to the notification and even the original EIA of 1994 would not apply. Further, it was also pointed out that Amendment Act 77 of 2004 was incorporated simultaneously with the explanation along with two Entries Nos. 31 and 32 to bring within its purview the "new construction projects" and "new industrial estates". Learned counsel pointed out so far as the Hydro Projects are concerned, they are not covered by the said two newly introduced Entries as from the very inception of 1994 notification, Hydro Power Projects are covered by Rule 2 of Schedule 1 and therefore the explanation so inserted also has no application. Consequently, the concept of 'plinth level' is also not applicable as it goes with the applicability of the Explanation.

15. Learned counsel also pointed out that the environmental clearance even otherwise was issued in the light of the specific decision of MoEF dated 03.08.2011 clarifying that the transfer letter of 27.3.2006 in favour of AHPCL was for 330 MW. Learned counsel in support of his contention made reference to the judgment of this Court in *Lafarge Umiam Mining (P) Ltd. v. Union of India*, (2011) 7 SCC 338. Learned counsel also pointed out that the project in question was conceptualized more than three decades back. As on date the project stands almost completed and more than Rs.4000 cores had been invested and therefore, there is no question of holding a public hearing at this stage. Further, it was also pointed out that State Government had ascertained views of the local inhabitants, public representatives, Gram Panchayat, Shopkeepers, Temple Pujaris, Trust, devotees etc. and it was considering their views, the MoEF granted environmental clearance and also forest clearance for the project.

16. MoEF in the counter affidavit filed on 25.7.2012 stated that the project in question was granted environment clearance in the year 1985 and hence it would not come under the purview of EIA Notification of 1994 or EIA Notification of 2006 which replaced the EIA Notification of 1994. Further, it was stated that the construction of project was already in an advance stage and hence public hearing would be an empty formality, since the purpose of public hearing is to know the concerns of the affected people and to incorporate their concerns appropriately into the Environment Management Plan (EMP) for the project and it is after incorporation of the concerns and revising/ modifying the EMP, the final EMP would be submitted to the MoEF for granting environmental clearance to the project. MoEF has, therefore, taken the stand that since environmental clearance to the project had already been granted in the year 1985 prior to the coming into force of the Environmental (Protection) Act, 1986 and the EIA Notification of 1994, no public hearing was necessitated.

17. Shri Lahoty also pointed out that so far as the issue of *Dhari Devi* temple is concerned, the Joint Committee had endorsed and recommended that upliftment of the temple adhering to the INTACH plan is the best option and has found wide acceptability amongst Temple Samiti, Pujari, local inhabitants as well as local statutory authorities. Elaborate arguments were also addressed by the learned counsel on muck Management and submitted and that they had substantially complied with the proposed directions under Section 5 of the Environmental Protection Act. Arguments were also addressed on the Catchment Area Treatment Plan and submitted that an amount of Rs.22.30 crores was deposited with the Forest Department way back in 2007-09. Further, it was also pointed out that the AHPCL had spent about 40 crores for rehabilitation and resettlement of the affected people in the catchment area. For Greenbelt Development, it was pointed out that an amount of Rs.2.30 crore was made available to the State of Uttarakhand by AHPCL. Learned counsel, therefore, submitted that the respondents are unnecessarily creating hurdle in the completion of the project and litigation is not in public interest but for advancing the private interest of the respondents.

18. We may indicate while going through the averments made in the writ petition as well as the impugned judgment and the pleadings of the parties, it is seen that the question that was primarily raised before the High Court was with regard to the necessity of a public hearing and also whether the sanction had been accorded to construct the project with the capacity of 330 MW. This Court in *Narmada Bachao Andolan* case (supra) has held that the 1994 Notification applies only prospectively, in any view so far as this case is concerned the environmental clearance cannot be an issue in view of the specific stand taken by MoEF and the orders dated 03.08.2011 passed by MoEF which can also be considered as an *ex post facto* approval. SHEP, it may be noted, is an ongo[illegible]h

environmental clearance was granted as early as in the year 1985 and forest clearance in the year 1987. Further, about 95 % of the work is already over and nearly Rs.4,000 crores has been spent. If public hearing is found necessary then the same should have held before granting environmental clearance. The purpose of public hearing, it may be noted, is to know the concerns of the affected people and to incorporate their concerns appropriately into the EMP and it is after incorporation of the concerns and revision/modifying plan, the final EMP would be submitted to the MoEF for granting environmental clearance. Environmental clearance, in the instant case, had been granted in the year 1985 and the project is an ongoing project which is now nearing completion and, therefore, no purpose would be achieved by way of a public hearing at this stage. We also notice from the various Committees' reports and the report dated 3.5.2013 that they had met the temple trustees, priests and residents of the locality, they had not raised any objection for not holding a public hearing. Further, the State of Uttarakhand has also never canvassed for a public hearing nor any complaint was received by the temple authorities or the worshippers raised any complaint of not holding any public hearing there. We, therefore, set aside the direction given by the High Court directing the MoEF to hold a public hearing.

19. We find that a new dimension has been added to this litigation by initiating certain proceedings by group of litigants before the National Green Tribunal, New Delhi. MoEF also, on 30.06.2011, in exercise of powers conferred under Section 5 of the Environment (Protection) Act, 1986 passed a stop work order directing AHPCL to attend certain environmental issues which included (i) mounting *Dhari Devi* temple at a higher elevation as per the Plan prepared by INTACH (ii) maintain and manage muck at the various muck disposal sites by providing retention wall, slopes, compacting and terracing etc. (iii) develop greenbelt (iv) Catchment Area Treatment (v) undertaking

Supana Query restoration (vi) maintain minimum environmental flow etc.

20. The second respondent and few others then approached NGT vide Appeal No. 9 of 2011 praying for some rigours orders against AHPCL. The appeal was, however, disposed of by NGT directing MoEF to take a final decision within a period of eight weeks. No decision was taken by the MoEF within the time granted by the NGT which led AHPCL filing M.A. No. 103/2012 before the NGT to revoke Section 5 directions and allow AHPCL to continue the construction work of the project.

21. The Tribunal (NGT) disposed of the application on 07.08.2012 expressing its anguish for not disposing of the matter within the time granted by it. The AHPCL submitted that in spite of the fact that it had complied with all the requirements stipulated in the notice dated 30.06.2011, unnecessarily the project was held up causing huge financial loss to it. AHPCL also sought a direction to transfer all the cases from NGT to this court to be heard along with the appeal. Consequently, all those related matters were transferred to this case Court and were heard along with these appeals.

22. We asked the Secretary, MoEF, when the matter came for hearing, as to whether the conditions stipulated in its order dated 30.06.2011 had been complied with by the project proponent. Committee headed by Dr. B.P. Das was constituted by MoEF to examine whether the project proponent had complied with the conditions stipulated in the environmental clearance granted in May 1985 as well as Order dated 30.06.2011 and the copy of the Das Committee report of August 2012 has been made available.

23. Reference was also made to the B.K. Chaturvedi Committee Interim Report, as well as the final report, with regard to the environmental flow of Alak[illegible]d

other tributaries of Ganga which has also made some reference to this project as well. After noticing Das Committee Report and after hearing learned counsel on either side, this Court thought it appropriate to constitute a joint team consisting of officials of MoEF as well as State Government so as to conduct an on the spot inspection of the project area in question and to examine whether the project proponent had complied with all the conditions stipulated in the environmental clearance of May 1985 as well as Order dated 30.06.2011 of the MoEF, which also referred to the issue of the protection of *Dhari Devi* Temple. The joint team was directed to give an opportunity of hearing to second respondent as well. We have taken such a course to give a quietus and finality to the various issues which are long standing.

24. The Joint Team consisted of Professor R. Ramesh National Centre Coastal Zone Institute, Chennai, Mr. Gambhir Singh, Chief Conservator of Forests, Garwhal, Prof. R. Sakthivakivel, International Water Management Institute, Mr. Lalit Kapur, Director, MoEF and Dr. Arun Kumar, CSO, AHEC, IIT Roorkee as a Chairman of the Committee. This 5-members Committee visited the project site including MUCK disposal sites on May 1st and 2nd 2013 and heard the second respondent as well as the AHPCL. The Committee also visited *Dhari Devi* temple site and met trustees, priests and few residents of village *Dhari. The* Committee also visited the catchment area. The Committee examined as to whether the AHPCL had complied with the conditions stipulated in the environmental clearance of May 1985 and also the conditions stipulated in forest clearance of April, 1987. The Committee also examined whether the AHPCL had complied with the conditions communicated under Section 5 of Environment (Protection) Act 1986 vide letter dated 30.06.2011, also issues with regard to *Dhari Devi* Temple. The Committees, after considering all those aspects, submitted its report on 03.05.2013. The operative portion of the same reads as follows:

"**2. Compliance of Conditions stipulated In Environmental Clearance of May, 1985**.

1. Fuel Wood should be provided to the construction stage so as to prevent indiscriminate falling of trees in the neigbouring areas. The budgeted estimate should therefore, be suitably augmented.

The AHPCL has informed that they have made arrangements through their contractor to supply cooking gas for all the workers of the project. Nearly three to four hundred cylinders are used by the workers of all contractors for cooking requirements. In case of non-availability of gas, kerosene is used on limited occasions. No fuel wood is used for cooking or any other purpose. In case of any exigency wood is purchased from authorized Government/Forest departments by the contractor.

2.Critically eroded areas in the catchment should be identified for undertaking time bound soil conservation program in the first phase, concurrently with the construction works. The catchment area treatment plans be worked out expeditiously.

Uttarakhand Forest Department has provided a status on the CAT plan and green belt matter and is placed at Annexure – 2.

Uttarakhand Forest Department is executing the CAT plan through its four Divisions viz. Narendranagar, Rudraprayag, Garhwal and Civil - Soyam Pauri Forest Division. The proposed outlay of CAT plan for five year period was Rs.22.03 crores deposited by the AHPCL in three instalments (last in April 2009) to the Nodal Officer who in turn transferred this amount to the CAMPA fund with Govt. of India. In 2010, the funds were transferred to the CAMPA society of Uttarakhand Govt. for execution of proposed works.

To bring uniformity and for providing directions for finalization of CAT plans in participatory mode, PCCF Uttarakhand vide letter No. 238/PA and *Kha*-2023/13-2(2) dated 25 March 2011 issued guidelines for implementation of CAT plans in participatory mode. Overall framework for reviewing CAT plans was approved by steering committee of UK CAMPA in its 3rd meeting on 16th May 2011. Further, the PCCF vide office Memo NO. 174/13-2(2) dated 03.08.2011 issued preliminary guidelines with respect to creation of a Project Management Unit (PMU) for implementation of the CAT Plan. The funds for CAT plan are being allocated as per original proposal. However, micro-plans are being prepared in participatory mode by the respective Divisions of the Forest department following the Procurement Rules, 2008.

