IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Protik Prakash Banerjee

W.P. No. 13564 (W) of 2015
M/s Seth Dey and Company and Another
—v—
State of West Bengal and Others

For the petitioners	:	Mr. Partha Bhanja Chowdhury, Adv., Mr. Ravi Kumar Dubey, Adv.
For the Respondent No.3	:	Mr. R.N. Majumdar, Sr. Adv., Mr. N. Rakshit, Adv.
Heard on	:	June 19, 2019, July 12, 2019 and July 29, 2019
Judgment Reserved on	:	July 29, 2019.
Judgment Delivered on	:	June 22, 2020.

PROTIK PRAKASH BANERJEE, J.:

1. WP No.13564 (W) of 2015 is a petition under Article 226 of the Constitution of India which seeks judicial review of the impugned award dated February 19, 2015 passed by the Learned First Industrial Tribunal, West Bengal in Case No. VIII—6 of 2008 between the petitioners herein and their workmen, represented by their employees' union. This was on a reference order dated January 17, 2008 passed by the Assistant Secretary to the Government of West Bengal, on the following issues: -

(i) Whether the suspension of work with effect from 17.4.06 as declared by the management of M/s Seth Dey & Co. in their shop at 7/1, Mahatma Gandhi Road, Kolkata—700 009 is justified?

(ii) To what relief, if any, are the workmen entitled?

2. Its a lengthy and comprehensive award whose judicial review has been sought. The facts of the case are clear from the recitals made in the award and I do not repeat them except to the extent required for this judgment. Suffice, that learned tribunal found fault on the side of both the parties and directed the withdrawal of the suspension of work by notice, and payment of fifty percent of the back-wages to the employees for the reasons stated in the order under challenge. The said award was published under Section 17(1) of the Industrial Dispute Act, 1947 and thus became final as against those parties who had not challenged it, under Section 17(2) of the said Act of 1947. Only the proprietress, being the petitioner, challenged the award. Therefore, it is reiterated that the findings contained in it, if to the prejudice of the respondent workmen, became final as against them.

3. Interestingly, the substantive findings recorded by the learned tribunal on facts, after recording the materials on record which impelled it to come to such conclusion, are as follows: -

"On a meticulous study as well as analysis of both oral and documentary evidence on record this much I can say that first of all proprietress of the shop is a lady, secondly, she was suffering kidney trouble and was undergoing treatment at Vellore (not disputed), thirdly on account of sufferance from illness she was not in a position to personally look after day to day business after coming to the business place. I think that taking advantage of these aspects, gradually control and possession of the shop room went under the custody of the employees. Of

course, it cannot be denied that the workmen took efforts so that the business may continue as usual for the benefit of both the employees and the employer, but unfortunately they did not act honestly while they ran the business from September, 2004 till 24.02.2006 independently and they did not observe the requisite formalities and/or procedure in running the business and they acted in defiance of the instructions of the proprietress – sometimes given by the proprietress herself and sometimes by her authorized representative which resulted in financial loss as well as causing displeasure to the employer. This Tribunal can reasonably presume that after running the business independently according to their sweet will the employees mainly Muktipada Dey and Pranab Kumar Ghosal were not in a position to accept the superintendence as well as interference of the proprietress and her representative since after making over the keys of the shop room on 25.02.2006 by the employees.

In the light of the foregoing discussion it can be safely concluded that since there were no change of circumstances and no tangible improvement of the business in all respects including the atmosphere of the business place even after taking over possession of the keys by the proprietress and also in view of leaving of the job by her authorized representatives one after another being disgusted with the conduct of the employees, the proprietress had no option but to declare suspension of work. In fact, in her evidence on 05.09.2013 she has demonstrated that as she had no alternative so she had to issue suspension of work. In my view, although admittedly declaration of suspension of work on 17.04.2006 was illegal in view of the then pendency of the proceeding before the Learned 3rd

Industrial Tribunal over the issue of charter of demand of the employees but at the same it has been proved from the evidence that such declaration of suspension of work/lock-out was the result of misdemeanor and conduct of the employees and as a defensive measure the proprietress having no option declared lock-out/suspension of work.

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I get merit in such contentions raised on behalf of the employees and in fact although the declaration of suspension of work has been found to be justified in its inception but in view of continuity of such lock-out for a prolonged period as well as running of the business at the same place i.e. 7/1 M.G. Road, since March, 2008 (as deposed on 05.09.2013 by C.W. – 1) without withdrawal of the notice of suspension and/or without lifting the notice of suspension legally and also without asking the employees to resume their duties, this Tribunal is left with no alternative than to hold that the suspension of work declared on 17.04.2006 by the proprietress is not only illegal but also in view of subsequent event of her running trading business there since March, 2008 or 29.01.2008 (as disposed by the proprietress inconsistently in her cross-examination), without lifting the lock-out legally the **'justified'** lock-out has assumed the character of being **'unjustified'**. I am sorry to say that the proprietress herself by her own act has led this Tribunal to hold that lock-out, although found to be justified at the time of declaration and/or at its inception, has now become unjustified."

4. The question whether a lockout is justified or not, as referred to by the appropriate government by the Memo dated January 17, 2008 is usually determined by ascertaining whether any of the fact situations mentioned in Section 22 or Section 23, and in case of commencement or declaration of a lockout, the fact situation mentioned in Section 24(1)(i), and in it is continuance of such lockout, the fact situation mentioned in Section 24(1)(ii) exists; if it does, then the lockout is, everything else being equal, not justified under statute. These, therefore, constitute jurisdictional facts, which must first be determined, in order for the decision-making process to be immune from judicial review.

5. Yet in the instant case, the learned tribunal was pleased to hold that the lockout was justified though illegal, without reference to the jurisdictional questions I have noted in paragraph 4, and which had to be determined first, in the peculiar facts and circumstances recorded by it which perhaps weighed more with the learned tribunal. After all, a damsel in distress, being a lone lady warring with a kidney problem, having to go to Vellore, leaving the business at the tender mercies of the workmen who are cheating her, and whom a receiver appointed in another lis between them has clearly indicated to be party at fault, and furthermore, political interference (we have to remember this was 2008) and getting nothing from her own business, are sufficient to moisten the heart of normal person and I am sure that is what happened here. However, this is therefore a clear decision on the first point referred to the learned tribunal and this was not challenged by the workmen, who have tried to urge that the lockout

was not lawful by referring to a pending conciliation proceedings. However, in the absence of a challenge, the factual determination that the lock-out was justified is now beyond challenge.

6. It is true that the learned tribunal did advert to the pendency of a conciliation proceedings in respect of a different matter between the parties during which the lockout was declared and was pleased to hold that the suspension of work by the proprietress was therefore illegal, but this was long after recording that the lockout, in the peculiar facts and circumstances of the case, was justified. This, in my humble opinion, would not save the decision-making process. If, for the purpose of coming to a decision, the adjudicator relies upon materials which are wholly irrelevant under the statute, and then remarks that there exists another reason which is recognized by the statute, it would not save the decision-making process from being one where irrelevant materials were considered.

7. Again, the workmen have been represented in this Court by counsel. They have used an affidavit-in-opposition to the writ petition. There, the workmen have contended why according to them the lockout was justified. The allegations contained therein, if true, would show existence of such jurisdictional facts as mentioned in paragraph 4 above. Despite the aforesaid, the workmen chose not to challenge the award to the extent of the finding that the lockout was justified in its inception or initially for the conduct of the workmen. They therefore allowed the finding that the lockout was justified to achieve finality.

8. All that remains is to see whether the continuance of the lockout can be said to be illegal, with reference to the tests laid down by the Industrial Disputes Act, 1947. Section 24(1)(ii). The learned tribunal has not recorded the existence of any of the facts mentioned in Section 24(2)(ii) of the Act of 1947. I have gone through the records and it does not appear that there was any order made under Section 10(3) of the Act of 1947 and therefore the continuance of the lockout in contravention thereof, does not and cannot arise. Similarly, the learned tribunal has not found any existence of any Order under Section 10A(4A) of the Act of 1947, far less its violation in continuing the lockout. Therefore, the finding of the learned tribunal that the continuance of the lockout is illegal, is contrary to the statute, and something for which there is no material on record and is thus perverse within the meaning of law, and any conclusion based on such finding deserves to be quashed.

9. Then again, the learned tribunal has come to the conclusion that the otherwise justified lockout (that is to say, a lawful lockout) became unjustified due to its continuance. I tried to find something in the statute which would allow such a conclusion to be reached or supported, but found none.

10. I therefore find no reason to sustain the award in view of such serious lacunae in the decision-making process as aforesaid and in view of the said perversity I am compelled to quash the impugned award dated February 19, 2015 passed by the Learned First Industrial Tribunal, West Bengal in Case No. VIII—6 of 2008 between the petitioners herein and their workmen and remand

the matter back to the learned tribunal for being decided afresh in accordance with law. I make it clear that the evidence already recorded shall be considered and if the tribunal feels necessary, additional evidence may be adduced. The entire proceeding ought to be concluded expeditiously, but no later than 8 months from the communication hereof. There is therefore no question of payment of back-wages. The parties shall bear their own costs.

11. Before parting with this case I record my appreciation of the registry and those involved in electronic dissemination of this judgment in real time, through the internet, because though this judgment had been prepared long since, due to the unfortunate pandemic and its consequences, until such technical expertise was brought to bear on a system of virtual court as now obtains in this Court, it could not be delivered.

(PROTIK PRAKASH BANERJEE, J.)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present :- Hon'ble Mr. Justice I.P.Mukerji
Hon'ble Mr. Justice Protik Prakash Banerjee

FMA No. 3398 of 2014
With
CAN 10008 of 2014

Sri Soumendra Malik
v.
Smt. Tumpa Malik

For the appellant :- Mr. Debjit Mukherjee
Ms. S. Chatterjee
Ms. D. Ganguly
....Advocates

For the Respondents :- Ms. Shanti Das
Mr. Subha Dey
...Advocates

Judgement On :- 21.12.2017

I.P. MUKERJI, J.

This case is about the court in which an application for custody of the child under Section 25 of the Guardians and Wards Act, 1890 is to be considered.

The minor, Ishita is very young, about nine years of age.

The parties were married on 13th May, 2007 according to Hindu rites. On 8th May, 2008 the child was born to them. On 12th July, 2010 the respondent wife left the matrimonial house with the daughter to stay with her parents. Since April, 2011 the wife has been staying at 68/1, Netaji Colony, Kolkata-90, separated from her husband in her aunt's house. The minor is in her custody, within the jurisdiction of the District Judge 24 Parganas (N). From 2012 the minor is going to a local school.

The learned District Judge Hooghly on 5th August, 2014 allowed the application of the wife challenging the jurisdiction of the Hooghly court.

The application was made by the appellant/husband under Section 25 read with Section 9 of the said Act before the learned District Judge,

Hooghly. The mother, Tumpa Malik took out a demurrer application under Section 4 (5) (b) (ii) of the said Act, saying that the Hooghly court had no jurisdiction to entertain the application, as the child did not ordinarily reside in any place within its jurisdiction and that the child resided in Baranagar within the jurisdiction of the District Judge 24 Parganas (N). The petition should be returned to the appellant/petitioner for presenting it in the proper court.

On behalf of the husband Mr. Mukherjee argued that a place where a child ordinarily resided connoted his place of permanent residence. Since the father's home was in Hooghly and the child lived there till 2012 it could be taken to be the permanent residence of the child. He also cited an example of a child being moved from place to place by the mother. That would not imply that the application under the said Act would be transferred from one court to another in harmony with the movement of the child. That could not be the intention of the legislature, he added. The place where the child ordinarily resided according to Mr. Mukherjee would denote the place of residence of permanent residence of the family to which the child belonged.

Some definitions in the Guardians and Wards Act, 1890 are very important.

The first is Section 4 (5) (b) (ii). It is set out herein below:-

"*4(5) "the court" means—*

> *(b) Where a guardian has been appointed or declared in pursuance of any such application—*
>
> *(ii) In any matter relating to the person of the ward the District court having jurisdiction in the place where the ward for the time being ordinarily resides."*

Section 25 of the Guardians and Wards Act, 1890 is also set out hereunder.

"25. Title of guardian to custody of ward---(1) If a ward leaves or is removed from the custody of a guardian of his person, the court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the court may exercise the power conferred on a Magistrate of the first class by Section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

The question before us is whether this decision was correct? Whether the District Court at Hooghly, 24 Parganas (N) had the jurisdiction to hear the application of the appellant under Section 25 read with Section 9 of the Guardians and Wards Act, 1890?

What is the meaning to be ascribed to the phrase "ordinary residence of a child?"

It has to be appreciated that the role of the court does not end with the appointment of a guardian over a minor. Nor does the responsibility of the court cease with the appointment of a guardian. The very nature of the provisions of the Guardians and Wards Act, 1890 tend to show that the court has to supervise the work of the guardian, not to remove its watchful eyes from the minor, ensure that the ward's welfare is being looked after by the guardian, his or her property is being taken care of by him and so on. Therefore, this court cannot be far removed from the minor. The ward has to be accessible to the court as much as the court should be accessible to the guardian and any other interested person in his or her welfare. Hence, the provision that only the court within the jurisdiction of which the minor ordinarily resides has the jurisdiction to entertain proceedings under the said Act.

A division bench of the Allahabad High Court in the case of **Jagdish Chandra Gupta v. Dr. Ku. Vimla Gupta** reported in **AIR 2003 Allahabad 317** has tried to identify the ordinary residence of a minor adopting some very relevant factors. The minor must be "dwelling in a place for some continuous time". The residence has to be something more than "temporary residence". "The question of residence is largely a question of intention." One observation in that judgement is very relevant to our case.

"19.....However, in case of the minor no question of intention can arise but the court will have to take into consideration all the relevant facts as brought on record to determine the actual place of residence looking the attendant circumstances. The past abode for however a long period it may be, can cease to be a place where the minor can be said to be ordinarily residing depending upon the facts and circumstances of each case and the nature and duration of the residence. The mere fact that a minor is found actually residing at a place at the time of the application is made by itself is not sufficient to determine the jurisdiction."

The Supreme Court in the similar case of **Ruchi Majoo v. Sanjeev Majoo** reported in (**2011) 6 SCC 479** observed that the place where the child ordinarily resided was a question of fact. The child was ordinarily residing where the mother was residing. She had been studying in a school there for nearly three years.

The parties were married on 13th May, 2007.

It is no doubt true that the minor was born in 2008 in her father's house is in Hooghly. From 12th July, 2010 the husband and wife are living separately. Since August, 2011 the child has been living at 68/1, Netaji Colony, P.S.-Baranagar, Kolkata-90, in the residence of his mother's maternal aunt (Masi). The child goes to a local school there regularly, as we have already observed.

Therefore, the ordinary place of residence of a child depends on the above factors amongst others. The appellant has not been able to

demonstrate before this court that the ordinary place of residence of the minor is not at Baranagar.

It is quite plain that the residence of the minor at Baranagar cannot be called temporary and it is continuous from 2011. It has the touch of permanence. In those circumstances, the court to which the application lay under Section 25 read with Section 9 of the Guardians and Wards Act, 1890 was the District Court at Hooghly 24 Parganas (N).

I feel that the learned District Judge has rightly refused to exercise her jurisdiction, as in her opinion, the ordinary residence of the child was in 24 Parganas (N). I concur with this view. The court at Hooghly had no jurisdiction to entertain the application.

We add that even if an application under Section 25 read with Section 9 of the said Act was made before a particular District Court, it will use jurisdiction the moment the minor's ordinary place of residence changes. The district Court having jurisdiction over this changed ordinary residence will now exercise jurisdiction.

This appeal is dismissed.

No order as to costs.

(I.P. MUKERJI, J)

PROTIK PRAKASH BANERJEE, J.

When learned counsel try their best to render an otherwise simple proposition into something very troublesome, it is only then that the glorious simplicity of the Opinion of my Learned Brother can be best appreciated. While agreeing with most of what my learned Brother has held I would like to add a few paragraphs, which throws into sharp relief the actual dispute between the parties.

The entire case revolves around a short compass as to what would be the meaning which the Court is to ascribe to the words in Section 25 of the Guardians & Wardss Act, 1890, "**Title of guardian to custody of ward-** (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

Both the learned Advocates tried to impress upon me that the magic words are in reality those contained in a few sections of the Guardians and Wards Act, 1890 pertaining to jurisdiction of the District Court. They both draw inspiration from firstly Section 4 Sub-Section 5 and then Section 9 read with Section 4 of the Act of 1890.

Since both the parties have placed great emphasis on these provisions, even if according to me the true construction of Section 25 of the Act, 1890 is to be discovered from the context of that Section alone I find myself reluctantly forced to deal with those Sections to which learned Counsel have drawn my attention.

Section 4 (4) read as follows: -

***"4. Definitions.**-In this Act, unless there is something repugnant in the subject or context.-*

(1) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority;

(2) "guardian" means a person having the care of the person of a minor or his property, or of both his person and property;

(3) "ward" means a minor for whose person or property, or both, there is a guardian;

(4) "District Court" has the meaning assigned to that expression in the Code of Civil Procedure (14 of 1882), and includes a High Court in the exercise of its ordinary original civil jurisdiction;

(5) "the Court" means-

(a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; or

(b) where a guardian has been appointed or declared in pursuance of any such application-

(i) the Court which, or the Court of the officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian; or

(ii) in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or"

Section 9 reads as follows:

"9. Court having jurisdiction to entertain application.-

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in

the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."

It will appear that the provisions indicated by the parties as above are subtly different from the case where a ward has been removed from the lawful custody of his or her guardian. I believe that the parties have been crying themselves hoarse on the altar of Section 4(5)(b)(ii) simply because the language of the said Sub-Section indicates that the District Court which would have jurisdiction in any matter relating to the person of the ward would be the District Court having jurisdiction over the place where the ward for the time being ordinarily resides.

I can see where and how this would appeal to the respondent/mother since it is an admitted position that the mother had removed the child from the custody of husband/father who admittedly is the natural Guardian way back on July 12, 2010 and has not returned the minor child (daughter) to the husband's custody from where the minor had been removed; this has become all the more important since the place where the parents and the ward ordinarily resided together was at a place which was within the jurisdiction of the Learned District Judge at Hooghly in Chinsurah and not the Court of the Learned District Judge at 24 Parganas North, who has jurisdiction over the place to which the minor had been removed; however, the emphasis that the mother/respondent has placed on the words "District Court having jurisdiction in the place where the ward for the time being ordinarily resides" is a double-edged dagger.

This is because something more than mere fortuitous stay or spending of a few nights is required to transform a halt for a night or a few nights into a place where the ward ordinarily resides. Staying in a hotel room does not make the person who resides at such place suddenly harbour an intention of permanent residence. There is a requirement that in

order to attract the jurisdiction of a place on the ground of "ordinary residence"there should be an intention, formed bona fide on the basis of several objective criteria, to reside there with some degree of permanence.

In fact, the judgments are not consistent whether in this country or elsewhere on this aspect of the matter. While the test of permanent intention to reside has not always been the case in India, the Courts have not even assigned a unique or unchanging meaning to the words "ordinarily resident".

The cases of **"Ruchi Majoo Vs. Sanjeev Majoo** reported in **(2011)6 Supreme Court Cases 479"** inter alia at Paragraph 60 as alsothe judgement reported in the case of **"Jagdish Chandra Gupta Vs. Dr.KumariVimla Gupta** reported **in AIR 2003 Allahabad 317"** inter alia at Paragraphs 19, 20 and 21 would clearly indicate (i) "ordinarily resides" has to be something more than temporary residence(ii) the place where the minor generally resides and would be expected to reside but for special circumstances (iii) is not a place which the person residing as a permanent resident has left for good with no intention to come back but has started living in some other place (iv) in addition for a minor, actual residence at or about the time of filing of the application cannot by itself be a reason to determine the ordinary place of residence.

Very obviously, this last criterion has been formulated knowing very well that a minor has very little control over his or her life, and usually the wishes of a minor and its welfare, though given such importance by a Court of Law, are ignored by whosoever has actual physical custody and control of the minor/ward to the extent that where a particular minor or ward is actually residing is not even important where the allegation against one of the parents is that he or she has removed the ward from the custody of a lawful guardian. This is only natural since no person can be allowed to benefit from his or her own fault. If a person could be

allowed to benefit from removing the person of a minor/ward from a jurisdiction to another to force the lawful guardian to chase the wrongdoing parent or person from one jurisdiction to another, this would have been the result. This is fact, appears to be the only rationale behind the rule that actual physical residence is not the criterion through which jurisdiction is attracted in a case which is framed under Section 25 of the Guardians and Wards Act, 1890 and provided that the order sought by the guardian is for the benefit of the minor and for its paramount welfare.

Therefore, the learned counsel for the mother has tried to find out the residence for the time being of the minor to attract the jurisdiction of the particular learned District Court within whose jurisdiction either the minor had been living residing prior to his removal on and from July, 2010 (according to Mr. Debjit Mukherjee) or the place to which the minor had been removed by the mother from the custody of the natural Guardian father after July, 2010. This shows that both the parties have been trying to rely upon the actual place of residence or the place at which either the father or the mother would want to keep the ward who is a minor. Again if the test provided under Section 9 of the Act of 1890 is applied it presupposes that in case where the person of the minor is involved the application would be made to the District Court having jurisdiction in the place where the minor ordinarily resides; but in case where the Guardianship of the property of the minor is applied for it can be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or where minor has property. It shall thus appear that there is no stringency regarding the place of residence nor any requirement to identify where the minor is deemed to ordinarily reside where only the Guardianship of the property of the minor is involved.

Since the entire Act of 1890 must be read as a whole and since each of the words used in the statute must be given meaning and since further the same words used in the same sense must be given the same meaning, and cannot be given widely different meaning and since the words used in the instant case in Section 25 of the Act of 1890 are perfectly capable of being understood without ambiguity I find that the behaviour of the parties to the present case, to identify the court of the learned District Judge having jurisdiction over the place where the ward ordinarily resides, in a case which involves Section 25, and not any other section, does more violence to the plain and literal meaning of the statutory provision aforesaid, and does both logic and the purpose for engrafting Section 25 a disservice.

To my mind the rest of the provisions of the Act of 1890 speak of where an application is to be made over appointment of a Guardian of the Ward or of his property or where Guardian had already been appointed where such application is to be made but Section 25 is an exceptional provision for giving relief to a Guardian from whose custody the ward is removed or the ward leaves provided that the order for return to the custody of the lawful guardian would be for the welfare of the minor. Therefore, Section 25 represents an exception to the general rule as to which District Court has jurisdiction over a case of return of a ward to the custody of the Guardian if he leaves or his removed from such custody. Since it is an exception, the normal rule of tracing jurisdiction to the ordinary place of residence on the basis of the above parameters as in Sections 4(5)(b)(ii) or Section 9 of the Act of 1890,is not to be used in case of Section 25 of the Act of 1890. This is because as indicated by the above persuasive precedents, the ordinary place of residence requires an immediate and clear intention to reside with a decree of permanence which is not merely a casual night's stay and impulsive residence for a while.

In cases covered under Section 25, the intention of the legislature is as I could gather is undoing the mischief of such removal of the ward from the custody of the lawful guardian, provided of course, that the return to the custody of the guardian is to the benefit of the minor. Therefore, provided that the guardian applies for such return to his custody within a reasonable time I hold that the District Court having jurisdiction must always be the District Court which exercises jurisdiction over the place where the ward has been staying before being removed from the custody of the guardian provided always that such application is made by the guardian with reasonable alacrity and any delay in making the application explained to the satisfaction of the learned District Judge in question.

In the instant case as stated by my learned Brother and as appears from the records, removal from the custody of the lawful and natural guardian happened in July 12, 2010, but the application for the return of the ward, was not made until June, 2012 when already the ward had become settled as a student in the school within the jurisdiction of the learned District Judge at District 24 Parganas North. It is therefore clear that the learned District Judge to whose jurisdiction the child had been removed continues to be the learned District Judge for more than one and half years and is still continuing as the learned District Judge and the husband/father clearly had no anxiety nor urgency in applying for return of the ward. So, while the normal rule is to ascertain where the ward ordinarily resides at the time when the application is filed, in case of an application under Section 25 of the Act of 1890 the special rule is to apply before the Court of the Learned District Judge within whose jurisdiction the Ward was ordinarily residing prior to his being removed from or leaving the custody of the said lawful guardian. Even this however, is subject to an exception, being where a lawful guardian has not moved with sufficient speed or lack of delay or laches to attract the

jurisdiction of the Learned District Judge where the ward had been staying with him prior to the ward's being removed from his custody, and where the passage of time shows that there is no logical explanation for such delay. The present case is one such example, where the lawful guardian from his own conduct is not in a position to show why he delayed more than one and a half years before even applying to the former jurisdiction, that is to say, the Court of the Learned District Judge at Hooghly in Chinsurah, from which the ward had been removed and where no satisfactory explanation is given for such delay.

As such I have no hesitation in holding at one with my Learned Brother, that in the instant case the lack of any explanation for the delay in moving the proper forum for an order for return of the ward to the father's custody, shows that the intention of the parties has always been that the ward should continue her studies in the home found for her by her mother, within the place over which the Learned District Judge at District 24 Parganas North has jurisdiction, rather than the Learned District Judge at Hooghly in Chinsurah and it is the place which the parties, including the lawful guardian father, have allowed to become the place where the ward ordinarily resides, and the element of immediate relief which usually accompanies any application under Section 25 of the Act of 1890 is clearly absent in the present case.

The same matter can be looked from a different angle. Where the husband/natural Guardian Acts with urgency to get back a child removed from his lawful custody, the place where he resided last, before the child was unlawfully removed from his custody, is the place on the basis of which jurisdiction would be attracted; where the husband/father/natural Guardian does not show alacrity it would be deemed that there is no cause to invoke the extraordinary jurisdiction under Section 25. In all other cases the test of ordinary residence would apply. I thus hold that the application of the Wife/Respondent seeking a

direction on the appellant/husband to take back the petition under Section 25 of the Act of 1890 with a further direction on the husband to file it before the Learned District Judge, District 24 Parganas North, was rightly allowed and I further hold that the husband's appeal is without any merit and is thus dismissed.

However, in the facts and circumstances of the case, the parties shall bear their own costs. The records are directed to be sent down to the Court of the Learned District Judge, Hooghly, at Chinsurah, as part of the records of Act VIII Case No. 1 of 2012 for taking steps in accordance with law in the light of our judgement and the consequential steps of filing the matter afresh before the Appropriate Court.

Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Protik Prakash Banerjee, J.)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :
The Hon'ble Justice Dipankar Datta
and
The Hon'ble Justice Protik Prakash Banerjee

MAT No.1191 of 2017
With
CAN 6705 of 2017

THE PRINCIPAL, BELDA COLLEGE
—v—
THE STATE OF WEST BENGAL AND OTHERS.
With
MAT No.1192 of 2017
With
CAN 6706 of 2017

KESHAB CHANDRA DEY
—v—
SRI SHIBU SARKAR AND OTHERS

For the Appellant in
MAT No. 1191 of 2017 : Mr. Soumen Kumar Dutta, Adv.
Md.G.N. Imrohi, Adv.

For the Appellant in
MAT No. 1192 of 2017 : Mr. L.K.Gupta, Sr. Adv.
Mr Atarup Banerjee, Adv.
Mr. Tapodip Gupta, Adv.

For the Respondent no.
15 in MAT No. 1191 of 2017
and respondent no. 1 in
MAT No. 1192 of 2017 : Mr. Sukanta Chakraborty, Adv.
Mr. Anindya Halder, Adv.

For the State of West Bengal : Ms. Chaitali Bhattacharya, Adv.
Ms. Saira Banu, Adv.

For the Vice Chancellor of the
Vidyasagar University : Ms. Debjani Sengupta, Adv.
Ms. Julekha Khatun, Adv.
Ms. Tiyasha Banerjee, Adv.
Ms. Shreya Bhattacharjee, Adv.

Hearing concluded on : December 18, 2017

Judgment on : May 4, 2018

PROTIK PRAKASH BANERJEE, J:

1. Two sets of appeals are before this Court. The appellants in both cases are aggrieved by the same order. This is the order dated July 5, 2017 passed by the Learned Single Judge. In W.P. No.2351 (W) of 2017 [Sri Shibu Sarkar—v—State of West Bengal and Others]. By this order, the Learned Single Judge allowed the writ petition under Article 226 of the Constitution of India and declared the appointment of the Appellant in MAT No.1192 of 2017 (respondent No. 21 in the writ petition) and any consequential action taken in aid of such appointment to be a nullity. MAT No.1191 of 2017 has been preferred by the college authorities, being the Principal of the College represented by Mr. Soumen Kumar Dutta and Mr. G.N. Imrohi. MAT No.1192 of 2017 has been preferred by the respondent No. 21 in the writ petition, being the appointee, whose appointment was declared to be a nullity. He is represented by Mr. L.K. Gupta, Learned Senior Advocate, ably assisted by Mr. Ataraup Banerjee and instructed by Mr. Tapodip Gupta, Learned Advocates. These appeals were consolidated and heard analogously, alongwith the interlocutory applications made therein, by consent of the parties expressed through their learned Advocates.

2. In the writ petition, the principal challenge was to the appointment of persons pursuant to the declaration of vacancies by the employer, the Belda College, on May 24, 2016. The relevant principal prayers are as follows: -

a. A writ of and/or in the nature of Mandamus to issue commanding the respondent authorities concerned to take immediate and/or appropriate steps to cancel all the appointments already given to the candidates thereby cancelling and/or setting aside the advertisement being memo No. .B.C./1626/16 dated May 24, 2016 from the office of the Principal, Belda College, District – Paschim Medinipur declared about the vacancies at Belda College in the category of Group C & Group D.

b. A writ of and/or in the nature of Mandamus to issue commanding the respondent authorities to take immediate and/or appropriate steps to issue a new notification thereby inviting applications from various candidates for Job Vacancy at Belda College.

c. A writ of and/or in the nature of Mandamus to issue commanding the respondent authorities to consider the representation dated January 4, 2017 made by the petitioner before the respondent authorities and dispose of the same by passing a reasoned order after giving a chance of hearing to the petitioner within a stipulated period of time.

d. A writ of and/or order and/or direction in the nature of Certiorari do issue calling upon the respondents and/or each of them, their servants, agents or assigns to certify and transmit to this Hon'ble Court all the records relating to the instant matter so that necessary orders may be passed and conscionable justice be done.

e. Rule Nisi in terms of prayers (a) to (d) above.

f. An Order may be passed thereby directing the respondent authorities to take immediate steps to cancel all the appointments already given to the candidates thereby declaring the advertisement being memo No. .B.C./1626/16 dated May 24, 2016 from the office of the Principal, Belda College, District – Paschim Medinipur as illegal.

g. An Order may be passed thereby calling for a status report from the respondent authorities disclosing the names of candidates to whom appoint (sic!) already given by virtue of the advertisement being memo No. .B.C./1626/16 dated May 24, 2016 from the office of the Principal, Belda College, District – Paschim Medinipur and the reasons thereof.

h. Ad-interim order in terms of prayer (f).

i. Costs of and incidental to this application be paid by the respondents.

j. Such further and/or other order or orders be passed and/or direction or directions be given as to this Hon'ble Court may deem fit and proper.

3. The selection process impugned resulted in the appointment of those persons who had been originally impleaded as respondents No.15 to 22 in the writ petition, but pursuant to leave being granted by the Learned Single Judge, on February 22, 2017, the respondents No.15 to 20 and 22 were struck off the array and the register and their names and styles expunged, presumably because only the respondent No. 21 in the writ petition had obtained appointment as a person with disability, since, as shall become clearer, it is on the point of whether the respondent No. 21 in the writ petition with an alleged disability of hearing impairment was entitled to be appointed to a post which the petitioner claims was to

be reserved for a person with the disability of visual impairment, which was at res in the writ petition and is in these appeals.

4. The appeals are contested by the Writ Petitioner – who is the respondent No. 15 in MAT No.1191 of 2017 and the respondent No. 1 in MAT No.1192 of 2017 – while the official respondents have joined together to impeach, once again before the Appellate court, the locus of the writ petitioner to have instituted the writ petition and have thus supported the Appellants. On merits, the records do not show that the Appellants have much to say, though that did not stop them from going on and on like an ocean of stories.

5. Perhaps this discussion will be more comprehensible if we infuse it with the bare facts necessary to appreciate the scope of the controversy.

THE FACTS:

6. The Appellant in MAT No.1191 of 2017 declared job vacancies at Belda College in Group C and Group D categories by a Memo No.B.C./1626/16 dated May 24, 2016.These job vacancies, admittedly, were covered by the model 100-point roster prescribed by the State of West Bengal. This roster was prescribed in exercise of powers conferred by Section 14 read with Sections 13 and 3(b) of the West Bengal Regulation of Recruitment in State Government Establishments and Establishments of Public Undertakings, Statutory Bodies, Government Companies and Local Authorities Act, 1999. This roster was made with due regard to the 100-point roster introduced by the Backward Classes Welfare Department, by Notification No.6320-BCW/MR-84/10 dated

September 24, 2010 in compliance with the provisions of the West Bengal Scheduled Caste and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976 (WB Act 27 of 1976) and the West Bengal Commission for Backward Classes Act, 1993 (WB Act 1 of 1993). His Excellency the Governor of West Bengal was also pleased to include as part of the said 100-point roster directions for reservation for persons with disabilities as provided under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 by way of implementing it in West Bengal. By this each of the three points being 12th, 42nd and 72nd of the 100-point roster, reserved for the persons with disabilities were and are mandatorily to be filled by persons suffering from (i) Blindness or Low Vision (ii) Hearing Impairment and (iii) Loco-motor disability or Cerebral Palsy, respectively in order to ensure one per cent reservation for each of the three categories of persons with disabilities. Relaxation of the upper age-limits for Scheduled Castes, Scheduled Tribes, Other Backward Classes Category A and Category B, persons with disabilities, ex-servicemen and exempted categories applied in respect of the criteria prescribed for filling the vacancies meant for the respective categories.

7. It is the case of the writ petitioner (respondent No. 15) that according to the 100-point roster, the 12th vacancy was to be reserved for persons suffering from the disability of “blindness or low vision” or visual impairment and not for any person suffering from the disability of hearing impairment (paragraph 12 of the writ petition). He relies upon Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 for this proposition. This position is admitted by the parties. It is the further case of the writ

petitioner that the Appellant in MAT No.1192 of 2017 – who is the respondent No. 21 in the writ petition – if he at all suffers from any disability, according to the disability certificate (whose validity and authenticity he also disputes) issued by the competent authority,it is from hearing impairment. Despite the aforesaid, the said Appellant in MAT No.1192 of 2017 was not only allowed to participate in the process of selection for the vacancies in the post of Group D referred to in paragraph 4 by the authorities of the Belda College but was selected and appointed as a Laboratory Attendant (Zoology). The writ petitioner has challenged not merely this appointment as being wholly without jurisdiction but the entire process of selection on the ground that it was politically motivated, vitiated by nepotism, and that the said Appellant in MAT No.1192 of 2017 (respondent No. 21 in the writ petition) was not suffering from any disability since he had a driver's licence and had been certified by the Life Insurance Corporation of India authorities who had insured his life as not having any disability and was at any event not disabled by way of visual impairment which would allow him to be selected for the vacancy according to the 12th point of the said 100-point roster. It is the writ petitioner's specific averment that the name of the respondent No. 21 had never been sponsored by the special employment exchange. This is the briefest possible summary of the case of the writ petitioner.

8. The Appellants in both the appeals have impeached primarily the locus of the Writ Petitioner to impeach either the appointment or the process of selection. It is the case of both the Appellants that where the Writ Petitioner did not even apply for the selection process, or offer himself for selection, the writ petition did not lie. This is a restatement of

the stand taken before the Learned Single Judge that the writ petitioner not having participated nor attempted to participate in the selection process is estopped from challenging it. I am thankful that the restatement was made, on the same facts and pleadings, because I have always been under the impression that the true position of law in India has been that one who has participated in a selection process and after being unsuccessful has thereafter challenged the process itself, is deemed to have waived his right to do so, unless he pleads and establishes that his challenge was on the basis of something he could not have known before the results were declared and had not, in fact, known it.

9. A weaker challenge was on the ground submitted from the Bar that the writ petition was affirmed only on January 25, 2017, when the selection process had been initiated on May 24, 2016 and the interviews were held on October 30 and 31, 2016 and the writ petition was made only thereafter for extraneous purposes, at someone else's behest, since there was an earlier writ petitionchallenging the selection process at the instance of someone who had participated in the process but that had been unsuccessful. This was in the case of W.P. No.27987 (W) of 2016 [Kartik Maity—v—Vidyasagar University and Others] which was dismissed by a Learned Single Judge of this Court on December 14, 2016. The collegeauthorities being the Appellant in MAT No.1191 of 2017 would suggest that the said earlier writ petitioner challenged the appointment of the appellant in MAT No. 1192 of 2017 made on November 2, 2016, on the ground that he had no disability and after its dismissal, at his behest, the instant writ petition was filed by the respondent No.1 in MAT No.1192 of 2017.It was argued that the fact of

the earlier writ petition had been suppressed in the present writ petition and further, there was no explanation for the delay of the writ petitioner in even making a representation to the authorities and why he chose to wait until the entire process was completed and appointments made, before challenging the memorandum declaring the vacancies issued on May 24, 2016 and thus the writ petition had deserved the fate of dismissal. Very strangely, in the copy of the writ petition which was annexed to CAN 6705 of 2017 in MAT No.1191 of 2017 preferred by the college authorities, while there is no averment about the earlier writ petition, I find that the order dated December 14, 2016 appears in between Annexures "P6" and "P7", at page 85 which appears also at page 75 of CAN 6706 of 2017, in MAT No.1192 of 2017. I have found out that in the original writ petition it appears also at page 53. Therefore, though there is no averment about the earlier writ petition, at least the order of dismissal has been annexed. I quite fail to understand the rationale behind annexing an order which is material without averring anything about it in the body of the writ petition – if this is a new style of trying to avoid the allegation of abuse of process, I must condemn it in the strictest of terms. However, since both the sides relied upon it, perhaps it cannot be said that there was suppression of the earlier writ petition and its order – it can be explained, as it was, from the Bar, that it is a case of faulty draftsmanship.

10. On merits, the Appellants have also referred to the fact that the 12th point in the 100-point roster, though reserved for persons with disability of visual impairment, was in this case in respect of the post of Laboratory Attendant (Zoology) and that in the event the order of the Learned Single Judge stands, "in that event the laboratory work cannot

be performed by a 100% blind man" (paragraph 10 of CAN 6705 of 2017). The Appellant Principal has in fact averred at paragraph 3 of CAN 6705 of 2017 "in terms of such advertisement as well as sponsored list, the blind man was not available but the other category like Hearing Impairment and Loco motor Cerebral Palsy was available. Accordingly, the resolution was taken to that extent that Zoology is a laboratory based subject and the blind man cannot do such work for laboratory to assist thereby and it was resolved by the resolution of the Governing Body that the present post, i.e., 12th post to be filled up by the persons applied from the PWD category and the blind man is not available. Accordingly, the 42nd post earmarked as PWD Category should be filled up by the blind man/low vision." (Paragraph 5 of CAN 6705 of 2017).

11. An additional point was raised by Mr. L.K. Gupta, Learned Senior Advocate appearing on behalf of the Appellant in MAT No.1192 of 2017, that the statute as interpreted by the Hon'ble Supreme Court spoke of reservation of posts for the disabled after identifying the posts according to the roster, and not of merely reserving vacancies. It was his submission that the purpose of identification of the posts for reservation according to the 100-point roster in case of the disabled was to ensure that mechanical mapping of a point in the roster with any post whatsoever would not be done; if the State of West Bengal had done this at the outset, before the college had duly notified vacancies, then situations like the present, where a person who was 100% visually impaired was supposed to be the Laboratory Attendant (Zoology) would not have arisen. After all, teachers and laboratory attendants are appointed not just for their livelihood but to instruct students, which is the purpose for which a college is established and runs – if the person

appointed as a laboratory attendant is physically incapable of attending in the laboratory the students will suffer. It was his further case that colleges not meant primarily for providing employment to the incompetent in the name of affirmative action, but for the benefit of the students.

12. On behalf of the writ petitioner the challenge to his locus to institute and maintain the writ petition was explained thus in the pleadings: -

Paragraph 17 of the writ petition: "The petitioner states that the name of Sri Keshab Chandra Dey was not recommended by the special employment exchange and the written examination was conducted on plain papers violating the norm and regulations prescribed for conducting the examinations. The petitioner further states that in any recruitment year if any vacancy under section 33, cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no parson (sic)with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability."

Paragraph 18 of the writ petition: "The petitioner states that he is 100% blind having certificate to that effect and Schedule Caste certificate as well and he is otherwise eligible to sit in the aforesaid examination on the next year but he will not be able to sit for the examination due to nepotism since the post for exempted category of visual impairment has been fulfilled by Sri Keshab Chandra Dey and the same can't be carried forward on the next year."

Paragraph 19 of the writ petition: "The petitioner states that in the present case since the post for exempted category of visual impairment has already been filled up by a person who is neither visually impaired nor suffers from any other disability, the petitioners write (sic for "right") to participate in the next year examination for Group D post unreserved (E.C.) has been curtailed. Thus the petitioner was compelled to send a representation dated January 4, 2017 and the same was duly received by the respondent authorities on respective dates. In the said representation the petitioner has prayed fora direction to cancel all the appointments already given to the candidates thereby declaring the notification dated 24.5.2016 (for Job Vacancy at Belda College) as illegal on an urgent basis preferably within a period of three days from the date of communication of the letter. The respondent authorities are sitting idle in spite of receiving the aforesaid representation thereby not taking appropriate steps against the illegality."

13. Therefore, the writ petitioner has made out a case that he is not disentitled to institute the writ petition because he did not apply for the selection process in the recruitment year 2016-2017. It is his case that in case there was non-availability of a suitable person with disability – in this case, for the purposes of the 12th point in the 100-point roster – he was entitled to have that vacancy carried forward by the Belda College to the succeeding recruitment year, when he could have applied for the selection process to that post, and that his cause of action arose when a person whose disability though not of visual impairment was nonetheless appointed to that vacancy covered by the 12th point of the roster, thereby depriving him of a right to participate in the process of selection to that post under such 12th point of the 100-point roster in the succeeding year. Thus, he says, he has sufficient locus.

14. I pass over the puerile attempt made by Mr. Soumen Dutta, the Learned Advocate appearing for the college authorities, to mislead the Court by trying to rely upon obviously doctored registers and documents from which he attempted to show that the said 12th point in the roster, being a new post created for the first time on January 22, 2016 was in the 100 point roster for non-teaching staff with effect from March 27, 1990 by Notification being G.O. No.90 – Edn (C.S.)/ 4E—44/95, whereas the post created by the same notification on the same date being 13th point in the roster was in the 100 point roster for non-teaching staff with effect from March 1, 2011, on two different but consecutive pages of the register. The originals of the register were called for and interpolation was detected from the different quality and age of the said consecutive pages. I do not ignore this abuse of process but apart from a faint feeling of disgust, it is not relevant to the adjudication of the questions raised in the appeals.

15. Based on the above, the Learned Single Judge recorded the reliance placed by the parties on the provisions of Sections 33 and 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, quoted the same and referred to the following authoritative decisions of the Hon'ble Supreme Court: -

a. In Re Ramchandra Murarilal Bhattad and Others—v—State of Maharashtra and Others reported in (2007) 2 SCC 588 at paragraph 47.

b. In Re: Bhavnagar University—v—Palitana Sugar Mill (P) Ltd. and Others reported in (2003) 2 SCC 111 at paragraph 40,

Both the judgements were cited as authorities for the proposition that where a power is given to do a certain thing in a certain way the thing

must be done in that way or not at all and that other methods of performance are necessarily forbidden.

16. The Learned Single Judge also analyzed the facts of the case to come to the conclusion that the correct statutory procedure was not followed and that the decision of the Director of Public Instructions, being the appropriate authority in the government for approval of interchange of categories of disability was not a prior decision but an ex-post-facto decision not permitted by law. Accordingly, the writ petition was allowed by the order dated July 5, 2017 in the manner mentioned in paragraph 1 of this judgement.

17. Now that the skeleton of the case made out by the parties has been noted, time has come to flesh it out with the law, not only the statutory provisions, but also their authoritative interpretation.

THE LAW

18. Neither before the Learned Single Judge nor before the appellate court did either party argue the matter based on the law which came into force with effect from April 19, 2017 being the Rights of Persons with Disabilities Act, 2016. This law came into force prospectively. Therefore, I too shall restrict myself to the provisions of the law which prevailed at the time when the memorandum was issued by the college authorities (employers) declaring vacancy and which was in vogue when the selection process was initiated and completed, being the said Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

19. Both before this Court and the Learned Single Judge, the parties have relied upon the provisions of Sections 33 and 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full

Participation) Act, 1995. In addition, before this Court, the Appellant in MAT No.1192 of 2017 has relied upon Section 32 of the said Act of 1995. It will be profitable to see what they provide.

PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995

"Section 32: - Identification of posts which can be reserved for persons with disabilities.

Appropriate Governments shall--

(a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology."

"Section 33 - Reservation of Posts: Every appropriateGovernment shall appoint in every establishment such percentage of vacancies not less than three per cent, for persons or class of persons with disability of which one per cent, each shall be reserved for persons suffering from--

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy,

in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

"Section 36 – Vacancies not filled up to be carried forward:

Where in any recruitment year any vacancy under section 33, cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government."

20. Based on the aforesaid, Mr. L.K. Gupta, Learned Senior Advocate, has urged that there is a distinction between "posts" and "vacancies". First there must be identification of posts, and when vacancies are declared, the reservation in respect of the vacancies to those posts would apply. He would argue that here the State of West Bengal, being the appropriate government, not having identified the posts, reservation may

be there, but an appointment cannot be vitiated by not following Section 33 or Section 36 of the Act of 1995 since appointment to a vacancy in a post reserved for the disabled requires as a precondition, identification of the post which can be filled by a person with a particular disability. By way of example he submits that where the nature of work in a post entails that a person must be able to see, being visually impaired will defeat the purposes of filling the post; he submits that in such a case there may be identification of a post with a particular type of disability as provided by the statute. He relies upon the judgement of the Hon'ble Supreme Court speaking through a Bench of 3 Hon'ble Judges, in the case of **Union of India and Another—v—National Federation of the Blind and Others**, reported in **(2010) 13 SCC 772** which has explained the ratio of the judgement in the case of **Government of India through Secretary and Another—v—Ravi Prakash Gupta and Another**, reported in **(2010) 7 SCC 626**.