In pursuance to the above mentioned facts preparatory phase for the CAT plan execution was started in 2011-12 during which identification of sites, consultations with village communities, preparation of micro-plans by PRA method and awareness campaigns were carried out. In 2012-13, nursery raising, advance soil works were carried out together with preparatory activities. Total 133 villages have been identified for the CAT plan and Division wise distribution of which is Narendranagar Forest Division – 40 villages, Rudraprayag Forest Division – 41 villages, Garhwal Forest Division – 21 villages and Civil-Soyam Pauri Forest Division – 31 villages. Out of the 133 villages micro-plans have been prepared for 76 villages and division wise status of preparation of micro-plans in Rudraprayag Forest Division – 34 villages, Garhwal Forest Division – 21 villages and Civil Soyam Pauri Forest Division – 31 villages. During the financial year 2012-13, implementation of micro plans was started in 10 villages

and during current financial year approximately 60 villages are being taken up for this purpose.

Nursery activities have been selected at Division level. The actual requirement of the plants is expected to be known on completion of all micro-plans. Based on estimates saplings are already being raised in nurseries as Narendranagar Forest Division – 1.5 lacs saplings, Rudraprayag Forest Division – 5.4 saplings, Garhwal Forest Division – 1.0 saplings and Civil-Soyam Pauri Forest Division – 1.3 saplings. Through these nurseries afforestation is being taken up through micro planning of the planned villages in the catchment.

A total sum of Rs.46.22 lacs has been spent so far by the department during the financial years 2011-12 and 2012-13 under the budget provided by the project.

Further from other sources of funding i.e. 13th Finance Commission and FDA etc. the forest department of Uttarakhand has treated 882 Ha area as well as constructed 81 check dams and 10 water ponds in the catchment of the project.

3. Afforestation should be undertaken on a large scale in the project area and a 50m wide green belt created around the periphery of the reservoir.

For afforestation the response has been same as above in 2.

Compensatory afforestation as the Indian Forest Conservation Act (1980) was completed in an area of 347 ha in district Lalitpur of Uttar Pradesh (the then combined State) after the forest clearance accorded in the year 1987.

Based on the estimates provided by Forest department in June 2012 for a sum of Rs e

implemented in six years, AHPCL has deposited first year budget of Rs.203.6 lacs with the state forest department for creating Green Belt around the rim of the reservoir of Srinagar HEP in August 2012.

The state forest department is expecting the Srinagar hydropower project to be commissioned in Dec. 2013/ Jan.2014 and only after filling the reservoir, they intend to assess the requirement of site above the submerged area, the selection of species, the type of soil works etc. and creating the Green Belt accordingly. Therefore they intend to start the green belt activities only after works of water reservoir are completed and is filled. The work in the private land shall be taken up for green belt development through participatory approach with the land owners.

4. Geo-morphological studies be undertaken in the catchment to formulate plans for the stability of slopes on reservoir periphery through engineering and biological measures.

Geological Survey of India (GSI) has been appointed as the agency for carrying out the Geo-morphological Studies. Total 9 villages have been identified. These are Dungripanth, Sendri, Dhari, Kaliyasour, Gandasu, Farasu, Mehargon, Paparasuand and Maliyasu. The studies for 7 villages are completed. Recommendations received for 5 villages namely Dungripanth, Sendri, Dhari, Kaliyasour, Gandasu and implemented by the AHPCL. As informed by AHPCL, the recommendations for the displacement of the houses in the rim area of the reservoir have been complied with. The balance reports are expected to be received from GSI soon.

Measures comprises of engineering and biological aspects in green belt area are being implemented by state forest department.

5. A monitoring committee should be constituted, in consultation with the Department of Environmental to oversee the effective implementation of the suggested safeguards.

The AHPCL has been submitting the half yearly compliance reports to the Regional Office of MoEF, Lucknow. The Regional Office also visited the project site from time to time. The committees of Dr. BP Das in June 2011, Dr. J.K. Sharma in June 2012, Dr. BP Das in Aug 2012 appointed by MoEF and Shri ADN Rao in Dec.2012 appointed by NGT have visited the project site and submitted the reports.

The committee is of the opinion that AHPCL should monitor the project during construction and post construction for various parameters of water quality, aquatic biodiversity, landslides in the rim area, inflow and outflow, impacts on water tables and springs and submit the reports to the State Government and MoEF regularly.

There should a monitoring mechanism at the state level which should have the data for practicing adaptive management and such monitoring may be carried out in association with project affective society.

3. Compliance of conditions stipulated in Forest Clearance (FC) of April, 1987.

1. Legal status of land will remain unchanged.

No change has been reported.

2. Compensatory afforestation will be raised over and equivalent non forest land.

Compensatory afforestation as per the Indian Forest Conservation Act (1980) was completed in an area of 347 ha in district Lalitpur of Uttar Pradesh (the then combined State) after the forest clearance acc[illegible]7.

3. The oustees will be rehabilitated as per plan submitted in the state government.

Since there were no human oustees in the submergence area no rehabilitation plan was prepared by the State government. However, Geological Survey of India (GSI) was appointed by AHPCL for carrying out the Geo-morphological Studies for 9 villages identified as Dungripanth, Sendri, Dhari, Kaliyasour, Gandasu, Farasu, Mehargon, Paparasu and Maliyasu. As informed by AHPCL, the recommendations for the displacement of the houses in the rim area of the reservoir have been complied with for the recommendation received from GSI so far. The balance reports are expected to be received from GSI soon.

Dhari Devi temple coming under the submergence area has been reported separately.

4. The project authority will establish fuel wood depots and the fuel wood be provided to construction labor and staff free of cost, or its cost deducted from the salaries and wages to be paid to the staff and labor.

The AHPCL has informed that they have made arrangements with the local gas supplier to supply cooking gas for all the workers of the project. Nearly three to four hundred cylinders are used by the workers of all contractors for cooking requirements. In case of non-availability of gas, kerosene is used on limited occasions. No fuel wood is used for cooking or any other purpose. In case of any exigency wood is purchased from authorized Government/Forest departments by the contractor.

4. Compliance of conditions communicated under Section 5 of EP (Act) 1986 vide letter dated 30.06.2011.

1. To preserve the religious sanctity and character of the *Dhari Devi* Temple, a modified plan will be prepared in collaboration with INTACH, a Conservation Architect, the local Temple Samity and the representative of GSI. The Plan should, inter alia, examine how part of rock on which the platform of the deity has been constructed, along with the rock that formed its backdrop, shall be mounted at a higher elevation in such a way that it maintains contact with the base rock from which it is raised.

2. Only after modified Plan as specified above has been prepared, the construction shall be resumed at *Dhari Devi* Temple.

As reported by AHPCL a modified Temple Plan was prepared in collaboration with INTACH, Temple Samithi and Geological Survey of India and submitted to MoEF on 12.09.2011 and further intimated to MoEF on 09.02.2012 for continuation of works as per provisions of para 14(ii) of Section 5 notice.

Earlier committees which visited sites during 16-17th June, 2012 and 29-30th August, 2012 and B.K. Chaturvedi Committee report April 2013, have all recommended construction of temple works as per INTACH scheme. The committee visited the temple site and found the work of raising the platform was in advance stage of construction with certain changes made by temple priest and trustees.

3. The muck slope at the edge of the river shall be adequately protected by a retaining wall of at least 1-2 m height to be 1m above HFL corresponding to a flood of 2500 to 3000m3/sec in the river.

4. The existing slope of the muck disposed off is around 40-45o and shall be flattened to 35o. The walls

shall be constructed partially upto a maximum of 2m height and need to be completed to the top with surface protection before July 2011 when monsoon precipitation becomes intense. This is considered expedient to prevent sloughing, sliding of the critically steep much slope and to arrest flow of the muck into the river. The wall shall be constructive over a length of almost 1 km stretch at three major sites i.e. the dam, desilting basin and power house. This would lead to adequate environmental protection.

5. Muck shall be compacted and Terraces shall be formed where so ever possible.

As per plan approved by the State forest department there are 10 muck disposal sites in the project area out of which only sites 8 & 9 are permanent and others are temporary meant only for construction duration. A total volume of 66.1 lacs cubic meter of muck was estimated, out of which 16.79 lacs cubic meter of muck has been utilized for back filling purpose. Further 12.5 lacs cubic meter is contemplated to be utilized from muck site 6, 7 and 10 for back filling. 37.62 lacs cubic meter is planned to be left over at site 3 (2.01 lacs cubic meter), 4(4.22 lacs cubic meter), 6(4.96 lacs cubic meter), 7(2.39 lacs cubic meter), 8(8.8 lacs cubic meter), 9(12.48 lacs cubic meter) and 10(2.77 lacs cubic meter) for land shaping and grading. Total muck utilization as on date as informed by AHPCL is estimated to be about 44%.

A review of water quality parameters (Temperature, pH, Dissolved Oxygen, Biological Oxygen Demand) provided by the State Pollution Control Board, Uttarakhand for the year 2011-12 and 2012-13 measured in Alaknanda at Rudraprayag i.e. upstream of Srinagar project and in Alaknanda at Deoprayag i.e. downstream of Srinagar

project indicates that there is negligible difference in the water quality parameters due to project construction activity.

Slope dressing and toe walls are constructed/being repaired at temporary sites. Some construction material is stored on site No.6 and the same is planned to be removed after completion of words. Soil from site No.4 is planned to be removed before monsoon, 2013 as the batching plant has been removed now. Soil from site no.7 is being removed now. Slope dressing, Terracing, Toe walls would be completed in location nos. 8 and 9 where much disposal is going to be permanent.

Angles of muck disposal sites 4,6,7,8 & 9 were got measured by AHPCL and are reported as follows: 4 – 21o/25o, 18o/33o, site 6 – 28o/29o, 32o/32o, site 7 – 33o/29o, 37o/36o/27o, site 8 – 31o,32o, site 9 – 35o/36o/35o/37o, 35o/32o.

Slopes of muck disposal areas (angle of repose) are given as 45o at para 18(3) page no.16 of Report on "Muck Disposable and Management of Srinagar project" by IIT, Roorkee, November 2008. However MoEF letter has suggested flattening the slopes up to 35o. The slopes measured and reported by AHPCL appear to be in order.

Earthen cofferdam in front of power house is planned to be removed after completion of power house for joining the water from powerhouse to river through tail water channel and soil to be utilized for back filling and landscaping. This cofferdam was synonymously referred to as Muck disposal site no. 10 at Power house location in the section 5 notice dt. 30.06.2011. Disposal Location no. 10 is well behind the power house coffer dam and has no contact with river water.

All the toe walls which got damage

sites during monsoon, should be repaired by AHPCL especially for those sites where muck is being stored permanently.

The photographs of all muck disposal sites of different time along with approved muck disposal plan by AHPCL is placed at Annexure – 3.

6. Appropriate protection by plantation and gabions should be put only after slopes are flattened to 35o, protected by retaining walls of desired height. Thereafter, appropriate soil cover of 1m shall be provided to raise plantation for slope protection.

7. Muck disposal site wise restoration plan with the targets shall be submitted immediately to the MoEF.

In view of the ongoing removal of the muck from sites and construction activity the plantation is expected to be taken up thereafter.