21. However, this judgment, if read in its entirety, does not aid the Appellant in MAT No.1192 of 2017. Rather than summarize the judgment of the Apex Court in my own words, I think it would be better if the ex-cathedra pronouncement and the ratio are allowed to speak for themselves.

22. It has been held by the Hon'ble Supreme Court in the case of **National Federation of the Blind** (*supra*), as follows: -

30. The question for determination raised in this case is whether the reservation provided for the disabled persons under Section 33 of the Act is dependent upon the identification of posts as stipulated by Section 32. In *Ravi Prakash case* [(2010) 7 SCC 626 : (2010) 2 SCC (L&S) 448] , the Government of India sought to contend that since they have conducted the exercise of identification of posts in civil services in terms of Section

32 only in the year 2005, the reservation has to be computed and applied only with reference to the vacancies filled up from 2005 onwards and not from 1996 when the Act came into force. This Court, after examining the interdependence of Sections 32 and 33 viz. identification of posts and the scheme of reservation, rejected this contention and held as follows: (SCC pp. 633-34, paras 25-27, 29 & 31)

"*25.* ... The submission made on behalf of the Union of India regarding the implementation of the provisions of Section 33 of the Disabilities Act, 1995, only after identification of posts suitable for such appointment, under Section 32 thereof, runs counter to the legislative intent with which the Act was enacted. To accept such a submission would amount to accepting a situation where the provisions of Section 33 of the aforesaid Act could be kept deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected. Accordingly, the submission made on behalf of the Union of India that identification of Groups A and B posts in the IAS was undertaken after the year 2005 is not of much substance.

26. As has been pointed out by the High Court, neither Section 32 nor Section 33 of the aforesaid Act makes any distinction with regard to Groups A, B, C and D posts. They only speak of identification and reservation of posts for people with disabilities, though the proviso to Section 33 does empower the appropriate Government to exempt any establishment from the provisions of the said section, having regard to the type of work carried on in any department or establishment. No such exemption has been pleaded or brought to our notice on behalf of the petitioners.

27. It is only logical that, as provided in Section 32 of the aforesaid Act, posts have to be identified for reservation for the purposes of Section 33, but such identification was meant to be simultaneously undertaken with

the coming into operation of the Act, to give effect to the provisions of Section 33. The legislature never intended the provisions of Section 32 of the Act to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate Government to make appointments in *every establishment*.

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29. While it cannot be denied that unless posts are identified for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the Act, as submitted by the learned ASG, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.

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31. We, therefore, see no reason to interfere with the judgment of the High Court impugned in the special leave petition which is, accordingly, dismissed with costs. All interim orders are vacated. The petitioners are given eight weeks' time from today to give effect to the directions of the High Court."

(emphasis in original)

31**.** In the light of the above pronouncement, it is clear that the scope of identification comes into picture only at the time of appointment of a person in the post identified for disabled persons and is not necessarily relevant at the time of computing 3% reservation under Section 33 of the Act. In succinct, it was held in *Ravi Prakash Gupta* [(2010) 7 SCC 626 : (2010) 2 SCC (L&S) 448] that Section 32 of the Act is not a precondition for computation of reservation of 3% under Section 33 of the Act rather Section 32 is the following effect of Section 33.

32. Apart from the reasoning of this Court in *Ravi Prakash Gupta* [(2010) 7 SCC 626 : (2010) 2 SCC (L&S) 448] , even a reading of Section 33, at the outset, establishes vividly the intention of the legislature viz. reservation of 3% for differently abled persons should have to be computed on the basis of total vacancies in the strength of a cadre and not just on the basis of the vacancies available in the identified posts. There is no ambiguity in the language of Section 33 and from the construction of the said statutory provision only one meaning is possible.

33**.** A perusal of Section 33 of the Act reveals that this section has been divided into three parts:

33.1**.** The first part is:

"33**. *Reservation of posts***.—Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability…."

It is evident from this part that it mandates every appropriate Government shall appoint a minimum of 3% vacancies in its establishments for persons with disabilities. In this light, the contention of the Union of India that reservation in terms of Section 33 has to be computed against identified posts only is not tenable by any method of interpretation of this part of the section.

33.2**.** The second part of this section starts as follows:

"… of which one per cent each shall be reserved for persons suffering from—

(*i*) blindness or low vision;

(*ii*) hearing impairment; and

(*iii*) locomotor disability or cerebral palsy,

in the posts identified for each disability:"

From the above, it is clear that it deals with distribution of 3% posts in every establishment among 3 categories of disabilities. It starts from the word "of which". The word "of which" has to relate to appointing not less than 3% vacancies in an establishment and, in any way, it does not refer to the identified posts. In fact, the contention of the Union of India is sought to be justified by bringing the last portion of the second part of the section viz. "… identified posts" in this very first part which deals with the statutory obligation imposed upon the appropriate Government

to “appoint not less than 3% vacancies for the persons or class of persons with disabilities”. In our considered view, it is not plausible in the light of established rules of interpretation. The minimum level of representation of persons with disabilities has been provided in this very first part and the second part deals with the distribution of this 3% among the three categories of disabilities. Further, in the last portion of the second part the words used are “in the identified posts for each disability” and not “of identified posts”. This can only mean that out of minimum 3% of vacancies of posts in the establishments 1% each has to be given to each of the 3 categories of disability viz. blind and low vision, hearing impaired and locomotor disabled or cerebral palsy separately and the number of appointments equivalent to the 1% for each disability out of total 3% has to be made against the vacancies in the identified posts. The attempt to read identified posts in the first part itself and also to read the same to have any relation with the computation of reservation is completely misconceived.

33.3**.** The third part of the section is the proviso which reads thus:

“Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.”

The proviso also justifies the abovesaid interpretation that the computation of reservation has to be against the total number of vacancies in the cadre strength and not against the identified posts. Had the legislature intended to mandate for computation of reservation against the identified posts only, there was no need for inserting the

proviso to section which empowers the appropriate Government to exempt any establishment either partly or fully from the purview of the section subject to such conditions contained in the notification to be issued in the Official Gazette in this behalf. Certainly, the legislature did not intend to give such arbitrary power for exemption from reservation for persons with disabilities to be exercised by the appropriate Government when the computation is intended to be made against the identified posts.

34**.** In this regard, another provision of the said Act also supports this interpretation. Section 41 of the said Act mandates the appropriate Government to frame incentive schemes for employers with a view to ensure that 5% of their workforce is composed of persons with disabilities. The said section is reproduced hereinbelow:

"**41.** ***Incentives to employers to ensure five per cent of the workforce is composed of persons with disabilities***.—The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, provide incentives to employers both in public and private sectors to ensure that at least five per cent of their workforce is composed of persons with disabilities."

35**.** Thus, on a conjoint reading of Sections 33 and 41, it is clear that while Section 33 provides for a minimum level of representation of 3% in the establishments of appropriate Government, the legislature intended to ensure 5% of representation in the entire workforce both in public as well as private sector."

37. Admittedly, the Act is a social legislation enacted for the benefit of persons with disabilities and its provisions must be interpreted in order to fulfil its objective. Besides, it is a settled rule of interpretation that if the language of a statutory provision is unambiguous, it has to be interpreted according to the plain meaning of the said statutory provision. In the present case, the plain and unambiguous meaning of Section 33 is that every appropriate Government has to appoint a minimum of 3% vacancies in an establishment out of which 1% each shall be reserved for persons suffering from blindness and low vision, persons suffering from hearing impairment and persons suffering from locomotor disability or cerebral palsy.

38. To illustrate, if there are 100 vacancies of 100 posts in an establishment, the establishment concerned will have to reserve a minimum of 3% for persons with disabilities out of which at least 1% has to be reserved separately for each of the following disabilities: persons suffering from blindness or low vision, persons suffering from hearing impairment and the persons suffering from locomotor disability or cerebral palsy. Appointment of 1 blind person against 1 vacancy reserved for him/her will be made against a vacancy in an identified post for instance, the post of peon, which is identified for him in Group D. Similarly, one hearing impaired will be appointed against one reserved vacancy for that category in the post of Store Attendant in Group D post. Likewise, one person suffering from locomotor disability or cerebral palsy will be appointed against the post of “Farash”, Group D post identified for that category of disability. It was argued on behalf of the Union of India with reference to the post of driver that since the said post is not suitable to be manned by a person suffering from blindness, the above interpretation of the section would be against the administrative exigencies. Such an argument is wholly misconceived. A given post may not be identified as suitable for one category of disability, the same could be identified as suitable for another category or categories of disability

entitled to the benefit of reservation. In fact, the second part of the section has clarified this situation by providing that the number of vacancies equivalent to 1% for each of the aforementioned three categories will be filled up by the respective category by using vacancies in identified posts for each of them for the purposes of appointment.

39. It has also been submitted on behalf of the appellants herein that since reservation of persons with disabilities in Group C and D has been in force prior to the enactment and is being made against the total number of vacancies in the cadre strength according to the OM dated 29-12-2005 but the actual import of Section 33 is that it has to be computed against identified posts only. This argument is also completely misconceived in view of the plain language of the said section, as deliberated above. Even for the sake of argument, if we accept that the computation of reservation in respect of Group C and D posts is against the total vacancies in the cadre strength because of the applicability of the scheme of reservation in Group C and D posts prior to enactment, Section 33 does not distinguish the manner of computation of reservation between Group A and B posts or Group C and D posts respectively. As such, one statutory provision cannot be interpreted and applied differently for the same subject-matter.

40. Further, if we accept the interpretation contended by the appellants that computation of reservation has to be against the identified posts only, it would result into uncertainty of the application of the scheme of reservation because experience has shown that identification has never been uniform between the Centre and the States and even between the departments of any Government. For example, while a post of middle

school teacher has been notified as identified as suitable for the blind and low vision by the Central Government, it has not been identified as suitable for the blind and low vision in some States such as Gujarat and J&K, etc. This has led to a series of litigations which have been pending in various High Courts. In addition, Para 4 of the OM dated 29-12-2005 dealing with the issue of identification of jobs/posts in sub-clause (b) states that list of the jobs/posts notified by the Ministry of Social Justice and Empowerment is not exhaustive which further makes the computation of reservation uncertain and arbitrary in the event of acceptance of the contention raised by the appellants."

23. On the basis of the above ratio, the Hon'ble Supreme Court was pleased to pass the following directions: -

"Directions

55**.** In our opinion, in order to ensure proper implementation of the reservation policy for the disabled and to protect their rights, it is necessary to issue the following directions:

55.1**.** We hereby direct the appellant herein to issue an appropriate order modifying the OM dated 29-12-2005 and the subsequent OMs consistent with this Court's order within three months from the date of passing of this judgment.

55.2**.** We hereby direct the "appropriate Government" to compute the number of vacancies available in all the "establishments" and further identify the posts for disabled persons within a period of three months from today and implement the same without default.

55.3. The appellant herein shall issue instructions to all the departments/public sector undertakings/government companies declaring that the non-observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and the Nodal Officer in department/public sector undertakings/government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default."

24. It is therefore not possible to accept the submissions of Mr. L.K. Gupta, Learned Senior Advocate, that unless the posts are identified, there can be neither any reservation nor any appointment made de hors the reservations mandated by the statute can be said to be vitiated. The Hon'ble Supreme Court, as extracted above, on considering the conjoint effect of Sections 32, 33 and 36 of the Act of 1995 has clearly laid down the law that "The attempt to read identified posts in the first part itself and also to read the same to have any relation with the computation of reservation is completely misconceived" and the Apex Court has also held that the argument thatthe actual import of Section 33 is that it has to be computed against identified posts only is an argument which is also completely misconceived. The law as laid down and interpreted by the Hon'ble Supreme Court is without any scope of ambiguity and in fact non-observance of the scheme of reservation as laid down by the Apex Court has been held to be an act of non-obedience. Therefore, I do not hesitate to hold that where the scheme of reservation which entails reservation of 3% of the vacancies such that one percent each is for each of the specified categories of disability, has not been adhered to, the selection process in respect of the person alleged to be disabled, is vitiated and a nullity. Admittedly, the reservation was of 3% of posts of which 1% was for visually impaired. Admittedly, the 12th item in the 100

point roster – applicable in the present case – was for a person with the disability of visual impairment. Admittedly, the person who was appointed to such post appearing as the 12th item in the roster (Laboratory Assistant (Zoology)] was not visually impaired, but even according to his own case, was suffering from hearing impairment. Admittedly therefore, there has been violation of the statutory provisions as implemented in West Bengal by giving the said appellant in MAT No.1192 of2017 employment as a Laboratory Attendant (Zoology) and the law laid down in the case of **National Federation of the Blind** (*supra*). I therefore agree with the finding of the Learned Single Judge in this regard.

25. The appellant in MAT No. 1192 of 2017 claims that his appointment was made on November 2, 2016 and the record shows that it is correct.He says that be college authorities resolved on October 13, 2016 to "earmark the post of Lab Attendant (Zoology) for PWD with Hearing impairment and the next 42nd post be reserved for 100% blind/Low Vision as per 100 point roster." The college authorities, (appellant in MAT 1191 of 2017) submit that not only was the appointment made pursuant to the said resolution of the governing body of the college, the college authorities also sought "permission to carry forward 12th Position (PWD) of the 100 Point Roster earmarked for Blindness or Low Vision Category to 42nd position (P.W.D.) of the R.O.A. in case of appointment of Lab. Attendant in Zoology Department of Belda College", from the appropriate government. Unfortunately, the permission was sought from the appropriate government only on March 10, 2017 whereas the resolution was made on October 13, 2016 and the appointment was given on November 2, 2016. Quite apart from the question of whether this could have been done under the first part of Section 36 of the said Act of 1995, evenwhen such an inter change is to

be made, the statute by way of the proviso to Section 36 aforesaid mandates “prior approval of the appropriate Government”.In the present case, an approval sought on March 10, 2017 for an appointment made on November 2, 2016 after an interchange was resolved to be done on October 13, 2016 is admittedly not a prior approval.

26. Therefore, on the face of the records it an admitted position that the college authorities did not take prior approval but admittedly inter changed the vacancies amongst the three categories and only after giving appointment, and after the illegality had been detected by the writ petitioner and representation made against it, sought approvalto do so. The judgment in the case **National Federation of the Blind** (*supra*) of does not make the proviso or infact any part of Section 36 of the Act of 1995 capable of such relaxation whereby the mandate for prior approval can be converted to a subsequent approval which too was applied for only after the present writ petitioner made his representation on January 4, 2017 challenging the illegality of the entire selection process and appointment. At best it is an afterthought. At worst it is a naked attempt by the college authorities to exploit the opportunities which are rife for the unscrupulous in the chasm created by education and employment in educational institutions.

27. I am thus completely in agreement with the finding of the learned single judge as mentioned in paragraph ‘D’ of the impugned order dated July 4, 2017 that the post facto approval of the inter change in the vacancies given after the appointment is not merely illegal but is an egregious violation of the statutory provision regarding prior permission rendering the entire process into a nullity by way procedural ultra vires in terms of the judgements referred to by the learned single judge both in the case of **Ramchandra Murarilal** (*supra*) and **Bhavnagar University**

(*supra*). I therefore affirm the finding of the Learned Single Judge in this regard.

28. Lastly, I come to the question of whether in terms of Section 36 and its Proviso, of the Act of 1995, the vacancies could at all have been exchanged, even if there had been prior approval. The locus of the writ petitioner as pleaded by him and extracted by me, in the earlier portions of this judgement, is inextricably connected with the question. Section 36 has been extracted in its entirety in paragraph 19 of this judgement and the effect of the said Act of 1995 so far as reservation and the mandate on the appropriate governments has also been dealt with extensively in paragraphs 22 and 23 of this judgement. It only remains for me to construe Section 36 and its proviso aforesaid, to ascertain when interchange of the vacancies reserved for the different categories of those with disability can be done.

29. As I scan Section 36 and its proviso, it appears to me that the proper manner of construing them, keeping in mind the plain meaning of the words while being guided by the purpose of the provision while considering the beneficial and welfare statute as a whole, is as follows: -

a. A situation may arise that in any recruitment year a vacancy within the meaning of Section 33 of the Act of 1995, reserved for a disabled person cannot be filled up either because there is no suitable person with that specified kind of disability or for other sufficient reason.

b. In such case the vacancy (the use of the singular rather than the plural is to be noted) shall be carried forward in the succeeding recruitment year.

c. If in the recruitment year referred to in sub-paragraph (b) above also a suitable person with disability is not available, then and only then

it may first be filled by interchange among the three categories. This presupposes that there is a vacancy according to the 100 pointroster reserved for a person with a specified disability among the three categories of disabilities mentioned in Section 33 of the Act of 1995, and there is no suitable candidate with that type of disability but there are other candidates with some other category of a specified disability within the meaning of Section 33. Only then can there be an interchange amongst the categories for which reservation has been made.

d. Only if there is no person with any of the categories of disability available for the post in even that year as referred to in sub-paragraph (b) above, the employer shall fill up the vacancy by a person other than a person with disability.

e. The proviso, which carves out an exception, applies only when the nature of vacancies (plural and not singular) in the establishment is such that a given category of persons cannot be employed, and only then would the employer have a right to apply to the appropriate government for approval of interchange of the of the vacancies among the three categories, and only after such approval is granted by the appropriate government, can the vacancies be interchanged and appointment be given.

30. If the above interpretation of Section 36 of the Act of 1995 is applied to the present case, it will be clear that the statute envisaged that once the applications were received by the employer and the names sponsored by the special employment exchange had been received, for the posts for which vacancies were declared, the employer being the college authorities were required to screen the applications to find who were the eligible candidates for the reserved categories and among them, who were the eligible candidates for the reservation made for the three

categories of persons with disability, according to the said 100 point roster. The creation of new posts notified by the appropriate government on January 22, 2016 clearly indicated that of the 7 posts according to the 100 pointroster, the post of Laboratory Attendant (Zoology) was the 12thpoint in the roster, and was thus reserved for a person with disability. The order notified by the appropriate government by Notification dated March 1, 2011 bearing No. 50-Emp/1M-25/98 issued by the Chief Secretary to the Government of West Bengal at Note 2, clearly mentions that the 12thpoint in the roster was reserved for persons with the disability of Blindness or Low Vision. It was the only vacancy declared by the college authorities for a person with disability as aforesaid. Therefore, once the college authorities found that there was no suitable person with such disability for that only vacancy reserved for a person with the disability of blindness or low vision, they could do either of two things: to either carry the vacancy forward to the succeeding recruitment year, and if in the succeeding recruitment year also there was no suitable candidate with that specified category of disability (blindness or low vision) to interchange the vacancy with a person having some other category of a specified disability without seeking prior permission *OR IN THE ALTERNATIVE* to apply to the appropriate government for prior permission to interchange the vacancies such that the said vacancy in the 12thpoint of the roster could be filled by a person with some other category of a specified disability if the necessity of filling the vacancy of a Laboratory Attendant in Zoology could not permit such delay. Once the college authorities decided not to ask for prior approval and went ahead with the selection process up to the interview, it was no longer open for them to interchange the vacancy as they did. They could not even ask for approval thereafter, as I have held above. They had just the duty to carry forward the said vacancy

ascribed to the 12th point of the roster to the succeeding recruitment year and thereafter proceed as stated above. If they had carried forward the vacancy aforesaid to the succeeding recruitment year instead of appointing the Appellant in MAT No.1192 of 2017 to the said vacancy, though he was not suffering from the disability of blindness or low vision, then the Writ Petitioner would have had the opportunity to participate in the said selection process for the said succeeding year. However, by appointing the Appellant in MAT No.1192 of 2017 to the said vacancy, this right of the writ petitioner was taken away by the college authorities in collusion with the State of West Bengal, the appropriate government and its functionaries. Therefore, the writ petitioner has rightly averred that he has locus to maintain the writ petition and is a person aggrieved by such appointment and such vitiated selection process even without having participated in the process of selection initiated by the declaration of vacancy on May 24, 2016.

31. So far as the question of delay in approaching the writ court is concerned, from the above analysis it ought to be clear that the writ petitioner was aggrieved by the fact that the appointment, without prior approval from the appropriate government for any exchange of the vacancies inter se the specified categories of disability, of a person who was not suffering from the disability of blindness or low vision was made for the vacancy reserved for such a disability. The appointment was admittedly made on November 2, 2016. Therefore, such cause of action did not arise before November 2, 2016. The writ petitioner made his representation on January 4, 2017 and the writ petition was affirmed on January 25, 2017 on the specific allegation that the respondent authorities in the writ petition did not ameliorate the grievances raised. This delay of a little more than two months in making the representation and around two months and 23 days in filing the writ petition from the

arising of the cause of action, does not appear to be such a delay – keeping in mind the utter nullities brought before the Court – as would disentitle the writ petitioner from availing of equitable remedies. Of course, it would have been better if the writ petitioner had explained this in so many words, instead of leaving the Court to come to the logical inference from the records annexed to the writ petition. That may have been the fault of the draftsman – since learned advocates draft the writ petition and the litigants take responsibility for it – but I cannot shut my eyes to the blatant fact that it was only after the writ petition was instituted after affirmation on January 25, 2017, that the college authorities woke up to the fact, as late as on March 10, 2017, that what they had done was illegal and only then applied for approval of the interchange in the vacancies for persons with disability, as aforesaid. The writ petitioner could have in fact waited until March 10, 2017 to take advantage of this nullity before filing the writ petition. Therefore, I hold that the writ petition is not barred by reason of any unconscionable or unreasonable delay in approaching the Court.

32. Thus, the entire selection process and the appointment of the Appellant in MAT No.1192 of 2017 is incurably and fatally vitiated by procedural ultra vires as I have held above and are nullities. They cannot be sustained.

33. Accordingly I also affirm these findings of the Learned Single Judge as in Findings B), C) and E) of the judgement dated July 5, 2017 impugned before this Court.

34. Once I have found that the selection procedure and the appointment are both nullities, there can be no question of interfering with the order dated July 5, 2017 which is therefore affirmed.

35. In view of the fact that on questions of law on the basis of the admitted facts I have held that the procedure of selection and the appointment are nullities, it is not required to decide the other questions raised by Mr. Chakraborty, for the writ petitioner, that the Appellant in MAT No.1192 of 2017 is not a person with any disability and does not even have any disability of hearing impairment whether because he has a driving licence or because he has life insurance where he was allegedly held to be perfectly fit. His appointment is, was and continues to be illegal, being a nullity at law, on the basis of the admitted facts relating to the procedure adopted by the college authorities and the appropriate government in appointing him. Nothing else is required to be said about the disability alleged by the said Appellant in MAT No.1192 of 2017. Besides his disability as alleged by him has been upheld by the Learned Single Judge by the order dated December 14, 2016 passed in the case of **Kartik Maity** (*supra*) being W.P. No.27987 (W) of 2016. It has not been challenged. It has become final. It cannot be reopened collaterally in this appeal by the present writ petitioner.

36. Thus, I dismiss both MAT No.1191 of 2017 and MAT No.1192 of 2017 and the connected applications for stay. Fresh process is to be initiated in accordance with law. Consequentially the stay of operation of the order dated July 5, 2017 granted on November 24, 2017 stands vacated. In view of the fact that the Appellant in MAT No.1191 of 2017 had attempted to mislead this Court by relying upon doctored documents which the Appellant later admitted was a mistake without ill-motive, as recorded by the Court on December 18, 2017, no further proceeding is taken against him, except that the said Appellant is to bear the costs of the appeal in MAT No.1191 of 2017 which are assessed to be 60 GMs, to be paid to the Respondent No.15/Writ Petitioner in MAT No.1191 of

2017. There shall be no order as to costs in respect of MAT No.1192 of 2017 and the parties shall bear their own costs.

(Protik Prakash Banerjee, J.)

DIPANKAR DATTA, J.

I agree.

(Dipankar Datta, J.)

Later:

37. Prayer for stay of operation of the order made by Mr. Dutta, learned advocate for the appellant is considered and rejected.

(Dipankar Datta, J.)

(Protik Prakash Banerjee, J.)

IN THE HIGH COURT AT CALCUTTA

CONSTITUTIONAL WRIT JURISDICTION

APPELLATE SIDE

Present:

The Hon'ble Justice Protik Prakash Banerjee

W.P. No. 411 (W) of 2018

With

W.P. No. 412 (W) of 2018

Sri Ashis Kumar Dey & Another.

—v—

The State of West Bengal & Ors.

For the petitioners	:	Mr. Kushal Chatterjee, Adv. Mr. Surendra Kumar Sharma, Adv. Mr. Subhasish Mitra, Adv.
For the State in W.P. 411 (W) of 2018	:	Mr. Soumitra Bandyopadhyay, Ld. Senior Govt. Adv. Mr. Subrata Bandyopadhyay, Adv.
For the State in W.P. 412 (W) of 2018	:	Mr. Sushobhan Sengupta, Ld. Senior Govt. Adv. Mr. Manas Kumar Sadhu, Adv.
Date of Hearing	:	January 02, 2019.
Judgement on	:	January 11, 2019

PROTIK PRAKASH BANERJEE, J.:

1. Is the King above the law? Edward Coke even while throwing himself at the feet of James I of England (James the VI of Scotland) to save his neck, declaimed "The King is above all, save God and the Law" ...and this, at least three reigns after Henry the VIII had shown that he spoke for God. After five centuries, the question, which this writ petition raises, is whether the Government is above the Law.

2. The writ petitioners claim to be the co-owners of certain lands which are right behind government lands – more specifically, lands which belong to the Public Works Department of the Government of West Bengal being L.R. Plot No. 844 under Mouza- Purusattampur, J.L. No. 47 Singur, District- Hooghly and so recorded and apparent from the Mouza map as stated in paragraph 3 of the writ petition. This land is recorded to be adjoining Baidyabati-Tarakeswar, a State Highway. This is not even denied in the Affidavits-in-Opposition nor commented on.

3. The State of West Bengal has made a law being the West Bengal Highways Act, 1964. It is still in force. State highways are governed under it. It provides, under Section 2(bb), by an amendment, to boot, as follows: -

(bb) "Government road" means a road, vested in the Government, or under the control and administration of the Public Works Department of the State Government, and includes—

(i) the slope, berm, borrow-pits and side-drains of any such road;

(ii) all lands and embankments vested in, or under the control and administration of, the said Public Works Department, and attached to a Government road;

(iii) all bridges, culverts or causeways built on or across any Government road:

and

(iv) all fences and posts on any Government road or on any land attached to a Government road, and all road-side trees on

such land:

Provided that nothing in the definition shall affect the provisions or the Calcutta Municipal Act, 1951, or of any rule or by-law made thereunder, in so far as they empower the Corporation of Calcutta to take action in respect or the Government roads now under the control of the Corporation.

4. It has also defined a “highway” (unless the context otherwise requires), to mean, under Section 2(c) of the Act of 1964: -

> "highway" means—
>
> (1) any Government road, or
>
> (2) any other road, street, path, way or land, other than a national highway within the meaning of the National Highways Act, 1956, which is declared by the State Government to be a highway under section 3 and
>
> includes—]
>
> (i) the flanks, footpaths, pavements and drains adjoining such highway;
>
> (ii) all bridges, culverts, causeways, carriageways and other structures built on or across such highway;
>
> and
>
> (iii) any land in the possession of the State Government or any other authority adjoining such highway, used or intended to be used for purposes of the highway;

5. Therefore, on a plain reading of these provisions, the land which is vested in or under the control of the Public Works Department of the State of West Bengal, and attached to the Baidyabati-Tarakeswar road (a government road) as in paragraph 2 of this judgment is also a highway

within the meaning of the Act of 1964, since it is a government road within Section 2(bb) of the Act of 1964.

6. There is a curious specialty of such a land. No encroachment, by any one whatsoever is permitted on such land without a prior permission to encroach being granted by a statutory authority under the Act of 1964. Encroachment is specially defined under the Act of 1964. As is the special duty I referred to above. For convenience the definition of encroachment is set out hereinbelow: -

Section 2(b): “(b) "encroachment" means any occupation or use of any highway or part thereof by any unauthorised person and includes any projection on, over or under such highway”.

7. Section 8 of the Act of 1964 provides as follows: -

8. Permission to make encroachment.- (1) No person shall make any encroachment without obtaining previous permission in writing of the Highway Authority or any officer not below the rank of an Assistant Engineer authorized by him in this behalf.

(2) The Highway Authority or such officer may, having due regard to the safety and convenience of traffic and subject to such conditions and on payment of such fee or other charge as may be prescribed, grant a permit to any person to use or occupy temporarily any land appertaining to or adjoining a highway for such period as may be specified therein.

(3) Any person holding a permit granted under sub-section (2) shall, if required, produce it for inspection before the Highway Authority or any officer authorized under sub-section (1) and shall on the expiry of the period specified therein restore the land under his use or occupation to its original condition and make over possession thereof to the Highway Authority or the officer referred to in sub-(1).

8. I find that the statutory provision being Section 8 does not make any distinction between the State of West Bengal, its officers, any statutory or constitutional authority or an individual or a trespasser so far as the necessity to obtain previous permission in writing of the Highway Authority or any officer not below of an Assistant Engineer

authorized by him in this behalf. If and when such prior permission is sought, and the prescribed fee or charge is paid, such Authority may, having due regard to the safety and convenience of traffic and subject to such conditions as he impose, grant such prior permission only after which such person can even enter upon the land to occupy or use it.

9. The writ petitioners have alleged at paragraph 4 of the writ petition that the respondent no. 9 has tried to commence construction over the said land which has been referred to in paragraph 2 of this judgment, and for that purpose, has posted pillars thereuponwhich was unauthorized and illegal because it was without the said prior permission issued by the Highway Authority. They have also alleged that this construction obstructed their free ingress and egress into their own land, behind the said land of the Public Works Department.

10. In an earlier round of litigation between the parties, a coordinate bench by an Order dated November 17, 2017 had directed the Executive Engineer, who was also the Highway Authority, to consider and dispose of the representation of the writ petitioners by a reasoned order after due hearing within a stated time.

11. The said Highway Authority/Executive Engineer, claimed to have personally inspected the site with the Assistant Engineer, Hooghly Construction Sub-Division III and other officials of the administration after the said order by the coordinate bench. Thereafter it issued due notices of hearing, and held due hearings on two days and accepted written notes of argument. By an order dated December 26, 2017 it ultimately held as follows: -

"Prodhan, Nasibpur Gram Panchayet claimed that the Nasibpur Gram Panchayet has not make any construction upon the L.R. Plot No. 844 and also he claimed petitioner encroached the said P.W.D. Land and they constructed temporary latrine. He also claimed that the classification of L.R. Plot No. 33 is Doba. He also filed photocopy of L.R. record is Annexed-B.

The Block Development Officer, Singur claimed that that West Bengal Govt. Project namely a "Karmathirthya" will be executed in Plot No. 844 measuring an area 7.27 decimal out of 30 decimal. In this regard red portion of the hand sketch map showing the proposed project of "Karmathirthya".

Considered all the submissions and perused of those documents, written argument and report submitted by Assistant Engineer, P.W.D., Hooghly Construction Sub-Division No. III and I find that entire P.W.D. land of L.R. Plot No. 844 is laying vacant and there is no any construction upon the said plot. So question of obstruction for ingress and egress to the petitioners land namely L.R. Plot No. 33 does not arise at all.

Hence, I dispose off the representation of the petitioner dt. 27.05.2017 issued through their Ld. Advocate being Annexure P-2 to the W.P. No. 16966 (W) of 2017 is disposed off as per order of the Hon'ble Justice Rajsekhar Mantha, J, High Court, Calcutta."

12. Therefore, as on December 26, 2017 the Highway Authority has recorded that the Panchayat authorities (respondent no. 9) has claimed that it has made no constructions whatsoever, the State of West Bengal claimed it has a project it will execute upon itand most importantly that the land in question is "lying vacant and there is no construction upon the said plot. So, the question of obstruction for ingress and egress to the petitioners' land namely L.R. Plot No.33, does not arise at all."

13. However, in answer to the writ petitioners' allegations, the Affidavit-in-Opposition affirmed on behalf of the respondents no. 1 to 17 by the Junior Engineer, Water Resources and Development Directorate, Singur Development Block, has categorically stated at paragraph 5 thereof that while the respondent no. 9 is not carrying out any construction on the said land, the construction has been "undertaken by

the Department of Panchayat and Rural Development, Government of West Bengal, through the Block Development Officer, Singur, Hooghly." Moreover, the photographs which have been produced before this Court by way of a supplementary affidavit clearly show structures and walls from January 14, 2018 till dates in February 2018, and they seem to be ongoing constructions.

14. Thus, it is clear that even if there had been no construction as on December 26, 2017, construction that is to say encroachment, as I have held above, has been continuing on the said land as in paragraph 2 of this judgment. The only way it could have been done lawfully, if there was a prior permission from the Highway Authority. Let me see whatthe Respondents have said themselves, in their Affidavit-in-Opposition.

15. In paragraph 3c of the Affidavit-in-Opposition, the deponent has admitted "A letter was also sent by the Block Development Officer, Singur, vide memo no. 236/1 dated 23.6.2017 to the Executive Engineer, P.W.D. Construction Division Hooghly seeking NOC for construction of Karmathiritha over the said land of P.W. Department attaching all relevant documents including approval of the District Magistrate, Hooghly. Yet he has not affirmed that the such prior permission for encroachment was granted by the said Highway Authority who is the Executive Engineer aforesaid.

16. The letter referred to in paragraph 3c of the said Affidavit-in-Opposition is dated June 15, 2017. It has a lot of interesting things to consider and none of them is complimentary to the respondents. It shows first that the land has not yet been departmentally transferred

though a request for the proposed land has been sent to the Additional District Magistrate (Land Reforms) and so no construction could be made on it; it also shows that the "said land has been illegally occupied by some local people and are utilizing the land for their personal purposes. The local Gram Panchayet, i.e., Nasibpur G. P. and Singur Panchayet Samity has made dialogue with them and settled for the construction of the Karmathirtha". Most importantly a request was made to the said Assistant Engineer "to issue NOC to the undersigned for the successful implementation of a Govt. scheme". The only other annexure to the Affidavit-in-Opposition was the letter of that Assistant Engineer to the Executive Engineer dated June 23, 2017seeking action on this. The note sheet of approval from an authority different from the Highway Authority was also annexed.

17. So, it is clear that no prior permission in terms of the Section 8 of the Act of 1964 was given by the Highway Authority to the Respondent no. 1 State of West Bengal or to any of its authorities or anyone purporting to act under the authority of the respondent no. 1 or the respondent no. 5. Despite that, the Panchayat on behalf of the respondent no. 1 settled"for the construction" on the said land and as I have recorded, and the Respondent no. 1 and its officers took advantage of the construction and as appears from the pictures of the site in January-February 2018, there have been such construction. However exalted and beneficial the construction, the means do not justify the ends, especially in a democracy which says that it is ruled by law. The Rule of Law requires that the procedure prescribed by law must be followed. If a procedure has been prescribed by Section 8 of the West

Bengal Highways Act, 1964 an encroachment as defined thereby must be done, even by the State of West Bengal and its agent, only in the manner prescribed or not at all.The government is not above the law. The law that it has made for "any person" applies with equal strictness to it. Any other mode of acting, is to be deemed to have been expressly prohibited. No precedent is required for this. This is settled law and is the basis of procedural ultra vires. Since the encroachment is procedurally ultra vires, it is a nullity as are all its consequences.

18. The writ petitioners have of course principally prayed in WP No.411(W) of 2018 for: -

"(i) A writ of and/or writs in the nature of Mandamus be issued commanding the respondents authorities to quash and set aside the order dated December 26, 2017 passed by the respondent authority and to set aside the said report dated December 18, 2017 prepared by the Assistant Engineer PWD and take immediate steps to stop the said illegal and unauthorized construction over said PWD land lying and situate in front of the petitioners' land;

(ii) A writ in the nature of mandamus be issued commanding the respondent authorities to demolish the illegal construction over the said PWD land lying and situated in front of the plot of lands of the petitioners."

This is apart from praying for a writ of prohibition against the respondent no. 9 under the impression that it was he or at his instance the encroachment had been made and the illegal and unauthorized construction was being carried on.

19. The construction made on the lands as in paragraph 2 of this judgment are, for the reasons summarized in paragraph 17 of this judgment read with the discussion contained in the paragraphs which

precede it, without jurisdiction and since they have been done at the instance of the officers of the State of West Bengal as admitted in the Affidavit-in-Opposition and recorded by me at paragraph 13 of this Judgment, the respondent no. 1 through its Block Development Officer and also its Secretary, Department of Panchayat and Rural Development, Government of West Bengal shall be responsible to demolish the construction and vacate the said lands within 4 weeks from the date of this order. Of course, if within such period the prior permission is granted by the Highway Authority this order shall not prevent the respondents from commencing construction afresh in accordance with law on the said lands.

20. So far as the connected case is concerned, WP No.412(W) of 2018 has been taken out by the writ petitioners on the contention that they have no convenient access to their lands beingL.R. Dag No. 33 & 58 under Mouza- Purusattampur, J.L. No. 47, P.S. Singur, District- Hooghly situated on the Baidyabati-Tarakeswar Highway. They contend that in front of the said land, another plot of land belonging to the Public Works Department, being L.R. Plot No. 84 under Mouza- Purusattampur, J.L. No. 47 Singur, District- Hooghly is situated and the writ petitioners have no convenient approach to their said lands (L.R. a Dags No.33 and 58) unless they are allowed to have an approach road over the said Dag No.844 of the Public Works Department alongwith a culvert. This Dag No.844 is the self-same land in respect of which W.P. No.411 (W) of 2018. The respondents no in WP No.411 (W) of 2018 have disclosed in their Affidavit-in-Opposition a sketch map of the dags in concern showing the lands involved and the proposed Karmatirtha project of the

State of West Bengal. This is at page 15 of the Affidavit-in-Opposition. On a plain reading of the said Affidavit-in-Opposition and taking the said sketch map as Gospel Truth I find that Dag No. 58 is not accessible from the Baidyabati—Tarakeswar Highway without travelling over Dag No.844. It can be possible to go the opposite way, the existing Singur road. At any rate, the respondents have admitted the material facts alleged in WP No.412 (W) of 2018 by their said sketch map used in WP No.411 (W) of 2018 while denying the statement in paragraph 11 of the Affidavit-in-Opposition to the said WP No.411(W) of 2018. Even assuming that a 10 feet wide passage has been given in respect of Dag No.33 at one corner, no access has been given to Dag No.58 to the Baidyabati—Tarakeshwar Highway through the only way which lies over Dag No.844 belonging to the Public Works Department. A representation dated June 14, 2017 at Annexure P/2 has been made to the respondent no. 4 seeking permission to encroach Dag No. 844 to construct an approach road over the said land with culvert but it does not appear to have been considered or disposed of by the respondent no. 4. Accordingly, WP No. 412(W) of 2018 is disposed of by directing the respondent no. 4 to consider and dispose of Annexure P/2 after giving due opportunity of being heard to the petitioners by a reasoned order and after holding a physical joint inspection which shall not be complete without the presence of the petitioners or its duly authorized representatives. Since I have called for no affidavit in this writ petition, the allegations contained in it are deemed not to be admitted except for the situation of the lands of the petitioners as admitted by the respondents in their sketch map at page 15 of the Affidavit-in-Opposition used in WP No. 411 (W) of 2018. The respondent no. 4 shall exercise his discretion in terms of Section 8(1) of

the Act of 1964 and on the basis of usual conditions imposed in such case and for the prescribed fees and charges. The entire exercise shall be completed within 4 weeks from date of communication of the order. Both the writ petitions are disposed of on the above terms.

21. No order as to costs.

22. Urgent Photostat Certified copy be delivered to the parties, if applied for, upon compliance of all formalities.

(PROTIK PRAKASH BANERJEE, J.)

W.P. 16267 (w) OF 2017

30.01.18
Sl no. 5 Biswajit Bag.
Ct no. 22 - Vs -
P.M. Indian Oil Corporation Limited & Ors.

Mr. Kamakshya Prasad Mukhopadhyay

... for the petitioner

Mr. N.K. Mehale,
Mr. P.K. Bhowmick

... for the respondents.

Liberty is granted to the writ petitioner to add the Union of India, service through the Secretary of the appropriate Ministry pertaining to Petroleum products by whatever name called, service at the Branch Secretariat, Union Ministry of Law, Justice, Company and Legal Affairs, at 11, Strand Road through the learned Central Government advocate/Joint Secretary of such Ministry as added party respondent No. 5.

The learned advocate on record of the writ petitioner is directed to effect amendment in the cause title of the writ petition herein and now. The necessary changes/amendments to the file and register and all cause papers shall be made by the learned advocate on record of the writ petitioner after approaching the department at a mutually convenient time. Such amendment/ correction to the file and register and cause papers shall be carried out within a period of three weeks from the server copy being made available.

(ii) Liberty is also given to the petitioner to use a supplementary affidavit bringing on record a copy of the letter dated June 19, 2017 disclosed by the writ petitioner today and alleged to have been sent by the learned advocate acting on behalf of the competent authority Mr. Malay Kumar Maity.

(iii) Copies of the amended parts of the writ petition especially the cause title at pages 3 and 4 shall be served once again on each of the respondents. A copy of the amended writ petition shall be served on the added respondent. The copies of the supplementary affidavit shall be served on each of the respondents

including the added respondent. Such service shall be completed within two weeks from the date of effecting amendment as aforesaid.

It is the case of the writ petitioner that despite the statutory prohibition under Clause (c) of the proviso to Section 7 sub-Section (1) Clause (i) of the Petroleum and Minerals Pipelines (Acquisition of Right of User Inland) Act, 1962 (Act No.50 of 1962) a pipeline has not only been laid but in fact three pipelines have been laid by the respondent corporation under the land, which is appurtenant to his Kutcha dwelling house.

Section 7(i) reads as follows: -

> 7. Central Government or State Government or corporation to lay pipelines.- (1) Where the right of user in any land has vested in the Central Government or in any State Government or Corporation under section 6-
>
> (i) it shall be lawful for any person authorised by the Central Government or such State Government or corporation, as the case may be, and his servants and workmen to enter upon the land and lay pipelines or to do any other act necessary for the laying of pipelines:
>
> Provided that no pipeline shall be laid under –
>
> (a) any land which, immediately before the date of the notification under sub-Section (1) of Section 3, was used for residential purposes;
>
> (b) any land on which there stands any permanent structure which was in existence immediately before the said date;
>
> (c) any land which is appurtenant to a dwelling house or
>
> (d) any land at a depth which is less than one metre from the surface;"

It is his further case that he is a day labour and that he has been paid Rs. 2,616/- way back in 1998 for acquisition of the rights of user of his land. The writ petition also discloses that by salami tactics, first the Respondent No.1 acquired the land for laying pipelines under it, though the lands were appurtenant to his dwelling house, wholly without jurisdiction and thereafter said that the portion of the pipelines has made the said Kutcha structure unsafe and that for this reason it would demolish Kutcha structure. However, the learned advocate appearing for the respondents correctly points out that the writ petitioner has admitted that the cause of action arose for the first time in 1997 and thereafter in 1998 when the paltry amount was paid, and that the writ petitioner did not

avail of the statutory remedy for disputing the compensation paid to him, for more than 19 years. The Learned Advocate appearing for the Respondent No.1 and the competent authority also submits that the writ petitioner he has been suffering the illegality and acts without jurisdiction at least last 19 years and has not come to court. It is also the case of the learned advocate for the respondents that mere representation will not stop limitation from running. He submits that had this been a civil case where the statute of limitation is applicable mere representation would not have enlarged the period of limitation or given rise to a fresh period of limitation. Therefore it cannot be an explanation of the delay in filing the writ petition. The representation was made and replied to in 2017 which was far beyond the period of limitation from the original causes of action urged (paltry compensation and acquisition of right of user and laying of pipeline, without jurisdiction) and, therefore, it would not give rise to a fresh period of limitation and thus cannot be an explanation for the delay. It is his further case that the so-called dwelling house of the writ petitioner is nothing but a cattle-shed. He submits that ultimately the writ petitioner's prayer for enhancement of compensation is not only bared by 19 years of limitation which ought to be held be a period of unexplained delay but further that this court ought not to exercise its jurisdiction under Article 226 of the Constitution of India, despite the effective statutory remedy which is granted by Section 10 sub-Section 2 of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962. He submits that the said provision not only provides the appropriate statutory forum but also has the power to go into the question of facts on which the petitioner is now seeking enhancement of the compensation.

The learned advocate for the respondent also draws the attention of the Court to Sections 13 and 14 of the said Act.

The contents of Sections 13 and 14 are quoted below : -

13. Protection of action taken in good faith –

(1) No suit, proceeding or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or notification made or issued thereunder.

(2) No suit or other legal proceeding shall lie against the Central Government, the competent authority or any State Government, or corporation for any damage, loss or injury caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this Act or any rule or notification made or issued thereunder.

14. Bar of jurisdiction of civil courts – Save as otherwise expressly provided in this Act, no civil court shall have jurisdiction in respect of any matter which the competent authority is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or proposed to be taken in pursuance of any power conferred by or under this Act.

On the face of it Section 13 sub-Section (2) on which reliance is placed by the learned advocate for the respondent relates to immunity granted in respect of suit or other legal proceeding which phrase will have to be read ejusdem genesis and is in respect of bona fide acts on the part of any person pursuant to the Act of 1962. Section 2 grants immunity to the authorities and the governments and the corporations concerned, but for that the person concerned, who seeks immunity, is required to show that the action complained of was taken in good faith. In the instant case, prima facie it is apparent that when a statutory authority exercising powers purportedly under Section 7 of the said Act not only violates the provisions of the Act under which he purports to act but ignores it and acts wholly without jurisdiction by laying pipelines under the land appurtenant to a dwelling house, the authorities cannot say that they did it on good faith. The fact that there is a dwelling house on the said land is too glaring a physical fact to enable the authorities to allege that they did it in good faith.

The authorities and its officers concerned committed acts, prima facie, without jurisdiction and knowing it to be so.

In order to accept the submission made by the Learned Counsel for the Respondents rather ingenuously, I will have to hold that even when an act is wholly without jurisdiction, the writ court should not interfere but allow the authorities to get away with it under a clause in the statute granting immunity from civil suits and other legal proceedings only in respect of acts in good faith, which prima facie this is not.

I am not inclined to accept such an interpretation of Section 13 as would emasculate the writ court at the threshold. So far as Section 14 is concerned by now it is well settled that the bar of jurisdiction of a civil court is not a bar to judicial review under Article 226 of the Constitution of India especially when it is doing its Constitutional duty to keep arrogant statutory authorities within the purview of their statutory power and when there is no bar under the Constitution of India to judicially review the acts undertaken purportedly under the said Act of 1962. It is not in dispute that if the land does appertain to a dwelling house, Section 7 of the Act of 1962 does not allow the respondent Corporation to acquire the right of user and lay a pipeline under that land.

Since as of today the writ petitioner is on oath and respondents are not, I have to proceed on the basis of the premises that there is a kutcha dwelling house and the land in question appertains thereto under which the respondent Corporation has laid pipelines wholly without jurisdiction. Therefore, prima facie, it is procedurally ultra vires.

So far as, the question of delay is concerned it is true that the court of equity shall give aid to the vigilant but it is difficult for me to perceive of a situation where an authority or “State” under Article 12 of the Constitution of India can be allowed to say that delay, for however long a time, would convert an act wholly without jurisdiction and a nullity, into a lawful act. The acts complained to be wholly without jurisdiction in a manner which violates prima facie the fundamental rights of the petitioner, a daily labour, under Article 19(1)g

read with Article 21 of the Constitution as also Article 14 thereof have to be inquired into before taking a decision finally.

The acts of the Respondents as complained of, comprise first attempting to acquire the right of user of the lands of the petitioner on which he has a dwelling house, secondly paying him only Rs.2,616 to first take the right of user of his land, which contains a dwelling house, though kutcha, and then, wholly without jurisdiction, laying pipelines under the said land appertaining to a dwelling house, and then alleging that due to the operation of the pipelines the kutcha structure has become unsafe and then by threatening to demolish the kutch structure thus rendering him homeless and relegate him to finding on the daily wages of a daily labour and a princely compensation of Rs.2,616 paid in 1998, presumably require him to build or acquire a shelter in any civilized part of West Bengal. Had the writ petitioner known that this was the intention of the oil company, he would certainly have challenged the acquisition itself in a Court of law. Despite the aforesaid, the learned Advocate for the respondents seeks to set up delay and alternative remedy as grounds for not entertaining the writ petition.

By now it is well settled that an alternative remedy is not an absolute bar. In case the writ petitioner can show that there is gross violation of his fundamental rights or the basic principles of natural justice, or acts wholly without jurisdiction on the face of the records, among a few other exceptions, the writ court is not powerless to interfere merely because of alternative statutory remedy. I rely upon the judgment reported in the case of **Registrar of Trademarks—v—Whirlpool Corporation** reported in **(1998) 8 SCC 1**.

In fact, since the question relating to lack of jurisdiction is dependent upon a question of fact as to whether or not there was a dwelling house on the land under which the pipelines were laid, at the time when the pipelines were proposed to be laid and in fact laid, I had invited the learned Advocate for the Respondent to consider whether the matter ought to be heard further before affidavits had been exchanged.

However, the Learned Advocate for the Respondents continued to insist with unfailing humility that he be heard to oppose the writ petition on all grounds before calling for affidavits including on grounds which could not be decided without first having the Respondents deny on oath statements made on oath. Hence I heard him in extenso. However, I cannot persuade myself to agree with the learned Advocate for the Respondents that I should ignore a statement made on oath by the petitioner that there is a dwelling house on the land in question under which the pipelines were laid, which dwelling house is now being threatened to be demolished by the Respondent authorities, merely because the Learned Advocate says there is no dwelling house, before filing an Affidavit-in-Opposition though he intends to file it.

Since the liberty to file supplementary affidavit has already been given, the writ petitioner has ample opportunity to explain the question of delay in making this application.

The Respondents shall file their affidavit-in-opposition to be filed within six weeks from date of service of copy of the amended parts of the writ petition on them and in case of the added respondent, within six weeks from the date of service of the copy of the amended writ petition itself; reply; if any, be filed three weeks thereafter.

I find that the petitioner has made out a strong prima facie case on records and the preponderance of balance of convenience is in favour of the writ petitioner and the orders prayed for being passed. There is great urgency in the matter since demolition is threatened and the learned Advocate for the Respondent No.1 is not in a position to assure that there will be no demolition during the pendency of the interim order, but he submits orally, without any document that even if there is demolition of the kutcha structure, the writ petitioner will not be homeless but he has a two storied pucca structure nearby. Since demolition has been threatened, if the interim order as passed is not granted, it would amount to refusal of the writ petition on the first day and so it

is a rare case where such an interim relief has been granted on the above tentative findings and to preserve the status quo of the said lands.

Therefore, I find it a fit and proper case to pass an interim order. There shall be an interim order to the effect that the respondents and/or not their men, agents, servants, staff, employees and/or anyone claiming thereunder shall not demolish the dwelling house of the petitioner on the lands in question and neither shall they or any of them so use the lands in question and/or act as would affect the said kutcha dwelling house to the prejudice of the writ petitioner or affect his peaceful possession thereof. If necessary, the petitioner may apply to the police authorities under the Howrah Police Commissionerate and the concerned police station to prevent the respondent Indian Oil Corporation and/or its personnel from entering upon the said land, and if such request is made, the Commissioner of Police, Howrah, shall ensure that the respondent Indian Oil Corporation and/or its personnel and/or anyone claiming thereunder shall not to have access to the premises without the leave of the writ petitioner. It is of course, needless to mention that the writ petitioner shall not unreasonably refuse to grant such leave to have access to his land to the respondent No.1 and/or its personnel for the essential purposes of maintaining and operating the pipelines under his land which are in question herein. The interim order shall continue till disposal of the writ petition.

Let the matter appear in the list ten weeks hence from the date of effect the service of the notice.

I hastily point out that all points including delay and alternative remedy as raised by the learned Advocate for the Respondent No.1 are kept open for being decided finally at the time of final hearing of the writ petition and the above findings are tentative and only prima facie. .

(Protik Prakash Banerjee, J.)

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction
Appellate Side

25-06-2018
Subrata

.

W.P.No.4861(W) of 2018
Sri Rabi Sankar Ghosh
-vs-
The State of West Bengal & Ors.

Mr. Prabir Chatterjee …for the petitioner

Mr. Pantu Deb Roy
Ms. Chama Mukherjee
Ms. Paramita Pal
Mr. Arindam Deb Roy …for the State

The writ petitioner's grievance was about police inaction. When the writ petition was moved it was found that one of the accused had been arrested; charge-sheet had been filed; still after the last hearing on June 18, 2018, the sensitive ears of the State heard plaintive's wails of Mr Chatterjee's client rendered in Mr Chatterjee's all-too-masculine voice and as a consequence the investigating officer has been changed.

I thought the petitioner's cup runneth over, but Mr Chatterjee like Oliver wants more. Mr Chatterjee submits that he apprehends that the police may not act on his client's further complaint if and when his client takes up residence in the flat in question, and that the police would not act on his complaint if he makes complaints of any untoward incident. Mr Chatterjee's client apprehends too many contingencies which are yet to happen. The present cause of action, if at all, has been exhausted.

Accordingly, this writ petition is disposed of with liberty to the petitioner to approach the appropriate forum if he is aggrieved. I hasten to add when the police have on their own changed the investigating officer heeding the cries of the citizen, the petitioner ought to have nothing to fear. No costs.

Certified website copy of this order, if applied for, shall be given to the parties.

[Protik Prakash Banerjee, J]

July 02, 2018
11 ARDR

WP 4606(W) of 2018

Smt. Putul Paul
Vs.
The State of West Bengal & Ors.

Mr. Kalyan Kr. Chakraborty,
Mr. Kashinath Bhattacharyya
...for the petitioner.

Mr. Subhabrata Datta,
Mr. Debashis Sarkar,
...for the State.

Mr. P. C. Paul Chowdhury
...for the respondent.

Honesty is a lonely word. Everyone is so untrue. Thus, sang Billy-Joel. I would have content on this dwelt realm of music and have raised its ugly head in this Court.

The relationship between the Bar and the Bench cannot be that of armed or unarmed hostility. When counsel makes submissions from the Bar or relies upon the Affidavit of service made by the clerks on which they rely upon to show service of the copy of a writ petition on the non-State respondents, it is expected that they and their learned advocate-on-record will take responsibility for it.

My order dated June 13, 2018 read with the order dated June 6, 2018 show amply how the faith of this Court in the Officers of the Court who owe a higher retainer to justice has been betrayed in the deepest regard.

The system of administration of justice that we have in this court is not so brittle as to be shattered by such an unfaithful act whose sharpness cuts like a jagged knife on the very ethics of the

noble profession to which learned advocates for the writ petitioner belong.

Nonetheless, instead of penalising the learned advocate or referring him to the Bar Council, I record my profound sorrow at the fact that the illusion that I had about the nobility of the profession and that the statements made from the Bar are sacroscant have been broken beyond repair. In the future this Court shall be wary of accepting the Affidavit of service affirmed by Subrata Hazra, a registered clerk of Mr. Sarbani Roy (Pandit).

However, since I am told that a report is already prepared and is produced before me under a sealed cover, let this report be kept with the records and a copy of the report be made over to the writ petitioner and the non-State respondents. They are entitled to file their exceptions in the form of an affidavit, if so advised.

Let Affidavit-in-opposition be filed within three weeks from date. Reply, if any, thereto be filed within one week thereafter.

Matter to appear four weeks hence.

(Protik Prakash Banerjee, J.)

2nd July,
2018
(SKB)

W.P. 4606 (W) of 2018

Later:

Q.1. Mr. Chakraborty does your client understand english ?

Ans. No.

Q.2. If I ask you question in English, will you be able to translate it into Bengali and ask your client that question ?

Ans. Yes.

Q.3. Will you translate your client's answer in English and inform this Court accordingly ?

Ans. Yes.

Q.4. Ask your client to whom is he registered ?

Ans. Sarbani Kar.

Q.5. Who has affirmed the affidavit of service dated May 11, 2018 ?

Ans. He has affirmed.

On query by the Court, Mr. Subrata Hazra, registered clerk to Sarbani Kar admits that he did not effect service or send any material under registered cover or speed post whether the copy of the writ petition or the forwarding letter. Therefore, the allegations contained in paragraph 2 to the affidavit of service that statements made are true to his knowledge, so far as service upon the private respondents are concerned are false.

The said affidavit is prepared in the office of Mr. Ranojoy Chatterjee, learned advocate who, therefore, has to take ultimate responsibility of the false affidavit, since the clerk registered to him does not accept the truth of the allegations drafted in the affidavit and prepared in the office of Mr. Ranojoy Chatterjee.

Since this is the first time I have detected this offence by this clerk, I shall take no further steps against him, as a last chance.

The Commissioner of affidavits and the departments are requested to be extra vigilant and cautious every time in the future that any affidavit of service is affirmed by Mr. Subrata Hazra. The Commissioner of oath and its department are also directed to be cautious and vigilant in future in respect of any affidavit or petition prepared or affirmed in the office of Mr. Ranojoy Chatterjee.

Let a copy of this order be circulated by the learned Registrar General to all concerned officers and the departments and also be sent to the Secretary of the Bar Association and to the learned Advocate General.

(Protik Prakash Banerjee, J.)

August,
2018
SKB)

W.P. 9872(W) of 2018

Gita Rani Kundu
Versus
The State of West Bengal & Ors.

Ms. Sanchayita De
... for the petitioner.

Ms. Dipali Halder
... for the State.

Affidavit of service filed in Court today be kept on record.

A draft order has been handed up by the learned advocate appearing for the writ petitioner showing the proposed changes in respect of orders passed by the co-ordinate Benches in similar matters. I find that the cases are substantially similar to the matters decided by the co-ordinate Benches.

The husband of the petitioner was the Assistant Teacher of K.J.K. High School, Bankura and retired from service on December 31, 2004. tHe grievance of the petitioner is that the gratuity amount was disbursed only on February 27, 2006. The husband of the petitioner died on September 8, 2006. Petitioner claims interest on the delayed payment of the gratuity amount.

It is now settled law that the pensionary benefits are to be released to the retired employee or his heirs immediately upon retirement/death. If there is a delay in releasing the pensionary benefits, the retired employee is entitled to interest.

Various orders have been passed by this Court holding that the retired employee is to receive interest on delayed payment of the gratuity. Some of such orders have been placed before me.

Although the point of delay or limitation has not been urged on behalf of the State, I deem it appropriate to address that issue briefly. The Limitation Act in terms does not apply to writ petitions. The Hon'ble Supreme Court in the case of *Union of India Versus Tarmen Singh* reported in *(2008) 8 SCC 648* has observed that if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. It is settled law that the right of a retired employee to get his retiral dues on the date of attaining superannuation is a valuable right which accrues in his favour on the date of his attaining superannuation. Further, pension is no more considered to be a bounty to be handed out by the State at its whim. An employee has a right to receive pension upon retirement. If payment of such pension is delayed, the retired employee is surely entitled to get some interest for such delayed payment.

The Rule that the High Court may not enquire into belated and stale claim is not a Rule of Law, but one of practice based on sound and proper exercise of discretion. The principle on which the relief to a party is denied on the ground of laches or delay is that the right which have accrued to others by reason of delay in approaching the Court should not be allowed to be disturbed. In the present case, it was the bounden duty of the State to disburse the pension amount on the due date. If it has failed to do so and has released such amount after

unexplained delay, it is obliged to pay interest to the retired employee. This is compensatory in nature. Pension and gratuity are aimed at maintaining the life of a retired employee and his/her dependents, these are welfare provisions and even if there is delay on the part of a retired employee to approach the court claiming interest on delayed payment of pension, the delay per se should not be the ground for rejection of the writ petition. No third party interest will be affected by a direction on the State to compensate the retired employee for delayed payment of pension by paying interest at a reasonable rate.

Having heard the learned counsel for the parties and having regard to the orders of this court passed in other matters, I direct the Director of Pension, Provident Fund and Group Insurance, Government of West Bengal as also the concerned Treasury Officer to pay interest to the writ petitioner at the rate of 9% per annum on the gratuity calculated from January 1, 2005 till actual date of actual payment.

Such payment is to be made within six weeks from the date of communication of the certified copy of this order to the concerned authorities.

W.P. 9872(W) of 2018 is, accordingly, disposed of.

There shall, however, be no order as to costs.

Since no affidavit is called for, the allegations made in the writ petition are deemed to have been denied.

Urgent photostat certified copy of this order, if applied for, shall be given to the parties on compliance of all necessary formalities.

(Protik Prakash Banerjee, J.)

08.04.2019
08
RP Ct.10

WP 9405 (W) of 2016
(Usman Ghani & Ors. vs. State of W.B. & Ors.)

Mr. Kamalesh Bhattacharya, Adv.
Mr. Rezaul Hossain, Adv.
Mr. Parvez Hossain, Adv.

.... For the Petitioners

Mr. Subhrangshu Panda, Adv.

.... For the Director of Madrasah Education

Mr. Panda, learned Advocate for the Director of Madrasah Education places the original of the DLIT report dated February 5, 2011 in Court today. Let the original report be kept on record. Mr. Panda is granted liberty to take a photocopy of this original report.

This is a writ petition seeking in effect approval of the status of the institution as a junior High Madrasah. A lot of water has flown down the bridge including an inspection by the District Level Inspection Team on February 5, 2011. According to the memo dated July 11, 2011 the said inspection team on February 5, 2011 had recommended for approval of the said institution to the Madrasha Siksha Kendra/Madhyamik Siksha Kendra (Senior Type Madrasha) including

in the case of Kailara Junior High Madrasha at item no.37 of the said list. Initially, this report was not traceable from the records of the respondents and thereby confusion was created. Today the original of the said report has been placed and from the said report it does not appear that any recommendation was made as alleged by the District Officer of Minority Affairs. After considering the said memo no.520/Minority Affairs dated July 11, 2011 at page 25 of the writ petition it does not appear that the said authority has said categorically that there was any recommendation made by the District Level Inspection Team but he had said after 'verify' inspection by the said team duly filled in prescribed proforma was being sent to the Director of Madrasha Education for further action towards approval. On the basis of this communication a coordinate bench had at an earlier stage of this writ petition by an order dated January 12, 2018 quashed the decision of the said Director of Madrasha Education at Annexure P-5 (Dated December 3, 2015) and called for a fresh inspection by the District Level Inspection Team. Such report was filed in a sealed cover and it is dated 16th February, 2018. By the said report no recommendation has been made by the District Level Inspection Team. Mr. Bhattacharya's clients have taken exception to the said report which is also on record.

The scope of controversy has now contracted to a very short compass. According to Mr. Bhattacharya, learned Advocate for the

petitioners the report enumerates facts which are in favour of the proposal being granted and that the institution fulfills all the parameters for being granted as an approval as a Madrasha Siksha Kendra which can still be approved under the existing law. He says that the conclusion that "considering the present condition of the institution, the case is not recommended for approval as MSK" is perverse to the extent that it records a conclusion contrary to the materials on record. He submits that if the report is considered in its proper perspective then it would be seen that not only has the institution fulfilled all the criteria but the nearest other school which could serve the students of this junior high madrasah is 5 kilometers away as appears from the report itself and the same is on the border of Bangladesh.

In view of the mandate on the federating State of West Bengal to safeguard the right of a linguistic and a religious minority imparting religious instruction through educational institutions established and managed by such linguistic or religious minority, I do not think that it would be proper to relegate the students of India in West Bengal to Bangladesh for continuing their education in a Madrasha or Madrasha Siksha Kendra. To do so would be to allow fraud on the principles enshrined under Article 30 of the Constitution of India. Naturally, though a case is to be decided on the basis of the facts brought before

the Court when the opinion of an expert body on which the Director of Madrasha Education is to rely upon is contrary to the materials on record found by the said expert body, it is a situation where the writ Court may intervene by way of judicial review. Accordingly, I dispose of the writ petition with a direction on the Director of Madrasha Education to consider and dispose of the prayer of the petitioners for approval of its institution as a Madrasha Siksha Kendra or any other institution allowed by the executive instructions and statutory guidelines to continue on the basis of the facts recorded by the District Level Inspection Team and not on the basis of its recommendation which recommendation is perverse within the meaning of law. The entire exercise shall be completed within a period of June 30, 2019 and logical effect shall be given thereto within a further period of one week thereafter. The said respondent shall give reasonable opportunity of being heard to the petitioners and to all other persons concerns and also call the members of the District Level Inspection Team who had signed on the report of 16th February, 2019 for ascertaining the facts.

Even though in the normal circumstances by the order dated January 12, 2018 the writ petition would have come to an end, the co-ordinate bench by its order aforesaid chose not to do so. Sitting in a co-ordinate bench I cannot sit in appeal over the said judgment.

The writ petition is disposed of.

There shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be delivered to the learned Advocates for the parties, upon compliance of all formalities.

(PROTIK PRAKASH BANERJEE, J.)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present :- Hon'ble Mr. Justice I.P.Mukerji
Hon'ble Mr. Justice Protik Prakash Banerjee

FMA No. 3398 of 2014
With
CAN 10008 of 2014

Sri Soumendra Malik
v.
Smt. Tumpa Malik

For the appellant :- Mr. Debjit Mukherjee
Ms. S. Chatterjee
Ms. D. Ganguly
....Advocates

For the Respondents :- Ms. Shanti Das
Mr. Subha Dey
...Advocates

Judgement On :- 21.12.2017

I.P. MUKERJI, J.

This case is about the court in which an application for custody of the child under Section 25 of the Guardians and Wards Act, 1890 is to be considered.

The minor, Ishita is very young, about nine years of age.

The parties were married on 13th May, 2007 according to Hindu rites. On 8th May, 2008 the child was born to them. On 12th July, 2010 the respondent wife left the matrimonial house with the daughter to stay with her parents. Since April, 2011 the wife has been staying at 68/1, Netaji Colony, Kolkata-90, separated from her husband in her aunt's house. The minor is in her custody, within the jurisdiction of the District Judge 24 Parganas (N). From 2012 the minor is going to a local school.

The learned District Judge Hooghly on 5th August, 2014 allowed the application of the wife challenging the jurisdiction of the Hooghly court.

The application was made by the appellant/husband under Section 25 read with Section 9 of the said Act before the learned District Judge,

Hooghly. The mother, Tumpa Malik took out a demurrer application under Section 4 (5) (b) (ii) of the said Act, saying that the Hooghly court had no jurisdiction to entertain the application, as the child did not ordinarily reside in any place within its jurisdiction and that the child resided in Baranagar within the jurisdiction of the District Judge 24 Parganas (N). The petition should be returned to the appellant/petitioner for presenting it in the proper court.

On behalf of the husband Mr. Mukherjee argued that a place where a child ordinarily resided connoted his place of permanent residence. Since the father's home was in Hooghly and the child lived there till 2012 it could be taken to be the permanent residence of the child. He also cited an example of a child being moved from place to place by the mother. That would not imply that the application under the said Act would be transferred from one court to another in harmony with the movement of the child. That could not be the intention of the legislature, he added. The place where the child ordinarily resided according to Mr. Mukherjee would denote the place of residence of permanent residence of the family to which the child belonged.

Some definitions in the Guardians and Wards Act, 1890 are very important.

The first is Section 4 (5) (b) (ii). It is set out herein below:-

"*4(5) "the court" means—*

> *(b) Where a guardian has been appointed or declared in pursuance of any such application—*
>
> *(ii) In any matter relating to the person of the ward the District court having jurisdiction in the place where the ward for the time being ordinarily resides."*

Section 25 of the Guardians and Wards Act, 1890 is also set out hereunder.

"25. Title of guardian to custody of ward---(1) If a ward leaves or is removed from the custody of a guardian of his person, the court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the court may exercise the power conferred on a Magistrate of the first class by Section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

The question before us is whether this decision was correct? Whether the District Court at Hooghly, 24 Parganas (N) had the jurisdiction to hear the application of the appellant under Section 25 read with Section 9 of the Guardians and Wards Act, 1890?

What is the meaning to be ascribed to the phrase "ordinary residence of a child?"

It has to be appreciated that the role of the court does not end with the appointment of a guardian over a minor. Nor does the responsibility of the court cease with the appointment of a guardian. The very nature of the provisions of the Guardians and Wards Act, 1890 tend to show that the court has to supervise the work of the guardian, not to remove its watchful eyes from the minor, ensure that the ward's welfare is being looked after by the guardian, his or her property is being taken care of by him and so on. Therefore, this court cannot be far removed from the minor. The ward has to be accessible to the court as much as the court should be accessible to the guardian and any other interested person in his or her welfare. Hence, the provision that only the court within the jurisdiction of which the minor ordinarily resides has the jurisdiction to entertain proceedings under the said Act.

A division bench of the Allahabad High Court in the case of **Jagdish Chandra Gupta v. Dr. Ku. Vimla Gupta** reported in **AIR 2003 Allahabad 317** has tried to identify the ordinary residence of a minor adopting some very relevant factors. The minor must be "dwelling in a place for some continuous time". The residence has to be something more than "temporary residence". "The question of residence is largely a question of intention." One observation in that judgement is very relevant to our case.

"19.....However, in case of the minor no question of intention can arise but the court will have to take into consideration all the relevant facts as brought on record to determine the actual place of residence looking the attendant circumstances. The past abode for however a long period it may be, can cease to be a place where the minor can be said to be ordinarily residing depending upon the facts and circumstances of each case and the nature and duration of the residence. The mere fact that a minor is found actually residing at a place at the time of the application is made by itself is not sufficient to determine the jurisdiction."

The Supreme Court in the similar case of **Ruchi Majoo v. Sanjeev Majoo** reported in (**2011) 6 SCC 479** observed that the place where the child ordinarily resided was a question of fact. The child was ordinarily residing where the mother was residing. She had been studying in a school there for nearly three years.

The parties were married on 13th May, 2007.

It is no doubt true that the minor was born in 2008 in her father's house is in Hooghly. From 12th July, 2010 the husband and wife are living separately. Since August, 2011 the child has been living at 68/1, Netaji Colony, P.S.-Baranagar, Kolkata-90, in the residence of his mother's maternal aunt (Masi). The child goes to a local school there regularly, as we have already observed.

Therefore, the ordinary place of residence of a child depends on the above factors amongst others. The appellant has not been able to

demonstrate before this court that the ordinary place of residence of the minor is not at Baranagar.

It is quite plain that the residence of the minor at Baranagar cannot be called temporary and it is continuous from 2011. It has the touch of permanence. In those circumstances, the court to which the application lay under Section 25 read with Section 9 of the Guardians and Wards Act, 1890 was the District Court at Hooghly 24 Parganas (N).

I feel that the learned District Judge has rightly refused to exercise her jurisdiction, as in her opinion, the ordinary residence of the child was in 24 Parganas (N). I concur with this view. The court at Hooghly had no jurisdiction to entertain the application.

We add that even if an application under Section 25 read with Section 9 of the said Act was made before a particular District Court, it will use jurisdiction the moment the minor's ordinary place of residence changes. The district Court having jurisdiction over this changed ordinary residence will now exercise jurisdiction.

This appeal is dismissed.

No order as to costs.

(I.P. MUKERJI, J)

PROTIK PRAKASH BANERJEE, J.

When learned counsel try their best to render an otherwise simple proposition into something very troublesome, it is only then that the glorious simplicity of the Opinion of my Learned Brother can be best appreciated. While agreeing with most of what my learned Brother has held I would like to add a few paragraphs, which throws into sharp relief the actual dispute between the parties.

The entire case revolves around a short compass as to what would be the meaning which the Court is to ascribe to the words in Section 25 of the Guardians & Wardss Act, 1890, "**Title of guardian to custody of ward-** (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

Both the learned Advocates tried to impress upon me that the magic words are in reality those contained in a few sections of the Guardians and Wards Act, 1890 pertaining to jurisdiction of the District Court. They both draw inspiration from firstly Section 4 Sub-Section 5 and then Section 9 read with Section 4 of the Act of 1890.

Since both the parties have placed great emphasis on these provisions, even if according to me the true construction of Section 25 of the Act, 1890 is to be discovered from the context of that Section alone I find myself reluctantly forced to deal with those Sections to which learned Counsel have drawn my attention.

Section 4 (4) read as follows: -

***"4. Definitions.**-In this Act, unless there is something repugnant in the subject or context.-*

(1) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority;

(2) "guardian" means a person having the care of the person of a minor or his property, or of both his person and property;

(3) "ward" means a minor for whose person or property, or both, there is a guardian;

(4) "District Court" has the meaning assigned to that expression in the Code of Civil Procedure (14 of 1882), and includes a High Court in the exercise of its ordinary original civil jurisdiction;

(5) "the Court" means-

(a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; or

(b) where a guardian has been appointed or declared in pursuance of any such application-

(i) the Court which, or the Court of the officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian; or

(ii) in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or"

Section 9 reads as follows:

"9. Court having jurisdiction to entertain application.-

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in

the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."

It will appear that the provisions indicated by the parties as above are subtly different from the case where a ward has been removed from the lawful custody of his or her guardian. I believe that the parties have been crying themselves hoarse on the altar of Section 4(5)(b)(ii) simply because the language of the said Sub-Section indicates that the District Court which would have jurisdiction in any matter relating to the person of the ward would be the District Court having jurisdiction over the place where the ward for the time being ordinarily resides.

I can see where and how this would appeal to the respondent/mother since it is an admitted position that the mother had removed the child from the custody of husband/father who admittedly is the natural Guardian way back on July 12, 2010 and has not returned the minor child (daughter) to the husband's custody from where the minor had been removed; this has become all the more important since the place where the parents and the ward ordinarily resided together was at a place which was within the jurisdiction of the Learned District Judge at Hooghly in Chinsurah and not the Court of the Learned District Judge at 24 Parganas North, who has jurisdiction over the place to which the minor had been removed; however, the emphasis that the mother/respondent has placed on the words "District Court having jurisdiction in the place where the ward for the time being ordinarily resides" is a double-edged dagger.

This is because something more than mere fortuitous stay or spending of a few nights is required to transform a halt for a night or a few nights into a place where the ward ordinarily resides. Staying in a hotel room does not make the person who resides at such place suddenly harbour an intention of permanent residence. There is a requirement that in

order to attract the jurisdiction of a place on the ground of "ordinary residence"there should be an intention, formed bona fide on the basis of several objective criteria, to reside there with some degree of permanence.

In fact, the judgments are not consistent whether in this country or elsewhere on this aspect of the matter. While the test of permanent intention to reside has not always been the case in India, the Courts have not even assigned a unique or unchanging meaning to the words "ordinarily resident".

The cases of **"Ruchi Majoo Vs. Sanjeev Majoo** reported in **(2011)6 Supreme Court Cases 479"** inter alia at Paragraph 60 as alsothe judgement reported in the case of **"Jagdish Chandra Gupta Vs. Dr.KumariVimla Gupta** reported **in AIR 2003 Allahabad 317"** inter alia at Paragraphs 19, 20 and 21 would clearly indicate (i) "ordinarily resides" has to be something more than temporary residence(ii) the place where the minor generally resides and would be expected to reside but for special circumstances (iii) is not a place which the person residing as a permanent resident has left for good with no intention to come back but has started living in some other place (iv) in addition for a minor, actual residence at or about the time of filing of the application cannot by itself be a reason to determine the ordinary place of residence.

Very obviously, this last criterion has been formulated knowing very well that a minor has very little control over his or her life, and usually the wishes of a minor and its welfare, though given such importance by a Court of Law, are ignored by whosoever has actual physical custody and control of the minor/ward to the extent that where a particular minor or ward is actually residing is not even important where the allegation against one of the parents is that he or she has removed the ward from the custody of a lawful guardian. This is only natural since no person can be allowed to benefit from his or her own fault. If a person could be

allowed to benefit from removing the person of a minor/ward from a jurisdiction to another to force the lawful guardian to chase the wrongdoing parent or person from one jurisdiction to another, this would have been the result. This is fact, appears to be the only rationale behind the rule that actual physical residence is not the criterion through which jurisdiction is attracted in a case which is framed under Section 25 of the Guardians and Wards Act, 1890 and provided that the order sought by the guardian is for the benefit of the minor and for its paramount welfare.

Therefore, the learned counsel for the mother has tried to find out the residence for the time being of the minor to attract the jurisdiction of the particular learned District Court within whose jurisdiction either the minor had been living residing prior to his removal on and from July, 2010 (according to Mr. Debjit Mukherjee) or the place to which the minor had been removed by the mother from the custody of the natural Guardian father after July, 2010. This shows that both the parties have been trying to rely upon the actual place of residence or the place at which either the father or the mother would want to keep the ward who is a minor. Again if the test provided under Section 9 of the Act of 1890 is applied it presupposes that in case where the person of the minor is involved the application would be made to the District Court having jurisdiction in the place where the minor ordinarily resides; but in case where the Guardianship of the property of the minor is applied for it can be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or where minor has property. It shall thus appear that there is no stringency regarding the place of residence nor any requirement to identify where the minor is deemed to ordinarily reside where only the Guardianship of the property of the minor is involved.

Since the entire Act of 1890 must be read as a whole and since each of the words used in the statute must be given meaning and since further the same words used in the same sense must be given the same meaning, and cannot be given widely different meaning and since the words used in the instant case in Section 25 of the Act of 1890 are perfectly capable of being understood without ambiguity I find that the behaviour of the parties to the present case, to identify the court of the learned District Judge having jurisdiction over the place where the ward ordinarily resides, in a case which involves Section 25, and not any other section, does more violence to the plain and literal meaning of the statutory provision aforesaid, and does both logic and the purpose for engrafting Section 25 a disservice.

To my mind the rest of the provisions of the Act of 1890 speak of where an application is to be made over appointment of a Guardian of the Ward or of his property or where Guardian had already been appointed where such application is to be made but Section 25 is an exceptional provision for giving relief to a Guardian from whose custody the ward is removed or the ward leaves provided that the order for return to the custody of the lawful guardian would be for the welfare of the minor. Therefore, Section 25 represents an exception to the general rule as to which District Court has jurisdiction over a case of return of a ward to the custody of the Guardian if he leaves or his removed from such custody. Since it is an exception, the normal rule of tracing jurisdiction to the ordinary place of residence on the basis of the above parameters as in Sections 4(5)(b)(ii) or Section 9 of the Act of 1890,is not to be used in case of Section 25 of the Act of 1890. This is because as indicated by the above persuasive precedents, the ordinary place of residence requires an immediate and clear intention to reside with a decree of permanence which is not merely a casual night's stay and impulsive residence for a while.

In cases covered under Section 25, the intention of the legislature is as I could gather is undoing the mischief of such removal of the ward from the custody of the lawful guardian, provided of course, that the return to the custody of the guardian is to the benefit of the minor. Therefore, provided that the guardian applies for such return to his custody within a reasonable time I hold that the District Court having jurisdiction must always be the District Court which exercises jurisdiction over the place where the ward has been staying before being removed from the custody of the guardian provided always that such application is made by the guardian with reasonable alacrity and any delay in making the application explained to the satisfaction of the learned District Judge in question.

In the instant case as stated by my learned Brother and as appears from the records, removal from the custody of the lawful and natural guardian happened in July 12, 2010, but the application for the return of the ward, was not made until June, 2012 when already the ward had become settled as a student in the school within the jurisdiction of the learned District Judge at District 24 Parganas North. It is therefore clear that the learned District Judge to whose jurisdiction the child had been removed continues to be the learned District Judge for more than one and half years and is still continuing as the learned District Judge and the husband/father clearly had no anxiety nor urgency in applying for return of the ward. So, while the normal rule is to ascertain where the ward ordinarily resides at the time when the application is filed, in case of an application under Section 25 of the Act of 1890 the special rule is to apply before the Court of the Learned District Judge within whose jurisdiction the Ward was ordinarily residing prior to his being removed from or leaving the custody of the said lawful guardian. Even this however, is subject to an exception, being where a lawful guardian has not moved with sufficient speed or lack of delay or laches to attract the

jurisdiction of the Learned District Judge where the ward had been staying with him prior to the ward's being removed from his custody, and where the passage of time shows that there is no logical explanation for such delay. The present case is one such example, where the lawful guardian from his own conduct is not in a position to show why he delayed more than one and a half years before even applying to the former jurisdiction, that is to say, the Court of the Learned District Judge at Hooghly in Chinsurah, from which the ward had been removed and where no satisfactory explanation is given for such delay.

As such I have no hesitation in holding at one with my Learned Brother, that in the instant case the lack of any explanation for the delay in moving the proper forum for an order for return of the ward to the father's custody, shows that the intention of the parties has always been that the ward should continue her studies in the home found for her by her mother, within the place over which the Learned District Judge at District 24 Parganas North has jurisdiction, rather than the Learned District Judge at Hooghly in Chinsurah and it is the place which the parties, including the lawful guardian father, have allowed to become the place where the ward ordinarily resides, and the element of immediate relief which usually accompanies any application under Section 25 of the Act of 1890 is clearly absent in the present case.

The same matter can be looked from a different angle. Where the husband/natural Guardian Acts with urgency to get back a child removed from his lawful custody, the place where he resided last, before the child was unlawfully removed from his custody, is the place on the basis of which jurisdiction would be attracted; where the husband/father/natural Guardian does not show alacrity it would be deemed that there is no cause to invoke the extraordinary jurisdiction under Section 25. In all other cases the test of ordinary residence would apply. I thus hold that the application of the Wife/Respondent seeking a

direction on the appellant/husband to take back the petition under Section 25 of the Act of 1890 with a further direction on the husband to file it before the Learned District Judge, District 24 Parganas North, was rightly allowed and I further hold that the husband's appeal is without any merit and is thus dismissed.

However, in the facts and circumstances of the case, the parties shall bear their own costs. The records are directed to be sent down to the Court of the Learned District Judge, Hooghly, at Chinsurah, as part of the records of Act VIII Case No. 1 of 2012 for taking steps in accordance with law in the light of our judgement and the consequential steps of filing the matter afresh before the Appropriate Court.

Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Protik Prakash Banerjee, J.)

IN THE HIGH COURT AT CALCUTTA
CONSTITUIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT : **Hon'ble Justice Dipankar Datta**
and
Hon'ble Justice Protik Prakash Banerjee

A.S.T 62 of 2018

with
A.S.T.A 19 of 2018

(Nusrat Jahan Ruhi Vs. Shyam Steel Industries Ltd. & Ors.)
With

A.S.T 63 of 2018

With

A.S.T.A 20 of 2018

(BMA Stainless Ltd. Vs. Shyam Steel Industries Ltd. & Ors.)
With
F.M.A.T. 1002 of 2018
&
F.M.A.T. 1001 of 2018
With
F.M.A.T. 1054 of 2018
With
C.A.N. 8308 of 2018

(BMA Stainless Ltd. Vs. Shyam Steel Industries Ltd. & Ors.)
With
F.M.A.T. 1055 of 2018
With
C.A.N. 8262 of 2018

(Nusrat Jahan Ruhi Vs. Shyam Steel Industries Ltd. & Ors.)
With
FMAT 1058 of 2018
With
CAN 8352 of 2018

(Shyam Steel Industries Ltd.—v—Nusrat Jahan Ruhi and Others)

For the appellant in AST 62/18, FMAT 1055/18 & respondent no. 2 in AST 63/18 : Mr. Joydeep Kar, Senior Adv.
Mr. Srijib Chakraborty,
Mr. Rajdeep Majumder,
Ms. Urmila Chakraborty,
Mr. Mayukh Mukherjee
Mr. Souvik Das,

For the appellant in AST 63/18, FMAT 1054/18 & respondent no. 2 in AST 62/18 : Mr. Pratap Chatterjee, Senior, Advocate,
Mr. Mainak Bose,
Mr. Paritash Sinha,
Mr. Amitava Mitra,
Ms. Soni Ojha,
Ms. Sweta Gandhi,

For the respondent no. 1 in all the above appeals : Mr. Saktinath Mukherjee, Senior Advocate,
Mr. Surajit Nath Mitra, Senior Advocate,
Mr. Aniruddha Chatterjee,
Mr. Suddhasatva Banerjee,
Mr. Shounak Mitra,
Mr. Rishav Dutt,
Mr. Soumabho Ghose,
Mr. Zulfiqar Ali Alquaderi,

For the Appellant in FMAT 1058 of 2018 : Mr. Aniruddha Chatterjee.

Heard on : October 10, 2018

Judgment on : October 12, 2018

PROTIK PRAKASH BANERJEE, J:

1. A steel manufacturer sued a celebrity, her management agency and a competitor, for specific performance of a contract dated August 7, 2017 and also for permanent and mandatory injunctions, which would, among other things, have the effect of enforcing a negative covenant in the contract. The contract in question, very common in these days, envisaged that for a certain consideration, the celebrity would endorse or promote only the products of the plaintiff/steel manufacturer for the period during which the agreement would subsist and would not endorse or promote the products of any rival/competitor. The plaintiff alleged breach on the part of the celebrity, induced among others, by the rival, who was said to benefit from the breach.

2. The plaintiff sought interlocutory reliefs in its suit and an ex parte ad interim order of injunction was passed on September 15, 2018, by the learned Judge, VIth Bench, City Civil Court at Calcutta in Title Suit No.1215 of 2018 without prior service of any notice or copy of the petition on the defendants. The celebrity and the rival preferred two several appeals against this ex parte ad interim order, which were registered as AST Nos.62 and 63 of 2018 respectively. While this court was hearing the applications in connection with the appeals to consider the question of interim reliefs, the learned court below proceeded to extend the original ad interim order. Against the extension of the ad-interim orders, two further appeals being FMAT Nos.1001 and 1002 of 2018 were preferred by the celebrity and the rival, respectively. During its pendency, the rival had applied under order 39 Rule 4 of the Code of Civil Procedure. This court

directed that the application for vacating the interim order taken out by the celebrity be treated as a written objection to the application for interlocutory reliefs in the court below and that such application be heard out alongwith the injunction application, in the meanwhile. The learned court below did so, and was pleased to make the original ad interim order, as extended, absolute till the disposal of the appeal being AST No.62 of 2018 and the connected application before this court, by an order dated October 3, 2018. This was further challenged by the celebrity and the said rival by way of FMAT 1054 and 1055 of 2018 respectively. In each of these appeals, the respondent no. 1 is the plaintiff. The plaintiff has also carried that part of the order dated October 3, 2018 aforesaid which directs the interim order to continue till the disposal of the appeal (AST No.62 of 2018) and the connected application by this court. This appeal, where the plaintiff is the appellant, has been registered as FMAT No.1058 of 2018. This court directed on October 12, 2018 that this last appeal at the instance of the plaintiff would be disposed of together with the said three appeals where the plaintiff was the respondent No. 1.

3. While hearing the parties on the application for stay, with the consent of the parties this court heard the parties on the merits of the appeals themselves, dispensing with all formalities, including notice since all parties who had appeared in the court below were represented by learned counsel.

4. The appellant celebrity has alleged based on the pleadings of the respondent no. 1 and the documents it had produced that it was the said

respondent who was in breach of the contract and as a wrongdoer, it was disentitled to claim an equitable relief such as an injunction at the interlocutory stage. The appellant rival supports this contention in its independent appeals. The respondent no. 1 on the other hand alleges that the documents including digital evidence generated by the celebrity/appellant herself, show that she was in breach. To understand the rival contentions, a brief summary of the contractual terms of which the breach is complained, is to be noted.

5. The parties relied upon the following contractual clauses: -

"1. TERM

1.1 Unless terminated earlier this Agreement shall be valid for a period of 2 (two) years, commencing on the Effective Date till 6 August 2019 (hereinafter referred to as the "Term"). Upon expiry or earlier termination of this Agreement, the Company shall remove the promotional and advertising materials bearing the Celebrity, within a period of 90 days thereof.

1.2 This Agreement may be renewed at the option of the Company, on mutually agreed terms and conditions.

2. ENDORSEMENT RIGHTS

2.1 In consideration of the retainer fees (as set out in Clause 3) and on the terms and conditions herein mentioned, the parties hereby agree to the following:

2.1.1 Scope of services: During the Term, the Celebrity shall make himself available for 3 (three) Days per year ("Committed Days"), on the dates as the Company may require for shoot and promotional appearance for endorsing and promoting the products, through photo-shoots, video-shoots, ad-campaign shoots, retail and promotional appearances, dealer meets, voice over, signing souvenirs and press and media appearances. Any unutilized Committed Days(s) during a year shall be rolled over to consecutive year during the Term. The Celebrity shall post, publish, share, comment and like the media contents or advertising materials provided by the Company, from time to time, on various

personal social media platforms of the Celebrity, including but not limited to, Facebook, Twitter and Instagram.

It is hereby clarified that the Committed Days shall include such number of days as mentioned in Clause 2.1.1 above, each constituting of an eight-hour shift excluding any travel time ("Day").

2.1.2 Promotional Materials: The Company shall be entitled to sue the promotional and advertising materials or any promotional activities featuring the Celebrity, during the Term for the promotion of the products, in any manner, including but not limited to, electronic, audio, visual, audio-visual, print and digital media which includes, but not limited to, posters, banners, magazines, newspapers, radio, cinema, outdoor advertising, company reports, publications, television and such other ATL and BTL items.

2.1.3. Non-compete: Notwithstanding anything to the contrary, Celebrity hereby undertakes that during the term, Celebrity shall not directly or indirectly, promote, market and/or endorse any product and/or activity, which is or may be construed to be similar, identical, deceptively similar or in competition with the products

3. RETAINER FEES

3.1 In consideration of the services to be rendered by the Celebrity and the obligations undertaken by the Celebrity under this Agreement the Company agrees to pay to the Celebrity, annual retainer fees of Rs. 5,75,000/- (Rupees five lacs seventy five thousand only) ("Retainer Fees") plus GST as may be applicable, subject to the deduction of income tax under the applicable Law, payable in the following manner.

(i) 50% of the Retainer Fees to be paid on the date of commencement of first year and second year respectively;

(ii) 50% of the Retainer Fees to be paid within 15 days from the date of commencement of first year and second year respectively.

6. TERMINATION

6.1 During the Term, the Company shall have the right to terminate this Agreement with 30 (thirty) days' prior written notice to Celebrity, without assigning any reason whatsoever."

6. The case of the respondent no. 1 as made out in the plaint, is that it entered into the above agreement on August 7, 2017, and thus the appellant celebrity was bound by the terms of the agreement till August 6, 2019. Within this period, even after it "duly performed" its part of the contract, the celebrity chose to endorse the product of its rival in breach of the negative covenant as in Clause 2.1.3 above, which the plaintiff came to know only on September 13, 2018. It has alleged that the celebrity treated the contract to be subsisting by retweeting a product of the plaintiff on September 13, 2018 itself. This it says, continues the endorsement of the products of the respondent no. 1 even while the appellant celebrity was, without the consent of the respondent no. 1, promoting the competing products of the appellant rival. What "endorsement" means is defined as part of Clause 2.1.1 according to both the sides. Therefore, the plaintiff has sued for specific performance, which would inter alia require the strict compliance of the negative covenant during the subsistence of the agreement.