8. Green Belt development to be undertaken simultaneously along with project construction.

Based on the estimates provided by Forest department in June 2012 for a sum of Rs.652.49 lacs for implementation in six years, AHPCL has deposited first year budget of Rs. 203.6 lacs with the state forest department for creating Green Belt around the rim of the reservoir of Srinagar HEP in August 2012.

The state forest department is expecting the Srinagar hydropower project to be commissioned in Dec 2013/Jan 2014 and only after filling the reservoir, the forest department intend to assess the requirement of sites above the submerged area, the selection of species, the type of soil words etc. and creating the Green belt accordingly. Therefore they intend to start the green belt

activities only after works of water reservoir are completed and is filled. The private land shall also be taken up for green belt development through participatory approach with the land owners.

9. For expediting Geo-morphological studies by Geological Survey of India (GSI) and implementation of recommendations before Dam gets operational. AHPCL shall pursue with GSI and take up the mitigation measures immediately.

Geological Survey of India (GSI) has been appointed as the agency for carrying out the Geo-morphological Studies. Total 9 villages have been identified. These are Dungripanth, Sendri, Dhari, Kaliyasour, Gandasu, Farasu, Mehargon, Paparasu and Maliyasu. The studies for 7 villages are completed. Recommendations received for 5 villages namely Dungripanth, Sendri, Dhari Kaliyasour, Gandasu and implemented by the AHPCL. As informed by AHPCL, the recommendations for the relocation of the houses in the rim area of the reservoir have been complied with. The balance reports are expected to be received from GSI soon.

Village: Dungripanth

Recommendation of GSI with status

House of Sri Hari Sankar Singh is to be relocated – *Complied*.

The area falling between +605.90 and 611.00 both Dungripanth and Dikholi villages may be monitored from safety view point immediately after impounding of reservoir – *Shall be monitored accordingly*

House of C.S. Bahuguna needs to be relocated to a safe place – *Complied*.

Village : Sendri

Recommendation of GSI with status 4 houses located close to the outer edge of the ridge need to be relocated to a safer place – *Complied*

Village – *Dhari*

Houses and land upto EL +616.00 sshall have to be displaced/acquired – *Complied*

Village: Kaliyasour

There would not be major threat from the reservoir to the stability of slopes where main settlement is located – *No action is to be taken*

Village Gandasu

Suitable remedial measures for slopes at specific locations are being recommended –

Action may be initiated after receipt of recommendations

Village: Farasu

Studies conducted, report yet to be submitted.

Village Mehargon

Studies conducted, report yet to be submitted.

10. The Restoration work for Supana Quarry shall be undertaken simultaneously, leaving the part which is being used for storage of building material.

Committee observed from the site visit that storage of the building material has been almost removed and vacated site is being filled with muck.

11. AHPCL shall maintain a minimum environmental flow as will be decided by the Ministry on the basis of Study of IIT Roorkee on the Cumulative Impact Assessment on Alaknanda and Bhaghirathi Basin.

As per the approved Environmental Management Plan of the project, AHPCL is required to release a minimum of 5 cumecs of water from the Dam through out the year in the river section of water.

Ministry of Environment and Forest constituted an Inter-Ministerial Group (IMG) headed by Shri B.K. Chaturvedi to consider the issue related to hydropower projects and environmental flows in June 2012. The committee has submitted its report in April 2013 after considering the report from IIT Roorkee, Wildlife Institute of India and others as available.

The MoEF is expected to take a decision on this and convey to the project proponent at appropriate time for compliance.

12. Requisite clearances shall be sought by AHPCL for Alaknanda River Front Development Scheme before proceeding further on this scheme.

13. AHPCL shall submit a detailed Action Plan on the above mentioned directions with time targets along with a Bank Guarantee of Rs.1 crore in favour of the State Pollution Control Board, Uttarakhand. The Bank Guarantee shall be forfeited in case of non compliance by AHPCL.

AHPCL informed that the proposed scheme is not a part of approved EMP/EC of the project. This was an additional proposal from AHPCL. However, neither proposal nor word has been taken up so far.

A Bank Guarantee of Rs.1 core was submitted through Uttarakhand on July, 2011.

5. TOR II: The Committee will also submit a full and complete picture of the project at present.

AHPCL has provided the statement of physical and financial progress of various work of the Srinagar project as on March 31, 2013 and is given at Annexure 4. The summary of the same is as below:

Civil Works: diversion tunnel, coffer dams, dam and spillway, head race tunnel, forebay tank and byepass channel, bridges on the channel, penstock, power house building, switchyard are 100% completed. The cross drainage works of Munjh Kot nallah are 93% completed.

Hydro mechanical works: dam and spillway, head race tunnel, forebay and byepass and draft tube are 100% completed.

Electro-mechanical works: 3 units are 100% completed whereas unit 4 is under progress.

6.TORIII: In the context of *Dhari Devi* Temple, which is coming under submergence of the reservoir, the Committee will suggest best possible option regarding how to protect the Dhari Devi Temple without disturbance at its present location.

In the recent time there have been several committees who have gone through the issue of the submergence of *Dhari Devi* temple and a numbers of alternative to prevent the submergence of the *Dhari Devi* Temple were studied. These are as follows:

(a) Architectural Heritage Division of Indian National Trust for Art and Cultural Heritage (INTACH) has

prepared a plan in consultation with *Dhari Devi* Temple Trust, Geological survey of India and AHPCL in Sept 2011.

(b) Dr. B.P. Das Committee Aug 2012 recommended that "In view of the compelling Technical, Social, Religious and Sentimental Reasons narrated in para 4.2, the feasibility of constructing a dry well structure to protect the rock mound in situ and "Maa *Dhari Devi* Idol" in its existing position is not feasible. The team therefore recommends for continuation of works of restoration of the temple as per INTACH proposal".

(c) B.K. Chaturvedi Inter Ministerial Group (IMG) appointed sequel to the third meeting of National Ganga River Basin Authority (NGRBA) in April 2012 submitted its report in Sept 2012 where the IMG has recommended that best solution for saving the temple appears to be accepting the recommendation of two member committee comprising of Chairman Central Water Commission and Chairman Central Electricity Authority represented by its Member (Hydro). The two member committee examined the following option:

(i) Construction of an enclosure bund around temple and surrounding ghat and access road upto the level of 611m on the banks.

(ii) Construction of an concrete well of about 30 meter diameter and 18 meter height around the temple.

(iii) Relocation of the temple to a safe location on the left bank of the river.

(iv) Raising the temple above th[illegible]at

its current location and to install the idol at higher elevation at the same spot with access to the temple through a pedestrian bridge from the left bank.

(v) Construction of 30km long power channel and diversion dam in the upstream of existing dam.

Keeping in view the limitations and infeasibility of implementing the first three options the committee recommended the fourth option i.e. "Raising the temple above the highest flood level at its current location and to install the idol at higher elevation at the same spot with access to the temple through a pedestrian bridge from the left bank."

This committee visited the *Dhari Devi* temple on May 02, 2012 and interacted with trustees, priests of the *Dhari Devi* temple and few residents of village *Dhari* who were In favour of raising the temple above the highest water level. In fact the committee observed that the elevated platform of temple is in advance stage of construction and the preparations are under way for shifting the deities to the elevated location. The trustee, priests and resident who the committee interacted are of the opinion of early completion of the temple at the elevated location.

Dr. B. Jhunjhunwala expressed apprehensions against moving the *Dhari Devi* temple to a higher elevation, as it is against the "Rights of Worship". He proposed the option of Construction of 30 km long power channel and diversion dam in the upstream of existing dam.

7. TOR IV: The committee will gather evidence through photography/videography

The photographs taken during site visit are available at annexure – 5

8. TOR V: The Committee will give personal hearing to Shri Bharat Jhunjhunwala accompanied by his wife & representatives of the project proponent i.e. AHPCL who will place their views and records if any, before the said Committee.

The committee gave personal hearing to Shri Bharat Jhunjhunwala accompanied by his wife as well as project proponent (AHEC) on May 01, 2013 and heard patiently. The points raised by Shri Bharat Jhunjhunwala are addressed as below:

a. Sale of power outside the area

The project clearances were accorded in the year 1985 and 1987 during the period of undivided Uttar Pradesh. The power purchase agreement of the project is with Uttar Pradesh Govt. utility and free power @ 12% of power generated shall be available to Uttarakhand Government and is in line with the Uttar Pradesh state re-organization Act 2000.

b. Conditions attached to Environmental Clearance 1985

Not in the purview of the committee. He may request to the MoEF for the safe.

c. CAT Plan

The status on the CAT plan has been given above under the EC and FC clearance.

d. Compensatory afforestation

The status on the afforestation has been given above under the FC clearance.

e. Green Belt

The status on the green belt has been given above under the EC and FC clearance.

f. Geo morphological studies

The status on these studies and resettlement of the likely to be affected persons has been given above.

g. *Dhari Devi* Temple

The response is given under TOR 3

h. Muck Disposal

The status of muck disposal sites is elaborated above along with annexure 3 of photographs of all 10 locations.

i. Stop work order

As informed by AHPCL that in view of NGT order of M.A. No. 103/2012 in Appeal No. 9 of 2011 dated Aug 07, 2012 they are continuing the construction of work.

Committee also heard AHPCL through a power point presentation. The AHPCL requested the committee that their project may be allowed to be commissioned as earliest as possible.

9. RECOMMENDATIONS:

The committee after verifying the conditions and progress of the work at site and hearing of Dr. B. Jhunjhunwala along with his wife and project proponent AHPCL and interaction with others in the project area recommends following:

1. The muck disposal restoration may be done at the earliest. The necessary covering with top soil, plantation and toe wall for the permanent disposable site no. 8 & 9 be carried out at the earliest.

2. The catchment area treatment plan and green belt plan being executed by State Forest department be expedited.

3. An effective monitoring mechanism at the state level which should have the data for practicing adaptive management be created and such monitoring may be carried out in association with project affective society.

4. As the project is in close proximity to habitations having several national and state institutions/ organization, the ongoing construction activities may be completed at the earliest."

25. Report is now being questioned by the MoEF, in spite of the fact, that they constituted the joint team which included the Director, MoEF as its representative. MoEF, in their written submission, raised an objection with regard to the proposal to shift *Dhari Devi* temple to a higher place which according to the MoEF would wound the religious feeling of large sections of Hindus. The MoEF felt that the project proponents plan to lift the temple up on column and preserve it under guidance of INTACH which could not possibly be a viable solution in view of the recent judgment of this Court in *Orissa Mining Corporation v. MoEF* [(2013) 6 SCC 476] which says that the religious faith, customs and practices of tribals have to be preserved and protected. MoEF in its affidavit dated 6.5.2013 also took that position. The Principal Secretary and State of Uttarakhand filed their response on 10.05.2013 with respect to the affidavit filed by the MoEF on 06.05.2013 and the Report submitted by the Joint Team. Forest Department of Uttarakhand also filed their note indicating their s[illegible]n

submission has also been filed by the second respondent on 10.05.2013 with regard to the non-compliance of various directions given by the MoEF in its notice dated 30.06.2011 by AHPCL.