7. The celebrity and the rival, the two appellants, on the other hand, allege that the plaintiff is in breach of the contract so far as its most essential part is concerned, being the payment of consideration, which appears from the case made out in the plaint and the interlocutory application and the documents annexed thereto, which are all part of the records before this court. For this, a few dates, and facts, as appear from the plaint and the contract, are necessary to be considered. Admittedly, the plaintiff tendered to the celebrity the amount

mentioned in clause 3.1 (i) of the contract on August 7, 2017 which shows making of consideration agreed to be fifty percent of the retainer fee for the first year of the contract, but admittedly the plaintiff did not even send the cheque for the said amount for the second year of the contract, before September 14, 2018, whereas under the contract it was to send the said fifty percent of the retainer fee, less income tax and with applicable GST, by the 7th day of August, 2018 (the date of commencement of the second year of the contract). The fact that the plaint was presented on the very day after the plaintiff posted the cheque for the entire amount mentioned in clause 3.1., both sub clauses (i) and (ii) and not just the fifty percent, by a cheque dated September 14, 2018, which the respondent no. 1 has itself annexed to the plaint as Annexure "C", is submitted to be a demonstration that this gesture was only for the purpose of filing the suit and getting an interlocutory order and contradicted the allegation at paragraph 6 of the plaint.The further case of the appellants is that the respondent no. 1 has averred that the celebrity was to perform her part of the contract by endorsement in the manner mentioned in paragraph 2.1.1 only when the respondent no. 1 shared the promotional material prepared by the respondent no. 1 on the social networking platforms of the celebrity, and gave her instructions by electronic mail as evinced from paragraphs 11 and 12 of the plaint, and the documents annexed as Annexure "F" to the plaint, and admittedly there was no such instruction by the respondent no. 1 to the celebrity after July 3, 2018, which too was limited to the "post share schedule till" July 15, 2018. Therefore, when neither payment was received by August 7, 2018 by the celebrity, nor any

instruction given for further promotion, the celebrity was free to think that the contract had been terminated or at least repudiated by the respondent no.1. The celebrity explains the concerned re-tweet of September 13, 2018 as a voluntary act, not done pursuant to the contract which she has alleged in her application for vacating the ad interim order became null and void after August 7, 2018. Moreover, the celebrity has relied upon Section 42 of the Specific Relief Act, 1963, more particularly its proviso, read with Section 41(e) thereof, to show that no injunction can be granted in such a case, because the plaintiff is in breach. The appellants have impeached the reliance by the learned court below on only AIR 1996 Calcutta 67 while ignoring binding judgments of the Hon'ble Supreme Court, to hold that the tests of balance of convenience and its preponderance and whether damages would be adequate becomes immaterial in the case where enforcement of a negative covenant is involved, and prima facie case is enough.

8. In answer to this case, the respondent no. 1 has pointed to the fact that the interpretation of clause 2.1.1 of the contract offered by the appellants is not the only reasonable one on the face of the plain meaning of the words in the contract or in the circumstances of contracts of such nature. The respondent no. 1 urges that the words “on various personal social media platforms of the Celebrity, including but not limited to, Facebook, Twitter and Instagram” in clause 2.1.1 refer not to the place where the respondent no. 1 is to send the instructions or share the promotional materials with the celebrity, but where the celebrity is to inter alia perform her function of endorsement. The respondent

no. 1 submits that the peculiar nature of the digital media where the endorsement is to be done, allows the respondent no. 1 to share its materials on its own account or page with the setting set to public, and the moment that the celebrity likes it or re-tweets it, it becomes an endorsement, showing at the same time two things: that the celebrity acted as if the contract was subsisting, and that she was waiving the breach of the condition relating to payment of the retainer fee after the due date. The respondent no. 1 argued, alternatively, that this was a case where there was delayed payment but not default, and time was not of the essence but payment was and payment at the times mentioned in clause 3.1 (i) and (ii) was not an essential term of the contract. The respondent no. 1 also tried to submit, that payment required an invoice to be raised by the celebrity and in case of the first payment on August 7, 2017 though there was no invoice raised by the celebrity, the second tranche of payment in terms of Clause 3.1. (ii) was not payable by the respondent no. 1 until the celebrity raised her invoice which was done on September 15, 2017 only whereafter the payment was done on September 22, 2017. In case of the second year, no invoice was raised by the celebrity so no payment was made. However, the respondent no. 1 could not explain the reason why it therefore issued a cheque dated September 11, 2018 without any invoice, for the whole amount payable for the second year, not the fifty percent payable on August 7, 2018 or August 6, 2018 but the entire amount, with the applicable GST, but posted it on September 14, 2018 just one day before filing the suit. The respondent no. 1 has, however, pointed out that though the celebrity appellant by a letter dated September 25, 2018 has returned

the cheque to the office of the respondent no. 1, admittedly the celebrity had received the cheque on September 17, 2018 and had not returned it immediately.

9. In reply the appellants have submitted that the respondent no. 1 has tried to improve the case made out in the plaint by its affidavit-in-reply to the application for vacating the interim order, treated as a written objection and where the suit was itself barred by statute, as aforesaid, on the face of the allegations contained in and documents annexed to the plaint, no such injunction could be passed, either in the ex parte ad interim form, or by making it absolute till the disposal of the appeal.

10. Both the parties have placed reliance, inter alia, on paragraphs 6, 8, 10, 11 and 12 of the plaint, in support of their respective contentions and relied upon the documents annexed to the plaint. Paragraph 8 of the plaint reads as follows:

> "...The retainer fees have been duly paid to the defendant no. 1 in terms of the contract. For the first year period an invoice was raised by the defendant No.1 and accordingly payment was made by way of cheques drawn on UCO Bank, 2 India Exchange place, Kolkata 700001, within the jurisdiction of this Learned Court in the first year. For the second year 92018-19) period even though no invoice was submitted by the defendant no. 1, the plaintiff made payment by way of a cheque drawn on State Bank of India, 24, Park Street, Magma House Kolkata 700016 within the jurisdiction of this Learned Court. Copy of the invoice along with the copies of the cheques issued by the plaintiff in favour of the defendant no. 1 are annexed with the plaint and marked with the letter "C"..."

11. At the time of hearing, however, based on the above facts as admitted on the face of the records the learned Senior Counsel appearing for the first

respondent conceded that there was a breach so far as the time of payment was concerned but he contended that this was not essential term of the contract.

12. Learned arguments of law have flowed back and forth from the learned Senior Counsel engaged in the matter, ably assisted by their learned juniors. This court has heard arguments based on Fry on Specific Contract, 6th edition, travelled to the Court of Appeals in the United Kingdom and also to the Chancery and considered the learned treatise of Mullah on the law of contracts. The parties relied upon several judgments most of which pertained to the maintainability of the suit, the interpretation of Section 27 of the Indian Contracts Act, 1872, the extent of enforceability of a negative covenant, where it could not be enforced, the specific performance of contracts of service, and such weighty matters which properly speaking out to be decided only when the suit is finally heard.

13. Among these judgments, were **Burn & Co. Ltd—v—Thakur Sahib Sree Lokhdirji of Morvi Estate** reported in **AIR 1925 PC 188**, where also a question arose about whether time was of the essence of the contract. There, their Lordships were pleased to opine that they would advise His Majesty to dismiss the appeal. The ground was, that though the Division Bench in appeal from the learned single Judge had held that "but for the conduct of the defendants I should have thought that with regard to the payment of the second instalment, time was of the essence of the contract". The conduct referred to was despite there being a non- performance of the condition for payment of the second

installment within time, the defendants delivered the wagons in question. It was in respect of sale of goods, and there was a positive act clearly in terms of the contract, which could be shown to constitute a waiver by the defendants. In fact, the suit was decreed on such findings. In the present case relating to a contract of personal service, there is no such conduct which can be shown as waiver, without evidence being taken and the matter being decided finally. It therefore, will not apply to the present case which relates to the interlocutory stage.

14. Another judgment cited by the learned Senior Counsel for the respondent no. 1 was **Gomathinayagam Pillai and Others—v—Palaniswami Nadar** reported in **AIR 1967 SC 868**. This judgment too, would not apply since it was given in the backdrop of a final decision in respect of a contract for sale of immovable property, where, the question of the plaintiff being disentitled to specific performance on the ground of delayed performance was finally abandoned before the Hon'ble Supreme Court. Therefore, with respect, I do not think it applies to the present case, either.

15. Another judgment cited before this Hon'ble Court was **American Pipe Company—v—State of Uttar Pradesh** reported in **AIR 1983 Cal 186**. Here too, the suit was finally adjudicated and one of the issues which arose in this contract for sale of goods was whether time was of the essence of the contract and whether the exercise of option was under the contract. In this case, on evidence, time was held to be not of the essence of the contract. I do not understand how this can at all be applicable to the present case, where at the

interlocutory stage, it is clear and admitted that the respondent no. 1 did not make payment within the time stipulated in the contract of service and the appellant who was the defendant no. 1, never got the money before the suit was filed. This case clearly does not apply.

16. The judgment in the case of **Board of Acting Governor of the La Martirere and Others—v—National Engineering Industries Ltd**. and Others reported in **(2005) 2 CHN 207**, though in the context of rejection of an injunction order at the interlocutory stage, arose out of a registered deed of lease and covenants contained in it. It is on the general principle of enforcement of a negative covenant under Section 42 of the Specific Relief Act, 1963. The coordinate bench was not called upon to decide the effect of the proviso to Section 42 of the Act of 1963, and nor did it relate to a contract of personal service. It is not an authority for the question which arises in the present case, relating to whether or not the interlocutory orders seeking to enforce a negative covenant in the peculiar facts of this case, ought to be continued or set aside. This too therefore, does not apply.

17. Therefore, with great respect to the forensic skills of the learned counsel, this court feels that whether the plaintiff/respondent no. 1 will ultimately succeed in the suit ought not to be decided at this stage when the appeal at best survives as an appeal from an order of temporary injunction. If this court decides to record findings on the questions of whether the suit is maintainable by reason of the proviso to Section 42 of the Specific Relief Act, 1963, then nothing

will remain in the suit. Even the questions of whether time was of the essence of the contract and whether payment within the time stipulated in Clause 3.1 and its sub-clauses was an essential term of the contract, and whether the explanation offered by the respondent no. 1 for its delayed payment will have to be considered for the limited purpose of defending or impeaching the interlocutory order. It will naturally not bind the learned court below or influence it while deciding the suit itself. Therefore, this court declines to decide the other questions raised before it, including whether a contract of personal service is enforceable specifically, whether a negative covenant can be enforced in a suit, in restraint of trade or business, even if the restraint is partial, whether the agreement could be held to be subsisting as on September 13, 2018, or stood repudiated and/or terminated, or anything which, properly speaking has to be decided while finally adjudicating the suit.

18. In fact, a judgment cited at the Bar, being the case of **Percept D'Mark (India) (P) Ltd.—v—Zaheer Khan and Another**, reported in **(2006) 4 SCC 227**, where too the appeal arose from a division bench of the High Court of Judicature at Bombay reversing the decision of a learned single Judge granting an interlocutory order of injunction in a proceeding under Section 9 of the Arbitration and Conciliation Act, 1996, the Hon'ble Supreme Court was pleased to observe at paragraph 44 of the report that such an exercise as to interpretation whether the agreement was in restraint of trade or not was not to be undertaken in the present interlocutory proceeding.

19. As is clear, both the appellants and the respondent no. 1 spent the bulk of their energy trying to impeach or defend the maintainability of the suit for enforcement of the negative covenant in the facts of the case and the law applicable as they appeared at this stage, until on query by the court as to how the interlocutory order initially challenged as an ex parte ad interim order, and thereafter as a temporary injunction, could be defended or impeached they were prevailed upon to cite the authorities on this subject.

20. This court would rather travel to the first principles in India relating to grant of temporary injunctions and the law laid down in this behalf, in the specific context of enforcing negative covenants by interim reliefs and not as a final adjudication. For that, we shall examine first, the provisions of the Specific Relief Act, 1963, governing the grant of temporary injunctions.

"Section 37 - Temporary and perpetual injunctions: (1) Temporary injunctions are such as are to continue until a specific time, or until the further order of the court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908."

"Section 42 - Injunction to perform negative agreement: where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

Provided that the plaintiff has not failed to perform the contract so far as it is binding on him."

21. It has not been disputed at the Bar that the provisions which relate to the grant of temporary injunction are regulated by Section 94 and the provisions of Order 39 of the Code of Civil Procedure. The jurisdiction of this court as a court of appeal to interfere with such an interim order which is an equitable relief, has also been well settled as appears from the fact that both the adversarial sides relied upon the same binding judgment of the Hon'ble Supreme Court which has laid down the law in this behalf.

22. Both the parties have relied on the judgment in the case of **Gujarat Bottling Co. Ltd and Others—v—Coca Cola Co. and Others**, reported in **(1995) 5 SCC 545**. So far as the principles governing the grant of interim orders and the scope of this court's interference with it are concerned, the Hon'ble Supreme Court laid down this law: -

"Paragraph 43. The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court applies the following tests — (*i*) whether the plaintiff has a prima facie case; (*ii*) whether the balance of convenience is in favour of the plaintiff; and (*iii*) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine

where the "balance of convenience" lies. [See: *Wander Ltd.* v. *Antox India (P) Ltd.* [1990 Supp SCC 727] , (SCC at pp. 731-32.] In order to protect the defendant while granting an interlocutory injunction in his favour the court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial."

"Paragraph 47. In this context, it would be relevant to mention that in the instant case GBC had approached the High Court for the injunction order, granted earlier, to be vacated. Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings**."**

23. Even though the original ex parte ad interim order has now merged with the order dated October 3, 2018 by which the temporary injunction was passed, since the appeals from the said order and its extension are being heard together with the appeals from the order of temporary injunction, nothing prevents this court from examining whether the tests laid down by the Hon'ble Supreme Court in the case of **Gujarat Bottling Co. Ltd** (supra) were followed, at any of the stages as aforesaid. On the face of the documents annexed to the plaint, the conduct of the respondent no. 1 was not blameless when it approached the court. It sought an equitable relief which would have the effect of at least partially preventing the celebrity from earning a livelihood – from endorsements of products – on the basis of documents which clearly showed that in order to allege

that it had performed its part of the contract, it had tendered payment of consideration for the second year of the contract just one day before it filed the suit, and obtained the interim order. Prima facie, therefore, its conduct shows that the contract was not performed within the time stipulated in it, and worse, the affected appellant/defendant no. 1/celebrity had not even got the money when the suit was filed. Therefore, prima facie, the motive for such payment was not to perform the contract or comply with its contractual obligations, but only to give the impression that the contract was subsisting. The respondent no. 1 did not wait until the celebrity appellant, the defendant no.1 before the learned court below, had received the said cheque by mail, before presenting the plaint in the suit and seeking and obtaining an ex parte ad interim order without notice. There is no explanation for such delayed tender which the celebrity appellant did not even receive before the suit was filed. Therefore, a court considering grant of an equitable relief ought not to have, on the face of such documents, passed such an order, particularly when it never even considered the preponderance of balance of convenience. If the order itself was bad, then its extensions without independent reasons, are also bad. It is true that the weighty questions about the validity of the agreement, its subsistence, whether it is in restraint of trade, the interpretation of the contract are all of a nature which have to be decided on evidence and hence there is a prima facie case to go to trial. However, these are not the only factors which the learned court below ought to have considered in view of the binding judgment of the Hon'ble Supreme Court. By relying on a decision of this court, even a Bench decision, in preference to the law laid down

by the Hon'ble Supreme Court which was cited before it, the learned court below consciously ignored the question of balance of convenience and held it to be immaterial. The learned court below, by doing so, not only erred in law but did what even this court could not do – it acted contrary to judicial discipline and the doctrine of stare decisis and precedents and made mincemeat out of the hierarchy of courts and Article 141 of the Constitution of India. Therefore, even the final order on the application for temporary injunction cannot be sustained since it did not consider all the questions which the Hon'ble Supreme Court in the case of **Gujarat Bottling Co. Ltd** (supra) held must be considered before granting such an interlocutory relief. Such order must, therefore, be set aside.

24. To this Court, however, the greatest flaw in the case for the interim order appears to be that a plaintiff claiming an equitable relief, has approached the Civil Court without acting equitably. It did not disclose before the court the material fact that even on September 15, 2018, the date of institution of the suit, the defendant no. 1/appellant/celebrity had not received the amount that the respondent no. 1 had been required to pay to her in two tranches – fifty percent on August 6 or at the latest, August 7, 2018 and fifty percent on August 22, 2018. Instead it deliberately suggested that which was false, being that allegedly the retainer fees were duly paid to the celebrity in terms of the contract. The payment was clearly made merely to create an illusion of due payment (as in Paragraph 8 of the plaint aforesaid) for getting the interim order. These are examples of clever drafting which are deliberately made to create an illusion of

that which the litigant knows clearly is not true. This should not be encouraged by a court of equity because these illusions are no better than falsehoods, disguised as the truth. The bona fides of the first respondent, at least prima facie, are wholly demolished by these pleadings. Since temporary injunction is also an equitable relief within the discretion of this court and in a case were such sharp practice has not been explained properly, this court is not inclined to grant any order of temporary injunction in favour of the first respondent.

25. This court however, would not like to send the matter back on remand for the purpose of deciding the question of whether or not to grant temporary injunction, now that it has already found that the conduct of the respondent no. 1 was not blameless and it made the payment of the said amount by the cheque dated September 11, 2018, sent by it only on September 14, 2018, and when it filed the suit even before the defendant no.1/appellant celebrity had received it, without disclosing it and who has, thereafter, returned it to the respondent no. 1. Rather, the court takes up the questions of balance of convenience and inconvenience. No case has been made out that the services of the celebrity appellant are so unique or she is so unique that deprivation of endorsement by her, even if it is at the instance and to the benefit of the rival appellant, would mean an end of the business of the respondent no. 1. The respondent no. 1 enjoys an enviable reputation as a manufacturer of TMT bars – which its rival appellant also produces – and is endorsed by the likes of Virat Kohli, the captain of the BCCI Team India in cricket. The documents annexed to the plaint, which

were prepared by the respondent no.1, themselves show this. On the other hand, the celebrity appellant, while a thespian of some note in regional films, depends upon her income from her appearances and endorsements for her livelihood. If she is restrained from making any endorsement of the products of the rival appellant, when the respondent no. 1 admittedly has not issued any instruction to the celebrity beyond July 15, 2018 for any performance which she is to record or any material which she is to promote, especially during the festive season in West Bengal which commences from October 14, 2018, she will be without a substantial portion of her livelihood. Even assuming that the contract is subsisting – without deciding this question – the injury which the respondent no. 1 will suffer by her endorsing the products of the rival appellant, can be cured and compensated in money value. This is because it is not the case of the plaintiff in the plaint that it is only the endorsement by the celebrity appellant which has resulted in popularity of the product of the respondent no. 1, its reputation and the increase in its sales and without her endorsement or with her endorsing the rival's product, the business of the respondent no. 1 would come to a stand-still. As such the balance of convenience and inconvenience is clearly against grant of a temporary injunction as prayed for by the respondent no. 1. The appellant rival and the appellant celebrity shall however, keep a separate account of the money paid to the appellant celebrity for her promoting or endorsing the products of the appellant rival, which shall be paid to the respondent no. 1 as compensation in addition to the reliefs prayed for in the suit, in the event that the suit succeeds. Naturally, this court desires that the suit is

disposed of as expeditiously as possible, and subject to the convenience of the learned court below, but preferably before August 6, 2019.

26. The impugned orders under appeal, at the instance of the celebrity appellant and the rival appellant, in all the cases as above, are set aside with the above directions. The applications are disposed of accordingly.

27. So far as the appeal preferred by the respondent no.1 is concerned, against that part of the order dated October 3, 2018 which makes the interlocutory order of injunction absolute till the disposal of AST No.62 of 2018, this court agrees with Mr. Chatterjee that when an application for temporary injunction is being disposed of, it can either be allowed, so that the interim order granted continues till disposal of the suit or for a certain period, or it may be rejected, but making the injunction "absolute" till the disposal of the appeal is a material irregularity. Though this court appreciates the predicament of the learned court below, and its desire not to overreach the process of the appellate court, the learned court below ought to have appreciated that the desire of this court was that the learned court below adjudicated and disposed of the application for temporary injunction even during the pendency of AST No.62 of 2018 for which reason the hearing of the said appeal had been adjourned.

28. Be that as it may, now that this court has set aside the impugned orders dated September 15, 2018, its extension and the order dated October 3, 2018 in their entirety and passed other directions on the application for temporary

injunction disposing of it by reversing the said orders, as above, nothing remains of the appeal preferred by the plaintiff, and therefore, without approving of the said part of the order dated October 3, 2018 but strongly deprecating it, this court dismisses FMAT No.1058 of 2018 and the connected application.

29. The parties shall bear their own costs.

30. Photocopy of this judgment and order, duly countersigned by the Assistant Court Officer shall be retained with the records of all the appeals except A.S.T. 62 of 2018.

(Protik Prakash Banerjee, J.)

DIPANKAR DATTA, J.:

I agree.

(Dipankar Datta, J.)

Later:

After pronouncement of the judgement and order, learned advocate on behalf of the plaintiff/respondent, prays for stay of operation of the said judgment and order.

Such prayer is considered and refused.

(Dipankar Datta, J.) **(Protik Prakash Banerjee, J.)**

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C.A.N. 11856 of 2017
in
A.S.T. 403 of 2017
(Sri Sumant Yadav Vs. Union of India & Ors.)

Mr. Debrup Bhattacharjee
Mr. Tirthankar Dey
.....For the appellant/applicant

Mr. Sanajit Kumar Ghosh
Ms. Dhiswari Nag
.....For the respondents

Protik Prakash Banerjee, J.:

This appeal is directed against the order dated December 4, 2017 passed by the learned Judge by which A.S.T. No. 401 of 2017 (Sumant Yadav Vs. Union of India & Ors.) was dismissed on the ground that there was a provision of an appeal before the Chief Commercial Manager or recourse by way of arbitration.

According to the learned Judge in the impugned order, this was a writ petition which brought before the writ Court a dispute not involving any public law element. Also, according to the learned Judge, the question as to whether cancellation of the contract along with other punitive action was correct or not required adjudication upon receiving evidence and not by way of a writ petition. These findings of the learned Judge were in the context of an impugned order dated November

27, 2017 passed by the railway authorities purportedly in terms of a bilateral contract between the writ petitioner and the railways, under which the railways claimed that they had a power in certain contingencies not only for cancellation of contract but also to debar from fresh registration over all divisions and the zonal railways for the Indian Railways for a period of five years.

The relevant clauses 6.8 and 7.6 of the agreement on which reliance has been placed by the railway authorities are extracted hereinbelow for the sake of convenience: -

> *"**6.8** With a view to prevent fraud and leakage of railway revenue, the zonal railway must ensure that the cases where the lease holder applies for non loading/leave at originating station and same is granted, the originating station must convey the message to all the concerned to intermediate stations through commercial controller/ telephonically. On such days loading should not be done by the lease holder at any of the intermediate station.*
>
> *If it is found to have been loaded the lease SLR/VP by the leaseholder from any of the intermediate station on the day(s) of leave/exemption/non-loading permission, his lease contract will be terminated and registration will be cancelled for forfeiting security deposit and Registration fee as per Para 4.15 of FM Circular no. 06 of 2014. (para 18.8)*
>
> ***7.6** If the registration of a leaseholder is cancelled as a punitive measure, either for reasons of repeated over loading or for repeated failure to start loading after award of contract or for attempt to deliberately defraud railways or for repeated violation of any of the existing stipulations where cancellation of registration has been legislated as the penalty, then the entire registration fee would be forfeited.*

> *In addition to forfeiture of registration fee, all his existing leasing contracts being operated from that division would also be cancelled. However, contract can be cancelled/terminated by the Railways with the approval of tender accepting authority.*
>
> *In addition to cancellation, such a leaseholder would be debarred from fresh registration for a period of 5 years. All the Railways should be informed the name of the Firm who has been debarred fresh registration will not be done by any of the Zonal Railways/Divisions by the name of such firm/or leaseholder for a period of five (05) years. (para 4.15)*

By the order dated November 27, 2017, the railway authorities after having made certain allegations as to what are alleged to be the breaches by the petitioner of the contingencies which, according to the railways, would trigger the operation of the said clauses extracted above, passed the order as impugned in the writ petition.

The punishments imposed by the railways are as follows: -

> *"(1) Lease contract of RSLRD of 13465 UP Howrah-Malda Intercity Express Ex.HWH to MLDT which was valid from 01.02.17 to 31.01.22 cancelled with effect from 01.12.17 and security deposit is forfeited.*
> *(2) As per para 7.6 of the Agreement, your registration in Howrah Division is hereby cancelled and registration fee is forfeited. Your existing lease contracts i.e. leasing of FSLR II of 12311 up Kalka Mail valid for period from 01.12.17 and the security deposit thereof stands forfeited.*
> *(3) Your firm will be debarred from fresh registration over all Divisions and Zonal Railways over Indian Railways for a period of 05 years."*

In the said order dated November 27, 2017 issued by the Assistant Commercial Manager (HG) for Senior Divisional

Commercial Manager, Howrah, there is no allegation that the writ petitioner was put on notice or was given any opportunity to show cause or being heard before such an action was taken. No allegation was made that the writ petitioner was given any opportunity to defend himself. Clause 7.6 of the contract extracted above clearly show that the action of cancellation of registration and debarring the writ petitioner from fresh registration are punitive measures. Before the learned single Judge, the writ petitioner relied upon the decision in the case of **Erusian Equipment and Chemicals Ltd.—v—State of West Bengal and Another**, reported in **AIR 1975 SC 266** in support of the proposition that such an action by an authority under Article 12 of the Constitution of India which was "State" within the meaning of that article and which had civil consequences and attached a stigma was arbitrary and in violation of the basic principles of natural justice. It was also argued, relying upon the said decision and the way that the law had changed in the constitutional history of this country, that the Government unlike a private person would not pick and choose whom to give business to and at the very least in order to sub-serve the principles of natural justice had to grant an opportunity of being heard before taking any such

decision of blacklisting or debarment whether publicly or confidentially or departmentally. Such a decision of the Hon'ble Supreme Court did not find favour with the learned Single Judge.

Though the law is trite that every time there is a violation of the basic principle of natural justice causing prejudice, it is arbitrary and in violation of Article 14 of the Constitution of India, and that a gross violation of the basic principles of natural justice by an authority under Article 12 by itself gives rise to a public law dispute, the learned Single Judge was pleased to record a finding that no public law element was involved in the dispute.

Whether the appellant had actually committed the breaches complained of by the railways – we make it clear that they did not fall for decision either before this Court or before the learned single Judge. This is because the question was not whether the writ petitioner was guilty of anything he had been accused of doing by the railways, but whether the railways had jurisdiction to impose a punishment on him without allowing him an opportunity to defend himself and without putting him on notice of the proposed punishment.

That such punishment was imposed upon him without giving him any opportunity of defending himself is admitted both on the face of the records as also the submission of the learned counsel appearing on behalf of the railways. Therefore, this is not a case where a disputed question of fact has arisen for which evidence is to be taken. On the other hand, the admitted facts show that there was a gross violation of the basic principles of natural justice, as demonstrated above, with all the consequences which follow such facts.

On behalf of the railways, it was first submitted that the writ petition itself was not maintainable and even if it was maintainable, disputed questions of facts were involved for which this Court ought not to intervene under Article 226 of the Constitution of India; a further attempt was made to persuade this Court that since there were allegations of fraud against the appellant of a particularly egregious nature, this Court ought not to intervene.

Regarding the question of alternative remedy, since we have already held that there has been gross violation of basic principles of natural justice as above, this is one of the exceptional cases where despite the existence of an alternative remedy, the writ Court is not powerless to

intervene and in fact may, in some cases such as this one, be held duty bound to intervene. We draw sustenance from the judgment in the case of **Registrar of Trademarks Vs. Whirlpool Corporation** reported in **1998 (8) SCC 1**. So, it would not be necessary for the appellant to either knock on the doors of an appellate authority or seek arbitration under a bilateral contract.

At any rate, the law is also trite that an unfair trial cannot be cured by a fair appeal.

So far as the question of maintainability is concerned, it is clear from the answer to the query given by Mr. Ghosh, learned counsel for the railways that this objection was actually founded more on the ground of alternative remedy than on the ground of maintainability of the writ petition. The learned counsel for the railways accepts that this Court has territorial jurisdiction over the respondents and further that the railways are both “State” within the meaning of Article 12 of the Constitution of India and “person or authority” within the meaning of Article 226 of the Constitution of India, and that the impugned action was taken pursuant to power reserved to the railways under the Railways Act, 1989 and in exercise of its statutory duties, and that it is an authority against whom writs and orders

may be issued by this Court under Article 226 of the Constitution.

The submission that disputed questions of facts are concerned has already been dealt with, while we have held that such question does not arise, in the facts of the case and the appeal is being heard on a limited point.

Mr. Ghosh relies, on instructions, upon a so-called letter which is not dated and which is purported to have been signed by one Samir Ghosh, alleged to be an agent of M/s Siwalay Enterprise. In the said undated letter, many allegations have been made which would amount to admissions as against the interest of such M/s Siwalay Enterprise. It is needless to mention that M/s Siwalay Enterprise has been described as a sole proprietorship concern of the appellant/writ petitioner.

Even though Mr. Ghosh tried to impress upon us that this particular undated letter signed by Samir Ghosh was in response to a notice issued by the railways to give a writ petitioner an opportunity to show cause why punishment ought not to be imposed on M/s Siwalay Enterprise, he fairly submits that there is no written note in the records of the railways which he can produce in support of his contention that any such notice to show cause was sent to the writ

petitioner nor any office copy of any such notice nor even any document showing sending of such notice to show cause. On being pressed, he took instructions from the representative of his client present in Court and submitted, rather weakly, that the notice which was issued to the agent was oral.

Interestingly, the impugned order dated November 27, 2017 does not reflect even that such an oral notice had been issued.

We are are afraid that the railways which ought to have the custody and possession of the office copy of the said notice, and the records containing such office notes and endorsements of such a notice to show cause having been prepared and sent to the writ petitioner and the proof of sending it, being unable to produce such records, leaves us with no option but to draw adverse inference against the railways that had the said documents been produced, they would not have supported the version of the railways.

Accordingly, the said letter alleged to be written by Samir Ghosh in response to the invisible and unavailable notice to show cause whose existence cannot be established even prima facie, cannot be looked into at this stage by us, but of course the railways would have the right as and when a

properly constituted proceeding is initiated to rely upon such letter in accordance with law.

The only question of law which remains is whether the action of the respondent railways in terminating a contract as also debarring the writ petitioner from entering into any contract with any railway division or any zonal railways within the meaning of the Railways Act, 1989 is a contractual action or whether it can independently be challenged under Article 226 of Constitution of India as involving a public law dispute.

In support of the contention that this is a case of breach of contract and therefore not amenable to writ jurisdiction, the respondent relied upon a decision of **C. K. Achutan Vs. State of Kerala & Others** reported in **AIR 1959 SC 490**. In this judgment of the Hon'ble Supreme Court (Bench strength 5), the Hon'ble Supreme Court was pleased to hold in the peculiar fact situation of that case where the writ petitioner had moved the Hon'ble Supreme Court under Article 32 that his contract had been cancelled, and that it was not done in accordance with the manner mentioned in the conditions of the contract. In such factual matrix, the Hon'ble Supreme Court was pleased to hold in paragraphs 8 and 9 of the said report, as follows: -

"8. The gist of the present matter is the breach, if any, of the contract said to have been given to the petitioner which has been cancelled either for good or for bad reasons. There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is chosen rather than another, the aggrieved party cannot claim the protection of Art. 14, because the choice of the person to fulfil a particular contract must be left to the Government. Similarly, a contract which is held from Government stands on no different footing from a contract held from a private party. The breach of the contract, if any, may entitle the person aggrieved to sue for damages or inappropriate cases, even specific performance, but he cannot complain that there has been a deprivation of the right to practise any profession or to carry on any occupation, trade or business, such as is contemplated by Art. 19(1)(g). Nor has been shown how Art. 31 of the Constitution may be invoked to prevent cancellation of a contract in exercise of powers conferred by one of the terms of the contract itself.

9. The main contention of the petitioner before us was thus under Art. 10(1) of the Constitution, and he claimed equal opportunity of employment under the State. To begin with, a contract for the supply of goods is not a contract of employment in the sense in which that word has been used in the Article. The petitioner was not be employed as a servant to fetch milk on behalf of the institution, but was a contractor for supplying the articles on payment of price. He claimed to have been given a contract for supply of milk, and did not claim to be an employee of the State. Article 16(1) of the Constitution, both in its terms and in the collocation of the words, indicates that it is confined to "employment" by the State, and has reference to employment in service rather than as contractors. Of course, there may be cases in which the contract may include within itself an element of service. In the present case, however, such a consideration does not arise, and it is therefore not necessary for us to examine whether those cases are covered by the said Article. But it is clear that every person whose offer to perform a contract of supply is refused or whose contract for such supply is breached cannot be said to

have been denied equal opportunity of employment, and it is to this matter that this case is confined."

The factual matrix of the present case is not the same. We have already held that we are not going to interfere with the punishment of cancellation of the contract itself. The Hon'ble Supreme Court in the case referred to above had not been called upon to deal with the effect of a bar to fresh registration and a bar to entering into a contract with a person on the basis of grave allegations having civil consequences and a stigma without giving him an opportunity of defending himself. The Hon'ble Supreme Court was only deciding the case before it on the facts as were presented before it which were wholly different from the facts of the present case as indicated above. It is trite that a decision is only an authority for what it actually decides and not a proposition that may seem to flow logically from it and that a little difference in facts can make a lot of difference in the value of a case as a precedent as were, in effect, held in the case of **Quinn—v—Leathem** reported in (**1901) AC 495 : (1903) AER 1,** which has been followed in India in several cases including **Bhavnagar University—v—Palitana Sugar Mill Pvt. Ltd. and Others** reported in **AIR 2003 SC 511** and before that in **Mafatlal Industries Ltd and Others—v—Union of India and Others** reported in (**1997) 5 SCC 536**.

Therefore, this case is not an authority for the proposition canvassed by Mr. Ghosh and does not stand in the way of this Court either entertaining or allowing the appeal, id est., the grievance agitated in the writ petition to the extent of punishment no. 3 which was imposed without granting the writ petitioner any opportunity of defending himself. After all, even God gave an opportunity to Adam to defend himself in the Garden of Eden before imposing a punishment on him, and the Railways cannot be held to be higher than God Almighty.

Even otherwise, this is not a case merely of the State choosing to enter into a contract with one person over another, but a case of the State having awarded a contract to one party, and then admittedly imposing punishments on him of being ineligible for fresh registration for any new contract without giving him an opportunity of being heard, thus showing an animus sufficiently hostile to merit being called an executive action rather than a merely contractual one or choosing who will perform a contract for it.

It is perhaps no longer the law of the land that no writ petition lies against the State when it acts in its contractual capacity when the writ jurisdiction under Article 226 is concerned. It has been appositely held by the Hon'ble

Supreme Court that "*Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist*" in the case of **Kumari Shrilekha Vidyarthi and Others—v—State of U.P. and Others** reported in **AIR 1991 SC 537.** We hasten to add that we are not relying upon a decision of Bench Strength 2 in preference to a decision of Bench Strength 5. It is only that the decision of the Larger Bench is not applicable to the facts of this case and can be and has been distinguished as above.

So far as the distinction drawn by the learned single Judge on facts with **Erusian Equipment** (*supra*) on the ground that in **Erusian Equipment** (*supra*) the punitive action was black-listing though confidential and departmental, which was permanent and in this present case, it is a bar to registration only for a period of five years albeit without granting any opportunity of defending himself being granted to the petitioner, is concerned, with great respect to His Lordship, we must hold that it is a distinction without a difference in the facts of the case. The judgment of the learned single Judge does not address the question of the gravity of the civil consequences suffered by the writ petitioner in both the cases and the bar to fresh registration which ensues on the basis of allegations against which the writ petitioner was never given any opportunity to defend himself.

No useful purpose will be served by remanding the matter back to the learned single Judge for a decision on the matter since we have already decided the question of violation of natural justice as above.

Accordingly, this appeal succeeds to the extent of quashing of the impugned order dated November 27, 2017 so far as punishment no. 3 extracted above is concerned and

also to the extent of setting aside the order passed by the learned single Judge.

We make it clear that we do not propose to interfere with that part of the order dated November 27, 2017 which cancels the contract of lease between the parties and forfeiture which are incorporated in punishment nos. (1) and (2) of the said order. This is because this would require sifting of evidence and taking of evidence which we are not inclined to do in this jurisdiction.

Liberty is reserved to the writ petitioner to take appropriate steps in respect of such penalty as incorporated in punishment nos. (1) and 2 of the said order as aforesaid, as may be advised.

We think, the interests of justice would be best served if the matter is disposed of by granting liberty to the respondent railway authorities to proceed afresh in accordance with law against the writ petitioner after giving him due notice and reasonable opportunity of defence; liberty is also granted to the writ petitioner to proceed in accordance with law as he may be advised in respect of the punishment which has not been interfered with by this Court as indicated above. We make it clear that we have not gone into the merits of the case and rival allegations and that all the points

in respect of the merits of the case shall remain to be agitated including whatever amount has been forfeited.

It is made clear that setting aside of punishment no. 3 will not by itself restore the registration or enable the writ petitioner to apply for fresh contract and forfeiture of registration fee shall abide by the result of the decision to be given in the fresh proceedings to be initiated in terms of this order.

The appeal is disposed of. In the instant case, there shall be no order as to costs.

In view of the aforesaid order, nothing survives for decision on C.A.N. 11856 of 2017 and the same stands disposed of too.

Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

(Protik Prakash Banerjee, J.) (Dipankar Datta, J.)

S/L No. 45
13.11.2018
Ct- 10
(AD)

W.P. 9776 (W) of 2018

Smt. Shikha Sarkar
Vs.
The State of Wes Bengal & ors.

Mr. Kumar Jyoti Tewari
Mr. Rajlakashmi Ghatak
…. For the Petitioner.

Mr. Arjun Roy Mukherjee
Mr. Sajal Kumar Pandit
…. For the State

ears of independence and the bold words of Article 14 of the titution of India, and the hallowed expectations of Article 15 t women in India are still treated as the second sex, and er equality remains a concept which is used, in reality, to rce the patriarchal traditions of our society. This is what ars to me when I go through the records relating to the writ ion where Mr. Kumar Jyoti Tewari's client has had to enge the decision of the respondent no. 3 upholding the ol authority's decision to dock the pay of the writ petitioner pril 2017 because she availed of a child care leave for the ons stated therein.

Roy Mukherjee, learned Advocate for the State submits that judicial review is directed against an order of the respondent passed on June 14, 2018. This order was passed in terms e last chance to comply as given by a coordinate Bench on 8, 2018 in an application for contempt where rule was

ed. Such application for contempt arose from an order ed by the coordinate Bench on July 19, 2017 in W.P. 2592 (W) of 2017. In such writ petition, the writ petitioner challenged the action of the respondent authorities including chool for wrongful withholding of the salary of the petitioner period when the petitioner had not attended her duties. It the case of the petitioner that she had duly applied for child leave. The case of the respondent school was that though had applied for leave from 14th of February, 2017 she gone eave from 17th of February, 2017 and availed of 42 days of even before it was approved. Thus, the case of the school, ief, as Mr. Roy Mukherjee would like to put it, is that the petitioner had been willfully absent without leave and a very punishment of withholding of one month's salary was sed on her.

e earlier writ proceedings as aforesaid a Coordinate Bench directed that the third respondent who considers and osed of the said representation. By an order dated ember 20, 2017 the third respondent had expressed his on as follows:

> "From the records as were placed before me I am of the opinion that grant of child care leave is not a matter of legal right and every employer, before granting such leave, has to balance various aspects, including the working requirement of the employer not being affected on account of leave sought by an employee and in the instant case the petitioner was enjoying such leave prior to sanction of the same was made by the administrator of the school and the petitioner left the school without confirmation being made on such leave by the school administration and enjoying a total 42 days of unauthorised leave."

eafter the respondent no. 3 had however not disposed of the

er but directed the present respondent no.4, the nistrator of the school, to take a decision in the matter. The empt application was filed since the third respondent had complied with the order of the coordinate Bench of July 19, , by not disposing of the matter himself.

Roy Mukherjee submits that by the order dated June 14, the respondent no.3 has not taken any fanciful decision has merely upheld the decision taken by the school orities, for the reasons stated in it, against which the first petition aforesaid had been filed. This decision of the school ority is also annexed to the present writ petition and ars at page 75 and a sequel of several notices of the loner to show-cause.

rding to Mr. Roy Mukherjee, the opinion which has been rated in the fourth last paragraph of the order dated June 018 (annexure P/14) could not be different from his opinion essed in the order dated September 20, 2017 because that the reason for passing the said order and this order has r been set aside.

, the order of the school authorities appearing as page 75 of writ petition is said to have been upheld by the third ondent any judicial review of the said order would require the decision-making process behind the said order dated mber 27, 2017 at page 75 be scrutinized.

plain reading of the said order it is clear that the school orities considered the following as a reason for passing the ion.

> *"After that without any consideration she had done a Writ Petition numbering 12592(w) of 2017"*

efore, the materials which were considered by the school orities were not merely the alleged unauthorized leave or ing of leave before its confirmation. It also included the fact the present writ petitioner had filed a writ petition.

Even I take the most charitable interpretation, that an oyee has filed a writ petition challenging the action of holding her salary, her means of livelihood, cannot be a ant material for considering whether her salary should nue to be withheld.

Therefore, by consideration of that which has not relevant school authorities had violated the well-settled principles of nesburyreasonableness.Even if I embark upon a deeper tiny of the said decision making process I find that proper ntage has not been given to the fact that gender equality ands that the species of special protection given to women n the meaning of Article 15 of the Constitution of India sub- s horizontal reservation and affirmative action for which one o give such treatment to women as would negate inequality h has been traditionally imposed on women as those who de care to children at home, are homemakers and, fore, are held to be unable to do gainful employment like

In other words, while the society provides guarantees of lity, it does not provide the means for a woman to be a an and still earn our livelihood. Instead, it is expected that

en who work for a living and earn their livelihood, shall r not care for their husbands, children and the home, or give up working for their livelihood and do the washing, ing and look after their husband and children and do what e-makers do.Equal footing, in this context, would have ıt creating conditions which would allow the woman to do she wanted to do for the family while at the same time g able to maintain her livelihood. Is it proper that her ren will not get her care? The school thinks it is the ɔndent no.3 has not questioned this article of faith of the ɔl.For that special provisions were made for women as ıitted under Article 15 of the Constitution of India. Child leave is such a special provision. A complete mockery of this .al protection will occur if a woman is required to wait until application for child care leave is granted before she is ʻed to go on such child care leave, on pain of forfeiting her hood if she does not do so. If, instead of the factual .tion for which she wanted this leave, her child had had an lent and required urgent hospitalization, would the ɔndents or even this court insisted, in all fairness, that she ɔones taking her child to the hospital until her application ːave was granted? The principle must be same, regardless of xact reason for seeking such child care leave. This aspect of matter was not even considered by either the school orities or the respondent no. 3.

As I analyse the very introduction of the concept of ting child-care leave to a Mother, by a democratic state idering not just the health and nutritional welfare but even

levelopmental needs of a child which includes, inter alia, the ational, physical and mental nourishment from the parents, d that even if relief is granted to the mother, the very ework is predisposed to perpetuate the existing notions of archy which has still not been dispelled despite 68 years of titutional experiment in our country. It is noteworthy that conception of a family arises out of equal contribution from ends, and the outcome must therefore not be treated as a ity of the mother or father, alone where the situation is not single parent. Sadly, the legal framework of addressing erns like child-welfare do not concentrate on this aspect of y life but are rather based upon what seems a societal umption. As I proceed to address this notion, what I observe at even though the fundamental principles of equality as nched under part III of the Constitution of India proffer er neutrality but in situations like this, the said concept is nt. That apart, it is to be seen when there is conferment of affirmative right on women, can it go to the extent of treating as the sole bearer of child care, in all circumstances, even ne cost of their professional distress? Viewed from this age point, such provisions seem to create a dent on the idual independent identity of a woman and tantamount to rdination of a woman where the Constitution confers equal ts. A time has come when the society must realize that a an is equal to a man in every field. The presumption that the onsibilities within the family must be the priority of the en, I protest, appears to be quite archaic. When the society esses and the rights are conferred, the new generation of ghts spring, which under the existing circumstances are

pensable to the growing movement to address the ıalities in a gender binary society and sustain a level playing for individuals across genders. The constitutional morality eveloped by our superior courts of record, demand that we de to all citizens a level playing field, and not just technical lity.

Very recently, in the case of Joseph Shine v. Union of India led on September 27, 2018 by a Constitution Bench, the eme Court of India while discussing the constitutional ity of section 497 of the Indian Penal Code, 1860 has ıasized upon the patriarchal undertones which have crept n the legal system of our democracy. In no uncertain terms, Apex Court was pleased to hold that "the Indian prudence has interpreted the constitutional guarantee of sex lity as a justification for differential treatment: to treat men women differently is, ultimately, to act in women's interests. status of Section 497 as a "special provision" operating for benefit of women, therefore, constitutes a paradigmatic ıple of benevolent patriarchy."

Delineating further, the Apex Court, in paragraph 48 of its ment observed the following:

> "48. Article 15(3) encapsulates the notion of 'protective discrimination'. The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of 'protection'. This latter view of protection only serves to place women in a cage. Article 15(3) does not exist in isolation. Articles 14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle. Neither Article 15(1), nor Article 15(3) allow discrimination against women. Discrimination which is grounded in paternalistic and patriarchal notions cannot claim the protection

> of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was 'seduced' into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to 'protect' her. The 'protection' afforded to women under Section 497 highlights the lack of sexual agency that the section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women."

In her book, "Seeing like a Feminist", author Nivedita ɔn has recognized the patriarchal family as the "basis for the ıdary status of women in society." Menon notes that 'the ɔnal is political'. Her scholarly work implores us to recognize es which may be considered personal such as the bedroom kitchen. These spaces are immersed in power relations, but ramifications for the public sphere.[1]

As I see, the basic underpinnings of child care stems out of ɔarochial understanding of family life which has furthered archy deep inside not just personal and individual beliefs ıas even been conditioning the society to its utter detriment. erly understood, Patriarchy, is an unjust burden on men as as on women. It divides both from their common humanity proscribes a structure of authority at the expense of their non humanity – an ethics of equal respect and a democracy ual human rights.[2]

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[1]Nivedita Menon, Seeing like a Feminist, Zubaan Books (2012) at page 35

[2] David A. J. Richards, FUNDAMENTALISM IN AMERICAN RELIGION AND LAW: Obama's Challenge to Patriarchy's Threat to Democracy, Cambridge University Press (2010) at page 4.