26. Dr. B. Jhunjhunwala - party in person submitted that the High Court was right in directing a public hearing following the 1994 Notification, the necessity of the same, according to him, has been highlighted by this Court in *G. Sundarrajan v. Union of India and Others,* the judgment of which is reported in (2013) 6 SCC 620. Dr. Jhunjhunwala has also highlighted the necessity of keeping *Dhari Devi* temple on the spot at its present location. Dr. Jhunjhunwala further submitted that Right to Worship stands at a higher pedestal than Right to Life under Article 21 and any disturbance of the temple would violate the Right to Worship at *Dhari Devi* temple without any hindrance as guaranteed under Article 25 of the Constitution of India. Dr. Jhunjhunwala also suggested that the temple could be saved by making a canal instead of reservoir at the impugned project and the sacred rock in situ by constructing a dry well of sufficient height and diameter around it and providing pilgrim access to it by building an approach road.

27. We have gone through the affidavits filed by the State of Uttarakhand and we find they have wholeheartedly accepted the B.P. Das Committee Report and the report dated 3.5.2013 submitted by the Joint Team and also the B.K. Chaturvedi interim report dated September 2012. When this Court constituted the Committee on 25.4.2013, this Court directed the inclusion of the State Government representative as well, so that the State Government can express its views on various issues including the issue relating to *Dhari Devi* temple. State Government in their affidavit, it may be noted, have not questioned the suggestions made by the Committee in its report dated 3.5.2013. Consequently, we have to take it that the State Government has no objection whatsoever with regard to the suggestion made by the joint Committee in its report

dated 03.05.2013 i.e. raising the temple above the highest flood level at its current location and to install the idol at higher elevation at the same spot with access to the temple through a pedestrian bridge from the left bank. The Committee specifically stated in the report that they had visited *Dhari Devi* temple site and met trustees, priests of the temple and few residents of village *Dhari* and no objection was raised either by the trustees or priests of the temple on the suggestion made by the joint team in the report dated 03.05.2013.

INTACH Report:

28. We also find that the Architectural Heritage Division of Indian National Trust for Art and Cultural Heritage (INTACH) has prepared a plan in consultation with *Dhari Devi* temple trust, Geological Survey of India and AHPCL and which was submitted to the MoEF on 12.9.2011, which has been accepted by all the subsequent Committees appointed.

Dr. B.P. Das Committee Report

29. MoEF in compliance with the order passed by this Court in SLP 362 and 5849 of 2012 in Writ Petition No. 68 of 2008 dated 27.07.2012 constituted B.P. Das Committee vide his Order dated 17.08.2012 to verify whether AHPCL has complied with the conditions of the environmental clearance granted in May 1985 and directions of the order issued under Section 5 of Environmental (Protection) Act, 1986 dated 30.06.2011 and to examine the feasibility of well option of *Dhari Devi* Temple.

30. We have already referred to in detail the steps taken by AHPCL to comply with the environmental clearance granted in 1985 and the conditions stipulated in the MoEF Order dated 30.06.2011, which has also been noted by the Joint Team constituted on the basis of the directions of this Court. B.P. Das Committee has elaborately examined the issue regarding restoration of Dhari Devi Temple in Par

6.0 of its report of August 2012 and ultimately came to the conclusion that the proposal made by INTACH be accepted. The paragraphs mentioned above are extracted hereunder for easy reference:

"4.0 **Restoration of *Dhari Devi* Temple**

The Team visited the temple premises and surroundings on 29th August 2012. Discussions were held with the officials of AHPCL, office bearer of Aadhyashakti Maa Dhari Pujari Nyas, Shri V.P. Pandey, President along with Shri Vivek Pandey, Secretary and a Pujari namely Shri Manish Pandey. A number of local people and people representing different organizations/groups were present during the discussions. The following emerged as a result of discussions and interactions.

4.1 **Upliftment scheme for *Dhari Devi* temple prepared in collaboration with INTACH**

- In accordance with the directions issued by MoEF vide dated 30.06.2011; the project proponent had got a restoration plan for *Dhari Devi* Temple prepared by INTACH. The construction, as per this plan, had already begun. Fourteen pillars out of eighteen have been erected upto 10-15 meters of heights. No Temple work was in progress on the day of site visit.

- In addition to main Deity ie Maa *Dhari Devi*, the Plan contains provision for installation of other deities namely; Hanuman, Shiva, Havan Room, Prayer Hall, Mother rooms (2nos), office room and adequate space for passage and congregation of devotees. A total plan area of 544 sq. Mtr. Has been envisaged in the design of the temple at 611 meter Elevation and at 614 meter Elevation, as per the scheme formulated by INTACH.

- The Group explained to the Temple Samity about the concept and design of Kudala Sangam Temple in Karnataka where a well structure has been built to house a Samadhi. There was vehement opposition from the Temple Samiti and the people gathered in an around the temple to this concept. All the assembled people expressed that confinement of deity in a well is totally unacceptable to them. The Temple Samiti explained that Maa *Dhari Devi* is presently facing a village called *Dhari* Village and offering its blessing to the villagers and thus, protecting them from the perils and penury of different sorts. Under no circumstances the deity should be hidden and kept in the well which will cause obstruction to Maa *Dhari Devi* from viewing *Dhari* village. It was explained by them that the top of the sanctum sanctorium shall have to be kept open to sky and therefore, a well structure will pose many a problems.

- It was learnt from the Temple Samiti that Maa *Dhari Devi* is not part of the base rock. It is placed on a marble/tiled platform on the rock. The President of Temple Samiti also informed that about 20-22 years back, the deity had once lifted from its earlier position.

- The Temple Samiti expressed their anguish and resentment at the prolonged delay in completing the temple in its new form as per the INTACH design. They, along with the local people also informed that they might execute the remaining work through *Kar Seva* if an early decision in their favour is not forthcoming. They stated that they were fed up in facing Committees after Committees on this issue.

- The Temple Samiti as w e

expressed the view that in case of Kudala Sangam in Karnataka State, a Samadhi has been housed in the well. They opined that there is no parity of reasoning and therefore, these two are not comparable. Thus, the concept of well structure of Kudala Sangam is not for a temple and the same cannot be considered appropriate for adoption in case of *Dhari Devi* Temple. They further informed that the temple rehabilitation plan prepared by INTACH is in conformity with temple architecture prevalent in Northern Part of India. They further informed that the temple plan was approved by the State Govt. Of Uttarakhand during year 2009.

· The people also raised security, safety issues and difficulty in movement of devotees as the congregation would be much more in case of Maa *Dhari Devi* temple than Kudala Sangam. The entry and exit access for a well structure would be through spiral stairs along the stenning wall which are disadvantageous and accident prone.

4.2. On the feasibility of "**Protecting the sacred rock in situ by constructing a dry-well of sufficient height and diameter around it and providing pilgrims access to it by building an approach way and a stair case on the inner wall of the dry-well**."

The team considered the following two alternative options:

(i) To protect the "Maa *Dhari Devi* idol" along with the sacred rock mound (Shila) by constructing a bigger diameter dry well.

(ii) To protect the rock mound (Shila) by constructing a smaller diameter dry-well in conjunction with the "Maa *Dhari Devi* Idol" upliftment scheme prepared in collaboration with the INTACH.

For the reasons and constraints mentioned below the team is of the view that both the proposals are not feasible.

· A plan area of 544 sq. Meter has been worked out and provisioned for the temple complex. For a circular structure such as dry well, this will entail a Bigger diameter (exceeding 50 meter) in order to accommodate staircases, space for deities and other associated facilities. This has been examined by Tata Consulting Engineers also, on behalf of the AHPCL. In view of very large diameter, the dry well structure would encroach into the river where its width is already narrow. The construction of dry-well structure will therefore, need temporary diversion of river water requiring structures like cofferdam etc. Fresh EIA study and EC for river diversion arrangements may be required and thereby delaying the temple construction/ rehabilitation work and impounding of the reservoir.

· The concept of a "Small Dry-well" of around 15m in diameter is not feasible as four columns (out of eighteen) enclosing an area of 10mX15m around the deity planned from structural consideration that emerges out of INTACH restoration plan, will be fully interfering with the 15m well. This dry well from consideration of structural safety to resist uplift of 17m (anticipated HFL of 609.5 at the temple due to backwater rise minus base level of 593 m) will need a solid reinforced concrete (RC) raft of 20 to 22m diameter, which would mean shattering and removing the entire rock mound below the deity by the action of Drilling and Blasting. Even an annular raft will interfere with the central four columns and shatter the sacred rock during blasting operations. This will defeat the very purpose of protecting it.

· During field visit, neither the puja samiti / the head priest nor the large number of devotees gathered there expressed their desire to go down to the lower level of the rock mound, once Maa *Dhari D*

614.00 and all other deities will be installed to complete the religious paraphernalia. The Puja Samity and the people at large expressed that they would feel hurt and anguished if the lower rock is encircled by a large well barring an open exposure.

· The size and nature of sub-structure and its foundation of the well will depend on the geological strata and formation of river bed which will govern the actual quantum of work for erecting the structure. Detailed sub-soil study will be necessary for this.

· Safety arrangements covering a number of aspects have to be provided such as for emergency evacuation, fire hazards etc. in case a well option is though of. It will also impede future expansion of the temple premises which may be essential to cater for the increasing number of devotees visiting the temple.

· As the top of the well would have to be kept open, the well will be subjected to heavy rain and occasional cloud burst that may endanger the safety of deity and devotees. In addition, poor ventilation and stampede like situation cannot be ruled out. In the net, the well structure will hinder smooth "darshan" and movement of devotees.

· Structurally, the well will be subjected to huge uplift pressure making the well unsafe and unstable. This will also entail huge thickness of wall and heavy founding rafts and thus, making construction complicated as drilling, blasting and grouting of rocks will be a necessity.

· The devotees strongly object to any concept of well and expressed that confinement of Deity Maa *Dhari Devi* in a well is totally unacceptable to them. The devotees strongly fell that under no circumstances the Deity Maa *Dhari Devi* should be hidden and kept in a well. They desire that Maa *Dhari Devi* should continue to face the *Dhari* village and

offer blessings to the villagers and thus protect them from perils and penury of all sorts.

· The well structure will go against the local aesthetic and cultural heritage as prevalent in the region.

In view of the compelling Technical, social, religious, and sentimental reasons, the scheme of constructing a big/ small dry well structure to protect "*Dhari Devi* Idol" and the surrounding sacred rock mound in its existing position is not feasible.

5.2.1 *Dhari Devi* Temple Rehabilitation Scheme (submission of modified plan for construction commencement)

There has been adequate compliance by the Project Proponent and they have proceeded as per advice / directions given vide MoEF letter dated 30.06.2011. The project proponent has also informed the MoEF in February, 2012 about their program to resume the works as per modified temple restoration plan that has been prepared in collaboration with INTACH, a Conservation Architect, involving local Temple Samity and a representative of GSI. The AHPCL informed the MoEF about resumption of works on the Temple restoration accordingly.

6.0 **Conclusion on *Dhari Devi* Temple Restoration Proposal.**

The group is of the view that the architecture of temple in southern part of India and in Northern part of India is altogether different. The INTACH proposal takes care of the people's acceptability of the temple in terms of design, plan, facade and overall architecture of the temple.