Patriarchy expresses its demands in two related ways. , it rigidly imposes a gender binary (e.g., reason as culine, emotion as feminine), which tracks not reality but the er stereotypes which support patriarchy. Second, it always s one pole of the binary in hierarchical order over the other. psychology of patriarchy offers an explanation of how these features of patriarchy come to be culturally entrenched, hing a moral voice that challenges both the gender binary its hierarchical ordering. The opposite of patriarchy is, we e, democracy, in which authority accords everyone a free equal voice, a voice that both breaks out of the gender y and contests hierarchy. When I say free and equal, I n giving both the freedom and the opportunity to become l such that whatever difference one may have, whether by tion, anatomy or due to the "other's" mindset, is offset by an ling special provision, which brings both to a level playing in reality and not just seemingly. What patriarchy udes is love between equals, and thus it also precludes ocracy, founded on such love and the freedom of voice it urages. Because patriarchy is inconsistent with the ıative demands of democratic constitutionalism, its stence is a continuing threat to democracy.[3]

The contradiction between patriarchy and democracy is not – indeed, is so easily dismissed – because our society has so itically structured its authority in terms of a patriarchal hology that we have come to regard patriarchy as nature, ed as God's law. Both these patriarchal structures and the

[3]Ibid at page 5.
[4] Ibid at page 7

orting psychology darken our ethical intelligence in law. In a ocratic country like ours, we need to question the psychology triarchal manhood and womanhood – its force in our society in our politics– that has held us captive for much too long. annot deal with the problem until we can see the problem.[4]

The moment we let assumptions such as these weigh the l of the respondent no. 3 when he takes a decision, or that of chool authority when it takes such a decision, we allow the ept of equality, equity and social engineering inherent in the n Constitution to be defeated by paternalistic consideration.

To the extent that the third respondent has not considered above in his decision-making process, as aforesaid, such ion-making process is one-sided, mechanical and flawed. I ot, therefore, sustain such a decision-making process. The h respondent despite service has not come forward to defend ecision based on extraneous materials as aforesaid.

The fact that the school authority allowed the fact that the petitioner had instituted writ proceedings to ventilate her ances, to be a factor in its process for taking the decision, shows that the respondent no. 4 (and by extension, the ondent no. 3) think that the right of judicial review by a rior court of record under the Constitution of India is not thing which employees can resort to, especially when they want a consideration.

The Fundamental and other rights guaranteed under Part the Constitution of India become illusory unless the means xercise the said rights are also protected. The right to

ction of the means to exercise such fundamental or itory rights, is also fundamental and/or basic and is ired to be declared as existing by necessary implication. ral rights which are required for exercising fundamental or itory rights, have grown silently and without legislation, as e which are necessary and basic, for exercising the statutory ndamental rights, and some of these have been declared or preted to exist by amplifying the meaning of existing rights. respondents no.3 and 4 obviously feel that such means t not to exist, because the fact that the writ petitioner uted the petition under Article 226 of the Constitution of was considered to be one of the relevant factors for lowing her prayer.

Accordingly, having found such fatal flaw in the decision-ng process it cannot be sustained, and the impugned order annexure P/14 and the basis of the decision upheld of the order as also the order dated September 20, 2017 are, fore, quashed, set aside and cancelled along with the ion at page 75 of the writ petition.

I make it clear that the State of West Bengal has made sions even for teachers and non-teaching staff of arasahs, panchayats and government servants for earned in general and child care leave in particular, and these do t a discretion to the respondents concerned to approve, even ost facto, for sufficient reason shown, any such absence out leave being granted before the person commenced on . In a similar matter cited on behalf of the writ petitioner, g the case of **Kakali Ghosh—v—Chief Secretary, Andaman**

Nicobar Administration and Others reported in **(2014) 15 300** the Hon'ble Supreme Court was pleased to grant relief writ petitioner stated to be similarly circumstanced as the ent writ petitioner.

The third respondent shall take a fresh decision without g influenced by anything mentioned at page 75 or the ds on which they were based on or his earlier order, but in ght of my above judgment.

Such decision shall be taken within a period of two hs from the date of communication of this order.

No direction was sought for filing affidavits and since I have led the matter only on the basis of the records produced e me, the allegations contained in the writ petition are ied not to have been admitted.

The writ petition is allowed to the above extent. There shall be no order as to costs.

(Protik Prakash Banerjee, J.)

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W.P. 6039 (W) of 2017

Amiya Banerjee
Versus
Union of India & Ors.

Mr. Dilip Kumar Samanta,
Mr. Biswapriya Samanta
... for the petitioner.

Mr. Kousik Chanda,
Mr. Kumar Jyoti Tewari,
Mr. Manas Kumar Das
... for the U.O.I.

Mr. Pradeep Kumar,
Mr. P. K. Pandey,
Mr. Shreya Trivedi
... for respondent no.2.

The writ petition involves interpretation of the rights and duties which arise from the provisions of Section 10 of the Petroleum and Minerals Pipelines (Acquisition of Right of User Inland) Act, 1962 [hereinafter referred to as the said 'Act']. As recorded in the order dated November 3, 2017 passed by this Court, which reads as follows:

> "It appears from the petition that a notice was served on the writ petitioner, which is appearing at page 25 (Annexure-P/2), bearing Memo No. PHDPL/MGR/CAWB/PALSIT-39/169 dated July 9, 2016 which is purported to be under Section 10 of the Petroleum and Minerals Pipelines (Acquisition of Right of User Inland) Act, 1962 [hereinafter referred to as the said 'Act']. Strangely enough, the said notice contains no amount proposed to be awarded as compensation despite express mandate of Section 10 of the said Act. It would be convenient to consider the provisions of Section 10 aforesaid, which is set out hereinbelow:
>
> "10. Compensation.— (1) Where in the exercise of the powers conferred by section 4, section 7 or section 8 by any person, any damage, loss or injury is sustained by any person interested in the land under which the pipeline is proposed to be, or is being, or has been laid, the Central Government, the State Government or the corporation, as the case may be, shall be liable to pay compensation to such person for such damage, loss or injury, the amount of which shall be determined by the competent authority in the first instance.
>
> (2) If the amount of compensation determined by the competent authority under sub-section (1) is not acceptable to either of the parties, the amount of compensation shall, on application by either of the parties to

the District Judge within the limits of whose jurisdiction the land or any part thereof is situated, be determined by that District Judge.

(3) The competent authority or the District Judge while determining the compensation under sub-section (1) or sub-section (2), as the case may be, shall have due regard to the damage or loss sustained by any person interested in the land by reason of –

(i) the removal of trees or standing crops, if any, on the land while exercising the powers under section 4, section 7 or section 8;

(ii) the temporary severance of the land under which the pipeline has been laid from other lands belonging to, or in the occupation of, such person; or

(iii) any injury to any other property, whether movable or immovable, or the earnings of such persons caused in any other manner:

Provided that in determining the compensation no account shall be taken of any structure or other improvement made in the land after the date of the notification under sub-section (1) of section 3.

(4) Where the right of user of any land has vested in the Central Government, the State Government or the corporation, the Central Government, the State Government or the corporation, as the case may be, shall, in addition to the compensation, if any, payable under sub-section (1), be liable to pay to the owner and to any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such vesting, compensation calculated at ten per cent of the market value of that land on the date of the notification under sub-section (1) of section 3.

(5) The market value of the land on the said date shall be determined by the competent authority and if the value so determined by that authority is not acceptable to either of the parties, it shall, on application by either of the parties to the District Judge referred to in sub-section (2), be determined by that District Judge.

(6) The decision of the District Judge under sub-section (2) or sub-section (5) shall be final."

On that day hearing the respondent-Union of India, this Court had recorded a tentative finding to the effect that "to my mind, the requirement of the statute is that the person who is interested in the land-in-question be notified of the amount that is proposed to be given to him as compensation. The present notice appearing at page 25 (Annexure P-2) to the writ petition, does not intimate the writ petitioner about the proposed quantum".

The matter had been kept for today to hear the learned Additional Solicitor General on this aspect of the matter. The learned Additional Solicitor General appearing on behalf of the Union of India would submit that the concept of

issuing a notice specifying the amount of compensation is alien to the language of Section 10 as also to the scheme of acquisition and compensation provided for by this special statute. It is his interpretation of Section 10 and its various sub-sections and since the word 'notice' itself is not referred to in any of the provisions of the said sub-sections, all that the competent authority is to do to issue a notice to the persons interested who has sustained damage, loss or injury within the meaning of Section 10 sub-section (1) requiring him to attend at the office of the competent authority on a certain date and time where the amount of compensation will either be determined in his presence or having already been determined, shall be communicated to him and recorded. On such determination and recording such person interested shall have a right to either accept or dispute and these two shall be recorded.

It is the submission of the learned Additional Solicitor General that the copy of this recording is to be provided to such person interested on such date itself which would allow him to apply to the learned District Judge by way of Section 10 sub-section (2) or sub-section (5), as the case may be. The same situation would apply if it was the government-in-question or corporation which chose not to accept but dispute the amount of compensation. As such, he would submit that the only infirmity in the present notification is that the date the person interested to attend had not been supplied.

Mr. Samanta, learned counsel appearing on behalf of the writ petitioner, in reply, on the other hand, pointed out that Section 10 sub-section (1) does not by itself envisage a hearing before determination of the amount of compensation. He laid emphasis on the words "the amount of which shall be determined by the competent authority in the first instance". According to him, this implies that first the competent authority would determine the amount of compensation under sub-section 10(1) and thereafter, he shall issue a notice mentioning the amount of compensation where, of course, person interested may be asked to attend on the later date and, in fact, willing to accept the amount or to dispute.

While such a submission may at the first instance be alluring the fact remains that if a notice is to be at all issued specifying the compensation in it, then the question of attending the office of the competent authority merely to signify that a person does not accept would not arise. It can be done in writing too. Again if the intention of the legislature was that there would be no participation by the affected party during the determination of compensation at the first instance, then disputing it at the second stage would mean exclusion of

natural justice at the first stage, would be attempted to be cured by natural justice being offered at the appellate stage.

The law is well settled that unless expressly excluded by the statue, principles of natural justice must be read in. Therefore, I cannot agree with Mr. Samanta that the determination of the first instance has to be ex parte without the participation of the person interested. Nor can I agree particularly, with the leaned Additional Solicitor General that since the statute does not say in express terms that a notice is to be served, it means that a notice is to be given for the person interested to attend only to hear what has been determined *ex parte* by the competent authority.

The Union of India cannot have it both ways. Either it accepts that the statute not having provided for any notice, the entire proceeding would happen behind the back of the person interested; or it must accept that despite the absence of an express provision for notice, such provision for notice has to be read in prior to determination of the compensation at the first instance. No authorities or rules have been produced before me having any force in law as would elucidate the scope of Section 10 of the said Act in this regard. The so called Rules of December 7, 1962, which have been handed over to me begin by saying "these instructions have no statutory force and should not be quoted in any correspondence with out side authorities". So no reliance can be placed on it.

I also cannot accept the submissions of Mr. Samanta that merely because the Act of 1962 also envisages a two-stage process for acquisition being notification under Section 3 and declaration under Section 6, the statute should be held in *pari materia* with the land acquisition Act, 1894. Therefore, the line of the authorities which lay down the law relating to issuance of notice and communication of the amount of compensation under Act 1 of 1894, I am sure, will not help us. The purpose and intendment are clearly different. In order to sub-serve the principles of natural justice, Section 10 of the said Act must be read in such a manner that the determination of the compensation in the first instance under Section 10(1) or Section 10(4) and Section 10(5) must be made after the notice is issued to such persons interested within the meaning of those sub-sections where they are asked to attend the particular office on a specified date at a specified time when their documents and contentions are to be considered along with those produced by the appropriate government or by the corporation; only thereafter the determination would be made in their presence

and communicated to them. This communication will serve the purpose of Section 10(2) as also Section 10(5) for the purposes of raising a dispute. It would not matter if the competent authority had already made a tentative determination prior to the date of issuance of notice or even before hearing of the persons interested so long as effective hearing was given after the notice.

So far the facts of this case is concerned, there appears to be no dispute that the notice cannot stand because it does not even contain a date when the person interested/petitioner has been directed to attend. The parties do not seriously dispute such notice is so unfair and opaque as to be arbitrary non est.

Accordingly, the impugned notice at Annexure 'P-2' bearing memo no. PHDPL/MGR/CAWB/PALSIT-39/169 dated July 9, 2016 is set aside and quashed as non est and the concerned respondent being the competent authority who has been arrayed as respondent no.2 in the writ petition is directed to issue fresh notice and complete the exercise in the light of the observations made in the earlier part of this judgment and intimate to the writ petitioner the amount of compensation proposed to be awarded to him as expeditiously as possible but possibly within three months from the date of communication of this order.

Accordingly, the writ petition is disposed of.

The Court records its gratitude for the assistance rendered by the learned Additional Solicitor General. In the facts and circumstances of this case, the parties shall bear their own costs.

(Protik Prakash Banerjee, J.)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Protik Prakash Banerjee

W.P. No. 9286 (W) of 2018

Rajpati
Vs.
State of West Bengal & Ors.

For the petitioner : Mr. Sandip Ghosh, Adv.

For the Respondents : Mr. Joynal Abedin, Adv.

Heard on : July 27, 2018

Judgement on : September 6, 2018

PROTIK PRAKASH BANERJEE, J.:

1. An apparently commonplace question has been brought before me in this challenge under Article 226 of the Constitution of India against non-payment of interest on delayed payment of gratuity amount and arrear pension.

2. The facts are not in dispute. The writ petitioner reached the age of superannuation on February 28, 2011 and therefore superannuated. Thereafter, he duly complied with all formalities to get all the benefits being in the nature of his fruits of labour. He also prepared and submitted his pension booklet to the proper authorities. Though the pension papers were sent to the concerned District Inspector of Schools, admittedly for no fault of the writ petitioner, the matter was kept pending for a long time. Ultimately, the pension payment order was issued only on July 22, 2011.Despite the said pension payment order being issued,

the respondent authorities did not actually disburse the amount of such arrear pension and gratuity until October 25, 2011. They however, did not do their duty in the matter of timely releasing the pensionary benefits or paying interest at any rate, far less at the rate of 10% per annum, whether in terms of the Government Circular No.88-WBSE (B) dated May 26, 1988 or the Circular No. 641-F dated January 19, 2004, respectively. The writ petitioner due to financial stringency had to accept such delayed payment without any interest. The writ petitioner, thereafter, approached this court, when after repeated oral requests no action was taken on the part of respondent no. 2 to ensure disbursal of such interest.

3. Normally the duty to pay gratuity is statutory in India, at least ever since 1972, if a person can show he or she is an employee within the meaning of the Payment of Gratuity Act, 1972, in an establishment covered within the meaning of Section 1 of the Act of 1972. However, the situation is not as simple as that in case of “teachers”. The petitioner, needless to mention, is claiming the retirement benefits including gratuity for his service as a teacher.

4. Even though in 1997 a notification was issued by the Central Government within the meaning of Section 3(1)(c) of the said Act of 1972 bringing educational institutions within the purview of the said Act of 1972, the question of the said welfare legislation being applicable even to teachers, traveled to the Hon'ble Supreme Court. This was in the case of **Ahmedabad Private Primary Teachers’ Association—v—Administrative Officer and Others**, reported in **(2004) 1 SCC 755**. At paragraphs 24, 25 and 26, the Hon’ble Supreme Court was pleased to hold, as follows: -

"Paragraph 24: ...The teachers are clearly not intended to be covered by the definition of employee."

"**25.** The legislature was alive to various kinds of definitions of the word "employee" contained in various previous labour enactments when the Act was passed in 1972. If it intended to cover in the definition of "employee" all kinds of employees, it could have as well used such wide language as is contained in Section 2(*f*) of the Employees' Provident Funds Act, 1952 which defines "employee" to mean "*any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment* ...". Non-use of such wide language in the definition of "employee" in Section 2(*e*) of the Act of 1972 reinforces our conclusion that teachers are clearly not covered in the definition."

"**26.** Our conclusion should not be misunderstood that teachers although engaged in a very noble profession of educating our young generation should not be given any gratuity benefit. There are already in several States separate statutes, rules and regulations granting gratuity benefits to teachers in educational institutions which are more or less beneficial than the gratuity benefits provided under the Act. It is for the legislature to take cognizance of situation of such teachers in various establishments where gratuity benefits are not available and think of a separate legislation for them in this regard. That is the subject-matter solely of the legislature to consider and decide."

5. Therefore, the Hon'ble Supreme Court has been pleased to lay down the law that despite the notification of 1997, "teachers" are not covered by the provisions of the Payment of Gratuity Act, 1972. However, in several States as in 2004, there were several rules and regulations governing payment of gratuity to the teachers. These would continue to operate in those States, where they are available. In case of such establishments where the benefit of gratuity is not available to teachers, the Hon'ble Supreme Court was pleased to hold that the competent authority to take cognizance of it was the Legislature, which was to make appropriate legislation – till then, in such establishments naturally, no benefit of gratuity for teachers would be available.

6. Thankfully, in West Bengal, we have had schemes or rules for granting such benefit of gratuity to teachers and these were in operation when the Hon'ble Supreme Court was pleased to deliver the judgement in the case of Ahmedabad Pvt Primary Teachers' Association (supra). I will

briefly summarize the said extant schemes/rules in West Bengal, hereinbelow.

(i) "Recognised Non-Government Secondary Institution Pension Rules", which were in the nature of a scheme framed by the respondent no.1 by way of Memorandum No. 2156-Edn(s)I-E-14/67 dated September 20, 1967. These Rules applied to permanent employees (both teaching and non-teaching) serving in a recognised Non-Government Secondary Institution participating in the Grant-in-Aid Scheme. These Rules came into force on and from 1st April, 1966. Terminal benefits included Contributory Provident Fund with employers' contribution at the rate of 6 1/2 % of basic pay and pension (including Special Pay, if any) for every completed year of service upto a maximum of 30/120th of the pay. This rate was much below the rate granted to the Government School pensioners being 33/80 of such average pay.

(ii) Contributory Provident Fund-cum-Pension Scheme and "Rules regarding Payment of Pension, Gratuity etc. under West Bengal (Rural) Primary Education Act, 1930. For Primary Teachers. (G.O. No.485-EDN(P) dated March 25, 1968 and G.O. No.2299-EDN(P) dated December 12, 1972).Persons who retired from service prior to April 1, 1981 will get pensionary benefit under these Scheme/Rules. (Also see 11 & 12).

(iii) Thereafter, the State Government in terms of Finance Department's Resolution No. 9716-E dated 16th November 1977 set up a 2nd Pay Commission to consider and recommend the pay-structure and pensionary benefits of the teaching and non-teaching employees who are then in active service in the different Non-Government Educational Institutions and the said Pay Commission by its report dated 15th October 1980 recommended certain pay-scales, and pensionary benefits for teaching and non-teaching of all recognised Government and Non-Government Institutions in West Bengal. The State Government on the basis of the recommendation of the said Pay Commission by its Memorandum No. 139-Edn. (B) dated 15th May 1985, inter alia, provided that retirement benefits at the rates prescribed in the West Bengal Recognised Non-Government Educational Institution Employees (Death-Cum-Retirement Benefit) Scheme, 1981 will be admissible to all whose services are approved as teaching and non-teaching employees of the Non Government Institutions who were in active service on or after 1st April 1981. Pensioners who retired from service prior to 1st April 1981 will not get these benefits.

(iv) This was challenged on the ground of being discriminatory so far as those who had retired prior to April 1, 1981 were concerned. In the case of **Non-Govt. School Pensioner's Association and Another—v—State of West Bengal and**

Others, reported in **(1989) 2 CHN 225**, relying upon the decision of the Hon'ble Supreme Court in **D.S. Nakara—v—Union of India** reported in **AIR 1983 SC 130**, a coordinate bench of this Court held that

> "that the pensioners formed one class and there is no basis for making classification between the pensioners who had retired before or after a particular date and that the persons who have retired earlier were entitled to get the benefit of the Notification under which the pensions have been revised at the enhanced"

and further that in respect of the said writ petition,

> "The revised pensionary benefits must be extended to all persons who have retired before 1.4.81 and in the matter of computation of pensionary benefits, all other benefits which have been given to the persons who have retired after 1.4.81 should also be given to the persons who have retired before 1.4.81 and their pensionary benefit should be computed and paid accordingly".

(v) In terms of the said Scheme of 1981, the Scheme is applicable to the employees of State Government Sponsored or aided educational Institutions (excluding D.A. Getting schools) as indicated in Statement-I of G.O. No.136-EDN(B) dated May 15, 1985. The writ petitioner's husband belonged to a school which was covered under the said scheme.

(vi) The said scheme, moreover, made it clear that the Pension Sanctioning Authority in case of all but primary schools and junior basic schools, covered by it was the District Inspector of Schools (Secondary Education) and the Audit Officer and authority for issuing the Pension Payment Order was the Director of Pension, Provident Fund and Group Insurance or any officer authorized by him. However, for revision of retirement benefits, the appropriate authority is the Director of School Education, who is to be approached through the concerned District Inspector of Schools.

(vii) Effect was given to the order of the coordinate bench referred to in sub paragraph (iv) above, by way of G.O. No.163-EDN(B) dated June 15, 1990 the retirement benefits as provided for in the W.B. Recognised Non-Govt. Educational Institution Employees (Death-cum-Retirement Benefits Scheme, 1981 has been extended to the Teaching and non-teaching employees of the non-Government Educational Institution and Organisation covered by the said Scheme who retired prior to April 1, 1981 subject to refund or adjustment of employer's share of Contributory Provident Fund with interest, and also subject to due adjustment of Pension and ex-gratia increases as were or are being drawn by such pensioners.

(viii) The Memorandum dated May 26, 1998 which is a scheme for payment of pension and gratuity on the date of

superannuation to the employees of West Bengal Recognized Non-Government Educational Institutions.

(ix) The effect of this Memo has been succinctly stated in paragraphs 9, 10, 11 and 12 of the judgment of a coordinate Bench in the case of **Satya Ranjan Das—v—State of West Bengal and Others** reported in **(2007) 3 Cal LT 531 (HC)**, which I respectfully follow. Paragraph 8 of the said Memorandum has been quoted in paragraph 10 of the said judgment. The coordinate bench has been pleased to emphasize that for settling pensionary claims, with a view to handing over the copy of the Pension Payment Order, including Gratuity and Commuted Value of pension where applicable, on the date of superannuation of an employee as defined in paragraph 5(k) of the scheme, the scheme inter alia provides for the specified authorities being liable for disciplinary action, quite apart from the requirement of the Government to pay amounts additionally by way of interest for delayed payment of retiring benefit for employees.

7. The above memoranda/schemes having the force of law, as interpreted by the coordinate benches, bind me. Particularly, the succinct statement of law and the ratio in the case of Satya Ranjan Das (supra) makes it clear that the respondent no. 1 is required to hand over the Pension Payment Order including gratuity and commuted value of pension where applicable, on the date of superannuation itself such that the pensioner concerned appears before the Treasury Officer and produces his copy of the pension payment order and "No Liability/Liability Certificate" issued by his appointing authority/head of the institution, and thereafter in terms of clauses 6, 6.1, 6.2, 7 and 8 the amount is to be disbursed immediately after making the recoveries, if any, and if there is any delay in making over the copy of the Pension Payment Order or in the process not attributable to the petitioner/pensioner, then the Government would be liable to pay interest from the date of superannuation till the date of actual disbursement.

8. In fact, I am fortified in my view about the principles which operate behind the desirability of awarding interest on such delayed disbursement of retirement benefits such as gratuity, though in a case where the statutory liability was being considered, by the judgment of the Hon'ble Supreme Court in the cases of **State of Kerala and Others—v—M. Padmanabhan Nayyar** reported in **(1985) 1 SCC 429** and also **H. Gangahanume Gowda—v—Karnataka Agro Industries Corporation Limited** reported in **(2003) 3 SCC 40 (paragraph 7)** where it was held: -

"Payment of gratuity with or without interest as the case may be does not lie in the domain of discretion but it is a statutory compulsion. Specific benefits expressly given in a social beneficial legislation cannot be ordinarily denied. Employees on retirement have valuable rights to get gratuity and any culpable delay in payment of gratuity must be visited with the penalty of payment of interest"

9. That leaves only the question of the rate at which such interest on the delayed payment of gratuity ought to have been paid. If the Act of 1972 had been applicable, it would not have been difficult to ascertain the rate. This is because Section 7(3A) of the Act of 1972 also specifies that this shall be simple interest, not exceeding the rate notified by the Central Government from time to time for repayment of long term deposits as *"that"* Government, which is to say the Central Government may, by notification, specify. This too, is capable of being made certain.

10. It appears that the Central Government has issued a notification under Section 7(3A) of the Act of 1972. This is the Notification under Section 7(3A) S.O-874, which reads as follows: -

"In exercise of the powers conferred by sub-section (3A) of Section 7 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specifies ten percent per annum as the rate of simple interest payable for the time being by the employer to his employee in cases where the gratuity is not paid within the specified period. This notification shall come into force from the date of its publication in the Official Gazette."

11. However, as already noticed above, the Act of 1972 does not apply to the present case. Still, the rate which the Central Government has fixed, being 10% per annum, seems to be reasonable in the circumstances, if for nothing else then because in the case of the Memo dated May 26, 1998 where only 8% simple interest per annum was awarded, there was also a direction for recovery from the delinquent officials, but in the equally binding judgments referred to below such directions were not given. In order to give effect to the scheme and to ensure that distributive justice is actually done and not merely pretended to be done, it is open to the court to enforce the scheme strictly, and both award interest at a slightly lower rate, ensure that disciplinary proceedings are taken against the erring officials and ensure recovery from the delinquent employees for whose fault the delayed disbursement of the retirement benefits occurred, or, in the alternative, to ensure that the benefit under the welfare scheme is delivered to the pensioner or his family, with interest for the delayed payment off-setting the privations caused by the delay without being unduly harsh to the employees for whose benefit the delay occurred.

12. My judgment will not be complete unless I refer to a few other judgments, which the Learned Advocates habitually use. These are resorted to by rote, taking help of formats and copying and pasting writ petitions in similar matters which have succeeded, sometimes without even changing the gender or the dates which necessarily differ from case to case. These writ petitions – including the present one – do not even refer to all the above schemes/administrative orders or guidelines or rules (as they are called) as I have referred to in paragraph 6 above.

a. The Judgment and Order dated March 28, 2005 passed in FMA No.720 of 725 of 2004, which was seminal in nature in the sense that the respondent no. 1 had carried the order of a Learned coordinate bench in appeal not because in law the order for payment of interest on delayed payment of gratuity could not be passed, but because of two reasons: - the coordinate bench had mooted the question of fixation of pecuniary responsibility on the officer for whom such delay had occurred and because the rate of interest of 10% was held to be excessive. It does not appear that there was any discussion on why the rate of interest was found to be payable or reasonable. There, the parties signed minutes agreeing to a rate of simple interest of 10% rather than 18% as awarded by the coordinate bench and on the basis of such compromise and concession which bound the parties, the order for payment of interest on delayed payment was passed. This compromise was accepted by the Hon'ble Division Bench as being fair. This, with respect, is not a binding precedent so far as other cases are concerned, even if they raise similar questions of facts and law, simply because the order passed by the Hon'ble Division Bench was passed on compromise, and unless the respondent no. 1 compromises in each case such an order cannot be passed in every case.

b. This was followed, however, in the case of **Sri Satya Narayan Singh—v—The State of West Bengal and Others** [WP No.23226 (W) of 2010], and a connected batch of cases, by a coordinate bench of this court by its order dated December 3, 2012. There, His Lordship was pleased to hold that the said order dated March 28, 2005 had achieved finality since none had appealed against it –

which could not have been preferred, since it was passed on consent – and because His Lordship had no reason to take a different view. With the greatest possible respect, I cannot subscribe to a view which was taken by the Hon'ble Division Bench on the basis of a compromise only because it appears to me to be fair and I do not want to differ from it – when in the case before me, no compromise was recorded.

c. The other case I would like to refer to is the case of **Abha Acharya—v—State of West Bengal and Others**, [W.P. No.10750 (W) of 2007) and a batch of other cases, decided on July 1, 2008, which does not appear to have been reported anywhere, but which the Learned advocates for the petitioners habitually cite before me. It is of a coordinate bench. There, after considering all the judgements cited before the coordinate bench, His Lordship was pleased, after holding that though the judgment dated May 28, 2005 may not strictosensu apply in that case, nonetheless taking into consideration the overall scenario and also taking into consideration the facts and circumstances involved in those cases, the coordinate bench was pleased to take the view that 10% interest would sub-serve the ends of justice.

d. I would like to specially mention the case of **Mohan Chandra Halder—v—State of West Bengal and Others** [W.P. No.30624 (W) of 2008], and a batch of related cases,apparently unreported as yet, but which was decided on May 14, 2009 and which sought to consider most of the coordinate bench decisions so far, and also judgments of the Hon'ble Supreme Court. I will try to classify the

questions decided therein according to broad heads, answers whereto I shall also summarize below: -

(i) Whether in a case where the demand for payment of interest on gratuity was made by way of a writ petition more than three years from the date of receipt of gratuity, the writ court should at all interfere on the ground of delay and laches?

The answer to this was that the decisions relied upon by the respondents in those cases were on the basis of unexplained delay and where the delay was explained, those decisions did not automatically disentitle the writ petitioner from approaching the writ court even beyond three years; further the coordinate bench held that none of the decisions of the Hon'ble Supreme Court relied upon disentitled a petitioner from obtaining a relief even after long delay where the wrong complained of was a continuing wrong, that is to say, a wrong which was not completed on the day it occurred, but continued from day to day; this was subject to the important caveat, that if third party rights were created during the delay, then the writ petition would not be entitled.

(ii) Whether in a case where demand for justice had not been made any writ petition in such a case for interest on delayed payment of gratuity ought to be entertained?

Here too, after reviewing the authorities the coordinate bench held this was a mere procedural formality and this could be dispensed with even where Mandamus had been sought, provided such notice is unlikely to serve any purpose and would be an idle formality, and failure to have served such a notice demanding justice would not be fatal for maintaining the writ petition.

(iii) On merits it was held by the coordinate bench that unless the authorities could show that the receiving of gratuity amount or disbursement of gratuity amount was held up for some specific negligent acts on the part of the claimants and the said sum could not be paid on the date of superannuation or at any later date, then it would be permissible for the said authority (to) decline payment of interest. In the case of Mohan Chandra Halder (supra) the coordinate bench also directed the respondent authorities to pay interest at the rate of 10% (simple) per annum from the date of superannuation of the petitioner/concerned employee where the legal representative had petitioned the court, in each individual case, till the date of disbursement.

(iv) I respectfully record my concurrence with the said judgement.

e. The decision of a coordinate bench in the case of **Niranjan Kumar Mondal—v—The State of West Bengal and Others**, reported in **(2012) 1 WBLR (Cal) 903**which relied upon a Bench decision in the case of **Padma Rani Thakur—v—Secretary Department of Home**, reported in **(2007) 1 Cal LJ (Cal) 21: (2007) 1 WBLR (Cal) 584**when a similar question of delay was raised in the matter of the defaulting respondents who had not paid the death-cum-retiring gratuity within due period, to hold (at paragraph 7 of the West Bengal Law Reporter) as follows: -

> "One cannot be unmindful about the fine distinction between violation of one's ordinary legal right and infringement of one's fundamental right guaranteed under Part III of the Constitution. When a person comes to a Court under Article 226 of the Constitution of India alleging violation of his ordinary legal right, the Court may refuse to grant relief to a party if he does not approach the Court with all promptitudeness. However, if fundamental right of a citizen is infringed, can the High Court refuse to enforce fundamental right guaranteed to a citizen only on the ground of delay? The Division Bench of this Hon'ble Court, in the case of Padma Rani Thakur vs. Secretary, Department of Home; reported in 2007 (1) CLJ (Cal) 21, held that when in a writ application, a citizen alleges infringement of his fundamental right guaranteed by our Constitution at the instance of a State, and if such infringement is actually proved, a writ Court should not dismiss such an application on the ground of delay. The said conclusion was arrived at by following a settled principle of law which declares that there can be no loss of fundamental right on the ground of non-exercise of such right"

While I respectfully agree with the conclusion of the coordinate bench, I must add that this judgment does not dispense with the requirement to explain the delay in filing the writ petition since an equitable relief under Article 226 of the Constitution of India is being sought.

f. I also repeat that I have relied largely on the decision in the case of **Satya Ranjan Das—v—State of West Bengal and Others** reported in **(2007) 3 Cal LT 531 (HC)**referred to in paragraph 6(ix) of this judgment,for the interpretation of the Memo dated May 26, 1998 and the date from which gratuity and other pensionary benefits become payable to a teaching staff in an educational institution.

g. I now turn to the judgments of the Hon'ble Supreme Court which the parties have relied upon.

h. Coming first to the case of **S.K. Dua v. State of Haryana**, reported in **(2008) 3 SCC 44,** I notice that this was an appeal to the Hon'ble Supreme Court against an order of dismissal of a writ petition claiming interest on delayed payment on retirement benefits other than provisional pension, in limini on the ground of an effective alternative remedy before the learned civil court. At paragraph 14, their Lordships were pleased to hold as follows: -

> **"14.** In the circumstances, *prima facie*, we are of the view that the grievance voiced by the appellant appears to be well founded that he would be entitled to interest on such benefits. If there are statutory rules occupying the field, the appellant could claim payment of interest relying on such rules. If there are administrative instructions, guidelines or norms prescribed for the purpose, the appellant may claim benefit of interest on that basis. But even in absence of statutory rules, administrative instructions or guidelines, an employee can claim interest under Part III of the Constitution relying on Articles 14, 19 and 21 of the Constitution. The submission of the learned counsel for the appellant, that retiral benefits are not in the nature of "bounty" is, in our opinion, well founded and needs no authority in support thereof. In that view of the matter, in our considered opinion, the High Court was not right in dismissing the petition in limine even without issuing notice to the respondents."

The ratio of the decision, as I understand it, is that if there are no statutory rules or administrative instructions, guidelines or norms, then the writ petitioner may claim benefit of interest on that basis. However, in the absence of the aforesaid, an employee may claim interest under Part III of the Constitution of India under Articles 14, 19 and 21 of the Constitution of India. In a case covered under administrative instructions or "rules" or "schemes" having a statutory flavour as in West Bengal and as I have discussed in paragraph 6 of this judgement, as interpreted by successive coordinate benches, I do not see how this case can help the writ petitioners, because they are asking for what has become their right on interpretation of that which has the force of law. Of course, I respectfully follow the ratio that retirement benefits are not in the nature of a bounty.

i. I come to the case of ***Union of India v. Tarsem Singh*****,** reported in **(2008) 8 SCC 648**. This was a case where the employee concerned had sought only in 1999 that disability pension be paid to him with effect from the date he was invalidated out of the army on the ground of disability, on November 13, 1983. While allowing the appeals of the Union of India, holding categorically at paragraph 8 that the delay of 16 years would affect the consequential claim for arrears and that the High Court was not justified in directing payment of arrears relating to sixteen years, and that too with interest, and that it ought to have restricted the relief relating to arrears to only three years before the date of the writ petition, or from the date of demand to the writ petition whichever was lesser, and that it ought not to have granted interest on arrears in such

circumstances, the Hon'ble Supreme Court was also pleased to lay down the following as law in paragraph 7: -

> **"7.** To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."

j. I have understood the above judgements as the coordinate bench did in the case of **Mohan Chandra Halder (supra)**, to the effect, that in case no third-party rights have accrued in a service matter, such as pay fixation/refixation or as recovery of arrears for a past period, it is a continuing wrong and relief may be granted even if there is long delay in seeking the remedy. However, even in this judgment which the petitioners brandish like a sword cutting through the question of aiding the dormant instead of the vigilant, the Hon'ble Supreme Court has not been pleased to lay down that the delay is not required to be explained in a petition under Article 226 of the Constitution of India, if it is beyond the period of delay

held ordinarily to be reasonable had this been a money claim under statute.

k. In fact, I find sustenance in the decision of the Hon'ble Supreme Court rendered by a strong Bench, of Bench Strength 5, in the case of **State of M.P.—v—Bhailal Bhai,** reported in **AIR 1964 SC 1006** where their Lordships were pleased to hold, inter alia: -

> "**17.** At the same time, we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a Civil Court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the court for relief under Article 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any Rule for universal application. It may however be stated as a general Rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on the grounds like limitation the court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a Civil Court and to refuse to exercise in his favour the extraordinary remedy under Article 226 of the Constitution."

13. As a result of the aforesaid I hold that arrear pension and gratuity must be paid within the time mentioned in paragraph 7 of this judgment, which is to say on the date of superannuation or at best within 24 hours thereafter, subject to the procedure mentioned in the Memo dated May 26, 1998 as referred to and interpreted in the case of **Satya Ranjan Das (supra)**cited in paragraph 6(ix) of this judgment and if not paid, it will carry simple interest at the rate of 10% for the reasons mentioned by me in paragraph 11 of this judgement from the date when it became payable till the date it is actually disbursed, and a claim for such benefit may be made by way of a writ petition even without a demand for justice, even after a long period, but if it is beyond three years, it must be explained adequately in the petition for it to be considered reasonable in the circumstances of the case. I also hold that in a case where the writ petitioner has pleaded and established that he had no source of income or livelihood apart from his salary and after superannuation, his pensionary and other retirement benefits, the amounts payable to him on such counts were not merely property but also formed a part of his life and thus non-payment was a violation of a right under Part III of the Constitution of India, being Article 21 of the Constitution of India, which cannot be lost and can be enforced on explaining the delay to the satisfaction of the court. This explanation is not on the ground of limitation as in case of an ordinary legal right, but only so as to satisfy the conscience of the court that it is not aiding one who is not acting equitably.I also hold that the claim for interest on delayed payment of gratuity is a right under that which has the force of law, even in case of employees of non-government schools which the State has recognized.

14. The respondent no. 2 and the concerned treasury officer being the respondent no. 4 and the state government, being the respondent no. 1 through the respondent no.2 are bound to pay the writ petitioner simple interest at the rate of 10% per annum on the delayed payment of the retirement benefits, in this case, arrear pension and gratuity, till the date of its disbursement. In default of the respondent no.1 in making payment of such interest within four weeks from communication of this order, in addition to whatever other relief the writ petitioner may have whether by way of moving the court under Article 215 of the Constitution of India, or otherwise, the respondents shall be liable to make payment of additional penal simple interest at the rate of 2% per annum on the sum due as on today on count of such interest for delayed disbursement.

15. The writ petition is allowed as above. There shall be no order as to costs. Urgent photostat certified copy of the present order shall be made available on the usual undertakings.

(PROTIK PRAKASH BANERJEE, J.)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Dipankar Datta
and
The Hon'ble Justice Protik Prakash Banerjee

MAT 1049 of 2017
Marian Coeducational School and Others
—v—
Stephanie Fernandes Mondal and Others.

With

MAT 997 of 2017
Stephanie Fernandes Mondal—v—State of West Bengal & Others

For the appellants in MAT 1049 of 2017 and the respondents 4 - 6, 8 & 10 in MAT 997 of 2017	:	Mr. Rahul Karmakar, Advocate, Ms. Gargi Goswami, Advocate.
For the respondent no. 1 in MAT 1049 of 2017 and the appellant in MAT 997 of 2017	:	Mr. Subhro Prokash Lahiri, Advocate.
For the respondent no. 4 in MAT 1049 of MAT 1049 of 2017	:	Mr. Sanjay Kr. Baid, Advocate.
Heard on	:	February 5, 2018
Judgement on	:	February 28, 2018

Protik Prakash Banerjee, J.:

1. Two appeals have been preferred from an order dated May 12, 2017 passed by the learned Single Judge in W.P. No.25600 (W) of 2016 [Stephanie Fernandes Mondal—v—State of West Bengal and Others]. An order removing the writ petitioner from service, following disciplinary proceedings initiated against her by the management of Marian Coeducational School (hereinafter referred to as "the said school"), was under challenge in the writ petition. After considering the submissions made by the parties, the learned Single Judge by the impugned order had been pleased to decline jurisdiction on the ground of what was submitted to be an alternative remedy under the Code of Regulations of Anglo-Indian and Other Listed Schools, 1993 (hereinafter referred to as "the Code"), as amended, and relegated the parties to an arbitration by an arbitrator to be appointed by the "State Board", which was not a party respondent before His Lordship though the State was impleaded as the respondent no. 1 in the writ petition.

2. MAT 1049 of 2013, has been preferred by the authorities of the said school, primarily on the ground that there is no existence of any provision for arbitration under the Code at the relevant point of time when the dispute arose and further that there is an effective appellate remedy under the Code.

3. MAT 997 of 2017, on the other hand, was preferred by the writ petitioner, on several grounds, which may be difficult to appreciate without considering the

facts of the case, at least briefly. One common ground to both the sides was in respect of the lack of any provision for arbitration in the Code.

4. It is not disputed that the said school is affiliated to the Council for Indian School Certificate Examinations, Delhi (ICSE) (hereinafter referred to as "the said Council"). The Code referred to above applies to all listed schools. A listed school under Regulation 5(10) of the Code, as rightly held by the learned Single Judge, is one which is not an Anglo Indian School, but which is recognized by the said Council for presenting candidates for the examinations conducted by it. Therefore, the Code applies to the said school.

5. Under the provisions of Regulation 18, the Managing Committee of such schools can frame rules not inconsistent with the provisions of the Code. The Code by way of Regulation 24 provides for the procedure for disciplinary action against confirmed staff. "Staff" as defined in the explanation to Regulation 5 at clause (14) includes both teaching and non-teaching Staff. Regulation 24 is set out hereinbelow: -

> **"24. Procedure for disciplinary action against confirmed staff :**
> (a) The Head will frame charges after giving sufficient warning on the basis of the allegation against a staff and will bring it immediately to the notice of Managing Committee. No warning will, however, be necessary for gross misconduct.
>
> (b) The Chairperson of the Managing Committee will appoint a person to conduct an enquiry.
>
> (c) The employee shall be supplied with a copy of the charges together with a statement of allegations on which the charges are based.

(d) He/she will be required to submit within 10 days of the receipt of the charges and the statement of allegations a written statement to the Enquiring Officer in his/her defence and also to state whether he/she desires to be heard in person and adduce witnesses in his/her favour. He/ she will have the right to have another person to defend him/her, if so desired, to adduce defence evidence.

(e) The Enquiring Officer will prepare a report of the enquiry with his findings on each of the charges together with reasons thereof.

(f) The enquiry report will then be sent to the Chairperson of the Managing Committee who will issue a show-cause notice with proposed penalties, if any, and the employee will be called upon to reply to the show-cause notice within a fortnight of the receipt of such notice. Thereafter, the Managing Committee will take a final decision about the penalty, if any, that should be imposed.

Provided that any employee who is dismissed, removed or reduced in rank may, within a period of 90 days from the date of communication to him/her of the order of such dismissal, removal or reduction in rank, appeal against such order to the Tribunal constituted under Section 24A."

6. Mr. Lahiri, the learned advocate appearing on behalf of the writ petitioner, took us through the facts of the case in some detail. The writ petitioner's case is that she applied for leave from May 3, 2016 to May 13, 2016 to pursue her law-studies. The said school refused such leave on the ground of paucity of teachers and the heavy duty the writ petitioner was performing, which could not be easily distributed among the existing teachers. The writ petitioner, admittedly, did not attend duty during the period for which she had sought leave to pursue studies in law, but instead produced a medical certificate. It is not known what happened to such pursuit. The said school did not accept her medical certificate but proceeded to hold a disciplinary proceeding against her by issuance of a

chargesheet dated May 13, 2016, of which two charges pertained to the alleged unauthorized absence and the medical certificate, while the third was in respect of an unconnected issue. It is the case of the writ petitioner that an inquiry was conducted by an inquiry officer who was not appointed by the Chairperson of the Managing Committee in terms of Regulation 24(b) of the Code but by the Secretary of the Managing Committee and that though she participated in the inquiry, she was not allowed to cross-examine the witnesses produced by the school authorities in support of the charges. It is trite, therefore, that the disciplinary authority was not the inquiring authority.

7. One of the questions and answers recorded in the inquiry proceedings, whose minutes bear her signature, was Question No.12: "Did you change your plan of giving the LLB Exam? Answer: No, was supposed to only go for registration but fell sick". It ought to be remembered that she applied for a leave of 13 days to pursue studies in law, but she herself answered that she was supposed to only go for registration.

8. Her further contention is no copy of the inquiry report containing the findings on the charges framed against her was served on her. Despite the aforesaid, she was served with a notice dated September 7, 2016 issued by the Secretary of the Managing Committee of the said school to show cause, why the penalty of removal from service should not be imposed on her. Very significantly, it was mentioned in the said notice issued by the Secretary, inter alia, as follows: -

> "The Enquiry Officer appointed to enquire into the charges made against you vide Secretary's letter dated 13th May, 2016, has submitted his Report and Proceedings.
> On a careful consideration of the Enquiry Report the Managing Committee of the School at its Meeting on 1.09.2016 comes to the conclusion that you are not a fit person to be retained in the service of the School and so the school Managing Committee proposes to impose on you the penalty of your removal from service. In accordance with the provisions of Rule 23 (vii) of the Rules relating to the Terms of Employment and Conditions of Service of Teaching and Non Teaching Staff in the Diocesan Schools of the Archdiocese of Calcutta, you are being directed to show cause within a fortnight of receipt of this Notice as to why the proposed penalty of your removal from service should not be imposed on you."

9. Therefore, it is clear that the school authorities relied upon the findings contained in an inquiry report – naturally against the writ petitioner – to arrive at a conclusion which sought to take away her livelihood and asked her to make a representation against the proposed penalty based on such an inquiry report, copy whereof was never served on her. In other words, she was being asked to defend herself against a report on the basis of which her employers came to a conclusion against her. Her employers are "State" within the meaning of Article 12 of the Constitution of India, since they perform public and statutory duties under statutory regulations. They are supposed to be model employers. Yet, they were asking her to defend herself against something whose contents she did not know. This would not have been permissible even if the employers had no whiff of the "State" about them. She could not, therefore, make any meaningful representation against it and the opportunity to make a representation or show cause against the proposed penalty was wholly illusory without supplying a copy of the said inquiry report on which the school authorities had relied upon to come to the said conclusion. According to the writ petitioner, there was thus a

gross violation of the basic principles of natural justice and the principle of audi alteram partem. These, she perceived, vitiated the entire exercise and were in violation of Articles 14 and 21 of the Constitution of India. She replied to the notice to show cause where all possible defences were raised, as appears from her reply showing cause dated September 21, 2016 including at paragraph 9 thereof, that no copy of the inquiry report was served on her. Such pleading, incidentally is also present at paragraph 26 of the writ petition. However, the cause shown by her was not accepted. As a consequence, she was removed from service without an adequate opportunity of being heard.

10. On facts, Mr. Karmakar, the learned advocate appearing for the said school admitted before this Court that no copy of the inquiry report was ever served on the writ petitioner though she was asked to respond to the notice to show cause why the penalty of removal from service should not be imposed upon her on the basis of the conclusion reached by the school authorities relying upon the findings in the inquiry report as aforesaid. He, however, drew inspiration from Regulation 24(f) of the Code which clearly specifies that "The enquiry report will then be sent to the Chairperson of the Managing Committee who will issue a show-cause notice with proposed penalties, if any, and the employee will be called upon to reply to the show-cause notice within a fortnight of the receipt of such notice. Thereafter, the Managing Committee will take a final decision about the penalty, if any, that would be imposed."

11. Mr. Karmakar submitted that Regulation 24(f) as it stands simply requires that the inquiry report is to be sent only to the Chairperson of the Managing

Committee and not that a copy be sent to the staff facing the disciplinary proceeding. It is his further case, that there can be no question of violation of the Code when the authorities act strictly according to the Code and the literal meaning of its regulations which permit no ambiguity. He pointed to the resounding silence of the Code not merely from the date when it was given effect to but till today, after several amendments, in respect of any requirement of supplying a copy of the inquiry report to the delinquent staff before asking him or her to show cause against the penalty. He submits, in effect, that while enforcing the Code this Court cannot add words that the framers of the Rule did not, in their wisdom, themselves enjoin. He has further submitted that his clients were under the impression that they were guided by the rules of the Archdiocese within whose jurisdiction their school, they thought, was situated in the episcopal sense. He also submitted – after a query from the Court – that factually the said school is not at all a Diocesan School under the Archdiocese of Calcutta. In the context of this admission, it ought to be remembered that the school authorities purported to remove the writ petitioner from service under Clause 23(vii) of Terms of Employment and Conditions of Service of Teaching and Non-Teaching Staff in the Archdiocese of Calcutta.

12. On behalf of the said school, Mr. Karmakar also disputed the contention of the writ petitioner that no opportunity was given to her to cross examine the witnesses produced on behalf of the management of the said school or that the appointment of the enquiry officer by the Secretary rather than the Chairperson of the Managing Committee is a fatal defect particularly when the writ petitioner, according to him, participated in the inquiry proceedings.

13. Now that the factual matrix has been summarized, let me deal with the law on the subject of the failure to supply an inquiry report to a delinquent employee by an authority which is "State" within the meaning of Article 12 of the Constitution of India, in a case where such report has been relied upon by the employer to come to a conclusion that the employee is guilty as charged and a penalty is proposed to be imposed upon him, and he is asked to show cause why such penalty shall not be imposed.

14. The majority decision in the case of **Managing Director, ECIL—v—B. Karunakar** reported in **(1993) 4 SCC 727** and some subsequent decisions on the point, have been succinctly considered by a learned Single Judge of this Court, which I quote with approbation. The judgment in the case of **Smt. Aloka Bhattacharjee—v—North Bengal State Transport Corporation and Others**, reported in **(2017) 2 CAL LT 499 (HC),** passed by one of us (Dipankar Datta, J), concisely sets forth the correct position of law, in the following terms: -

A. "17. Owing to a perceived conflict of opinion in the decisions reported in (1988) 3 SCC 600 (Kailash Chander Asthana v. State of U.P.) [where it was held that non- service of a copy of the report of enquiry, the enquiry having been held in that case by an Administrative Tribunal under the relevant disciplinary rules, was immaterial] and (1991) 1 SCC 588 (Union of India v. Mohd. Ramzan Khan) [where it was held that the delinquent employee is entitled to a copy of the enquiry report before the disciplinary authority takes its decision on the charges levelled against him], both rendered by Benches of three learned judges, several matters were referred by another Bench of co-equal strength to the Constitution Bench for decision by an order dated August 5, 1991 reported in (1992) 1 SCC 709 (Managing Director, ECIL v. B. Karunakar). It is worth mentioning that Mohd. Ramzan Khan (supra) ushered in a new phase in the law relating to disciplinary action by acknowledging that consideration of the report of enquiry by the disciplinary

authority without furnishing copy thereof to the delinquent employee constitutes violation of natural justice.

B. 18. The majority decision of the Constitution Bench in B. Karunakar (supra) was authored by Hon'ble P.B. Sawant, J. (as His Lordship then was). Paragraph 2 of the decision contains recital of the basic question that arose for decision, which in turn gave rise to certain incidental questions. The basic question and the incidental questions, from paragraph 2 of the decision, are quoted below:

> "2. The basic question of law which arises in these matters is whether the report of the enquiry officer/authority who/which is appointed by the disciplinary authority to hold an inquiry into the charges against the delinquent employee, is required to be furnished to the employee to enable him to make proper representation to the disciplinary authority before such authority arrives at its own finding with regard to the guilt or otherwise of the employee and the punishment, if any, to be awarded to him. This question in turn gives rise to the following incidental questions:
> (i) Whether the report should be furnished to the employee even when the statutory rules laying down the procedure for holding the disciplinary inquiry are silent on the subject or are against it?
> (ii) Whether the report of the enquiry officer is required to be furnished to the delinquent employee even when the punishment imposed is other than the major punishment of dismissal, removal or reduction in rank?
> (iii) Whether the obligation to furnish the report is only when the employee asks for the same or whether it exists even otherwise?
> (iv) Whether the law laid down in Mohd. Ramzan Khan case will apply to all establishments -- Government and non-Government, public and private sector undertakings?
> (v) What is the effect of the non-furnishing of the report on the order of punishment and what relief should be granted to the employee in such cases?
> (vi) From what date the law requiring furnishing of the report, should come into operation?
> (vii) Since the decision in Mohd. Ramzan Khan case has made the law laid down there prospective in operation, i.e., applicable to the orders of punishment passed after November 20, 1990 on which day the said decision was delivered, this question in turn also raises another question, viz., what was the law prevailing prior to November 20, 1990?"

C. 20. This statement is sufficient to clear the doubt of there being any conflict of opinion expressed in the decisions in Kailash Chander

Asthana (supra) and Mohd. Ramzan Khan (supra). The Court, in normal circumstances, may not have proceeded further but found reason to do so in view of what was recorded in paragraph 19. Such paragraph reads:

> "19. In Mohd. Ramzan Khan case the question squarely fell for consideration before a Bench of three learned Judges of this Court, viz., that although on account of the Forty-second Amendment of the Constitution, it was no longer necessary to issue a notice to the delinquent employee to show cause against the punishment proposed and, therefore, to furnish a copy of the enquiry officer's report along with the notice to make representation against the penalty, whether it was still necessary to furnish a copy of the report to him to enable him to make representation against the findings recorded against him in the report before the disciplinary authority took its own decision with regard to the guilt or otherwise of the employee by taking into consideration the said report. The Court held that whenever the enquiry officer is other than the disciplinary authority and the report of the enquiry officer holds the employee guilty of all or any of the charges with proposal for any punishment or not, the delinquent employee is entitled to a copy of the report to enable him to make a representation to the disciplinary authority against it and the non- furnishing of the report amounts to a violation of the rules of natural justice. However, after taking this view, the Court directed that the law laid down there shall have prospective application and the punishment which is already imposed shall not be open to challenge on that ground. Unfortunately, the Court by mistake allowed all the appeals which were before it and thus set aside the disciplinary action in every case, by failing to notice that the actions in those cases were prior to the said decision. This anomaly was noticed at a later stage but before the final order could be reviewed and rectified, the present reference was already made, as stated above, by a Bench of three learned Judges. The anomaly has thus lent another dimension to the question to be resolved in the present case."

D. 23. Turning to the conclusions recorded, it appears that the answer to the basic question is in paragraph 29 of the decision (the majority view) reading as follows:

> "29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled

against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice."

E. 24. Hon'ble Ramaswamy, J. observed, in relation to the basic question, as under:

"61. It is now settled law that the proceedings must be just, fair and reasonable and negation thereof offends Articles 14 and 21. It is well- settled law that the principles of natural justice are integral part of Article 14. No decision prejudicial to a party should be taken without affording an opportunity or supplying the material which is the basis for the decision. The enquiry report constitutes fresh material which has great persuasive force or effect on the mind of the disciplinary authority. The supply of the report along with the final order is like a post-mortem certificate with putrefying odour. The failure to supply copy thereof to the delinquent would be unfair procedure offending not only Articles 14, 21 and 311(2) of the Constitution, but also, the principles of natural justice. The contention on behalf of the Government/management that the report is not evidence adduced during such inquiry envisaged under proviso to Article 311(2) is also devoid of substance. It is settled law that the Evidence Act has no application to the inquiry conducted during the disciplinary proceedings. The evidence adduced is not in strict conformity with the Indian Evidence Act, though the essential principles of fair play envisaged in the Evidence Act are applicable. What was meant by 'evidence' in the proviso to Article 311(2) is the totality of the material collected during the inquiry including the report of the enquiry officer forming part of that material. Therefore, when reliance is sought to be placed by the disciplinary authority, on the report of the enquiry officer for proof of the charge or for imposition of the penalty, then it is incumbent that the copy thereof should be supplied before reaching any conclusion either on proof of the charge or the nature of the penalty to be imposed on the proved charge or on both."

F. 25. The incidental questions were answered in paragraph 30. The Court held, while answering question (i), that even if the statutory rules laying down the procedure for holding disciplinary inquiry do not permit the furnishing of the report or are silent on the subject, the delinquent employee would still be entitled to a copy of the report since the denial of the report of enquiry is a denial of reasonable opportunity and a breach of the principles of natural justice; and statutory rules, if any, which deny the report to the delinquent employee are against the principles of natural justice and, therefore,

invalid. The answer to question (ii) was that, whenever the service rules contemplate an inquiry before a punishment is awarded and when the officer assigned with the duty of conducting enquiry is not the disciplinary authority, the delinquent employee will have the right to receive the report of enquiry notwithstanding the nature of the punishment. Question (iii) was answered by holding that whether or not the delinquent employee asks for the report, it has to be furnished to him since it is his right to have the report to defend himself effectively and it would not be proper to construe his failure to ask for the report, as a waiver of his right. In respect of question (iv), it was held that the law laid down in Mohd. Ramzan Khan (supra) should apply to employees in all establishments whether Government or non- Government, public or private.

G. 28. A threadbare analysis of the said decision would reveal the Court's anxiety to ensure that the delinquent employee's right to defend himself effectively at an enquiry conducted by an officer appointed by the disciplinary authority, and not conducted by such authority himself, is not defeated. Upon detailed survey of the law on the point as well as due consideration of the provisions of Article 311 of the Constitution, as it originally stood, and after the Constitution (42nd Amendment) Act, 1976 became operative from January 1, 1977, the Court succinctly stated the reason for its answer to question (i) i.e. the basic question, in paragraph 26 of the decision reading as under:

> "26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it

is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it.

H. 29. Right to receive copy of the report of enquiry by the delinquent employee, where charge(s) is/are held to be proved, thus was recognised by the Constitution Bench to be a valuable right of such employee, irrespective of who his employer is (public or private), and regardless of the position of the rules governing enquiry. Not only that, the requirement to furnish the report of enquiry by the employer, notwithstanding the employee not having asked for it, was also recognised since it was considered to be the right of the employee to receive it as part of reasonable opportunity.

I. 45. It is quire unheard of that the law laid down by a Constitution Bench of the Supreme Court may be allowed to be breached with impunity by employers, even bordering on contempt, yet permitting them to raise the point of "no prejudice" having been suffered by the delinquent employee at the time the matter reaches a court/tribunal. If indeed the answer given by the Constitution Bench to question (v) is the law on the effect of non-service of the enquiry report, this Bench is inclined to the view that there would have been no necessity for the Constitution Bench to discuss the law elaborately and to stress on the need for the enquiry report to be furnished to the delinquent employee. The Constitution Bench may have simply stated that if an employer, post-November 20, 1990, is found not to furnish copy of the report of enquiry to the delinquent employee and disciplinary action is taken without adhering to the law requiring furnishing of the enquiry report, and the issue reaches the competent court of law for its determination at a subsequent stage,

the employer may not be required to say why the report was not furnished and its action could be interdicted only if the delinquent employee succeeds, on the touchstone of prejudice, to prove that reasonable opportunity to defend was denied to him. Dilution of the law laid down by the Constitution Bench (regarding the necessity to furnish enquiry report to a delinquent employee before disciplinary action is taken, which is part of natural justice) by interpretative exercises subsequently undertaken without bearing in mind other Constitution Bench decisions [holding that violation of a principle of natural justice is violation of Article 14 of the Constitution (AIR 1985 SC 1416 : Union of India v. Tulsiram Patel), non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary (AIR 1981 SC 136 : S.L. Kapoor v. Jagmohan, approved by the Constitution Bench in AIR 1986 SC 180 : Olga Tellis v. Bombay Municipal Corporation) and no prejudice need be proved for enforcing the fundamental rights (AIR 1988 SC 1531 : A.R. Antulay v. R.S. Nayak)] is an unfortunate development likely to invite the frown of encroachment upon the rule of law.

J. 46. What then should be the proper course for the court/tribunal once the matter reaches it? The proper course would thus seem to this Bench to be to enquire from the employer ~ public or private ~ the reason for not furnishing copy of the enquiry report to the employee. This course, experience has shown, is seldom followed. If no justification is forthcoming and the court/tribunal has reasons to believe that copy of the enquiry report was not furnished with a view to advance an unholy cause or prompted by an extraneous reason or simply because of utter carelessness, the order of punishment ought not to be allowed to stand for a moment on the premise that the employer cannot be allowed to derive any advantage out of its own wrong and the matter remitted to the disciplinary authority to resume proceedings from the stage of consideration of the employee's representation against such report. Should the court/tribunal be satisfied that there was genuine endeavour to furnish the enquiry report to the employee but for some reason or the other, beyond the control of the employer, the report could not reach the employee, or some other justification is provided that is acceptable to the court/tribunal, the "prejudice" principle may be applied. However, application of the "prejudice" principle without embarking on an enquiry of the nature indicated above, in the humble understanding of this Bench, would tantamount to subverting the law laid down by the Constitution Bench in B. Karunakar (supra)."

15. Therefore, the judgment in the case of **Karunakar** *(supra)* was divided into a basic question and incidental questions. The basic question which permits of

no dilution is that a delinquent employee is entitled to have a copy of the inquiry report on which the disciplinary authority bases his conclusion of guilt and asks the employee to show cause why a certain penalty shall not be imposed, since it is a new material available on which the decision-making process is finally based. In the case of **Karunakar** *(supra)* the incidental questions arose and were answered. In case of reopening the disciplinary proceedings or setting aside the order of dismissal, only on the basis of non-supply of the inquiry report, the test of prejudice was used and intended to be used *only in respect of proceedings which had become final before the judgment in* **Karunakar** *(supra)* was rendered, in case of grave offences, where even the supply of inquiry report may ultimately prove to be a mere technical mistake, as appears from paragraph 44 of the judgment in the case of **Karunakar** *(supra)* itself. That is why **Karunakar** *(supra)* itself held at paragraph 44, that the law laid down in Mohd. Ramzan's case as referred to in **Karunakar** *(supra)*, needed to be made prospective. However, the learned Single Judge has gone on to also record how this aspect was widely misunderstood by applying the test of prejudice regardless of whether the disciplinary proceeding commenced or was yet to reach a terminus before the Disciplinary Authority, after the judgment in the case of **Karunakar** *(supra)*. What was the nature of the exercise that the Writ Court was to undertake once a penalty was imposed on the basis of a notice to show cause where no copy of the inquiry report was given to the employee, was laid down in paragraph 46 with sufficient clarity.

16. I agree with the view of the learned Single Judge as expressed in the case of **Smt. Aloka Bhattacharjee** (*supra*) as good law and even independently of

such judgment, construe the judgment in the case of **Karunakar** (*supra*) to mean that in any case where the inquiry report contains adverse findings against the delinquent employee, and a punishment is proposed to be imposed on him by the disciplinary authority (who is not the inquiry authority) on the basis of such findings, after having come to a conclusion that the charges against the delinquent employee stand proved, based among other things on such inquiry report, in the event such report had not been furnished to the employee before he was asked to show cause why such penalty shall not be imposed, then the punishment cannot stand and the disciplinary proceedings stand vitiated and the decision-making process is incurably and fatally in violation of the basic principles of natural justice and the right to defend oneself, and is thus doubly a nullity since it also violates Article 14 of the Constitution of India. The doctrine of fairness applies with equal force even to private employers where there are statutory rules which govern the field.

17. I have embarked upon such exercise and have found that had the writ petitioner been given a copy of the inquiry report, she would have been able to deal with the findings reached against her by the inquiring authority – holding her guilty as charged – and whether the inquiring authority had dealt with the question impeaching his jurisdiction having been appointed by someone other than the appropriate authority under the Code, and whether he had dealt with her allegations of not being afforded adequate opportunity of being heard including in the matter of cross-examination of the witnesses through whom evidence was adduced by the said school. Without the inquiry report being supplied, she was reduced only to making general objections on the point of

jurisdiction without knowing what findings had been reached even in respect of those objections by the inquiring authority. Therefore, in any view of the matter, non-supply of the inquiry report prejudiced her right of defence.

18. Once the legal position has been considered and decided as above, it is clear that non-supply of the inquiry report in the facts and circumstances of the present case, where the school authorities concerned relied upon it to arrive at a conclusion that the writ petitioner was guilty as charged and asked her to show cause why the penalty of removal from service should not be imposed upon her, it is also clear that the gravest of prejudices was being caused to her by relying upon materials not supplied to her, while at the same time asking her to defend herself against such material without knowing its contents. The case of **Karunakar** *(supra)* also makes it clear at paragraph 30 that even if the rules laying down the procedure for holding disciplinary inquiry were silent on the subject or do not permit the furnishing of the inquiry report, still it was to be furnished to the employee since the denial of the inquiry report is a denial of reasonable opportunity and a breach of the principles of natural justice.

19. Hence, I do not find merits in the submission of Mr. Karmakar, appearing on behalf of the said school, that non-supply of the inquiry report by the school authorities to the writ petitioner before issuing the notice to show cause against the penalty of removal from service proposed to be imposed upon her, on the basis of the said inquiry report and the eventual removal of the petitioner from service on that basis, does not vitiate the proceedings or the decision-making process. The fact that the Code is silent about supply of the inquiry report to the

staff proceeded against does not render the Constitution Bench decision in the case of **Karunakar** *(supra*), which explicitly envisaged such a situation, nugatory nor allows me to ignore binding law laid down by the Hon'ble Supreme Court and give an interpretation to the Code which is in violation of the law laid down by the Constitution Bench of the Hon'ble Supreme Court.

20. As such, I find a clear and gross violation of the basic principles of natural justice in the most egregious manner. The order of removal from service impugned in the writ petition shocks the conscience of the Court and cannot, therefore, stand.

21. The Archdiocese is the appellant no.4 in MAT 1049 of 2017 and is therefore one of the appellants, supporting the disciplinary proceedings and the punishment imposed. In view of the above discussions, I most emphatically lay down that the provisions of the Terms of Employment and Conditions of Service of Teaching and Non-Teaching Staff in the Archdiocese of Calcutta have no manner of application to the instant case and cannot and do not override the Code and to the extent that any rule has been made by the Archdiocese or the managing committee of the said school, which is inconsistent with either the statutory regulations in the Code as interpreted by me as above, or the law laid down by the Apex Court in the case of **Karunakar** *(supra)*, it cannot be applied to the present case and the case is governed by the Code as interpreted by us relying upon the judgment of the Hon'ble Supreme Court in the case of **Karunakar** *(supra)***.**

22. In view of the point which I have decided, as above, the other contentions of the writ petitioner as contained in the writ petition or the representation/causes shown in the letter dated September 21, 2016 including the factual allegations made by the parties about the merits of the case, are not required to be decided since the appeals can be decided on the above question alone, on the basis of non-supply of the inquiry report in the facts and circumstances of this case and the discussion of the law laid down on the subject. Naturally, the other contentions shall be free to be agitated in terms of the order which follows.

23. So far as the order impugned in both the appeals are concerned, the parties say in unison that the statutory tribunal to be constituted under Regulation 24A of the Code, to which an appeal lies under the proviso to Regulation 24(f), has not been constituted. However, with the greatest possible respect to the learned Single Judge, I cannot agree that even if such a tribunal had been constituted, merely on the ground of alternative remedy, exercise of jurisdiction by way of judicial review against the decision making process behind such a blatant violation of the basic principles of natural justice and the law laid down by a Constitution Bench of the Hon'ble Supreme Court, on the face of the record, could have been declined by the learned Single Judge. The decision-making process has been rendered a nullity because of the gross violation of the basic principle of natural justice leading to deprivation of the livelihood of the writ petitioner without following due process or procedure established by law, which is furthermore a violation of her fundamental rights under Article 21 read

with Article 14 of the Constitution of India. The consequence of a nullity, being the penalty of removal from service, can only be a nullity. So alternative remedy, according to the well settled principles of law, would not be a bar. If authority is needed for this proposition, I may refer to the case of **Registrar of Trademarks—v—Whirlpool Corporation** reported in **(1998) 8 SCC 1**. The question is, however, academic since in the instant case there is no statutory appellate tribunal constituted till date and so there can be no question of relegating the writ petitioner to a statutory appeal under the Code.

24. Again, where the statutory regulations do not permit reference of a matter for arbitration, but envisages recourse to an appeal, even if no appellate forum is constituted, the question of referring the matter to arbitration appears to be judicial legislation of which I am understandably very wary. I am conscious that there is nothing in the Code, which is law within the meaning of Article 13 of the Constitution of India, by which a disciplinary dispute may not be referred to arbitration, but that does not mean a new provision has to be engrafted by judicial decision. The duty is to move from molar to molecular and the Court dwells in the interstices of statutory silence. It is no part of the Court's duty to create primal sound where already there is ambient cacophony.

25. I am, therefore, constrained to set aside the said order dated May 12, 2017 and to that extent both the appeals succeed. However, the writ petition is not remanded to the learned Single Judge but instead the following order is passed which, it is felt, ought to have been passed on the writ petition in the facts and circumstances of the case and in the light of the discussions as above.

26. I hold that the decision-making process based on the inquiry report, the notice to show cause dated September 7, 2016 and the ultimate decision based thereon removing the writ petitioner from service dated October 4, 2016 are all bad in law and are nullities, and I declare them to be so and strike them down as void ab initio.

27. As a consequence, the writ petitioner is entitled to be reinstated in service. However, the materials on record, including the answers of the writ petitioner to question No.12, as also the reason for the disciplinary proceedings mentioned in the charge-sheet, are not such which permit me to exonerate her without going into the merits of the matter which I have not done. I agree completely with the learned Single Judge in the order under appeal, that these are questions of fact which the writ court ought not to go into. Hence, while I have held the writ petitioner to be entitled to reinstatement, such reinstatement would for the present be for the purpose of completing the disciplinary proceedings only. Accordingly, I further direct that she be deemed to be under suspension from this date till the completion of the disciplinary proceedings, if resumed in terms of this order. If the school authorities decide to resume the disciplinary proceedings, it shall commence from the stage of issuance of a notice on her to show cause along with a copy of the inquiry report and shall be taken to its logical conclusion strictly in accordance with law. For the period during which she would be under suspension starting from this day till final order is passed on the disciplinary proceedings, the writ petitioner would be entitled to subsistence allowance according to the rules applicable to any employee under

suspension which are consistent with the Code. Should the writ petitioner be found not guilty of the charges levelled against her, she shall be entitled to full back wages from the date she was removed from service. Also, if it is decided against resuming the disciplinary proceedings, then the suspension will lapse and the writ petitioner shall be deemed to be in service with effect from October 4, 2016 and entitled to full back wages from the date of her removal from service, as if she was never removed. The appeal of the writ petitioner being MAT 997 of 2017 succeeds to that extent.

28. So far as MAT 1049 of 2017 is concerned, I make it clear that I allow it only in part so far as the direction of reference to arbitration is concerned. However, the disposal of the said appeal being MAT 1049 of 2017 or my present order shall not preclude the Chairman of the Managing Committee of the said school to serve a copy of the inquiry report on the writ petitioner and proceed afresh from the stage of issuing a notice to her to show cause and make a representation against the proposed penalty and then complete the exercise in accordance with law, if they are so advised, as directed above.

29. I have decided none of the other contentions raised by the parties in view of the position of law as discussed above, and the writ petitioner will be free to agitate all the said contentions before the disciplinary authority in the event of resumption of the disciplinary proceedings from the stage indicated above. The disciplinary authority, in such case, shall decide the matter afresh, being uninfluenced by its earlier decision and shall give a reasoned decision on every point which may be raised by the writ petitioner. The school authorities will also

be at liberty to urge all other points which have not been decided by me hereinabove.

30. The appeals are disposed of on the above terms. The parties shall bear their own costs.

(PROTIK PRAKASH BANERJEE, J.)

DIPANKAR DATTA, J.:

31. I have read the draft judgment proposed by my learned brother.

32. The occasion for writing a separate opinion would not have arisen but for reliance placed by Mr. Lahiri, learned advocate for the writ petitioner on the decision reported in (2017) 2 CAL LT 499 (HC) : Smt. Aloka Bhattacharjee—v—North Bengal State Transport Corporation and Others [incidentally, a judgment authored by me] and my learned brother proposing to hold that such decision lays down good law. It would be contrary to all canons of judicial propriety to agree with such opinion of my learned brother and thereby, effectively, give the ratio propounded in the decision in Aloka Bhattacharjee (supra) the imprimatur of a Division Bench being a member thereof. I, therefore, intend to decide the issue involved in the appeals without reference to what has been laid down in Aloka Bhattacharjee (supra).

33. The report of enquiry, admittedly, was not furnished to the writ petitioner. Indubitably, such report was a relevant material that the management considered while first proposing to remove the writ petitioner from service and ultimately in so removing her. The writ petitioner was entitled in law to claim that the report be furnished to her. She did, in fact, point out in her reply to the second show cause notice that she was disabled in putting up effective defence without having access to such report. Even then, the report was not furnished. Mr. Karmakar, learned advocate for the school, attempting to take shelter of the rules governing the disciplinary proceedings, contended that since the same did not require furnishing of the report the request of the writ petitioner was not accepted.

34. More than two decades back, the Constitution Bench of the Supreme Court in its decision reported in (1993) 4 SCC 727 : Managing Director, ECIL—v—B. Karunakar made it very clear that the requirement to furnish the report of enquiry has to be read into the rules, if the rules governing disciplinary proceedings of the employer ~ be it public or private ~ were silent on such aspect. It is indeed unfortunate that the law laid down by the Supreme Court has been observed in the breach. The explanation proferred by Mr. Karmakar does more harm than good for the cause of the management of the school inasmuch as the action is in the teeth of the answer to the basic question that arose for decision before the Supreme Court in B. Karunakar (supra). While law laid down by the Hon'ble Supreme Court is binding on all courts under Article 141 of the Constitution, all civil and judicial authorities in terms of Article 144 thereof are

obliged to act in aid of such Court. At this distance of time, it is considered inappropriate and improper for the management of the school to either feign ignorance of the law laid down in B. Karunakar (supra) or to contend that it chooses to stand by its own rules rather than the law laid down therein. I have, therefore, no hesitation in agreeing with my learned brother that the disciplinary proceedings stood grossly vitiated.

35. I further hold that the learned Judge of the writ court fell in error in making the ultimate direction for resolution of the *inter se* dispute by way of arbitration noticing that the appellate tribunal had not been set up. If indeed the writ petitioner had no remedy by way of appeal, the remedy of judicial review could be pursued by her; and within the parameters of judicial review, her grievance could have been scrutinised. If any of the vices of illegality, irrationality or procedural irregularity were found to be present in the decision making process leading to her removal from service, the writ petitioner could have been granted such relief as the circumstances warranted. I, thus, agree with my learned brother that the impugned order is indefensible and thus deserves to be quashed together with the order of removal passed against the writ petitioner.

36. I am also in agreement with my learned brother that the disciplinary proceedings must resume from the stage of furnishing of the report of enquiry to the writ petitioner, and the directions regarding conditional reinstatement of the writ petitioner, her placement on suspension and entitlement to back wages only if she is exonerated or the said school elects not to resume the proceedings against her.

37. The appeals shall stand disposed of on the terms as proposed, leaving the parties to bear their own costs.

(DIPANKAR DATTA, J.)

IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

Present:
The Hon'ble Justice Dipankar Datta, J.
And
The Hon'ble Justice Protik Prakash Banerjee, J.

F.M.A. 464 of 2017
National Insurance Co. Ltd.
—v—
Sohna Singh and Others
With
COT No.7 of 2017

Sohna Singh and Others
—v—
National Insurance Co. Ltd.

For the Appellant /Insurer	:	Mr. Rajesh Singh, Adv.
For the claimants /cross objectors	:	Mr. Ashique Mondal, Adv.
Heard on	:	February 06, 2018, September 18, 2018 and August 27, 2019.
Judgment on	:	November 15, 2019.

PROTIK PRAKASH BANERJEE, J.:

1. FMA 644 of 2017 is an appeal under section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as the "1988 Act"). It questions the

correctness of a judgment and award dated June 28, 2016 passed by the learned Additional District Judge, 3rd Court, South 24-Parganas at Alipore (hereinafter referred to as the "learned tribunal") in M.A.C.C. No. 195 of 2012/CIS No. M.A.C.C. No. 1352 of 2016 filed under section 166 of the 1988 Act. By the said order, the learned tribunal awarded compensation to the tune of Rs. 1,59,46,360/- (Rupees One Crore, Fifty-Nine Lakh, Forty-Six Thousand, Three Hundred and Sixty) in favour of the claimants/ respondents (hereinafter referred to as "the claimants") who are the mother, widow and two daughters of one Amardeep Singh (hereinafter referred to as "the victim") who was a victim of a road car accident. According to the records brought before us, the victim was grievously injured in the said road accident which occurred on May 16, 2007 at around 21:30hrs. on the New Town Road near Jatragachi More while the victim was on his way home alongwith his brother and a driver. The unfortunate accident took place when a Dumper Truck (hereinafter referred to as "the offending vehicle") collided with the car in which the victim was travelling. The said car belonged to the deceased. At the relevant point of time, the offending vehicle having registration number WB-37A/3616 was insured as goods carrying commercial vehicle in the name of one Kamaliya Dutta, owner of the offending vehicle, under an Insurance Policy which covered third party liabilities. The appellant is the insurer of the offending vehicle (hereinafter referred to as "the Insurer").

2. Initially, the claimants filed a motor accident claim application dated July 23, 2007before thelearned tribunal for grant of compensation on account of grievous accidental injuries sustained by the victim due to the said road accident under section 166 of the 1988 Act. The injuries suffered by the victim were particularly a closed fracture of the shaft of the right femur and complete dislocation of **C4** over **C5** causing severe compression of cervical cord by **C5** body against posterior elements of upper column due to fragmentation of posterior elements of **C4** bi-lateral. The victim also suffered complete rupture of interior and posterior spinal ligament with hematoma between **C4** and **C5**, deformity, compression and contusion of cervical cord from **C3-C4** to **C6-C7**. Due to such injuries sustained by the victim, he suffered from paralysis of all four limbs, a condition termed "quadriplegia" as a result of which he was rendered completely disabled. Immediately after the incident, the victim was removed to Apollo Gleneagles Hospital. Having been admitted on the same day, he underwent treatment till July 03, 2007. Thereafter, the victim was discharged from the said Hospital but the treatment continued at his residence according to the advice and under the aegis of doctors of the said Hospital as well asa team of renowned experts in the field of medicine. Despite the intensive treatment, the victim died on February 13, 2008. Soon thereafter, the claim petition was amended on February 17, 2008 and was converted into an application for grant of compensation for death of the victim as a result of succumbing to the accidental injuries.

3. The aforesaid facts are not in dispute. It is nobody's case that the abovementioned vehicles were not involved in the said accident, or that the injuries sustained by the victim werethe result of an altogether independent incident, or that the offending vehicle was not insured by the Insurer. Rather, this appeal of the Insurer is based on the evidence recorded by the learned tribunal and whether on that basis the claimants were entitled to recover anything from the Insurer. If we summarize the grounds taken briefly, the first is that the death of the victim did not occur because of the accident, but because of the failure of the victim to mitigate its effects by adopting quack remedies such as acupuncture instead of proceeding strictly with the regimen as prescribed by the doctors of Apollo Gleneagles, the second is that there was contributory negligence as held by the learned tribunal and since this was challenged in the cross-appeal, at least composite negligence, and most importantly, that the income of the deceased should have been pegged at Rs.20 lakhs per year less taxes, and the questions of consortium and future prospects should have been calibrated accordingly. In the cross-objection, the claimants have challenged the finding of contributory negligence or even composite negligence on the basis of the evidence recorded, and sought to have the income of the deceased per year to be pegged at a higher level than taken by the learned tribunal. Of course, the claimants have demanded consortium not just for the wife but also the mother of the deceased, though the deceased son was major and married at the time of his death.

4. We propose to deal with the appeal and the cross objection together, since logically the questions raised by the rival parties respectively, must be decided together even if they are in two different proceedings, one of them having the effect of a cross-appeal in the matter. We heard them together of course, in the same hearing.

5. Mr. Rajesh Singh, learned counsel for the appellant-insurer has submitted that the learned tribunal erred both in law and in fact in holding that the victim died because of the accident or that the accident was the proximate cause. It has been urged by the appellant-insurer that the death of the victim did not occur immediately after the accident on May 16, 2007 but the victim died on February 13, 2008 and therefore, the interval between the accident and the death of the victim was almost 9 months apart in time. On this ground, the Insurer has sought to contend that the injuries received by the victim at the time of the unfortunate incident cannot be said to be the only cause for his death 9 months after the said incident. Rather, the death of the victim could very well be attributed to reasons independent of the said accident. In fact, the learned counsel took great pains to suggest that the death of the victim is likely to have occurred due to medical negligence on the part of doctors treating the victim after his discharge from Apollo Gleneagles hospital. To buttress this submission, the learned counsel for the Insurer also argued that no autopsy report was filed by the claimants to suggest that the cause of death of the victim was consequential to the accidental injuries received by him. This, he submits,

is in contravention to the provisions of Rule 329 (3) of the West Bengal Motor Vehicle Rules, 1989 and therefore, in absence of such an autopsy report the death of the victim cannot be attributed to the said accidental injuries. A submission was even made on behalf of the Insurer that the victim failed to observe the discharge advice given by Apollo Gleneagles Hospital and the Insurer in fact pointed to the treatment of acupuncture resorted to by the victim as a proximate cause for his death, which was not an accidental injury.

6. As against this, the learned counsel for the claimants submits that the provision under Rule 329 (3) of the West Bengal Motor Vehicle Rules, 1989 do not oblige, as a strict rule, the production of the autopsy report but the same is optional. In this regard, for the proper understanding of the provisions of the aforesaid, the relevant portions need to be extracted and are set out herein below: -

> "(3) There shall be appended to every such application the following documents, namely,
> (i) Medical certificate in Form COMP B or Post-mortem Report, or DeathCertificate; and
> (ii) First Information Report in respect of the accident."

7. He also places reliance upon a judgment passed by a Division Bench of this Court in **Chhalana Dam and Others—v—New India Assurance Co. Ltd. and others** reported in **2010 ACJ 1338**, paragraphs 4 and 5 of which seem to be relevant to this case. They are set-out hereinbelow: -

> "4. As it appears from rules 329 and 330 of the West Bengal Motor Vehicles Rules, in order to maintain an application under section 140 of the Act, the claimant is required to submit the documents, referred to therein. It is not necessary that the postmortem report is

> a 'must'. Even the death certificate given by a doctor is sufficient for the purpose of maintaining an application under section 140 of the Act.
> 5. Therefore, we do not find any justification of rejecting the application on the ground of not filing the post-mortem report, when from the materials on record, it has been established that the victim met with the accident and ultimately died without regaining senses."

8. Finally, he submits that since the death certificate as issued by the relevant authorities has been submitted with the claim application, the provisions under Rule 329(3) of the 1989 Rules have been complied with.

9. When cornered at the time of hearing, the learned counsel for the Insurer conceded that the entire submission rests upon the opinion given by one Dr. Dulal Chandra Saha, a Professor and Head of the Department of Orthopedics at the Calcutta National Medical College and Hospital who deposed before the learned tribunal as D.W. 1. For the sake of proper appraisal of the opinion given by the said doctor, we reproduce part of his deposition before the learned tribunal herein below: -

> "On perusal of aforesaid certificate, I have mentioned in my opinion in the form of certificate which are as follows:-
> In my opinion alleged death without autopsy report cannot be definitely attributed for the cause of accident which took place 8 months prior to the cause of death.
> Medical negligence was also due to various types/streams like Chinese medication, therapy, acupuncture, etc. which might have aggravated the elements without following the proper advice of Apollo Gleneagles Hospital, Kolkata. In all such types of accident of patient medical code of conduct stipulates autopsy for confirmation of the cause of death by the autopsy surgeon. This conduct was not followed while death certificate was issued"

However, in his cross-examination, the aforesaid witness deposed the following: -

> "The case of death of Amardeep Singh is pulmonary embolism in the case of quadriparesis. Quadriparesis is the weakness of all four limbs

of person. Quadriplegia means paralysis of all four limbs in a person. Pulmonary embolism is the blockage of pulmonary vessels of human body by a blood clots etc. Mr. Amardeep Singh suffered quadriplegia on account of accidental injury sustained by him. I cannot say the percentage of recovery of a patient suffered by quadriplegia due to the accidental injury. There are many reasons for pulmonary embolism such as like hypertension cardiac ailments prolonged immobilization in bed due to some diseases. I agree that prolonged immobility is one of the reason of pulmonary embolism. Quadriplegia or paralysis are also reason for pulmonary embolism. Major surgery is also one of the reason for pulmonary embolism. Even the trauma is also one of the reason for pulmonary embolism. Pulmonary embolism is the earlier stage than pulmonary thrombosis. Pulmonary embolism may start from calf muscles. I agree that calf muscle is the second heart of human body after heart. If a person suffered with quadriplegia he shall have no capacity to move his lower limbs. In discharge summary it has not mentioned that patient Mr. Amardeep Singh was suffering that quadriparesis. It has mentioned in the discharge summary that patient Amardeep Singh was suffering with quadriplegia.

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In paragraph 6 of the said letter Senior Divisional Manager of National Insurance Company specifically requested me to prepare the report as per their guideline mentioning some points. YES, as per their guideline I have prepared the report and submit the same before them.

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In our hospital in spite of giving proper treatment death of few patients occurred. Our hospital used to issue death certificate to the patients whose death took place in our hospital. In death certificate we use to mention cause of death where cause of death were find out. In every cases we do not want to autopsy report at the time of issue of death certificate. In a case where cause of death was detected we do not ask for autopsy report.

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As I did not see any document regarding the follow up advice of Apollo Gleneagles Hospital, I came to the conclusion that patient Amardeep Singh was the victim of medical negligence. I agree that out of presumption, in my opinion that patient Amardeep Singh was a victim of medical negligence. It is fact that as per instruction of Senior Divisional Manager mentioned in his letter (ext. B) I have mentioned that patient Amardeep Singh is the victim of medical negligence.

* * * * * * * *

Under the circumstances, you are to ascertain as to whether the alleged death without autopsy report can be definitely attributed for

> the cause of accident which took place around 8 months prior to the date of death expert opinion for the above purpose. If considered, may also project the medical negligence for not following discharge advice of the doctors of Apollo Gleneagles Hospital. Moreover the treatment by the doctors of the various streams like Chinese medication therapy, acupuncture etc. might have aggravated the ailment. Your early report would be highly appreciated. Please note that your report may be questioned by the applicant's counsel for which we must be ready for the supporting documentary evidence"

10. A holistic appreciation of the deposition made by the D.W.1 before the learned tribunal below goes on to show that the initial suggestion of medical negligence was based on a conjecture of the witness. For an expert, opinion evidence is that of which he must have an opinion of his own, in his field of expertise. Since admittedly he is not an expert in the field of alternative medicine, what the effect of acupuncture or the Chinese system of medicine was or could be, is not within his area of expertise and therefore cannot be safely relied upon. Besides, the evidence does not show that the DW 1 (expert doctor) had gone through the follow up advice of the said Hospital before deposing and therefore, such presumption has no sound basis. We say this because the evidence of the DW 1 discloses that he was deposing before going through the discharge advice from Apollo Gleneagles Hospital which alone would have shown the follow-up advice. Furthermore, as observed towards the concluding part of the said witness' deposition, the said opinion was advanced by the witness according to the direction of the Senior Divisional Manager of the Insurer, and he was thus prepared to support the defence of the Insurer with a sound medical opinion. Admittedly, the said DW 1 is a panel doctor of the Insurer, and

there is evidence on record that he was directed by an officer of the Insurer to give his opinion in a particular manner. Such an opinion can hardly have the sanctity, if at all, of an expert opinion which the tribunal or this court can rely upon while upsetting a finding of death due to the accident. Thus, any reliance upon the evidence given by him would not be a safe course of proceeding. We, therefore, rule out any whisper of medical negligence in the death of the victim.

11. This conclusion is further supported by the deposition of one Dr. P.K. Pooviah, medical practitioner working at A.M.R.I. Hospital, Salt Lake who deposed as P.W. 2 before the learned tribunal. The relevant paragraph of the said deposition is set out herein below: -

> "When I examined the patient at first I heard from the patient party the patient had an accident few months back and was completely paralysed from neck to downwards. The pulmonary embolism is the disease which is caused by a clot formation usually in the leg vein of the patient and this clot breaks and sent into the lungs. Pulmonary embolism clot in the leg can form due to many reasons. Generally, due to immobility of limbs is one of the risk factor. Death of Mr. Amardeep Singh was caused due to pulmonary embolism in a cause of quadriparesis. Quadriparesis is a paralysis of all four limbs. Quadriparesis is defined as inability to move of any all four limbs. On 13.2.08 I examined Amardeep Singh at his residence."

12. Thus, it is clear that the depositions made by the witnesses examined before the learned tribunal at the behest of either party do not rule out pulmonary embolism resulting out of quadriplegia as the main cause of the death of the victim. It is also clear from the discharge summary of the victim issued by Apollo Gleneagles Hospital that the victim suffered from quadriplegia resulting out of the accidental injuries received

by him. Therefore, there lies a complete chain of circumstances to suggest that the death of the victim resulted due to pulmonary embolism suffered as a result of the accidental injuries received by him on the night of May 16, 2007 and the effect of the evidence referred to above is such that the situation negates any dispute as to the accident being the cause of death, and the ground taken by the Insurer is so answered.

13. The next point argued before us by the Insurer is that the said accident occurred not only because of negligence on the part of the driver of the offending vehicle but also due to the negligence of the driver of the vehicle in which the victim was travelling. This was vehemently opposed by the learned counsel for the Claimants in the cross-objection. The Learned Counsel for the Insurer, suggests that the victim's vehicle was driven at a very high speed and in a rash and negligent manner due to which the driver of the said vehicle lost control and therefore collided with the offending vehicle coming from the opposite direction. The contention of the Insureris based on the award passed by the learned tribunal below. Therefore, we need to quote the decision of the tribunal on this point: -

> "Allegation of the claimants was that the dumper was solely responsible for the accident.It has been mentioned in the claim petition that the dumper was coming from the opposite side at a very high speed in a zig zag manner and all on a sudden the dumper turned to the wrong lane. Though the driver of Honda City controlled its speed and almost stopped the vehicle, the offending driver rushed the dumper and dashed against the middle portion of the private car causing the accident and consequent death of the victim .Now, during evidence claimant/petitioner no.1 Sohna Singh deposed in her affidavit in the same language as stated above.But she has not seen the incident personally. So, her evidence should be excluded as hearsay evidence. The claimants/ petitioners further examined

one Md. Shakil as the PW-6 .This PW-6 in his deposition before the court stated in the year 2007 he used to be the driver of the Honda City Car No. WB-02V/1207.On the fateful night, at about 9.30 p.m his car faced an accident.PW-6 stated one dumper bearing No. WB-37A/3616 coming from the opposite side suddenly dashed his car in the side of the middle portion.He added that there was a divider in the road for up and down traffic.He was going on his left side on the road.But the dumper suddenly entered into his lane. This driver witness did not produce his driving license before the court.He did produce some documents i.e. one money receipt and a receipt copy from the licensing authority to show that he submitted his driving license for renewal on 18.08.2009.However , fact remains that no copy of the license was even produced before the court to show that this driver Md. Shakil was holding any valid license on the date of accident.Be that as it may, during cross examination Md.Shakil admitted that he cannot produce any document to show that he was appointed by the deceased victim to drive his car or that he was authorised to drive this car by the owner of the car by issuing ab authorisation letter.Now, it is to be noted that this driver witness has not mentioned in his deposition before the Tribunal that the offending dumper was coming at a very high speed as alleged by the claimants.This driver witness has not mentioned that the dumper was being driven in rash and negligent manner.He has not mentioned that the driver of the dumper was driving in a zig zag manner as alleged by the claimants.In the claim petition, it has been stated that the offending dumper changed the lane as the original lane was blocked.But the eye witness driver did not stated in deposition that there had been any such blockade.