The project proponent has go[illegible]e

construction of the uplifting proposal of the temple in compliance with the directions given under Section 5 of EP (Act), 1986 on 30.06.2011. They have followed the directions/ advice given under relevant paras of the order of the MoEF.

In addition to the engineering and construction related impediments in building a well structure which will encroach into the main course of the river where it is narrow. There has been tangible progress in the construction of the temple as per restoration plan prepared by INTACH and which has got the acceptance of the Temple Samiti and the local citizen.

The Group does not consider it appropriate to thrust an option against the faith, belief, expectation of the local people/stakeholders and which is contrary to cultural heritage of the region. It merits mention that they are totally opposed and appeared contemptuous to the very concept of a well structure for housing the deity.

A portion of the base rock is planned to be cut and placed at new location to form the Deity's backdrop. The Group noted that the Temple Samiti and others are in accordance with the overall plan of restoration of *Dhari Devi* Temple as suggested by INTACH.

The Group also apprehends public unrest, agitation leading to law and order problem in the event of thrusting upon them the option of well structure and other action causing prolonged delay in putting the temple restoration issue, in accordance with INTACH plan in rest."

B.K. Chaturvedi Committee Report

31. MoEF constituted an inter-ministerial group (IMG) under the Chairmanship of Shri B.K. Chaturvedi, Member, Planning Commission on 15th June, 2012 to review and consider certain

issues related to environmental flows, environmental impact of the hydro-power projects in the upper reaches of river Ganga and its tributaries such as Bhagirathi and Alaknanda. MoEF also vide its office memorandum dated 20.7.2012 requested the Chaturvedi Committee to review the cumulative impact on flow of river as also the social impacts of the relocation of *Dhari Devi* Temple situated upstream of the project. A two-Member Committee consisting of Chairman, Central Electricity Authority and Chairman, Central Water Commission, both of them are members of the IMG, was constituted to consider the issue with regard to *Dhari Devi* Temple and to make suggestions. The interim report dated 07.09.2012 (Volume II) of the two-Member Committee on *Dhari Devi* Temple reads as follows:

12.3 Construction of *Dhari Devi* Temple on raised platform

· The proposed structure of *Dhari Devi* temple on a raised platform on concrete columns above HFL (at El. +614 m) has been designed by IIT Roorkee and has got necessary clearance / permission of the State Government.

· During the visit, discussions were held with several local people and priest of the temple. All the people met with the Committee were found very positive towards the construction of *Dhari Devi* temple on a raised platform. There was no objection on raising the temple at higher elevation and so the project works can go on, it was felt by them.

· The construction of *Dhari Devi* temple on raised platform would cost to the Developer of Rs.9.0 crore only.

· It has been reported by the local residents that this temple has submerged earlier at several times during high floods. Even on 3rd August, 2012 the water level reached up to the floor level of the temple (+593 m) and lower part of the temple was filled with silt and floa

seen in the following photograph taken during visit.

· Even if, the dam would not have been constructed, there is always a possibility of submergence of the temple during high flash floods.

13. Recommendations of the Two Member Committee

Based on above findings, the recommendations of the TMC are as under:

· Considering the significant progress of the project, the Section 5 may be withdrawn by MoEF at the earliest so that the project works are resumed at site keeping in view the national interest of hydro power sector, benefits of local people, project specific local area development, feelings/views of project affected people, etc. otherwise it would be an end to hydro power development in Uttarakhand as well as in the country.

· Since an expenditure of over three thousand crore rupees have already been incurred on the project, any delay in commissioning would add to heavy burden of interest during the construction (IDC) and escalate the cost of the project and would make the tariff chargeable to consumers completely unviable.

· During the discussion with villagers, it was observed that barring few individuals, everyone is anxious to see completion of the project as early as possible. They are in favour of construction of *Dhari Devi* temple on raised platform above HFL at the earliest.

· Discussions were held with the officers of UJVNL and they were also keen in completion of this project in view of the power shortages in Uttarakhand. The Government of Uttarakhand would get 12% free power from the project on its commissioning.

14. Conclusion

· The idea of construction of a 30km power channel in lieu of existing dam cannot be accepted at this stage on account of (i) geological and geotechnical investigations not done, (ii) enormous cost of the power channel and new diversion dam, (iii) issue of forest clearance and land acquisition, (iv) minimum 5 years of construction time, (v) very high tariff to be paid by the purchaser.

· The *Dhari Devi* temple is not included in the protected monuments of Archaelogical Survey of India and it is a local temple to be worshipped by nearby villagers only. All the local villagers and the priest of the temple are in agreement with the project authorities to raise the temple on RCC structure above HFL.

· Option of providing a well surrounding the temple is neither practical nor acceptable to locals.

32. Final Report was submitted by B.K. Chaturvedi Committee on April 2013 (Vol 1) before MoEF, *inter alia*, reiterating its interim report on *Dhari Devi* Temple. Das Committee, Chaturvedi and Joint Team constituted on the basis of direction of this Court have, therefore, fully endorsed the views made by INTACH on *Dhari Devi* Temple. We find no reason to differ from the views expressed by the expert committee, which was submitted hearing all the affected parties, including the Trustees of the Temple, devotees, *Pujaris* etc. Committee reports to that extent stand accepted.

33. We are also not impressed by the argument that by accepting the suggestions of all the expert committees to raise the temple as such to a higher place, would wound the religious feelings of the devotes or violate the rights guaranteed under Article 25 of the Constitution. Sacred rock on which the temple exits is still kept intact and only the height of the temple increased so that the temple would no[illegible]e

water. In *Orissa Mining Corporation v. MoEF*, this Court was examining the rights of Schedule Tribes and the Traditional Forest Dwellers under the Forest Rights Act, 2006 in the light of Articles 25 and 26 of the Constitution. This Court held that those articles guarantee the right to practice and proposals not only in matters of faith or beliefs, but all rituals and observation. We are of the view that none of the rights of the devotees of *Dhari Devi* Temple has been affected by raising the level of the temple, which remains attached to the Sacred Rock.

34. MoEF proceedings dated 30.06.2011, Report of the Das Committee as well as the Joint Team dated 3.5.2013 refer to the issue of muck management and disposal, catchment treatment area plan and green belt and also the safety of the Dam.

Safety of the Dam

35. Dam safety and security is a matter of paramount importance, failure of which can cause serious environmental disaster and loss of human life and property. Proper surveillance, inspection, operation and maintenance of dams is essential to ensure for safe functioning of the Dams. The Central Water Commission (CWC) is a premier technical organisation of India in the field of water resources. The Commission is also entrusted with the general responsibilities of initiating, coordinating and furthering, in consultation with the State Governments concerned, schemes for control, conservation and utilisation of water resources throughout the country for the purpose of flood control, irrigation, drinking water supply and water power development. Safety of dams, in our country, is the principal concern of the State Government. The State Government has also to carry out investigation, planning, design, construction and operation. AHPCL says, so far as SHEP is concerned, engineering and technical parameters of the dam are clearly narrated in the detailed project report which, in turn, are assessed by CEA in consultation with the CEC and

GSI. The norms and regulations laid down by the concerned authorities, and whether those are strictly followed or not, have to be assessed and monitored by the Nodal Agency, CEA/ Ministry of Power as well as the GSI.

Safety and security of the people

36. Safety and security of the people are of paramount importance when a hydro electric project is being set up and it is vital to have in place all safety standards in which public can have full confidence to safeguard them against risks which they fear and to avoid serious long term or irreversible environmental consequences. The question as to whether the recent calamities occurred at Uttrakhand on 16.6.2013 and, thereafter, due to cloud burst, Chorabari Lake burst due to unprecedented rain and consequent flooding of Alaknanda river etc. has affected the safety of SHEP has also to be probed by the MoEF, State of Uttarakhand and Dam Safety Authority etc.

Muck Management and Disposal

37. Construction of SHEP involving excavation of earth and rock has generated large quantum and with the objective to protect the disposal areas from further soil erosion and develop the surrounding areas in harmony with the environment, the muck disposal plan is formulated. Muck disposal plan gives quantification of muck, identifies location and activities wherein muck is generated, during excavation and blasting operation and quantifies muck generated from the activities with relevance to disposal areas. The Das Committee visited the project site and submitted a status report on 29-30 August, 2012 which has dealt with muck disposal, details of which have already been dealt with in the earlier part of the Judgment. Report of the Joint Committee dated 03.05.2013 also refers to the AHPCL's action plan regarding muck management and disposal and recommended that remaining work, particularly, of the permanent site No.8 and 9 be carrie[illegible]t.

AHPCL has given the details of the work carried out for muck disposal. Failure of removal of muck from the project site may also cost flooding of the project areas, causing destruction to the environment and to the life of property of the people. MoEF and State Government and all other statutory authorities would see AHPCL takes proper action and steps for muck management and disposal.

Catchment Area Treatment (CAT)

38. CAT is required to be carried out by the project developer along with R & R and greenbelt activities, primarily to mitigate the adverse environmental impact created by the project construction. CAT is also resorted to reduce the inflow of silt and prevent sedimentation of reservoirs. CAT management involves steps to arrest soil erosion, rehabilitation of degraded forest areas through afforestation, controlling landslide and rockfalls through civil engineering measures and long time maintenance of afforestation areas. Silt inflows in river water not only result in reduction in storage capacity of dams, but also lead to increased wear and tear of turbines. Therefore, CAT is of crucial importance with regard to hydro electric projects. CAT plan has been prepared by the Uttrakhand Forest Department and the Project Proponent has paid the estimated amount of Rs.22.30 crores to the State Forest Department towards implementation of CAT Plan.

39. We may, in this connection, refer to the brief note submitted by the AHPCL wherein they have referred to landslide which occurred in the catchment area of dam Manari Bhali Stage-I in August 1978 blockading the Bhagirathi River with a dam of muck, about 40 KM upstream of dam. This dam of muck breached on its over after 12 hours and the monsoon water accumulated during this period gushed out in form of a wall of water about 20 meter high. The flood receded after a few hours, but the dam did not suffer any damage. It was pointed that during this flash flood period boulders up to 250

tonnes in weight had hit and rolled over the dam. The discharge in the river had risen to 4500 Cum per sec. Further it was also pointed out that in August 2012, partly constructed Srinagar Dam also faced similar type of flood. This time due to cloud bursts and breaching of coffer dams in the project upstreams, the water level at the Dam rose by 17 meters, but after the flood receded, no damage to the dam was noticed. The discharge in the river had risen to 6500 Cum per sec. AHPCL, therefore, maintains the stand that the structure of the dam is strong enough to bear the pressure not less than 6500 Cum per sec of water discharge.

40. The Principal Secretary of Forest Department, Government of Uttarakhand submitted in a short affidavit dated 10.05.2013, explaining the steps they have taken. The primary responsibility is on the Forest Department to carry out effectively the CAT Plan. Proper steps would be taken by the concerned authorities, if not already taken. MoEF, State Government and all other authorities will see the same is fully implemented at the earliest, so also the recommendations made by the Joint Team with regard to CAT.