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I have already stated the only eye witness of the incident produced by the claimants had not stated in his deposition that the driver of the dumper was driving his vehicle at a high speed, in a rash or negligent manner or in a zig zag manner.So the allegation raised in the claim petition is not sufficiently proved in respect of rash and negligent driving of the offending vehicle's driver.In a case where there has been a face to face collusion (sic for ‘collision’) between two vehicles running from opposite directions on the road, unless there are sufficient evidence against one of the vehicles for rash and negligent driving, the presumption should be that both the vehicles were rashly and negligently driven in causing the accident. And in the present case the preponderance of probabilities show that the Honda City Car and the driver of the dumper were equally negligent in causing the accident in which the victim died.

Keeping in view of the decision of the Hon'ble Apex Court in many cases including the one reported in 2008 (2)TAC at page -766 and the decision of the Hon’ble High Court reported in 1991 ACJ 403, the

> decision of the Hon'ble Punjab High Court reported in 1991 ACJ 651, if only one of the joint tort-feasors is before the court the award has to be apportioned to the extent of the negligence of that tort feasor who is before the court."

14. Therefore, the presumption of contributory negligence based on alleged preponderance of balance of convenience is contrary to the materials on record including the only ocular witness. It is based on a finding of there being a "face to face collision" which is contrary to the materials on record including the eyewitness account of what happened and where it happened. The deposition made by P.W. 6, being Md. Shakil, the driver of the victim's vehicle in this regard – he being the eyewitness – is quoted below: -

> "In the year 2007 I was a driver of a vehicle.Mr.Amaedeep Singh was the owner of the said vehicle.Number of the said vehicle is WB-02V/1207.Said car was a Honda City Car.I drove the said Car lastly on 16.05.07.Said car faced an accident on 16.05.07 at about 9.30 p.m. said accident was took place at yatra gachirmor, Rajarhat New Town Road.One Dumper being No. WB -37A /3616 dashed out the said car in the side of middle portion. Said Dumper was coming from the side of Nicco Park and it was going towards Rajarhatside.My vehicle was going towards Nicco Park side from the side of Rajarhat. When I drove my car and when it reached at Yatra Gachi aforesaid dumper was coming from the opposite side and all on a sudden it dashed on the right side middle of my vehicle.On that place there is a devision (sic) in the road i.e. for going up and down vehicle.I was going in the left side of the road.Aforesaid dumper all on a sudden entered into my lane i.e. left side road and thereafter dashed me.On that time my master Amar Deep Singh was sitting in the right side of back seat of the car and his brother Hardeep Singh was also sitting in the said car in the left side of back seat.At the time of accident I got injury in the right side of face, right leg and left side of chest.Amar Deep Singh also got injury on his person.He got injury on his shoulder. We shifted to Apollo Hospital for treatment. I was treated there. Aforesaid dumper was responsible for the said accident.

After the accident of my car was fully damaged.Police did not seize my driving license.Police did not start any case against me.I have filed this case for our compensation.
Today I brought my Voters Identity card in support of my identity. Today I did not brought the driving license because I have filed the same before the Motor Vehicles Department and I brought the said receipt.
Today I brought those document. I also brought one set of copy of this document duly authenticated by Notary Public marked as Ext. 11 to 13.

Cross- Examination

Mr. Amardeep Singh did not issue any appointment letter in my favour.I have no document to show that on the aforesaid date I was plying the vehicle of Amar Deep Singh. On the aforesaid date I was going from the side of Rajarhat towards Nicco Park side as I was going to the house of Amar deep Singh at New Alipore.There was a divider in the road for separating the road for up and down journey. I can't say the height of the divider (sic) . At the time of accident there was no road light on the road.
Offending vehicle entered into my lane in the cutting portion of devider (sic).Just before the moment of accident Amar Deep Singh and his brother did not ask me to stop the vehicle.Just at the time of accident speed of my car was 20/25 k.m. per hour. Just before the moment of accident I saw the offended vehicle from the right side and I kept my car left side of the road. My car was stopped just after pressing of the break by foot.After the accident Police shifted me to Apollo Hospital. Police came in the said spot just after 5 minutes from the said accident.Police did not interrogated me.At the time of accident I had sense and just after the accident I had also sense. I saw the number plate of the offending dumper.After the accident offending dumper was stopped. Amar Deep Singh did not provide any money for my treatment. At present I have no capacity to plying the vehicle because I got injury on the different parts of my body in the said accident.At present I am not able to plying any vehicle. I did not lodge any complaint before the police as I had no such capacity on that moment.
Not a fact that aforesaid accident was took place due to my fault.
Not a fact that Mr. Amar Deep Singh asked me to stop the vehicle immediately and I did not follow his direction.
I deposited Rs. 140/- to the M.V Department because my driving license was broken. My aforesaid license was broken after the accident.
I did not file any medical report in M.V Department."

15. The Insurer did not examine the driver of the dumper. The two occupants of the vehicle were both involved in the accident, one being the victim and the other being his brother. The only eyewitness examined was the driver of the victim's vehicle. The aforesaid deposition clearly shows that the said accident occurred when the offending vehicle dashed the victim's vehicle on the middle right side rather than a head-on collision as held by the learned tribunal. It is also clear from the said deposition that the two opposite lanes of the road were divided by a divider and that the offending vehicle entered the lane of the victim's vehicle from the gap between the divider, which is left open to facilitate turning. If the victim's vehicle was travelling at a high speed, the evidence as to the vehicle stopping immediately on application of the brake, would not have been there. A vehicle comes to rest immediately on being braked (the evidence is not that of hand brake being applied) if it is travelling at a comparatively lower speed. In the presence of such clinching and ocular description of the scene of accident, it is difficult to appreciate the case made out by the Insurer by which it has claimed that the entire compensation as awarded by the learned tribunal must be scrapped since the circumstances attached to the case suggests contributory and if not, at least composite negligence. Such finding is in fact contrary to the evidence on record and based on conjectures and surmises to a level which can only be called perverse within the meaning of law.

16. To understand how contributory negligence in motor accident claims cases is established, perhaps the judgment in the case of **Meera Devi and Others—v—H.R.T.C. and Others** reported in **(2014) 4 SCC 511** ought to be considered. At paragraph 10 of the report cited, the Hon'ble Supreme Court was pleased to hold: -

> "To prove the contributory negligence, there must be cogent evidence. In the instant case, there is no specific evidence to prove that the accident has taken place due to rash and negligent driving of the deceased scooterist. In the absence of any cogent evidence to prove the plea of contributory negligence, the said doctrine of common law cannot be applied in the present case. We are, thus, of the view that the reasoning given by the High Court has no basis and the compensation awarded by the Tribunal was just and reasonable in the facts and circumstances of the case."

17. In this case too, there was no evidence of rash and negligent driving. Therefore, the question of contributory negligence could not arise and the finding in this regard of the learned tribunal cannot be sustained and we agree with Mr. Mondal for the cross-objector/claimant that the reduction of the compensation payable by the Insurer to fifty percent of the sum awarded cannot be sustained.

18. The Insurer has then argued composite negligence to oust its own liability and suggest that the entire liability falls upon the owner of the vehicle in which the victim was travelling.

19. In order to understand the concept of composite negligence *vis-a-vis* contributory negligence, a brief reference to the following paragraphs of the judgment of the Hon'ble Supreme Court in the case of **T.O. Anthony—v—Karvarnan and Others** reported in **(2008) 3 SCC 748** must be made

> "6. Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.
>
> 7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore, where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

20. From the testimony of the sole eye-witness to the scene of the accident, it is clear that the offending vehicle was solely responsible for rashly entering the lane of the victim's vehicle and thereby dashing the same on the middle portion of its right side. The basis for the presumption of composite negligence is thus absent, and thus it is not possible on the

face of the evidence on record to entertain any argument of composite negligence.

21. In our opinion, even though a judicial opinion may rest upon a presumption of a fact, such a presumption cannot arise in the presence of unimpeachable evidence to the contrary. The presumption raised by the learned tribunal was that both the vehicles were driven in a rash and negligent manner and that the offending vehicle was only partially liable for the resulting collision due to which the liability of the appellant-insurer is limited only to the extent of one-half of the compensation sought by the claimants/cross objectors. This goes on to show that the learned tribunal gave only a ceremonial glance to the testimony of the eye-witness, being the driver of the victim vehicle without appreciating the complete effect of his evidence. As we have held above, inter alia at paragraph 15 of this judgment, such findings are perverse within the meaning of law and contrary to the materials on record.

22. Now that the Insurer was faced with a situation where the death of the victim due to the accident and the cause of the accident were determined, as we have held above, he impeached the award on the ground that it was passed without proper application of the provisions of the 1988 Act as well as the Rules made thereunder. He submitted that this was because the learned tribunal relied upon documents inappropriate and irrelevant to the case in hand whereas relevant evidence and exhibits as

presented by the Insurer before the learned tribunal were not sufficiently appreciated and appraised in their right perspective.

23. The first thing Mr. Singh submitted on this count is a strange contradiction in the order of the learned tribunal. The learned tribunal had held that the victim was in the age-group of 41 to 45 years at the time of his death but had awarded future prospects on the basis of 50% of his annual income. Mr. Singh rightly submitted that if the principles applicable in terms of the law settled by the Hon'ble Supreme Court were applied, for the age group of 41 to 45 years, the sum would be 40% of the annual income and not 50%. Admittedly, the victim was born on August 8, 1967 according to the date of birth recorded in his passport which was exhibited. Therefore, as on the date of the accident on May 16, 2007, he was 39 years, 9 months and 9 days old, whereas on the date of his death being February 13, 2008 he was approximately 40 years 6 months and five days old. Thus victim was well under 40 years on the date of the accident and was not to be put within the age-group of 41-45 years. It has to be noted that even though the learned tribunal put the victim within the age-group of 41-45 years, the future prospects awarded to the victim was 50% i.e. the future prospects for victim under the age of 40.

24. However, the claims of both the parties before this court rests upon a fine line of distinction drawn from the facts of the case in hand. On the one hand, the Insurer contends that the age of the victim has to be taken as on the date of death while awarding future prospects which in this case would

yield a lower multiplier and also a lower percentage of future prospects, while on the other, the claimants/cross objectors have submitted that the relevant date for calculating the age of the victim must be the date on which the accident took place. In our opinion, a deadlock like this has to be answered keeping in mind the decision of the Hon'ble Supreme Court in **Shashikala and Others—v—Gangalakshmamma and Others** reported in **(2015) 9 SCC 150** and placed before us by the Learned counsel for the claimants/cross objectors in support of the proposition that the date of death of the victim is immaterial and rather it is the date of the accident which is relevant to the computation of liability of the Insurer arising out of the said accident. In its judgment, the Hon'ble Supreme Court held: -

> "Paragraph 17: Insofar as appropriate multiplier, the date of birth of the deceased as per driving licence was 16.6.1961. On the date of accident i.e. 14.12.2006, the deceased was aged 45 years, 5 months and 28 days and the tribunal has taken the age as 46 years. Since the deceased has completed only 45 years, the High Court has rightly taken the age of the deceased as 45 years and adopted multiplier 14 which is the appropriate multiplier and the same is maintained. Total loss of dependency is calculated at Rs. 16,82,310/- (Rs. 1,20,165/- x 14)."

25. In such view of the matter, it is clear that the calculation of the age of the victim for the purpose of awarding future prospects must be as on the date on which the accident took place irrespective of when the victim died. Therefore, we find no reason to interfere with the award passed by the learned Tribunal so far as the issue of future prospects is concerned calculating his age at the time of his accident as the same corresponds to the guidelines laid down by a Constitution Bench of the Hon'ble Supreme

Court at paragraph 59.3 of its judgment in **National Insurance Company Limited—v—Pranay Sethi and others** reported in **AIR 2017 SC 5157** which held:

> "Paragraph 59(iii): While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax."

26. This brings us to the issue of the relevant income of the victim which needs to be considered for the purpose of determining just and equitable compensation for his dependents. In this regard, the Insurer contends that the reliance placed by the learned tribunal upon the Income Tax Return of the victim for the Assessment Year 2007-08 to assess the income of the victim for the purpose of ascertaining the amount of compensation is not tenable. He suggested, at the time of hearing, that since the IT Return for the Assessment Year 2007-08 was filed after the death of the deceased, the Insurer reasonably apprehends that the income of the victim might have been tampered with in order to present an inflated amount of compensation. The learned tribunal calculated the annual income of the victim, after necessary deduction of the income tax, at Rs. 20,10,649/- for the Financial Year 2007-08 relying upon the assessment order along with income tax return submitted to the income tax authorities.

27. The learned counsel for the claimants/cross objectors relied on the other hand, upon Form-16 of the deceased/victim submitted for the period

between April 1, 2007 and April 30, 2007 which shows the monthly income of thevictim at Rs. 3,40,394/- and Tax deducted at source at Rs. 61,536/- and the tax refundable for that month at Rs. 11,099/-. This was exhibited as Exhibit 20 at page 54 of the paper book, by the claimants/cross-objectors. Since the TDS for the said amount was deposited on May 07, 2007, it was contended that this amount should be taken to calculate the income of the victim. He also relied upon a letter dated May 08, 2007 exhibited as Ext. 26 at page 278 of the paper-book which proclaims that the annual emoluments of the victim were revised to Rs. 35,00,000/- per annum. It is this income minus the taxes, he suggests, that should be taken as the income of the victim for computation of the amount of compensation.

28. In this backdrop, if the income as disclosed from the Form-16 of the victim submitted for the period between April 1, 2007 and April 30, 2007 is accepted it is seen that the TDS in respect of such income was made, that is to say, the deduction was made, prior to the death of the victim, and therefore stood to his credit as what had already been paid as tax. In other words, it is a declaration of his employer to his prejudice, submitted by him to the Income Tax authorities and therefore is a declaration which goes against his interest for the statutory purpose for which it was shown. So, it can be relied upon in favour of his estate to show what was his annual income less taxes as on the date of the accident and/or immediately before it. Therefore, the apprehension of the Insurer would be satisfactorily answered as no claim of tampering of records pertaining to the income of the victim could be alleged before the

death of the of the victim. So we accept, in modification of the findings of the learned tribunal, as proposed by the claimants/cross-objectors, that the annual income of the victim at the time of the accident was to be taken as Rs.34,78,756/- as it works out by multiplying the monthly income in Form 16 exhibited, by twelve to come to the annual income of the victim and the compensation was to be awarded accordingly basing the calculation thereon, as just compensation, which the learned tribunal did not do.

29. Lastly, we refer to the contentions of the learned counsel for the claimants/cross objectors on the issue that an additional amount towards loss of consortium should have been awarded for the claimant-mother of thevictim as loss of filial consortium due to the loss of her son. The award of an amount towards loss of consortium has been settled by the Hon'ble Supreme Court in **Pranay Sethi (Supra)** wherein the Hon'ble Apex Court, after visiting its own precedents, held the following:

> "Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle."

The Hon'ble Apex Court even noted that in different cases different amounts have been granted. For example, a sum of Rs. 1,00,000/- was granted towards compensation to children for loss and affection of a deceased father in the case of **Rajesh and Others—v—Rajbir Singh and Others** reported in **(2013) 9 SCC 54**. In this regard, the Hon'ble Apex Court in **Pranay Sethi (supra)** held the following:

> "54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb Rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb Rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided."

30. It is therefore clear that the amount towards loss of estate, loss of consortium and funeral expenses has already been quantified by the Hon'ble Supreme Court at Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. Therefore, no further amount shall be granted towards loss of consortium beyond the figure provided above. Once the Constitution Bench judgment of the apex court is cited before us, which we must respectfully apply, we do not have the luxury of subscribing to a different view as it is a law laid down within the meaning of Article 141 of the Constitution of India, even if we thought differently, which we do not.

31. The learned counsel for the claimants/cross objectors brought to our notice a judgment passed by a Division Bench of the Hon'ble Supreme Court in **Magma General Insurance Co. Ltd.—v—Nanu Ram and Others** reported in **2018 ACJ 2782** equivalent to **MANU/SC/1012/2018** whereby an amount of Rs. 40,000 each for loss of filial consortium was awarded to

the father and the sister of the deceased in that case. Our difficulty in relying upon the aforesaid judgment is that even though a reference of the decision of a larger bench in **Pranay Sethi (supra)** was made, the law regarding payment of consortium as laid down therein was departed from in **Nanu Ram (supra)**. In view of the position of law and the provisions of Article 141 of the Constitution of India, however, **Nanu Ram (supra)** is at best a decision under Article 142 of the Constitution of India, to do complete justice to the parties in the facts and circumstances of the case, which power we do not have as a court of appeal under Section 173 of the 1988 Act. We continue to be bound by **Pranay Sethi (supra).**

32. Even otherwise, the decision in **Nanu Ram (supra)** does not apply to the present case on facts. In **Nanu Ram (supra)**, the victim was a 25-year old bachelor whose dependents included his unmarried sister and his father while the victim in this case is married and survived by his mother, a wife and two daughters. In this backdrop, no other amount towards loss of consortium could be awarded as filial consortium to the mother of the victim. In fact, the Hon'ble Supreme Court in **Nanu Ram (supra)** clarified the applicability of its decision in the following words:

> "The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium.
> Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.
> A few High Courts have awarded compensation on this count. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of Filial Consortium."

Therefore, the Hon'ble Supreme Court has clearly held in **Nanu Ram (supra)** that the peculiar facts of that case, where a parent or parents lost their minor child or unmarried son or daughter, they were allowed to be awarded loss of consortium. In the present case, the parent claiming amounts for loss of consortium admittedly was not the parent of an unmarried son or minor son for whose death due to the accident the compensation is payable. In such view of the matter, taking aid of the structured formula for the calculation of the amount of compensation as laid down in **Pranay Sethi (Supra)** is binding on us.

33. Finally, the claimants/cross-objectors have also claimed for payment for an amount of Rs. 11,83,822/- towards medical expenses incurred for the treatment of the victim and paid for by virtue of the Mediclaim policy of the victim. It has been the contention of the claimants that they are entitled to the aforesaid amount on account of various judicial precedents being decision of the Hon'ble Apex Court as well as this Court. In order to prevent a multiplication of precedents we refer to the foremost judgment in this regard passed by the Hon'ble Supreme Court in **Helen C. Rebello and Others—v—Maharashtra State Road Transport Corpn. and Others** reported in **(1999) 1 SCC 90** which lays down the following:

> "34. This being so, we finally revert to the question, which is in issue for consideration, whether the compensation computed under 1939 Act, the life insurance amount received by the claimants occasioned by the death of the deceased, is deductible from it or not?
> 35. Submission by the learned counsel for the appellants is, the insurance money is by virtue of a contractual relationship between the deceased and the Insurance Company and is payable to the legal

heirs of the deceased in terms of the contract. Such money cannot be said to have been received by the heirs only on account of the death of the deceased, but truly it is a fruit of the premium paid by the deceased during his life time. The deceased bought this insurance policy as an act of his prudence, to confer benefit either to himself or to his heirs in case of death. This amount is receivable by the claimant irrespective of the accidental death, even if he would have died the natural death. He further submits that the interpretation given by the High Court confers benefit to the tortfeasor for his negligence and wrong to the untimely death without any contribution by him. It permits him to escape from the liability cast by the statute. Thus, his submission is, any amount payable under any contract of social assurance or any insurance, ought not to be deducted as the same is payable to the heirs because of the contract and not on account of the death of the insured person. Referring on the dictionary meaning of the word 'compensation', he submits it would mean anything given to make things equal in value. He submits that in this case the death of the deceased-husband of the claimant was due to the negligence of the respondent has to be offset by a just equivalent, where claimants are put back in position where they would have been but for such death. On this, he draws the conclusion, the benefits of insurance policy cannot be deducted while awarding the compensation. On the other hand, learned counsel for the respondents restricted the argument as was advanced before the High Court and submitted, the High Court, after considering all aspects including English decisions and the decisions of this Court, rightly concluded to deduct the life insurance money out of the compensation payable to the claimant.

36. So far as the general principle of estimating damages under the common law is concerned, it is settled that the pecuniary loss can be ascertained only by balancing on one hand, the loss to the claimant of the future pecuniary benefits that would have accrued to him but for the death with the "pecuniary advantage" which from whatever source comes to him by reason of the death. In other words, it is the balancing of loss and gain of the claimant occasioned by the death. But this has to change its colour to the extent a statute intends to do.

Thus, this has to be interpreted in the light of the provisions of the Motor Vehicles Act, 1939. It is very clear, to which there could be no doubt that this Act delivers compensation to the claimant only on account of accidental injury or death, not on account of any other death. Thus, the pecuniary advantage accruing under this Act has to be deciphered, co-relating with the accidental death. The compensation payable under the Motor Vehicles Act is on account of the pecuniary loss to the claimant by accidental injury or death and not other forms of death. If there is natural death or death by

> suicide, serious illness, including even death by accident, through train, air flight not involving motor vehicle, would not be covered under the Motor Vehicles Act. Thus, the application of general principle under the common law of loss and gain for the computation of compensation under this Act must co-relate to this type of injury or deaths, viz., accidental. If the words 'pecuniary advantage' from whatever source are to be interpreted to mean any form of death under this Act it would dilute all possible benefits conferred on the claimant and would be contrary to the spirit of the law. If the 'pecuniary advantage' resulting from death means pecuniary advantage coming under all forms of death then it will include all the assets movable, immovable, shares, bank accounts, cash and every amount receivable under any contract. In other words, all heritable assets including what is willed by the deceased etc. This would obliterate both, all possible conferment of economic security to the claimant by the deceased and the intentions of the legislature. By such an interpretation the tortfeasor in spite of his wrongful act or negligence, which contributes to the death, would have in many cases no liability or meagre liability. In our considered opinion, the general principle of loss and gain takes colour of this statute, viz., the gain has to be interpreted which is as a result of the accidental death and the loss on account of the accidental death. Thus, under the present Act whatever pecuniary advantage is received by the claimant, form whatever source, would only mean which comes to the claimant on account of the accidental death and not other form of death."

34. Mediclaim policy is taken out by the victim (in case the deceased victim in his lifetime) from the own income of the victim. The insured pays the premia from his own income. The payment thereunder to the victim's nominee in terms of the insurance policy of Mediclaim is based on a contractual obligation to the victim by his insurer. On the other hand, the nature of a just compensation under Section 166 of the Motor Vehicles Act, 1988, awarded against an insurer of a vehicle which collided with the vehicle of the victim, and caused the accident, is an example of statutory and third party liability, assumed by the insurer of a vehicle other than that of the victim *and is not contractual but statutory.* Therefore, asking

him to forego the amount of medical expenses incurred by him as an effect of the accident, on the specious ground that he has already been compensated for it by his own insurer under Mediclaim, is not well-founded. We have held as much in an earlier judgment delivered by us, in the case of **The New India Assurance Company Limited—v—Bimal Kumar Shah and Another** reported in **2018 SCC Online Cal 10368** equivalent to **MANU/WB/1508/2018** where we have held as follows: -

> "The liability of an insurer providing insurance through Mediclaim to the victim for the medical expenses incurred by him for an accident or hospitalization, subject to a limit and based on the premiums paid by the victim by bilateral contract between the victim and his insurer, is distinct, separate and wholly different from, and independent of the liability imposed on the appellant as the insurer of the offending vehicle and its owner from third party risks in case of accident, and is provided for, created and imposed by the Motor Vehicles Act, 1988. It is not contractual as far as the victim, a third party, is concerned."

35. We do not feel any requirement to depart from our reading of the law as laid down by the Apex Court and as interpreted by us respectfully agreeing with it, even though **Bimal Kumar Shah (supra)** related to amputation of a limb rather than death, since the principles of Mediclaim being a product of contractual liability and just compensation for third party risks being a statutory liability are the same as have been laid down therein.

36. We reiterate that on the basis of our observations at paragraph 25 we find that since the age of the victim at the time of the accident was below 40 years, the multiplier to be applicable in this case would be 15 and not 14 as taken by the learned tribunal.

37. In order to avoid further complications, the payment of compensation as directed above is to be made as follows:

i. Annual income of the deceased will be taken as Rs. 34,78,756/-.

ii. An addition of 50% of the annual income amounting to Rs. 17,39,378/- shall be made towards future prospects which would increase the aforesaid amount to Rs. 52,18,134/-.

iii. A deduction towards personal expenses to the tune of 1/4th of the aforesaid amount amounting to Rs. 13,04,533/- has to be carried out, thus making the amount of dependency to stand at Rs. 39,13,601/-.

iv. After the application of the appropriate multiplier being 15 the amount of compensation to be awarded would be Rs. 5,87,04,015/-.

v. A further amount towards loss of estate, loss of consortium and funeral expenses must be awarded at Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively.

vi. The total compensation directed to be paid to the claimant/cross objector is Rs. 5,87,74,015/-.

38. The present appeal is decided as per the terms above.

39. By an order dated August 22, 2017 this court had granted the claimants leave to withdraw 50% of the sum deposited by the Insurer, being Rs.Rs.1,59,46,360/- which they had done, and account payee

cheques were issued to them. The sum thus deposited therefore is to be deducted from the total amount of the award as modified by us. It is therefore, directed that the Insurer shall make payment of the balance amount of the award being Rs. 4,28,27,655/- by four separate account payee cheques made out for one fourth of the said amount to each of the claimants on account of the death of the victim along with interest @ of 7% per annum from the date of filing of the claim petition i.e. July 23, 2007 within three months from the date of this order. We find no reason to revisit the rate of interest determined by the learned tribunal in this case.In addition, the claimants shall be entitled to apply for withdrawal of the remaining 50% of the sum deposited (Rs.1,59,46,360/-) which is Rs. 79,73,180/-, and any accumulation thereto on count of interest, which has been kept in an auto-renewable short term deposit by the Registrar General of this Court, and on such application being made, the learned Registrar General shall after proper calculation and on satisfaction of the identity of the claimants pay to them through the widow (claimant No.1) the said sum, as expeditiously as possible, but preferably within two months from the date of this order. All payments shall be made to the claimants who shall furnish their respective bank account numbers and computerized codes for online transaction and/or RTGS methods of deposit, to the Insurer and the learned Registrar General.

40. The appeal therefore is dismissed on all grounds. The cross-objection is allowed partially as appears from above. Since we have

discussed the questions raised by the appeal and the cross objection together, this order which in effect dismisses the appeal and partially allows the cross-objection, shall operate in modification of the award dated June 28, 2016 to the extent mentioned above, in paragraphs 37 and 38.

41. By an order dated February 6, 2018 we had reserved the assessment of the costs for adjournment of the day's hearing due to the fault of the Insurer to the final disposal of the appeal, and since we have dismissed the appeal, we assess the costs to be Rs.25,000/- which coincidentally is also the amount of statutory deposit made by the Insurer which therefore does not have to be refunded.

42. With the aforesaid directions, both the appeal in F.M.A. No. 464 of 2017 as well as the Cross-appeal in C.O.T. No. 7 of 2017 are disposed of with costs as aforesaid.

(DIPANKAR DUTTA, J.)

(PROTIK PRAKASH BANERJEE, J.)

Court N.22Sl 151/CL

S/L No.5
01.11.2018
Ct-6
(TKM &AD)

W.P. 22095(W) of 2018

Abhisek Panda & Ors.
vs.
The West Bengal National University of Juridical Sciences & Ors.

Mr. Suman Sengupta,.
Mr. Dwaipan Basu Mallick
Mr. Soumya Ray
...for the Petitioners.

Mr. Aryak Dutt
Mr. S. Mukherjee
... for the Respondent No.2

Three students of an On-line course said to have been offered by the respondent no.1/University and the respondent no.2 have come up before this Court seeking its intervention in respect of the decisions at Annexures P-2 and P-3 to the writ petition. It appears that the said respondents had accepted the money from each of the petitioners in order to enroll and offer to them On-line certification courses as described in the body of the writ petition. Documents annexed to the writ petition clearly show that such money was paid by the writ petitioners in favour of the said respondents. Suddenly, however, by Annexure P-2 the respondent no.2 issued a circular through its Assistant Registrar (Academic) which was uploaded on its Web-site alleging that the Academic Council had decided on May 10, 2018 as follows: -
" It was decided that all future activities pertaining to Distance Education and Online courses should be put on status quo, except those which are purely University initiatives.

All enrollments for these Online and Distance Education courses which used to be run by the University through private partnerships have been suspended till further order. Any person enrolling for these courses would be doing it at their own risk and the University shall not be held responsible for such matters."

The plain meaning of this Memo is that further enrolment shall be stopped but since status quo has been ordered all students enrolled for such distance education on June 27, 2018 shall be entitled to complete the course and receive certification particularly since nothing was said about refunding the fees already paid by such students.

However, by a further notice issued by the Acting Registrar on October 3, 2018 which is Annexure P-3, the following was directed: -

"It is issued for general information that all online courses run by WBNUJS in association with private parties have been stopped forthwith by the Executive Council in its 62nd meeting dated 29.9.2018. Henceforth all communications relating to all online courses and allied issues connected thereto shall be made to Prof. (Dr.) Anirban Mazumder, Director, School of Distance & Mass Educaiton (SDME) WBNUJS."

Subsequently, by an electronic mail addressed to the first petitioner, the third respondent who was named by the first respondent as the Nodal person who was to communicate with the affected students also washed his hands off the matter. This is Annexure P-4 to the writ petition.

Prima facie, I find that such course of action which affects the vital right of students without prior notice to them and without even offering to refund the fees that they have paid is arbitrary and does not become a premier institution such as the National University of Juridical Sciences. I do not know how the respondent no.2 could have been involved in the matter with the respondent no.1 since the latter is not a university and cannot on its face offer any On-line certification without having a tie-up with any university which has been granted permission by the University Grants Commission to offer Distance Education. Why the respondent no.1 decided to tie-up with such a private party is also not disclosed. However, I am sure all of this will come to light as and when the respondents are heard. However, the On-line courses for which the petitioners have enrolled prior to June 27, 2018 were something which the writ petitioners were entitled to complete and prima facie they are entitled to certificates if they completed successfully. Accordingly, Annexure P-2 must be treated to be prospective and, therefore, the operation of Annexure P-3 shall remain stayed so far as those petitioners who have enrolled themselves and paid the fees prior to June 27, 2018 are concerned. Considering the urgency of the matter leave is granted under Rule 26 of the Appendix - IV of the Appellate Side Rules.

Let this matter appear before the Regular Bench within one week after reopening after long vacation.

The operation of the order of stay shall continue for a period of two months after reopening after the long vacation or until further order whichever is earlier. The writ petitioner shall be entitled to apply for extension of the interim order on the self-same application. The respondents shall be at liberty to seek for vacating of interim order on showing cause.

The writ petitioners shall serve a copy of this order and the writ petition on each of the respondents and shall file affidavit of service before the Regular Bench. I note the submission of Mr. Sengupta, learned Advocate, that an attempt was made to serve the respondents and that the respondent NUJS and the respondent no. 2 were both served, and even though pursuant to such service, Mr. Aryak Dutta, learned counsel, has appeared on behalf of the 2nd respondent

instructed by a learned advocate on record, none has appeared for the NUJS. However, I do not find that strange, since in the notice which was shown to me as part of an affidavit of service, the date when the matter would be moved was not mentioned, and this matter has been moved with leave granted by me today itself. I therefore choose not to accept such affidavit of service or treat the petition as having been served on anyone but the respondent no.2 which has appeared.

This order shall not in any way prejudice any rights that the respondent no.2 and the respondent no. 1 may have inter se one another.

(Protik Prakash Banerjee J.)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

W.P. No. 15233 (W) of 2018

Debashis Nandy
—v—
Union of India & Ors.

Present:
The Hon'ble Justice Protik Prakash Banerjee

For the Petitioner : Mr. Arif Ali, Adv.

For the Private Respondent : Mr. Ambar Banerjee, Adv.
Mrs. Amrita Panja Moulick, Adv.

For the State : Mr. Ashim Kumar Ganguly, Adv.
Ms. Sonal Sinha, Adv.

Ld. Senior Standing Counsel : Mr. Amitesh Banerjee, Adv.

For the Respondents No. 5 & 6: Mr. Tarak Karan, Adv.

Ld. Addl. Solicitor General : Mr. Kaushik Chanda, Adv.

For the Union of India : Mr. Rabi Prosad Mookherjee, Adv.

Dates of Hearing : November 14, 2018 and
December 04, 2018

Judgment on : January 03, 2019

PROTIK PRAKASH BANERJEE, J.

1. This is an application under Article 226 of the Constitution of India. Essentially the writ petitioner has impugned the manner in which the second respondent records data regarding citizens in India under the provisions of the Aadhaar (Targeted Delivery of Financial and other Subsidies, benefits and services) Act, 2016 and also the provisions of the (Aadhaar Enrolment and update) Regulation 2018. However, the exact reliefs claimed by the writ petitioner principally are as follows:

(a) A writ of and/or order and/or direction in the nature of Mandamus do issue commanding the respondents authorities, each one of them, their men, agents, servants, subordinates and/or assigns to take steps against the private Respondent for offences committed punishable under the Indian Penal Code and under the Aadhaar (Targeted Delivery of Financial and other Subsidies, benefits and services) Act, 2016 and Section 31 of the Representation of People Act, 1950 as per the complaint of the petitioner;

(b) A writ of and/or order and/or direction in the nature of Certiorari do issue directing the respondents to forthwith transmit all records pertaining to the instant case so that conscionable justice be done;

2. Nothing else has been prayed for in the writ petition for which a Rule Nisi has been sought. Therefore, the writ petition must be considered as being restricted to not merely the above reliefs but to be considered within the four corners under the said statutes.

3. The writ petitioner is a co-owner of the three storied building at 52 B, Kansari Para Road, Kolkata 700025 along with the named persons who have not been made party to the writ petition. The ground floor of the said premises consisting of two rooms, a kitchen and a bath cum privy and a common court yard as described in paragraphs 4 and 3 of the writ petition. In 1969 it was demised in favour of one Dr. Keshab Bhusan Roy since deceased. He was married and resided there with his

wife Meenakshi Roy and his only son Bhaskar Roy. His daughter Debjani Bhattacharya (nee Roy), was married and resided elsewhere after marriagesince February 1985. The respondent no. 8 had a fortuitous surname which was the same as that of Dr. Roy. It is the case of the writ petitioner that he was a domestic help employed by Dr. Roy doing odd jobs in the house and chamber of Dr. Roy. It has been suggested from the Bar that the private respondent was a compounder of the said doctor. On September 24, 2006 the wife of the said doctor expired; on November 3, 2012 the only son of the said doctor expired while living in Netherlands. So, since September, 2006 Dr. Roy used to reside alone at the demised premises.

4. The writ petitioner claims that even after the respondent no. 8 obtained employment in Group D post under the respondent no. 7 he remained with the said doctor and under his employment. Therefore, he also resided with the said doctor. Taking advantage of this residence on the death on January 5, 2015 of the said doctor the private respondent continued in such possession though he had no right to reside there.

5. The writ petitioner has alleged that he and the other co-owners requested him to vacate the demised premises he, however, avoided them on one pretext or the other and remained in possession of the suit property.

6. In or around March 2015 the writ petitioner received summons of the said filed by the private respondent being Title Suit No. 37 of 2015 before the Learned Civil Judge (Junior Division) 4th Court at Alipore, district 24 Parganas for declaration and injunction. In the application for

the injunction the private respondent is the plaintiff petitioner alleged the following: -

"That thereafter said Dr. Keshab Bhusan Roy the father of the plaintiff died intestate on 05.01.2015 leaving behind him the plaintiff as his son and the daughter-in-law Soma Roy and grandson Sushmita Roy, the son and widow of deceased son Bhaskar Roy as his legal heirs and successors and the wife Meenakshi Roy and another son Bhaskar Roy predeceased him".

7. The documents disclosed by the private respondent no. 8 in support of the above claim included not merely the electoral identification card issued under the authorities under the Representation of People Act, 1951 but also the aadhar card issued by the respondent no. 2 under the provisions of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (Act 18 of 16). The writ petitioner therefore was given the impression that the private respondent no. 8 was an illegitimate but biological son of Dr. Keshab Bhushan Roy.

8. However, upon inquiries made with several government authorities, the petitioner came to know that the supporting documents of the private Respondent are forged insofar as they exhibit the name of his father as Dr. Keshab Bhusan Roy with an oblique motive and an ulterior intention to lay claim upon the demised tenancy.

9. An application made by the Petitioner under the Right to Information Act, 2005 before the Joint Director (Rationing) Kolkata, South Division in regard to the name of the private Respondent revealed that the name of the father of the Private Respondent was one 'R. C. Roy'. A similar application was made by the petitioner before the South

Eastern Railway by which the Petitioner came to know that the father of the Private Respondent is one 'Rakhal Ch. Roy'.

10. Thereafter, the petitioner lodged a complaint regarding falsification of information with the Chief Electoral Officer, West Bengal contending that the information provided by the private Respondent was false in nature. Pursuant to such complaints, a proceeding was initiated against the private Respondent and after a necessary Field Inquiry, where the private Respondent failed to produce any document establishing that his father's name was 'Dr. Keshab Bhusan Roy' and not 'Rakhal Ch. Roy', an order dated November 15, 2016 was passed by the Electoral Registration Officer by which the father's name of the private Respondent was changed to 'Rakhal Ch. Roy' from Keshab Bhusan Roy.

11. This order dated November 15, 2016 was not challenged by the respondent no. 8. As a matter of fact, on instructions, the learned advocate appearing for the private respondent submitted that his client was the compounder of the original "tenant" Dr. Keshab Bhusan Roy and did not seek leave to challenge the decision dated November 15, 2016 and did not even assert that his son was the son of the said Dr. Keshab Bhusan Roy or dispute what the petitioner was alleging on oath nor seek an opportunity to use any Affidavit-in-Opposition.

12. Finally, the petitioner approached the Respondent No. 2, the Unique Identification Authority of India, seeking action against the private Respondent for offences committed under chapter VII of the Aadhaar Act, 2016 and even lodged a complaint with the Respondent No. 4, the Officer-in-Charge, Kalighat Police Station, against the private Respondent for committing cognizable offence of cheating and of filing

false evidence under the Indian Penal Code, 1860. However, no action has been taken by the respective authorities upon the complaints of the petitioner and aggrieved by this, the Petitioner filed this writ petition before this Court seeking the aforesaid prayers.

13. When the matter was moved first on November 14, 2018, I recorded that the respondents had all been served but some of them including the respondents no. 2 and 3 were not represented. In view of the rules of our Court relating to applications under Article 226 of the Constitution of India I could not dispose of the writ petition finally in their absence. Hence, I once again directed service on the said respondents and, requested the learned Additional Solicitor General to assist the Court on the next date fixed being December 4, 2018. On the returnable date, the learned Additional Solicitor General appeared leading the learned advocate for the respondents no. 2 and 3 as also the Union of India including the respondent no.7.

14. In terms of the observations of the order dated November 14, 2018, a question had arisen as to how the Income Tax Authority and the other statutory authorities including the 2nd respondent could have recorded as the father of the private respondent any person merely on the declaration of the private respondent (respondent no. 8.), even though he only had as on the death of the said person (Dr. Keshab Bhusan Roy) a married daughter. What I had really wanted to know was, were the authorities of the respondent no.2 so gullible or so deficient in technology to accept whatever was stated by the individual regarding his “Demographic Information” as defined by the statute or whether there was any procedure for verifying and/or authenticating the same before recording it as part of the process of enrollment.

15. The Learned Additional Solicitor General alongwith Mr. Mukherjee, submitted that no authentication is made of any material which is declared by an applicant for Aadhar card in his application. It is done merely on the details provided by the applicant in his application. He also submitted that if there is any discrepancy alleged or any other mistake alleged there are also provisions under Regulation 28(1)(c) of the Aadhar (Enrolment and Update) Regulation, 2017 for correction of the same by the Aadhar authority themselves and the writ petitioner may be relegated to such remedy. The learned advocate for the petitioner submits that the penalty under Section 41 of The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (Act 18 of 16) can be imposed by the Aadhar authorities as and when they consider and dispose of the application made before the respondent authorities.

16. Even though he asked for further time to file an affidavit, opposing the application he could not give any particular as to which of the records disclosed by the writ petitioner his client the Aadhar authority would dispute. It was very strange that the respondent no. 2 could not give this rather simple information especially since the records relied upon by the writ petitioner are either those issued by statutory authorities or pleadings filed in court and their enclosures, even in 20 days though he could brief learned advocates, and despite service of the writ petition having been effected on it, on August 29, 2018 as appears from the affidavit of service. The office of the respondent no. 2 is at Ranchi in Jharkhand and not very far from Kolkata even by road, let alone by air. Instructions can be given on mobile phone and by electronic means, within minutes. If the respondent no. 2 could not

even give this instruction after going through the writ petition and even thereafter, when the engaging them to appear on the returnable date, it does not appear that it has anything to dispute. Again, in view of the Learned Additional Solicitor General's fair submission, there is nothing on merit that the respondent no. 2 can dispute. I therefore do not accede to his request to adjourn the matter.

17. The writ petitioner has challenged the cavalier manner in which the second respondent records date relating to citizens in India. Till very recently, the second respondent under the provisions of The Aadhaar (Targeted Delivery of Financial And Other Subsidies, Benefits And Services) Act, 2016 (Act 18 of 16) had an unlimited mandate of recording the most private information of citizens including their biometric information. This wascriticized as being the beginning of a Fascist State and the matter travelled to the Hon'ble Supreme Court of India. By the judgment of the Hon'ble Supreme Court of India Justice **K.S. Puttaswamy (Retd.) And Another—vs— Union of India And Others**being **Writ Petition (Civil) No. 494 Of 2012**which was decided on**September 26, 2018**,the law has been well-settled that Aadhaar is not the only mode of identification of a person nor can it be compulsorily demanded as a proof of identity in all cases.

18. One of the criticisms leveled against the system by which the second respondent prepares and issues such Aadhaar Card is that there is neither any sanctity of the information which is provided not any security that such information shall not be available to those who are not expressly authorized to access it. The present writ petition in effect challenges the first part of the system though it does not go far enough as to have the system quashed on the issue of the sanctity or

genuineness of the demographic information. To summarize the allegations contained in the writ petition in the facts narrated at paragraphs 1 to 12 of this judgement, according to the writ petitioner, an employee of a deceased tenant of the writ petitioner took advantage of the death of the tenant and alleged falsely that he was the son of the deceased tenant and, in fact, filed a civil suit for declaration of his tenancy on the basis of an Aadhar card where the demographic information which he relied upon for such false allegation, was furnished by him and accepted without verification by the respondent no. 2. There were other documents in which an allegation was made that the deceased tenant was the father of the private respondent (respondent no. 8). For instance, during the pendency of the suit, the respondent no. 6, after due investigation, has duly altered the name of the father of the respondent no. 8 from Keshab Bhusan Roy to Rakhal Chandra Roy in the "Voter Identity Card" of the private respondent as recorded at paragraph 10 above. This appears from annexure to the writ petition which is at page 61 of the writ petition.

19. The Respondent No. 2 before this Court, the Unique Identification Authority of India ("UIDAI" for short) is a statutory body under section 11 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits & Services Act) Act, 2016 ("the Aadhaar Act" for short) which came into force on September 12, 2016. The UIDAI is mandated to issue 12-digit Unique Identification Number called Aadhaar to the residents based on demographic and biometric information submitted by them to the UIDAI at the time of their enrolment into the Aadhaar scheme. These Aadhaar numbers are communicated to the respective holders in physical form vide Aadhaar letters by way of postal communication.

20. The system came into a conflict quite recently, with a number of public-spirited citizens approaching the Hon'ble Supreme Court in a number of Public Interest Litigations filed under Article 32 of the Constitution of India seeking that the Aadhaar Act be deemed unconstitutional for its mandatory provisions of enrolment which compulsorily required citizens to part with personal information, being demographic as well as biometric in nature, most importantly in the wake of the Hon'ble Supreme Court's judgment dated August 24, 2017 in **Justice K.S. Puttaswamy v. Union of India** reported in **(2017) 10 SCC 1** which unanimously affirmed that the right to privacy is a fundamental right under the Indian Constitution.

21. However, the issue which seeks judicial determination before this Court is not one which pertains to the violation of the fundamental right to privacy because of leakages to sensitive biometric as well as demographic information, the unauthorized sharing of such information or any other apprehensions with which the Petitioners before the Supreme Court of India were concerned of.Rather, questions have been raised against the very sanctity of an Aadhaar card as a source of individual identification.Therefore, to begin with, a disclaimer must be put to effect that Aadhaar is not the only means to identification and the question of identification of a person based on which a civil dispute would be decided do not solely rests with his/her Aadhaar identification. This legal position can be aptly inferred from the Supreme Court's decision in **Justice K. S. Puttaswamy (Retd.) and Another—v—Union of India and Others** being **Writ Petition (Civil) No. 494 of 2012 (supra)**. Seen from this angle, the case of the writ petitioner is simply that the private respondent in his Aadhaar application has provided false

demographic information with certain oblique and ulterior motive to wrongfully acquire the tenancy of the deceased tenant (Dr. Keshab Bhusan Roy) by projecting himself to be his son with the help of his Aadhaar credentials and that criminal proceedings are not being started against the private respondent.

22. The purpose of an Aadhar is manifold and it could best be understood by looking at the Statement and Objects of the Act. To this extent, reliance is placed upon a two-Judge Bench decision of the Hon'ble Supreme Court in **Binoy Viswam—v—Union of India and Others** reported in **(2017) 7 SCC 59**, wherein after taking into consideration the Statement of Objects and Reasons of the Act,the Hon'ble Supreme Court recapitulated the objectives of Aadhaar in the following manner:

> *"125. By making use of the technology, a method is sought to be devised, in the form of Aadhaar, whereby identity of a person is ascertained in a flawless manner without giving any leeway to any individual to resort to dubious practices of showing multiple identities or fictitious identities. That is why it is given the nomenclature "unique identity".*

23. A unique project in itself, the uniqueness of the Aadhar project is supplemented on account of the information collected for the generation of an Aadhar card. It is perhaps for the first time in the history of this country that individual biometric information became a cause of concern for its citizens and therefore a great many eyebrows were raised seeking their protection. One reason why an individual biometric information could be regarded so faultless is perhaps because of its aversion towards falsification. It could thus be said that biometric identification are less prone to falsification and thus more reliable.