Green Belt Development

41. AHPCL, it is seen, has deposited first year budget of Rs.203.6 lakhs to the State Forest Department for green belt rim of the reservoir in August 2012. Although green belt area is earmarked the technical documents based on the maximum flood level in the reservoir, the rim of the reservoir, could only be determined and developed after reservoir is impounded. Proper steps would be taken by the Forest Department of Uttarakhand to carry out the green belt development area in question. The MoEF, the State Government etc. would see that the proper steps would be taken by all the authorities including the AHPCL to give effect to the directions given by the Joint Team.

42. Going through the reports of Das Committee, Chaturvedi Committee as well as the Joint Team and after perusing the affidavits filed by the parties, we find no reason to hold up the project which is almost nearing completion. MoEF, AHPCL, Government of Uttarakhand, Forest Department would take immediate steps to comply with all the recommendations made by Joint Team in the report dated 03.05.2013 and also oversee whether AHPCL is complying with those directions as well.

43. Under such circumstances, the Appeal in SLP (C) No. 362/2012 would stand allowed and the judgment of the High Court stands set aside. Consequently the SLP (C) Nos. 5849-5850 of 2012 would stand dismissed. All the Transferred matters from NGT are also disposed of as above.

Court's concern

44. We are, however, very much concerned with the mushrooming of large number of hydroelectric projects in the State of Uttarakhand and its impact on Alaknanda and Bhagirathi river basins. Various studies also indicate that in the upper-Ganga area, including Bhagirathi and Alaknanda rivers and their tributaries, there are large and small hydro power dams. The cumulative impact of those project components like dams, tunnels, blasting, power-house, muck disposal, mining, deforestation etc. on eco-system, is yet to be scientifically examined. MoEF undertook two studies in the recent past:

(i) Assessment of Cumulative Impact of Hydropower Projects in Alaknanda and Bhagirathi Basins which was entrusted by National River Conservation Directorate (NRCD) of MoEF to the Alternate Hydro Energy Centre (AHEC), IIT Roorkee vide proceedings dated July 14, 2010.

(ii) MoEF also vide their proceedings dated 23rd July, 2010 authorized Wild Life Institute of India (WII), Dehradun to make an assessment on cumulative impacts of "Hydroelectric Projects on Aquatic and Terrestrial Biodiversity in Alaknanda and Bhagirathi Basins, Uttarakhand.

45. AHEC submitted their report to MoEF in December 2011 and WII finalized its report in December 2012. AHEC made some recommendations on Geology, seismology, soil erosion, sedimentation etc. Some of the major recommendations of the study covered the aquatic biodiversity profile, critically important fish habitats including recommendation on Fish Conservation Reserve at Nayar River and Bal-Ganga, Tehri Reservoir Complex. WII made recommendations on impact on aquatic biodiversity and their habitats, terrestrial component of biodiversity and details about these in the river basins. Recommendations were also made covering environmental flows, conservation, reserve, strategic option of regulating impact of hydropower projects of different categories and impact on aquatic biodiversity and terrestrial biodiversity in the above mentioned basins.

46. We have gone through the Reports and, *prima facie*, we are of the view that the AHEC Report has not made any indepth study on the cumulative impact of all project components like construction of dam, tunnels, blasting, power-house, Muck disposal, mining, deforestation etc. by the various projects in question and its consequences on Alaknanda as well as Bhagirathi river basins so also on Ganga which is a pristine river. WII in its Report in Chapter VIII states as follows:

"***Para 8.3.2 Present and future scenario***

The scenario building for assessing impacts on biodiversity values portrays very distinctively the present and futuristic trends of the impact significance of hydropower developments in all the sub-basins in the larger

landscape represented by the Alaknanda and Bhagirathi basins.

It becomes apparent that because of the fact that many of the projects are already in stage of operation and construction, the reversibility in significance of impacts on terrestrial biodiversity is not possible in sub-basins. Decline in biodiversity values of Bhagirathi II sub-basin have significantly been compounded by Tehri dam.

The scenarios provide adequate understanding to make decisions with respect to applying exclusion approach across the two basins for securing key biodiversity sites (such as critically important habitats) and prevent adverse impacts on designated protected areas.

Based on five different scenarios that have been presented the most acceptable option suggests that the decision with respect to 24 proposed Hydro Electric Projects may be reviewed."

47. WII report also states that out of total 39 proposed projects, 24 projects have been found to be significantly impacting biodiversity in the two sub-basins and the combined footprint of all 24 projects have been considered for their potential to impact areas with biodiversity values, both aquatic and terrestrial, critically important habitat of rare, endangered and threatened species of flora and fauna and IWPA projected species.

48. B.K. Chaturvedi Committee, after referring to both the Reports, in Chapter III (Volume I, April 2013) stated as follows:

"3.66 The River Ganga has over a period of years suffered environmental degradation due to various factors. It will be important to maintain pristine river in some river segments of Alaknanda and Bhagirathi. It accordingly recommends that six rivers, including Nayar, Bal Ganga, Rishi Ganga,

Assi Ganga, Dhauli Ganga (upper reaches), Birahi Ganga and Bhyunder Ganga, should be kept in pristine form and developments along with measures for environment up gradation should be taken up. Specifically, it is proposed that (a) Nayar River and the Ganges stretch between Devprayag and Rishikesh and (b) Balganga – Tehri Reservoir complex may be declared as Fish Conservation Reserve as these two stretches are comparatively less disturbed and have critically important habitats for long-term survival of Himalayan fishes basin. Further, no new power projects should be taken up in the above six river basins. In the IMG's assessment, this will mean about 400 MW of Power being not available to the State.

3.67 Pending a longer term perspective on the Ganga Basin Management Plan, following policy needs to be followed to implement the hydro power projects on the River Ganga on Bhagirathi and Alaknanda basins:

(i) No new hydropower projects be taken up beyond 69 projects already identified (Annex-VIA-VID).

(ii) New hydropower projects may be permitted to be constructed with limitations as in Paras 3.52-3.54 above and giving priority to those projects already under construction.

(iii) New hydropower projects which are still under investigation or under development are not being proposed for implementation. However, two such projects can be considered and a view taken after technical assessment by the CEA.

Based on the above, projects at Annex-VID may need a review and decision till after long term Ganga basin study by IIT Consortium.

3.70 The River Ganga has [illegible]r.

> Over a period of years, it has been used for irrigation, drinking water and other purposes. The efforts to keep it in the pristine form have been minimal. The IMG felt that it will be necessary to take measures for ensuring that several parts of it which have so far not been impacted continue to be in the pristine form. Secondly, it consider necessary to take measures on pollution, particularly in the upper reaches and the two basins of Bhagirathi and Alaknanda. The IMG, therefore, recommends that six rivers, including Nayar, Bal Ganga River, Rishi Ganga, Assi Ganga, Dhauli Ganga (upper reaches), Birahi Ganga and Bhyunder Ganga rivers should be kept in pristine form no further hydropower developments should take place in this region. Further, environment upgradation should be taken up in these sub-basins extensively."

49. In the Executive Summary of Chaturvedi Report, on the question of 'Environmental Impact of Projects', reads as follows:

> 4.17 Development of new hydropower projects has impact on environment, ecology, biodiversity, both terrestrial & aquatic and economic and social life. 69 hydropower projects with a capacity of 9,020.30 MW are proposed in Bhagirathi and Alaknanda basins. This includes 17 projects which are operational with a capacity of 2,295.2 MW. In addition, 26 projects with a capacity of 3,261.3 MW (including 600 MW Lohari Nagpala hydropower project, work on which has been suspended by Government decision) which were under construction, 11 projects with a capacity of 2,350 MW CEA/TEC clearances and 16 projects with a capacity of 1,673.8 MW under development.
>
> 4.18 The implementation of the above 69

> hydropower projects has extensive implications for other needs of this society and the river itself. It is noticed that the implementation of all the above projects will lead to 81% of River Bhagirathi and 65% of River Alaknanda getting affected. Also there are a large number of projects which have very small distances between them leaving little space for river to regenerate and revive.

50. The above mentioned Reports would indicate the adverse impact of the various hydroelectric power projects on the ecology and environment of Alaknanda and Bhagirathi river basins. The cumulative impact of the various projects in place and which are under construction on the river basins have not been properly examined or assessed, which requires a detailed technical and scientific study.

51. We are also deeply concerned with the recent tragedy, which has affected the Char Dham area of Uttarakhand. Wadia Institute of Himalayan Geology (WIG) recorded 350mm of rain on June 15-16, 2013. Snowfall ahead of the cloudburst also has contributed to the floods resulting in the burst on the banks of Chorabari lake near Kedarnath, leading to large scale calamity leading to loss of human lives and property. The adverse effect of the existing projects, projects under construction and proposed, on the environment and ecology calls for a detailed scientific study. Proper Disaster Management Plan, it is seen, is also not in place, resulting in loss of lives and property. In view of the above mentioned circumstances, we are inclined to give following directions:

(1) We direct the MoEF as well as State of Uttarakhand not to grant any further environmental clearance or forest clearance for any hydroelectric power project in the State of Uttarakhand, until further orders.

(2) MoEF is directed to const[illegible]y

consisting of representatives of the State Government, WII, Central Electricity Authority, Central Water Commission and other expert bodies to make a detailed study as to whether Hydroelectric Power Projects existing and under construction have contributed to the environmental degradation, if so, to what extent and also whether it has contributed to the present tragedy occurred at Uttarakhand in the month of June 2013.

(3) MoEF is directed to examine, as noticed by WII in its report, as to whether the proposed 24 projects are causing significant impact on the biodiversity of Alaknanda and Bhagirath River basins.

(4) The Disaster Management Authority, Uttarakhand would submit a Report to this Court as to whether they had any Disaster Management Plan is in place in the State of Uttarakhand and how effective that plan was for combating the present unprecedented tragedy at Uttarakhand.

52. Reports would be submitted within a period of three months. Communicate the order to the Central and State Disaster Management Authority, Uttarakhand.

53. In view of above, civil appeals and transferred cases are disposed of.

K.K.T. Appeals & Transferred Cases disposed of.

STATE OF UTTAR PRADESH & OTHERS
v.
ASHOK KUMAR SRIVASTAVA & ANR.
(Civil Appeal No. 6967 of 2013)

AUGUST 21, 2013

[ANIL R. DAVE AND DIPAK MISRA, JJ.]

Service Law:

Seniority – Date of seniority – Seniority granted w.e.f. the date of promotional order – The promotee claimed retrospective seniority w.e.f. the date the vacancy had arisen – High Court allowed the claim of the promotee on the grounds that the service rules provided to decide seniority w.e.f. the date of arising of vacancy; and that there has been hostile discrimination against the promotee as other 10 promotees had been accorded seniority w.e.f. the date of arising of vacancy – Held: Conferment of retrospective seniority to the promotee by High Court is not tenable – As per service rules the seniority has to be computed from the date of appointment, unless otherwise stipulated in the letter of appointment – High Court misdirected itself in holding that there was discrimination because the promotee in question and the other 10 promotees were governed by different set of rules – Uttar Pradesh Ayurvedic Aur Unani Mahavidyalaya Adhyapako ki Seva Niyamavali, 1990 – r. 21 – Constitution of India – Article 14.

State Public Service Commission recommended the name of respondent No.1 (lecturer in an Ayurvedic College) for promotion to the post of Reader against the vacancy which arose on 31.7.2001. On the recommendation of the Commission, the State Government promoted respondent No.1 giving him seniority w.e.f. 16.8.2005 i.e. the date of promotion order.

High Court, by the impugned judgment held that the service rules empower the Government to decide the seniority from the date of vacancy and that 10 promotees had been accorded seniority w.e.f. the date of arising of vacancy, hence non-granting of similar benefit to respondent No.1 would tantamount to hostile discrimination. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The claim of the first respondent for conferment of retrospective seniority is absolutely untenable and the High Court has fallen into error by granting him the said benefit. [Para 16] [861-H; 862-A]

2. Rule 21 of Uttar Pradesh Ayurvedic Aur Unani Mahavidyalaya Aadhyapako Ki Seva Niyamavali, 1990, the seniority of the candidates is to be determined from the date of order of substantive appointment. The proviso carves out an exception by stipulating that if the appointment order specifies a particular back date with effect from which a person is substantively appointed that date will be deemed to be the order of substantive appointment otherwise it would be the date of the issue of the order. The second proviso clarifies that the seniority will be determined when more than one orders of appointment are issued in respect of any one selection. From the aforesaid, it is luminous that unless otherwise stipulated in the letter of appointment, the seniority has to be computed from the date of appointment to the post. In the case at hand, nothing has been stipulated in the letter of appointment. [Para 9] [856-G-H; 857-A-B]

3. The High Court has misdirected itself by recording the finding that there has been hostile discrimination, as ten promotees have been accorded seniority relating back to the date when the vacancies arose. An additional affidavit has been filed on behalf of the appellants

clarifying the position that ten incumbents to whom the benefit of retrospective seniority was extended, they were selected under Rule 15 of Uttar Pradesh State Medical College Teacher Service (Second Amendment) Rules, 2005. Respondent is governed by different set of rules and the promotions that have been given to other category of teachers are under separate set of rules. When the seniority is governed by two separate set of rules, it is inconceivable that one can claim seniority on the basis of the rule relating to determination of seniority enshrined in the other rules. Respondent No. 1 is bound to base his case under Rule 21 of the 1990 Rules by which he is governed. The question of hostile discrimination would have arisen had the State Government extended the benefit under Rule 21 of the 1990 Rules to similarly placed persons governed by the same Rules. [Para 6] [853-D-E; 854-F-H; 855-A-B]

4. The names of candidates selected by the Selection Committee were sent to the Commission. Be it noted, six candidates were found fit for promotion and none of them was given retrospective seniority from the date when the vacancy arose. [Para 7] [855-C-D]

5. The High Court placed reliance on the recommendation of the Public Service Commission which was a reply to the query dated 4.6.2007. The commission by letter dated 10.8.2007 had stated that recommendation has been made for promoting respondent No.1 w.e.f. the date of vacancy created on 31.7.2001. The commission in his clarificatory recommendation had amended its letter dated 2.7.2007. The language used in the communication by the Commission is not free from ambiguity. That apart, the discretion, if any, rests with the Government. The recommendations of the Commission cannot be treated to be binding on the State Government. [Para 7] [855-C-G]

Nirmal Chandra Sinha vs. Union of India **(2009) 14 SCC 29;** *Jatinder Kumar and Ors. vs. State of Punjab* **(1985) 1 SCC 122: 1985 (1) SCR 899;** *Union of India vs. S.S. Uppal and Anr.* **(1996) 2 SCC 168: 1996 (1) SCR 230;** *State of Karnataka and Ors. vs. C. Lalitha* **(2006) 2 SCC 747: 2006 (1) SCR 971;** *State of Uttaranchal and Anr. vs. Dinesh Kumar Sharma* **(2007) 1 SCC 683: 2006 (10) Suppl. SCR 1;** *Pawan Pratap Singh and Ors. vs. Reevan Singh and Ors.* **(2011) 3 SCC 267: 2011 (2) SCR 831 – relied on.**

Keshav Chandra Joshi and Ors. vs. Union of India and Ors. **1992 Supp (1) SCC 272: 1990 (2) Suppl. SCR 573 – distinguished.**

Case Law Reference:

1990 (2) Suppl. SCR 573	**distinguished**	**Para 3**
(2009) 14 SCC 29	**relied on**	**Para 3**
1985 (1) SCR 899	**relied on**	**Para 7**
1996 (1) SCR 230	**relied on**	**Para 11**
2006 (1) SCR 971	**relied on**	**Para 12**
2006 (10) Suppl. SCR 1	**relied on**	**Para 13**
2011 (2) SCR 831	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6967 of 2013.

From the Judgment and Order dated 21.12.2009 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Service Bench No. 1268 of 2008.

P.N. Misra, Sanjay V., Abhisth Kumar for the Appellants.

Aseem Chandra, Vivek Singh for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The 1st respondent was appointed as a Lecturer on 23.3.1996 in "Ras Shastra" in Rajkiya Ayurvedic College and Chikitsalaya, Lucknow. The State Government vide notification dated 21.12.1990 notified the Service Rules, namely, Uttar Pradesh Ayurvedic Aur Unani Mahavidyalaya Aadhyapako Ki Seva Niyamawali, 1990 (for short, "the rules") for the teachers of Uttar Pradesh Ayurvedic Colleges. Under the rules, the promotional post from amongst the Lecturers is Readers. As the vacancies in respect of Readers were not filled up, the respondent No. 1 preferred W.P. No. 1136 (S/B) of 2004 before the High Court of Judicature at Allahabad at Lucknow Bench, Lucknow, wherein the High Court took note of the statement by the learned counsel for the State and directed that it should be in the fitness of things that the Public Service Commission shall make earnest efforts to expedite the whole process relating to promotion within a period of six months. Eventually, on 15.6.2005 the U.P. Public Service Commission, (for short 'the Commission'), the respondent No. 2 herein, recommended the names of six persons for promotion to the post of Readers. As far as the respondent No. 1 is concerned, he was placed at serial No. 6 and it was mentioned therein that the vacancy in respect of which the 1st respondent had been recommended for promotion had arisen after the superannuation of one Dr. Hari Shanker Pandey on 31.7.2001. The state Government considering the recommendation of the commission issued an office memorandum on 16.8.2005 promoting the 1st respondent and given him the posting in State Auyrvedic College, Lucknow. As the 1st respondent was given seniority w.e.f. 16.8.2005 which is the date of passing of the order of promotion he felt aggrieved and the said grievance compelled him to prefer O.A. No. 134 of 2006 before the U.P. State Public Service Tribunal (for short "the tribunal"). The

tribunal by order dated 2.2.2007 directed that the applicant therein should submit a representation to the Government within a period of one month against the order dated 16.08.2005 which shall be disposed of within two months by passing a reasoned order. In pursuance of the aforesaid order the State of U.P. vide letter dated 4.6.2007 sought a clarification from the Commission about its recommendation and after receipt of the said communication from the Commission and on due deliberation vide order dated 2.1.2008 the representation of the 1st respondent was rejected and it was clearly stated that seniority had been accorded to him from the date of passing of the order of promotion i.e. 16.8.2005.

3. Grieved by the order rejecting the representation the respondent No. 1 preferred W. P. No. 1268 (S/B) of 2008 before the High Court contending, inter alia, that he was entitled to be given retrospective seniority with effect from the date when the vacancy had arisen. The stand and stance put forth by him was opposed by the State and its functionaries by filing a counter affidavit that as per Rule 21 of 1990 rules the respondent's seniority had been correctly fixed from the date of promotion but not from the date when the vacancy arose. The 1st respondent brought to the notice of the High Court that ten persons had been conferred seniority with retrospective effect and he had been discriminated. The High Court placing reliance on a three-Judge Bench decision in *Keshav Chandra Joshi and Others v. Union of India and Others*[1] and after reproducing paragraph 24 of the said Judgment expressed the opinion that the principle laid down therein was binding and on that rationale distinguished the decision in *Nirmal Chandra Sinha v. Union of India*[2]. The High Court further proceeded to state that the service rules itself empower the Government to decide the seniority from the date of vacancy and when ten promotees had been accorded seniority relating back to the date of arising of

1. 1992 Supp (1) SCC 272.
2. (2009) 14 SCC 29.

vacancy, denial of the similar benefit to the petitioner by adopting a different criteria amounted to hostile discrimination inviting the frown of Article 14 of the Constitution. Being of this view, the Division Bench of the High Court quashed the impugned order dated 2.1.2008 and directed the respondents therein to consider the case of the petitioner and pass a fresh order in accordance with the verdict given by it. The penetrability of the aforesaid order is called in question by the State of U.P and its functionaries in this appeal by way of special leave.

4. It is submitted by Mr. P. N. Misra, learned senior counsel appearing for the appellant that the High Court has flawed by placing reliance on the decision rendered in *Keshav Chandra Joshi* (supra), as the same was delivered in a different context and that apart the ratio that has been culled out by the High court from the said pronouncement is not the correct one. The learned senior counsel has criticized the reasoning that when the service rule itself empowers the Government to decide the seniority from the year of vacancy, the Government is not justified in deciding the seniority of the 1st respondent from the date of promotion to the post of Reader. It is his further submission that the High Court has committed a grave factual error by opining that under Rule 21 of the 1990 rules when seniority was accorded to 10 persons form the date of vacancy, non-granting of the similar benefit to the respondent did tantamount to hostile discrimination, though it had clearly been brought on record that seniority of all the promoted candidates was fixed from the date of promotion and not from the respective dates when the vacancies had arisen.

5. Mr. Aseem Chandra, learned counsel appearing for the contesting respondent No. 1, per contra, urged that the High Court has properly applied the principle stated in *Keshav Chandra Joshi* (supra) and same being a three-Judge Bench decision has been aptly followed and, hence, the analysis made by the High court cannot be found fault with. Learned counsel would submit as the departme

promotional posts, the respondent was constrained to approach the High Court and on the basis of the direction issued by the High court when the posts had been filled up, it was incumbent on the authorities to reckon the seniority from the date when the vacancy had occurred. It is propounded by him that the language of Rule 21 of the 1990 rules confers discretionary power on the State Government and in the case at hand the authorities in an inequitable manner have failed to exercise the said power and, therefore, the High Court is absolutely justified in issuing directions for fixation of seniority with retrospective effect and, therefore, the order passed by it is absolutely impregnable.

6. At the very outset, we think it appropriate to deal with the facet of hostile discrimination. The High Court, as is manifest, has opined that ten promotees have been accorded seniority relating back to the date when the vacancies arose. Reference has been made to Rule 20. It is worthy to note that an additional affidavit has been filed on behalf of the appellants clarifying the position that ten incumbents to whom the benefit of retrospective seniority was extended, they were selected under Rule 15 of Uttar Pradesh State Medical College Teacher Service (Second Amendment) Rules, 2005. The said amended rules were brought into force on 12.5.2005 to amend the Uttar Pradesh State Medical Colleges Teachers Service Rules, 1990. Rule 15 of original rules dealt with procedure for recruitment by promotion. The amended Rule 15 of 2005 provides the procedure for recruitment by personal promotion. Rule 20 of the original rules dealt with seniority and it has been amended and in the present incarnation the said Rule reads as follows: -

> "**20. Seniority** – The seniority of persons substantively appointed in any category of posts in the service shall be determined in accordance with the Uttar Pradesh

> Government Servants Seniority Rules, 1991, as amended from time to time.
>
> Provided that a person appointed to a post except the post of Associate Professor or Professor on the recommendation of the Commission for which the requisition had been sent to the Commission before the commencement of the Uttar Pradesh State Medical colleges Teacher Service (Second Amendment) Rules, 2005 shall be entitled to seniority from the date of his appointment notwithstanding the fact that a teacher has been given personal promotion to the same post under rule 15 in the same recruitment year."

Thus, on a plain reading of Rule 20 it is perceptible that certain categories of incumbents are entitled to seniority from the date of their appointment notwithstanding the fact that they have been conferred personal promotion to the same post under Rule 15 in the same recruitment year. It is evident that benefit of seniority has been given to the incumbents who are governed by a different set of rules altogether. The High Court, as we notice, has referred to Rule 21 of 1990 rules which governs the case of the respondent No. 1. The said Rule clearly stipulates that if an order of appointment specifies a particular back date with effect from which a person is substantively appointed then only that date will be deemed to be the date of the order of substantive appointment. From the narration of the aforesaid facts, it is demonstrable that respondent is governed by different set of rules and the promotions that have been given to other category of teachers are under separate set of rules. When the seniority is governed by two separate set of rules, it is inconceivable that one can claim seniority on the basis of the rule relating to determination of seniority enshrined in the other rules. The respondent No. 1 is bound to base his case under Rule 21 of the 1990 rules by which he is governed. Thus analysed, we find that the High Court has misdirected itself by

recording the finding that there has been hostile discrimination. The question of hostile discrimination would have arisen had the State Government extended the benefit under Rule 21 of the 1990 rules to similarly placed persons governed by the same Rules. That being not the position we are afraid that the view expressed by the High Court on that score is not sustainable.

7. In this context, it is seemly to state that the names of candidates selected by the Selection Committee in its meeting held on 19.5.2005 were sent to the Commission. Be it noted, six candidates, namely, Dr Hari Shanker Pandey, Dr. Jai Ram Verma, Dr. S.K. Arya, Dr. V.P. Upadhyaya, Dr. Lal Bahadur Singh and Dr. Ashok Kumar Srivastava were found fit for promotion and none of them was given retrospective seniority from the date when the vacancy arose. The High Court has placed reliance on the recommendation of the Public Service Commission which was a reply to the query dated 4.6.2007. The commission by letter dated 10.8.2007 had stated that recommendation has been made for promoting Dr. Ashok Kumar Srivastava on the post of Reader of Ayurvedic and Unani Colleges w.e.f. the date of vacancy created on account of the superannuation of Dr. Hari Shanker Pandey on 31.7.2001. It is condign to note here that the commission in his clarificatory recommendation had amended its letter dated 2.7.2007. It is also perceivable that the language used in the communication by the Commission is not free from ambiguity. That apart, the discretion, if any, rests with the Government. Be that as it may, the recommendations of the commission cannot be treated to be binding on the State Government. (See *Jatinder Kumar and Others v. State of Punjab.*[3]) Thus, it is perceptible that all the incumbents promoted along with the respondent No. 1 were given seniority from the date of promotion and not from the date when the vacancies arose. Therefore, the factum of arbitrary

3. (1985) 1 SCC 122.

discrimination does not arise and accordingly we are unable to concur with the view of the High Court.

8. Presently, we shall advert to the rule position. The relevant part of Rule 21 of the 1990 rules by which the 1st respondent is governed, is reproduced below:-

> "21. **Seniority** – (1) Except as hereinafter provided, the seniority of persons in any category of posts shall be determined from the date of the order of substantive appointment and if two or more persons are appointed together by the order in which their names are arranged in the appointment order :
>
> Provided that if the appointment order specifies a particular back date with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and in other cases, it will mean the date of issue of the order :
>
> Provided further that, if more than one orders of appointment are issued in respect of any one selection the seniority shall be as mentioned in the combined order of appointment issued under sub-rule (3) of rule 18 :
>
> Provided also that a candidate recruited directly may lose his seniority if he fails to join without valid reasons when vacancy is offered to him, the decision of the appointing authority as to the validity of reason shall be final."

9. On a studied scrutiny of the aforesaid Rule, it is vivid that the seniority of the candidates is to be determined from the date of order of substantive appointment. The proviso carves out an exception by stipulating that if the appointment order specifies a particular back date with effect from which a person is substantively appointed that date will be deemed to

be the order of substantive appointment otherwise it would be the date of the issue of the order. The second proviso clarifies that the seniority will be determined when more than one orders of appointment are issued in respect of any one selection. From the aforesaid, it is luminous that unless otherwise stipulated in the letter of appointment the seniority has to be computed from the date of appointment to the post. In the case at hand, nothing has been stipulated in the letter of appointment. The High Court while granting retrospective seniority with consequential benefits has placed reliance on the principle stated in *Keshav Chandra Joshi* (supra). In the said case, controversy related to fixation of seniority between direct recruits and the promotees. A three-Judge Bench took note of the plea which was to the effect that promotees should be declared to have been regularly appointed from the respective dates of their initial promotion as Assistant Conservators of Forest with all consequential benefits. To substantiate the said plea it was urged that though the promotees were appointed on ad hoc basis due to non-availability of direct recruits to the vacant posts of Assistant Conservators of Forest, yet they were continuing for well over 5 to 12 years discharging the same duties, drawing the same scale of pay without any reversion and, therefore, the posts held by them were not fortuitous, nor stop gap. In this backdrop it was contended that the entire continuous length of service from the dates of their initial promotion should be counted towards their seniority. In opposition, it was urged that the appointment of the promotees admittedly being ad hoc, they had no right to the posts and hence, their seniority could be counted only from the dates of their substantive appointment. The Court after scanning the anatomy of relevant rules opined that in order to become a member of the service he/they must satisfy two conditions, namely, the appointment must be in substantive capacity and the appointment has to be to the post in the service according to rules and within the quota to a substantive vacancy. The learned Judges observed that there exists a marked distinction between appointment in a substantive

capacity and appointment to the substantive post. Therefore, the membership to the service must be preceded by an order of appointment to the post validly made by the Governor. Then only he/they become member/members of the service. The Court further stated that any other construction would be violation of the Rules. After so expressing, the Court posed two questions :-

> "When promotees become members of the cadre of Assistant Conservators in accordance with the rules, and whether the entire length of service from the date of initial appointments should be counted towards their seniority."

Thereafter, analyzing the entire gamut of case law, opined that employees appointed purely on ad hoc or officiating basis due to administrative exigencies, even though continued for a along spell, do not become the members of the service unless the Governor appoints them in accordance with the rules, and so they are not entitled to count the entire length of their continuous officiating or fortuitous service towards their seniority. Eventually, in paragraph 24 which has been reproduced by the High Court in entirety in the impugned order to build the edifice of its reasoning, in essence, it has been laid down thus: -

> "It is notorious that confirmation of an employee in a substantive post would take place long years after the retirement. An employee is entitled to be considered for promotion on regular basis to a higher post if he/she is an approved probationer in the substantive lower post. An officer appointed by promotion in accordance with Rules and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary, shall be counted for seniority. Ad hoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority[illegible]e

was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Article 14 read with Article 16(1) of the Constitution as unequals would be treated as equals. When promotion is outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation."

In the ultimate conclusion the learned Judges ruled as follows:-

"Accordingly we have no hesitation to hold that the promotees have admittedly been appointed on ad hoc basis as a stop gap arrangement, though in substantive posts, and till the regular recruits are appointed in accordance with the rules. Their appointments are de hors the rules and until they are appointed by the Governor according to rules, they do not become the members of the service in a substantive capacity. Continuous length of ad hoc service from the date of initial appointment cannot be counted towards seniority."

10. From the aforesaid, it is clear as day that what is meant by reckoning of seniority from the date of vacancy in the context of the facts of the said judgment has been wholly misunderstood by the High Court. In the case of *Keshav Chandra Joshi* (supra), the controversy that arose pertained to the seniority between direct recruits and promotees. The Court opined that when promotion is given beyond the quota of the promotees, the seniority has to be reckoned from the date of vacancy arising within the quota meant for the promotees. The Court further observed that the previous promotion would be regular only from the date of vacancy within the quota and the

seniority shall be counted only from that date and not from date of earlier promotion or subsequent confirmation. The factual matrix, the relevant rules, the concepts of direct recruit quota and the promotee quota and the fortuitous appointment and the principle stated therein have nothing to do with grant of retrospective seniority in the context of the present case. Thus, we have no scintilla of doubt that the High Court has erroneously applied the ratio laid down in *Keshav Chandra Joshi* (supra).

11. The thrust of the matter is how the seniority is to be determined in such circumstances. In *Union of India v. S.S. Uppal and another,*[4] it has been opined that the seniority of a person is to be determined according to the seniority rule applicable on the date of appointment. It has also been observed that weightage in seniority cannot be given retrospective effect unless it is specifically provided in the rule in force at the material time.

12. In *State of Karnataka and others v. C. Lalitha*[5] it has been observed that it is well settled that seniority should be governed by rules and a person should not be allowed to derive any undue advantage over other employees, for concept of justice demands that one should get what is due to him or her as per law.

13. In *State of Uttaranchal and another v. Dinesh Kumar Sharma*[6] it has been clearly stated that seniority has to be decided on the basis of rules in force on the date of appointment and no retrospective promotion or seniority can be granted from a date when an employee has not even been born in the cadre.

14. In *Nirmal Chandra Singh* (supra) it has been ruled that

4. (1996) 2 SCC 168.
5. (2006) 2 SCC 747.
6.. (2007) 1 SCC 683.

promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post. It has also been laid down therein that it is settled in law that date of occurrence of vacancy is not relevant for the determination of seniority.

15. Learned senior counsel for the appellants has drawn inspiration from the recent authority in *Pawan Pratap Singh and others v. Reevan Singh and others,*[7] where the Court after referring to earlier authorities in the field has culled out certain principles out of which the following being the relevant are reproduced below:

> "(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.
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> xxx xxx xxx
>
> (iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime."

16. In view of the aforesaid enunciation of law, the irresistible conclusion is that the claim of the first respondent

7. (2011) 3 SCC 267.

for conferment of retrospective seniority is absolutely untenable and the High Court has fallen into error by granting him the said benefit and accordingly the impugned order deserves to be lancinated and we so do.

17. Consequently, the appeal is allowed and the order passed by the High Court is set aside. The parties shall bear their respective costs.

K.K.T. Appeal allowed.