24. A bare perusal of the Aadhaar Act, 2016 makes it patently clear that an individual seeking to register within the Aadhaar scheme has to part with four types of information collected for making an Aadhaar application complete. These are:

(i). Mandatory demographic information comprising name, date of birth, address and gender [Section 2(k) read with Regulation 4(1) of the Aadhaar (Enrolment and Update) Regulations, 2016];

(ii) Optional demographic information [Section 2(k) read with Regulation 4(2) of the Aadhaar (Enrolment and Update) Regulations, 2016].

(iii) Non-core biometric information comprising photograph.

(iv) Core biometric information comprising finger print and iris scan.

25. The biometric information of the individual is the individual's physical that is to say biological particulars which cannot be sent by someone. His retinal scan and finger prints must be provided by him personally by being present before the authorized person of the authority who records the biometric information after the individual has made the application before the respondent no. 2.However, these are information which can be physically verified and are in fact physical - demographic information such as the name, date of birth, address and other relevant information of an applicant requires something more to be verified and something more than mere declaration.

26. Therefore, this aspect of the Aadhaar scheme which concerns recording of the demographic information belonging to the individuals

assumes tremendous importance in the context of the present discourse. The Aadhaar Act, 2016 vide section 2 (k) defines 'Demographic Information' as:

> Section 2 (k): "demographic information" includes information relating to the name, date of birth, address and other relevant information of an individual, as may be specified by regulations for the purpose of issuing an Aadhaar number, but shall not include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history;

27. It is under this head that information concerning the parentage of an individual is sought. This becomes clear from the AADHAAR (ENROLMENT AND UPDATE) REGULATIONS, 2016 dated September 12, 2016 and issued under the authority of the Chief Executive Authority, UIDAI. Rule 10 of the aforesaid regulation lays down guidelines for submission and verification of information of individuals seeking enrolment. Sub-rule 5 of Rule 10 states that the verification of the enrolment data shall be as provided in Schedule III of the aforesaid regulation. Thus, it becomes necessary to understand the verification process in accordance with the aforesaid schedule. For this reason, Schedule III of the aforesaid regulations has been culled out and produced below:

SCHEDULE III

Verification of enrolment information (See Regulation 10(5) of these Regulations)

Information	**Fields**	**Verification Required?**	**Verification Procedure**

Personal Details	Name	Yes	• Any of the Proof of Identity documents. • Introducer/ Head of Family for people who have no documents.
	Date of Birth	….	• A flag is maintained to indicate if Date of Birth (DoB) is verified, declared, or approximate.
	Gender	No	---
Address Details	Residential Address (for Aadhaar letter delivery and other communications)	Yes	• Any of the Proof of Address documents. • Introducer/ Head of Family for people who have no documents.
Parent / Guardian Details	Father's/Mother' s/ Guardian's/Husband's / Wife's Name	Conditional	• No verification of Father/Husband/Guardian in the case of adults. • For children below

			five years of age, Father /Mother / Guardian's name, Aadhaar number and biometric information (any one modality) shall be captured for authentication. • For adults, Name of either Father/Husband/Guardian or Mother/Wife/Guardian is optional.

28. The demographic information under the head "parent/guardian" and the fields "father's/mother's/husband's/wife's name" are shown to be in Schedule III of the Regulations, but optional in case of regulations. There is no verification required to be done in case of adults for father, husband or guardian. Which means, whatever an applicant says his father's name is, the respondent no. 2 shall gullibly accept it as gospel truth.

29. It is not doubted that the entire system of Aadhaar has been structured in a way to ensure that there is no leakage of information resulting into the violation of the constitutional right to privacy of the

citizens from whom such information is collected. However, there has not been enough deliberation upon the other aspect of the system concerning demographic information, namely, as to what happens when such information taken turns out to be false.

30. In the aforesaid judgment dated September 26, 2018, the Hon'ble Supreme Court has been distinctly particular about the use of fingerprinting technology to cure leakages in the system resulting into identity frauds assuming that the biometric identification system can, at best, cure leakages related to identity fraud. As can be observed from paragraph 16 of the aforesaid judgment, several researcheswere conducted in this regard and the Report of the Task Force in this relation have largely delved into the matters pertaining to the accuracy of the information so collected. All of these reports showcase high accuracy rates of using fingerprint and iris authentication to authenticate identities and suggests that these technologies are most viable in the Indian context.

31. However, a glaring lacuna, which is borne out of all these reports, is in respect to the failure to ascertain the veracity of the demographic information received from a candidate when he is an adult, in case of certain matters. This is despite the fact that such information is capable of authentication by the authority which issued any certificate or document certifying it, where it exists. Rather, the overall emphasis has been provided upon the authentication, effectiveness and accuracy of biometric information. The consequences resulting out of this, force me to relook at the definition clause of the Aadhaar Act, 2016 once more. The said Act defines 'identity information' in respect of an individual under section 2 (n) in the following manner:

> Section 2(n): "identity information" in respect of an individual, includes his Aadhaar number, his biometric information and his demographic information;

32. This definition squarely lays down that information, both demographic as well as biometric, establishes the identity of an Aadhaar card holder. Therefore, information collected from an individual during the Aadhaar application process could not be treated with such disparity which would allow even false demographic information to pass under the scanner of the Aadhaar authorities without even being sufficiently verified. In other words, I think it is arbitrary to allow one sort of information establishing the identity of an individual to pass without verification while subjecting another sort of information stringent scrutiny though both are voluntarily submitted by the applicant and are for the same purpose. Such a lackadaisical attitude on the part of the Respondent No. 2 towards important identity information of an individual is sure to frustrate, if not the whole at least a substantial objective of the Aadhaar scheme. If such practices are allowed to pass unremarked under the judicial scanner, it would be diluting the credibility of an Aadhaar Card as far as the demographic information printed upon it is concerned thereby cheating millions in the country who hold their Aadhaar as a concomitant to their identity.

33. This aspect of an Aadhaar can be further explained by resorting to Section 4 of Aadhaar Act, 2016 which lays down the properties of an Aadhaar number. Sub-section (3) of Section 4 reads as under:

> "(3) *An Aadhaar number, in physical or electronic form subject to authentication and other conditions, as may be specified by regulations, may be accepted as proof of identity of the Aadhaar number holder for any purpose*."
>
> [emphasis supplied by me]

34. The whole architecture of Aadhaar is devised to give unique identity to the citizens of this country. No doubt, a person can have various documents on the basis of which that individual can establish her identity. It may be in the form of a Passport, Permanent Account Number (PAN) card, Ration card and so on. For the purpose of enrolment itself, a number of documents are prescribed which an individual can produce on the basis of which Aadhaar card can be issued. Thus, such documents, in a way, are also proof of identity. However, there is a fundamental difference between the Aadhaar card as a means of proving identity and other documents through which identity can be established. Enrolment for Aadhaar card also requires giving of demographic information as well as biometric information which is in the form of iris and fingerprints. This process eliminates any chance of duplication. It is emphasized that an individual can manipulate the system by having more than one or even number of PAN cards, passports, ration cards etc., however, when it comes to obtaining an Aadhaar card, there is no possibility of obtaining duplicate card. Sadly, the process installed to collect demographic information of an individual does not stand in the same spirit with which the Aadhaar scheme was projected.

35. Against this backdrop, this Court finds it necessary to refer to certain queries posed by the Petitioners in **S.G. Vombatkereand Another—v—Union of India** being **W.P. (C) No. 829 of 2013** and the responses of the UIDAI on the same. These questions and answers, as referred to in the **Justice K. S. Puttaswamy (Retd.) and Another—v—Union of India and Others** being **Writ Petition (Civil) No. 494 of 2012 (supra)** has been culled out and stated as the following:

Q (1) Please confirm that no UIDAI official verifies the correctness of documents offered at the stage of enrolment/updating.

Ans.: As per UIDAI process, the verification of the documents is entrusted to the Registrar. For Verification based on Documents, the verifier present at the Enrolment Centre will verify the documents. Registrars/Enrolment agency must appoint personnel for the verification of documents.

Q (2) Please confirm that UIDAI does not know whether the documents shown at the time of enrolment/updating are genuine or false.

Ans.: The answer is same as in (1) above.

Q (3) Please confirm:

(a) UIDAI does not identify the persons it only matches the biometric information received at the time of authentication with its records and provides a Yes/No response;

Ans.: Biometric authentication of an Aadhaar number holder is always performed as 1:1 biometric match against his/her Aadhaar number (identity) in CIDR. Based on the match, UIDAI provides Yes or No response. A “Yes” response means a positive identification of the Aadhaar number holder. Each enrolment is biometrically de-duplicated against all (1.2 billion) residents to issue the Aadhaar number (or Unique Identity).

Q (b) UIDAI takes no responsibility with respect to the correctness of the name, date of birth or address of the personenrolled.

Ans.: The Name/Address/DOB are derived from the Proof of Identity (POI)/Proof of Address (POA) documents submitted during enrolments. The enrolment/update packet (encrypted) retains a scanned copy of the POI/POA documents used for the enrolment which can be reviewed in case of dispute. UIDAI maintains the update history of each

> Aadhaar number related to changes in name, address, date of birth etc.
>
> Q (4) Please confirm:
> (a) UIDAI takes no responsibility with respect to the correct identification of a person.
>
> Ans.: Please refer to Answer (1) above. Additionally, it may be stated that enrolment of Aadhaar is done through a resident enrolment process and verification of the POI/POA document is done against the acceptable documents, as per the UIDAI valid list of documents as provided in Schedule II and III Aadhaar (Enrolment and Update) Regulations, 2016 read with Regulation 10. UIDAI takes responsibility in creating and implementing standards, ensuring matching systems installed in CIDR work as they are designed to do, and providing options to Aadhaar holders in terms of controlling their identity (such as updating their data, locking their biometrics, etc.) and accessing their own authentication records. One of the key goals of Aadhaar is to issue a unique identity for the residents of India. Hence, each enrolment is biometrically de-duplicated against all (1.2 billion) residents to issue the Aadhaar number (or Unique Identity).

36. These are very convincing answers, but not to the questions posed. The descendants of Mr. Nilekani have perfected the doublespeak of *1984 (George Orwell)* if not the *Yes Minister and Yes Prime Minister (Jonathan Lynn and Anthony Jay, BBC)*where it appears that a given question is being answered, though no information is given. The response to the first question in paragraph 35 would have been more honest and correct if it was that if the registrar/enrolment agency appointed personnel to verify the documents submitted for recording the information then the respondent no. 2 or its official could verify the correctness of the document offered at the stage of enrolment. It has clearly not stated that.

37. There is definitely something amiss with the Aadhaar enrollment process if important demographic information such as the name of an

applicant's father, as is the case in hand, can be falsified and even go undetected. Thus, in order to get a wider picture of the entire Aadhaar process, the regulations concerning the Aadhaar scheme could not be allowed to evade scrutiny of this Court.

38. Thus, Schedule III of the aforesaid regulations clearly lays down that demographic information so far as the name of an individual applicant's Father or Mother or Guardian or Husband or Wife is concerned is conditional and further no verification is done to that extent in case of adults. This position is further reinforced by the submissions made by the Learned Additional Solicitor General, appearing before this Court on behalf of the respondent Authorities wherein upon a question posed by this Court as to the process of verification of demographic information concerning the parentage of an individual applicant, the Learned Additional Solicitor General submitted that no verification is sought as regards such information and the application is processed on the basis of the bare information provided by the applicants in their application.

39. The malady in the present situation is further magnified by looking as to how arbitrary could the process of verification of demographic information of an Aadhaar applicant could be. One need not forget that misleading or false information in this bracket would result into an offence under section 34 falling under chapter VII of the Aadhaar Act, 2016. It provides for:

> Section 34: Whoever impersonates or attempts to impersonate another person, whether dead or alive, real or imaginary, by providing any false demographic information or biometric information, shall be punishable with imprisonment for a term which may extend to three years or

with a fine which may extend to ten thousand rupees or with both.

40. Yet in view of the reliefs sought by the petitioner and the pendency of the civil suit where this is also at res and the desire of the petitioner that his complaint culminate in criminal proceedings which are given a lawful conclusion, I cannot look at whether the procedure of recording the demographic information is itself arbitrary and thus struck by Article 14 of the Constitution of India. This therefore shall be considered in a proper case where this falls for a decision.

41. In order to pass an order as sought by the writ petitioner a prima facie finding is necessary to analyze as to whether an offence has been committed or not by the private respondent for indicating in his Aadhaar Card, the name of Dr. Keshab Bhusan Roy as that of his father. The facts of the case show that respondent no. 7, the employer of the private respondent no. 8 in an application under Right to Information Act, 2005 admitted that the name of the father of the private respondent's father according to service records is Rakhal Ch. Roy. This is not the same as Keshab Bhusan Roy. This is on the basis of the declaration and documents submitted by the private respondent. The Field inquiry carried on by the authorities who issue electoral identification cards alongwith photograph – in effect the Electoral Registration Officer - shows that the private respondent has nothing to prove or authenticate that his father's name is anything but Rakhal Ch. Roy and on that basis, has changed the name of the father of the private respondent from Keshab Bhushan Roy to Rakhal Ch. Roy in the electoral identity card of the private respondent. This has not been disputed or challenged by the private respondent as recorded in paragraphs 10 and 11 of this

judgment.This casts a serious doubt about the claims made by the private Respondent.

42. Sections 34 to 47 falling under Chapter VII of the Act enumerate various kinds of offences and provide penalties for such offences. For our purposes, relevant Section is Section 34 which makes an act of providing any false demographic information or biometric information with an intent to impersonate or even attempt to impersonate another person whether dead or alive, real or imaginary which is punishable with imprisonment for a term which may extend to three years or with a fine which may extend to ten thousand rupees or with both. Chapter VII contains the offences aforesaid. Section 47 of the said Act of 2016 provides as follows: -

"**47.** (*1*) No court shall take cognizance of any offence punishable under this Act, saveon a complaint made by the Authority or any officer or person authorised by it.

(*2*) No court inferior to that of a Chief Metropolitan Magistrate or a Chief JudicialMagistrate shall try any offence punishable under this Act."

43. Therefore, the only way that complaint made before the respondent no. 4 can be taken cognizance of, or that any step can be taken by the respondent no. 6 on it as prayed for, is if the complaint in question of an offence under the Act of 2016 or the Regulations of 2016 is made by the respondent no. 2. The petitioner is not the respondent no. 2 nor any person authorized by it. However, the petitioner has made a complaint/representation before the respondent no. 2 and also the respondent no. 4. From the undisputed records aforesaid and the discussions above, it is clear that on facts at least the writ petitioner has

made out a case of such offence under the Act of 2016 being done by the private respondent as has been alleged by him therein. Accordingly, I feel it is a case where the respondent no. 2 is directed to cause a complaint to be made to the statutory authorities including the respondents no. 4, 5 and 6 that an offence appears to have been done by the private respondent as informed by the petitioner on June 8, 2018 at page 69 and July 1, 2018 at page 71 to two different statutory authorities within two weeks from the date of communication of the order. As and when the said complaint is made, the said statutory authority shall take lawful steps to investigate and take the proceedings to a lawful conclusion. In case of the respondent no. 4, the complaint shall be sent to an officer of a rank not lesser than an Inspector of Police for investigation. In respect of the other statutory authorities they shall act in accordance with their parent law including the Representation of People Act, 19650. The respondent no. 2 and his men, agents, servants, employees, staff, subordinates and/or authorities shall also take proceedings under Regulation 29 of the Aadhaar (Enrolment and Update) Regulations 2016 notified on September 12, 2016 as to whether or not to cancel or omit or deactivate under Regulations 27, 28 and/or 29,the Aadhaar number issued to the private respondent, on the basis of the allegations contained in the said representation at page 69 made to the respondent no. 2 in accordance with law, giving full opportunity of being heard to the petitioner and the private respondent no. 8. He shall take a decision within a period of two months from the date of communication of this order on him. He shall give a prior notice of hearing to both the writ petitioner and the private respondent no. 8 for the first hearing whereafter the date will be fixed during hearing itself. He shall communicate a decision within a further period of seven days from

taking his decision. Till such decision and subject to it no benefit shall be taken under the Aadhaar card and/or Aadhaar number issued to the private respondent no. 8 by the private respondent no. 8 nor shall it be relied upon by any statutory authority or public authority or institution or the civil court for any purpose whatsoever.

44. Except that no dispute was raised to any document relied upon by the writ petitioner and that the decision of the respondent no. 6 as referred to in paragraph 10 of this judgment was not challenged by the private respondent and the conduct of the private respondent no.8 as in paragraph 41 of this judgment, nothing has been decided on facts and the respondent no. 2 is free to decide the questions under Regulations 27 and 28 which arise before him under Regulation 29 of the said Regulations. This does not mean that the complaint before the police or the respondent no. 6 shall depend upon the decision of the respondent no. 2. That he must do by order of this court since it would lead to an investigation and not necessarily punishment.All other questions are left to be decided by the appropriate authorities.

45. The writ petition is disposed of accordingly. There shall be no order as to costs.

PROTIK PRAKASH BANERJEE, J.

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present :- Hon'ble Mr. Justice I.P.Mukerji
Hon'ble Mr. Justice Protik Prakash Banerjee

FMA No. 3398 of 2014
With
CAN 10008 of 2014

Sri Soumendra Malik
v.
Smt. Tumpa Malik

For the appellant :- Mr. Debjit Mukherjee
Ms. S. Chatterjee
Ms. D. Ganguly
....Advocates

For the Respondents :- Ms. Shanti Das
Mr. Subha Dey
...Advocates

Judgement On :- 21.12.2017

I.P. MUKERJI, J.

This case is about the court in which an application for custody of the child under Section 25 of the Guardians and Wards Act, 1890 is to be considered.

The minor, Ishita is very young, about nine years of age.

The parties were married on 13th May, 2007 according to Hindu rites. On 8th May, 2008 the child was born to them. On 12th July, 2010 the respondent wife left the matrimonial house with the daughter to stay with her parents. Since April, 2011 the wife has been staying at 68/1, Netaji Colony, Kolkata-90, separated from her husband in her aunt's house. The minor is in her custody, within the jurisdiction of the District Judge 24 Parganas (N). From 2012 the minor is going to a local school.

The learned District Judge Hooghly on 5th August, 2014 allowed the application of the wife challenging the jurisdiction of the Hooghly court.

The application was made by the appellant/husband under Section 25 read with Section 9 of the said Act before the learned District Judge,

Hooghly. The mother, Tumpa Malik took out a demurrer application under Section 4 (5) (b) (ii) of the said Act, saying that the Hooghly court had no jurisdiction to entertain the application, as the child did not ordinarily reside in any place within its jurisdiction and that the child resided in Baranagar within the jurisdiction of the District Judge 24 Parganas (N). The petition should be returned to the appellant/petitioner for presenting it in the proper court.

On behalf of the husband Mr. Mukherjee argued that a place where a child ordinarily resided connoted his place of permanent residence. Since the father's home was in Hooghly and the child lived there till 2012 it could be taken to be the permanent residence of the child. He also cited an example of a child being moved from place to place by the mother. That would not imply that the application under the said Act would be transferred from one court to another in harmony with the movement of the child. That could not be the intention of the legislature, he added. The place where the child ordinarily resided according to Mr. Mukherjee would denote the place of residence of permanent residence of the family to which the child belonged.

Some definitions in the Guardians and Wards Act, 1890 are very important.

The first is Section 4 (5) (b) (ii). It is set out herein below:-

"*4(5) "the court" means—*

> *(b) Where a guardian has been appointed or declared in pursuance of any such application—*
>
> *(ii) In any matter relating to the person of the ward the District court having jurisdiction in the place where the ward for the time being ordinarily resides."*

Section 25 of the Guardians and Wards Act, 1890 is also set out hereunder.

"25. Title of guardian to custody of ward---(1) If a ward leaves or is removed from the custody of a guardian of his person, the court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the court may exercise the power conferred on a Magistrate of the first class by Section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

The question before us is whether this decision was correct? Whether the District Court at Hooghly, 24 Parganas (N) had the jurisdiction to hear the application of the appellant under Section 25 read with Section 9 of the Guardians and Wards Act, 1890?

What is the meaning to be ascribed to the phrase "ordinary residence of a child?"

It has to be appreciated that the role of the court does not end with the appointment of a guardian over a minor. Nor does the responsibility of the court cease with the appointment of a guardian. The very nature of the provisions of the Guardians and Wards Act, 1890 tend to show that the court has to supervise the work of the guardian, not to remove its watchful eyes from the minor, ensure that the ward's welfare is being looked after by the guardian, his or her property is being taken care of by him and so on. Therefore, this court cannot be far removed from the minor. The ward has to be accessible to the court as much as the court should be accessible to the guardian and any other interested person in his or her welfare. Hence, the provision that only the court within the jurisdiction of which the minor ordinarily resides has the jurisdiction to entertain proceedings under the said Act.

A division bench of the Allahabad High Court in the case of **Jagdish Chandra Gupta v. Dr. Ku. Vimla Gupta** reported in **AIR 2003 Allahabad 317** has tried to identify the ordinary residence of a minor adopting some very relevant factors. The minor must be "dwelling in a place for some continuous time". The residence has to be something more than "temporary residence". "The question of residence is largely a question of intention." One observation in that judgement is very relevant to our case.

"19.....However, in case of the minor no question of intention can arise but the court will have to take into consideration all the relevant facts as brought on record to determine the actual place of residence looking the attendant circumstances. The past abode for however a long period it may be, can cease to be a place where the minor can be said to be ordinarily residing depending upon the facts and circumstances of each case and the nature and duration of the residence. The mere fact that a minor is found actually residing at a place at the time of the application is made by itself is not sufficient to determine the jurisdiction."

The Supreme Court in the similar case of **Ruchi Majoo v. Sanjeev Majoo** reported in (**2011) 6 SCC 479** observed that the place where the child ordinarily resided was a question of fact. The child was ordinarily residing where the mother was residing. She had been studying in a school there for nearly three years.

The parties were married on 13th May, 2007.

It is no doubt true that the minor was born in 2008 in her father's house is in Hooghly. From 12th July, 2010 the husband and wife are living separately. Since August, 2011 the child has been living at 68/1, Netaji Colony, P.S.-Baranagar, Kolkata-90, in the residence of his mother's maternal aunt (Masi). The child goes to a local school there regularly, as we have already observed.

Therefore, the ordinary place of residence of a child depends on the above factors amongst others. The appellant has not been able to

demonstrate before this court that the ordinary place of residence of the minor is not at Baranagar.

It is quite plain that the residence of the minor at Baranagar cannot be called temporary and it is continuous from 2011. It has the touch of permanence. In those circumstances, the court to which the application lay under Section 25 read with Section 9 of the Guardians and Wards Act, 1890 was the District Court at Hooghly 24 Parganas (N).

I feel that the learned District Judge has rightly refused to exercise her jurisdiction, as in her opinion, the ordinary residence of the child was in 24 Parganas (N). I concur with this view. The court at Hooghly had no jurisdiction to entertain the application.

We add that even if an application under Section 25 read with Section 9 of the said Act was made before a particular District Court, it will use jurisdiction the moment the minor's ordinary place of residence changes. The district Court having jurisdiction over this changed ordinary residence will now exercise jurisdiction.

This appeal is dismissed.

No order as to costs.

(I.P. MUKERJI, J)

PROTIK PRAKASH BANERJEE, J.

When learned counsel try their best to render an otherwise simple proposition into something very troublesome, it is only then that the glorious simplicity of the Opinion of my Learned Brother can be best appreciated. While agreeing with most of what my learned Brother has held I would like to add a few paragraphs, which throws into sharp relief the actual dispute between the parties.

The entire case revolves around a short compass as to what would be the meaning which the Court is to ascribe to the words in Section 25 of the Guardians & Wardss Act, 1890, "**Title of guardian to custody of ward-** (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

Both the learned Advocates tried to impress upon me that the magic words are in reality those contained in a few sections of the Guardians and Wards Act, 1890 pertaining to jurisdiction of the District Court. They both draw inspiration from firstly Section 4 Sub-Section 5 and then Section 9 read with Section 4 of the Act of 1890.

Since both the parties have placed great emphasis on these provisions, even if according to me the true construction of Section 25 of the Act, 1890 is to be discovered from the context of that Section alone I find myself reluctantly forced to deal with those Sections to which learned Counsel have drawn my attention.

Section 4 (4) read as follows: -

***"4. Definitions.**-In this Act, unless there is something repugnant in the subject or context.-*

(1) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority;

(2) "guardian" means a person having the care of the person of a minor or his property, or of both his person and property;

(3) "ward" means a minor for whose person or property, or both, there is a guardian;

(4) "District Court" has the meaning assigned to that expression in the Code of Civil Procedure (14 of 1882), and includes a High Court in the exercise of its ordinary original civil jurisdiction;

(5) "the Court" means-

(a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; or

(b) where a guardian has been appointed or declared in pursuance of any such application-

(i) the Court which, or the Court of the officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian; or

(ii) in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or"

Section 9 reads as follows:

"9. Court having jurisdiction to entertain application.-

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in

the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."

It will appear that the provisions indicated by the parties as above are subtly different from the case where a ward has been removed from the lawful custody of his or her guardian. I believe that the parties have been crying themselves hoarse on the altar of Section 4(5)(b)(ii) simply because the language of the said Sub-Section indicates that the District Court which would have jurisdiction in any matter relating to the person of the ward would be the District Court having jurisdiction over the place where the ward for the time being ordinarily resides.

I can see where and how this would appeal to the respondent/mother since it is an admitted position that the mother had removed the child from the custody of husband/father who admittedly is the natural Guardian way back on July 12, 2010 and has not returned the minor child (daughter) to the husband's custody from where the minor had been removed; this has become all the more important since the place where the parents and the ward ordinarily resided together was at a place which was within the jurisdiction of the Learned District Judge at Hooghly in Chinsurah and not the Court of the Learned District Judge at 24 Parganas North, who has jurisdiction over the place to which the minor had been removed; however, the emphasis that the mother/respondent has placed on the words "District Court having jurisdiction in the place where the ward for the time being ordinarily resides" is a double-edged dagger.

This is because something more than mere fortuitous stay or spending of a few nights is required to transform a halt for a night or a few nights into a place where the ward ordinarily resides. Staying in a hotel room does not make the person who resides at such place suddenly harbour an intention of permanent residence. There is a requirement that in

order to attract the jurisdiction of a place on the ground of "ordinary residence"there should be an intention, formed bona fide on the basis of several objective criteria, to reside there with some degree of permanence.

In fact, the judgments are not consistent whether in this country or elsewhere on this aspect of the matter. While the test of permanent intention to reside has not always been the case in India, the Courts have not even assigned a unique or unchanging meaning to the words "ordinarily resident".

The cases of **"Ruchi Majoo Vs. Sanjeev Majoo** reported in **(2011)6 Supreme Court Cases 479"** inter alia at Paragraph 60 as alsothe judgement reported in the case of **"Jagdish Chandra Gupta Vs. Dr.KumariVimla Gupta** reported **in AIR 2003 Allahabad 317"** inter alia at Paragraphs 19, 20 and 21 would clearly indicate (i) "ordinarily resides" has to be something more than temporary residence(ii) the place where the minor generally resides and would be expected to reside but for special circumstances (iii) is not a place which the person residing as a permanent resident has left for good with no intention to come back but has started living in some other place (iv) in addition for a minor, actual residence at or about the time of filing of the application cannot by itself be a reason to determine the ordinary place of residence.

Very obviously, this last criterion has been formulated knowing very well that a minor has very little control over his or her life, and usually the wishes of a minor and its welfare, though given such importance by a Court of Law, are ignored by whosoever has actual physical custody and control of the minor/ward to the extent that where a particular minor or ward is actually residing is not even important where the allegation against one of the parents is that he or she has removed the ward from the custody of a lawful guardian. This is only natural since no person can be allowed to benefit from his or her own fault. If a person could be

allowed to benefit from removing the person of a minor/ward from a jurisdiction to another to force the lawful guardian to chase the wrongdoing parent or person from one jurisdiction to another, this would have been the result. This is fact, appears to be the only rationale behind the rule that actual physical residence is not the criterion through which jurisdiction is attracted in a case which is framed under Section 25 of the Guardians and Wards Act, 1890 and provided that the order sought by the guardian is for the benefit of the minor and for its paramount welfare.

Therefore, the learned counsel for the mother has tried to find out the residence for the time being of the minor to attract the jurisdiction of the particular learned District Court within whose jurisdiction either the minor had been living residing prior to his removal on and from July, 2010 (according to Mr. Debjit Mukherjee) or the place to which the minor had been removed by the mother from the custody of the natural Guardian father after July, 2010. This shows that both the parties have been trying to rely upon the actual place of residence or the place at which either the father or the mother would want to keep the ward who is a minor. Again if the test provided under Section 9 of the Act of 1890 is applied it presupposes that in case where the person of the minor is involved the application would be made to the District Court having jurisdiction in the place where the minor ordinarily resides; but in case where the Guardianship of the property of the minor is applied for it can be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or where minor has property. It shall thus appear that there is no stringency regarding the place of residence nor any requirement to identify where the minor is deemed to ordinarily reside where only the Guardianship of the property of the minor is involved.

Since the entire Act of 1890 must be read as a whole and since each of the words used in the statute must be given meaning and since further the same words used in the same sense must be given the same meaning, and cannot be given widely different meaning and since the words used in the instant case in Section 25 of the Act of 1890 are perfectly capable of being understood without ambiguity I find that the behaviour of the parties to the present case, to identify the court of the learned District Judge having jurisdiction over the place where the ward ordinarily resides, in a case which involves Section 25, and not any other section, does more violence to the plain and literal meaning of the statutory provision aforesaid, and does both logic and the purpose for engrafting Section 25 a disservice.

To my mind the rest of the provisions of the Act of 1890 speak of where an application is to be made over appointment of a Guardian of the Ward or of his property or where Guardian had already been appointed where such application is to be made but Section 25 is an exceptional provision for giving relief to a Guardian from whose custody the ward is removed or the ward leaves provided that the order for return to the custody of the lawful guardian would be for the welfare of the minor. Therefore, Section 25 represents an exception to the general rule as to which District Court has jurisdiction over a case of return of a ward to the custody of the Guardian if he leaves or his removed from such custody. Since it is an exception, the normal rule of tracing jurisdiction to the ordinary place of residence on the basis of the above parameters as in Sections 4(5)(b)(ii) or Section 9 of the Act of 1890,is not to be used in case of Section 25 of the Act of 1890. This is because as indicated by the above persuasive precedents, the ordinary place of residence requires an immediate and clear intention to reside with a decree of permanence which is not merely a casual night's stay and impulsive residence for a while.

In cases covered under Section 25, the intention of the legislature is as I could gather is undoing the mischief of such removal of the ward from the custody of the lawful guardian, provided of course, that the return to the custody of the guardian is to the benefit of the minor. Therefore, provided that the guardian applies for such return to his custody within a reasonable time I hold that the District Court having jurisdiction must always be the District Court which exercises jurisdiction over the place where the ward has been staying before being removed from the custody of the guardian provided always that such application is made by the guardian with reasonable alacrity and any delay in making the application explained to the satisfaction of the learned District Judge in question.

In the instant case as stated by my learned Brother and as appears from the records, removal from the custody of the lawful and natural guardian happened in July 12, 2010, but the application for the return of the ward, was not made until June, 2012 when already the ward had become settled as a student in the school within the jurisdiction of the learned District Judge at District 24 Parganas North. It is therefore clear that the learned District Judge to whose jurisdiction the child had been removed continues to be the learned District Judge for more than one and half years and is still continuing as the learned District Judge and the husband/father clearly had no anxiety nor urgency in applying for return of the ward. So, while the normal rule is to ascertain where the ward ordinarily resides at the time when the application is filed, in case of an application under Section 25 of the Act of 1890 the special rule is to apply before the Court of the Learned District Judge within whose jurisdiction the Ward was ordinarily residing prior to his being removed from or leaving the custody of the said lawful guardian. Even this however, is subject to an exception, being where a lawful guardian has not moved with sufficient speed or lack of delay or laches to attract the

jurisdiction of the Learned District Judge where the ward had been staying with him prior to the ward's being removed from his custody, and where the passage of time shows that there is no logical explanation for such delay. The present case is one such example, where the lawful guardian from his own conduct is not in a position to show why he delayed more than one and a half years before even applying to the former jurisdiction, that is to say, the Court of the Learned District Judge at Hooghly in Chinsurah, from which the ward had been removed and where no satisfactory explanation is given for such delay.

As such I have no hesitation in holding at one with my Learned Brother, that in the instant case the lack of any explanation for the delay in moving the proper forum for an order for return of the ward to the father's custody, shows that the intention of the parties has always been that the ward should continue her studies in the home found for her by her mother, within the place over which the Learned District Judge at District 24 Parganas North has jurisdiction, rather than the Learned District Judge at Hooghly in Chinsurah and it is the place which the parties, including the lawful guardian father, have allowed to become the place where the ward ordinarily resides, and the element of immediate relief which usually accompanies any application under Section 25 of the Act of 1890 is clearly absent in the present case.

The same matter can be looked from a different angle. Where the husband/natural Guardian Acts with urgency to get back a child removed from his lawful custody, the place where he resided last, before the child was unlawfully removed from his custody, is the place on the basis of which jurisdiction would be attracted; where the husband/father/natural Guardian does not show alacrity it would be deemed that there is no cause to invoke the extraordinary jurisdiction under Section 25. In all other cases the test of ordinary residence would apply. I thus hold that the application of the Wife/Respondent seeking a

direction on the appellant/husband to take back the petition under Section 25 of the Act of 1890 with a further direction on the husband to file it before the Learned District Judge, District 24 Parganas North, was rightly allowed and I further hold that the husband's appeal is without any merit and is thus dismissed.

However, in the facts and circumstances of the case, the parties shall bear their own costs. The records are directed to be sent down to the Court of the Learned District Judge, Hooghly, at Chinsurah, as part of the records of Act VIII Case No. 1 of 2012 for taking steps in accordance with law in the light of our judgement and the consequential steps of filing the matter afresh before the Appropriate Court.

Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Protik Prakash Banerjee, J.)

IN THE HIGH COURT AT CALCUTTA

CONSTITUTIONAL WRIT JURISDICTION

APPELLATE SIDE

Present:
The Hon'ble Justice Protik Prakash Banerjee

W.P. No. 26288 (W) of 2016

Gopi Vallabh Solutions Pvt. Ltd and Another
Vs.
The State of West Bengal and Others

For the petitioners	:	Mr. P.C. Sen, Senior Adv. and Bar-at-Law Mr. Raj Ratna Sen, Adv. Mr. Ritabrata Mitra, Adv. Mr. A.P. Gomes, Adv. Ms. Akriti Jain, Adv. Ms. Debolina Dey, Adv.
For the State	:	Mr. Sushovan Sengupta, Senior Government, Adv. Ms. Srilekha Bhattacharyya, Adv.
Heard on	:	June 27, 2018 and June 29, 2018.
Judgement on	:	July 2, 2018

PROTIK PRAKASH BANERJEE, J.:

1. This petition under Article 226 of the Constitution of India reminds us with a most ponderous voice, that there is a lot in a name. BnKe Solutions Private Limited, as the writ petitioner used to be called, does not smell as sweet to the respondents particularly the respondent no. 5 by any other name, even if duly changed.

2. The writ petitioners challenge Annexure P/20 dated July 7, 2015 by which a demand was made by the respondents no.1 to 5 for deposit of permission fees for transfer/sub-lease of the sub-leasehold of the writ petitioner no.1 and a further memo as in Annexure P/27 dated May 16, 2016 by which the demand was reiterated by the respondents. Both these demands were made because the writ petitioner no.1 duly changed its name from BNKe Solutions Private Limited to the present name of the writ petitioner no.1, Gopi Vallabh Solutions Pvt. Ltd. The representations made by the writ petitioner against the first memo were not disposed of by a reasoned order but the demand was reiterated apparently on legal advice which sought to go into the articles of association of the petitioner no.1 before change of its name and after change of its name, without there being any allegation at any time that there was any change in the composition of the shareholders to use the notion of legal entity to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

3. The facts of the case as relevant, would show that the writ petitioner used to be called BNKe Solutions Private Limited. It has its registered office at Infinity Tower—1, 4th Floor, Plot A-3, Block GP, Sector-V, Salt Lake City, Kolkata – 700091. While thus named, it took on sub-lease from the respondent no. 6 around 1.12 acres of land at Block EP and GP in Sector—V, Bidhannagar as described more fully in the (first) schedule to the duly registered deed of sub lease dated July 22, 2005 for a premium/salami of Rs.41,44,000/- and ground

rent for a period of 60 years, for establishing Information Technology/Information Technology Enabled Services industry thereon. In the deed of sub-lease the definition of the sub-lessee was inclusive and included its successors, administrators and assigns. The land itself had been leased to the respondent no. 6 by the respondent no. 1, by virtue of a deed of lease dated January 19, 1987 which by virtue of Clause 2(vii) allowed such sub-lease. The writ petitioner – while still operating under its former name – took possession of its sub-leasehold, paid the full consideration/salami, and duly obtained mutation of its name in the records of the respondent no. 1 in the department concerned, and paid all fees and did all things which the law and the contract between the parties, where one of the parties was "State" within the meaning of Article 12 of the Constitution of India, required it to do.

4. Thereafter, the writ petitioner duly changed its name under the provisions of Section 21 of the then Companies Act, 1956 from Bnk e Solutions Private Limited to its present name. Afresh certificate of incorporation was issued by the Registrar of Companies West Bengal, on March 12, 2012 which is conclusive proof of all the statutory requirements having been duly performed by the writ petitioner, including the accordance by the Central Government of approval.

5. Two provisions of the Companies Act, 1956 are required to be considered to appreciate the effect of the said duly effected change of the name of a company incorporated under the Companies Act, 1956. These are sections 21 and 23.

“Section 21 - Change of name by company:

A company may, by special resolution and with the approval of the Central Government signified in writing change its name:

[Provided that no such approval shall be required where the only change in the name of a company is the addition thereto or, as the case may be, the deletion there from, of the word "Private", consequent on the conversion in accordance with the provisions of this Act of a public company into a private company or of a private company into a public company.

Section 23 - Registration of change of name and effect thereof:

(1) Where a company changes its name in pursuance of section 21 or 22, the Registrar shall enter the new name on the register in the place of the former name, and shall issue a fresh certificate of incorporation with the necessary alterations embodied therein; and the change of name shall be complete and effective only on the issue of such a certificate.

(2) The Registrar shall also make the necessary alteration in the memorandum of association of the company.

(3) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against it; and any legal proceedings which might have been continued or commenced by or against the company by its former name may be continued by or against the company by its new name.**"**

6. Therefore, the statute makes it amply clear that the change of name of a company, if duly made as above, shall not affect any rights of the company. Therefore, the change of the name of the writ petitioner from BNK e Solutions Private Limited to Gopi Vallabh Solutions Pvt. Ltd. did not affect its rights, including its rights as a sub-lessee of the said sub-leasehold, in any way.

7. In fact, that is why when the respondent no. 6 by a registered deed of declaration dated July 18, 2012 effected some changes in the original deed of sub-lease dated July 22, 2005, including by incorporating some more covenants than the original deed of sub-lease had, and used the former name of the writ petitioner, it did not affect the property rights and continued to bind the writ petitioner, by whatever name called. While this deed of rectification reiterated that the writ petitioner shall use the space for which the land was allotted to "them" and that in addition "they" will also use the built up space for "their" own IT/ITES business, "However, the sub-lessee may sub-let/sub-lease the surplus built up space of the building of the premises for using other IT/ ITES and Electronics unit only on pervious written consent of the Sub-Lessor but the space shall not be used for other purposes."

8. Of more moment, for the purpose of the present litigation, is the clause which was inserted for payment of permission fees. It reads as follows: -

"The Sub-lessee hereby agreed to pay required permission fees to the Sub-lessor for letting out the surplus built up space for setting up IT/ITES and Electronics industries only. The Sub-Lessee also agreed to pay other fees payable to Urban Development Department and the Sub-Lessor for transfer/assignment of leasehold right partly or fully of the lease hold premises as mentioned in the Schedule."

9. Thereafter, documents annexed to the writ petition show that the petitioner sought permission to transfer/assign/sub-let part of the building constructed by it to different entities, and the writ petitioner duly paid permission and other fees. The respondent no. 6 also accepted that the writ petitioner under its changed name had the right to do so, and in fact by a letter dated November 18, 2013, among others, in case of one such proposed assignee, wrote to the respondent no. 4 seeking its consent for the writ petitioner to execute an appropriate deed of assignment. Very significantly, in the first sentence of the second paragraph of the said letter, the respondent no. 6, qua Sub-Lessor admitted as follows: - "We would like to draw your attention that the Corporation executed a sub-lease deed dated 22nd July, 2005 in favour of M/s BNK e Solutions Pvt. Ltd. (Now known as Gopi Vallabh Solutions Pvt. Ltd)". Therefore, the respondent no. 6 conducted itself, not just towards the writ petitioner, but to towards the public at large, that the writ petitioner, by whatever name called,

was the sub-lessee in respect of the said sub-leasehold, and permission fees was payable by it to the urban development department of the respondent no. 1, only if the writ petitioner assigned it to a third party.

10. At this stage, suddenly, and I do not know why or under which provision of which law in India, the respondent no. 5, an officious Additional Secretary to the Government of West Bengal who was in office in October 2014, wrote a letter dated October 29, 2014 to the writ petitioner, narrating the facts relating to the sub-lease in the name of the writ petitioner under its former name, and also admitting that mutation in the records of the respondent no. 1 had been made of the name of the writ petitioner in its erstwhile name but, a propos the proposal of the writ petitioner to transfer a part of the built up space under its sub-leasehold to third parties, he intimated to the writ petitioner

"Now I am directed to request you to state as to whether the change in the name of M/s BNKe Solutions Private Limited has been regularized by way of mutation/submission of Deed of Rectification duly confirmed by the Government. It is also to be confirmed if any Deed of Rectification between WBEIDCL and M/s Gopi Vallabh Solutions Pvt. Ltd. has been executed and registered with the approval of the Government."

11. I know, the respondent no. 5 sounded like a Vorgon bureaucrat when he wrote such an ignorant letter, contending that for change of name of company in the records of the respondent no. 1 a separate rectification deed was to be

executed and registered, but I resist the temptation to write an epic on this tragedy, since to my mind this is more bathetic than pathetic. I will content myself with only one observation – I would have thought that the law is well settled that by a change of name of a company under the provisions of the Companies Act, 1956, which is contemporaneously considered to be a change and not a transfer of one company to another, there is no change of legal personality and therefore there is no requirement to rectify any deed to effect mutation of the changed name in the records of rights or land records.

12. Pursuant hereto correspondence continued between the respondent no. 5 and the writ petitioner. The writ petitioner continued to stress that the change of name was duly made and certificate was duly issued by the Registrar of Companies while reiterating its prayer that mutation of the name of the writ petition as it stood after March 12, 2012 be effected in the records of the respondent no. 1 in the Urban Land Department. The writ petitioner, on oral request from the respondent no. 5, appears to have supplied its certificate of incorporation once again, showing the change of name and the memorandum and articles both in its original name and the new name. These are all annexed to the writ petition.

13. Once these were submitted, the respondent no. 2 suddenly intimated that the respondent no. 1 had decided that "the change of name in the sub lease deed results in change of leasehold right from one company to a new one. A new sub lease deed requires to be executed to incorporate the name change in the sub

lease deed", even while accepting that the name of the writ petitioner company had been changed with the approval of the Registrar of the Companies, though no prior permission of the Urban Development Department had been obtained.

14. Needless to mention, the Companies Act, 1956 under which the name of the writ petitioner was changed was not only a central statute, it was made in a field of legislation covered under List I of the 7th Schedule, and neither Section 21 nor Section 23 thereof required any approval, prior or otherwise of any agency or department of the federating State, being the respondent no. 1.

15. Thus, on the basis of these decisions which on their face were alien to Indian law and were in fact, taken in ignorance of law, a demand was made as if under the contract, for Rs.3 lakhs per cottah for according permission for "change of name of the company" as the sub-lessee of the plot in question and for further processing fees for mutation, also quite a hefty amount. This was by the letter dated July 7, 2015 as in Annexure "P/20" to the writ petition, and the writ petitioner by a representation narrated the above facts briefly by their letter dated July 27, 2015 (Annexure "P/21"), including that change of name does not bring into existence of a new company, and sought that such demand be recalled and/or rescinded in view of the fact that the clauses/notifications, were not applicable to the case. The respondent no. 2, on behalf of the respondent no. 1, by a memo dated August 25, 2015 (Annexure "P/22") forwarded the documents to the respondent no. 6 to nonetheless take necessary action in terms of the notifications which the writ petitioner had contended were not applicable, and

thereafter the respondent no. 6 apparently took some opinion from learned advocates which were forwarded to the respondent no. 1 whereafter the respondent no. 2 by a letter dated March 18, 2018, sought a certificate from a renowned chartered accountant as to whether the Memorandum and Articles of the writ petitioner while it had been known under its former name and its subsequently changed name, were identical or not. Such certificate was issued by the chartered accountant which is also annexed to the writ petition. Thereafter, by a letter dated May 16, 2016, the respondent no. 2 alleged that on scrutiny of the Memorandum and Articles of Association of the writ petitioner as it was known prior to the change in its name and the present name, "it transpires that the Articles of Association of the two companies are not the same. Structural changes between the companies have also been noticed after the name change. Evidently, this is not an issue of mere change of name of the company; but the formation of a separate company in place of the existing one.". On such a finding in the letter dated May 16, 2016as in Annexure "P/27", the respondent no. 2 requested – in effect demanded – that the requisite permission fee according to the letter of the respondents' letter dated July 7, 2015 be deposited for "transfer of sub-leasehold right" in respect of the plot in question to the writ petitioner in its present name from the writ petitioner under its former name.

16. It was not specified in the letter dated May 16, 2016 exactly what structural changes had occurred and how a company whose name had changed but there had neither been an amalgamation or merger or spin-off or demerger,

could suddenly have become a new company, merely because the name had been duly changed under Sections 21 and 23 of the Act of 1956 as they stood and perhaps even the controlling shareholding had changed. No details were given of how the two articles and memoranda of association were not the same. The letter dated July 7, 2015 was even better in the sense that it did not even consider these things but merely proceeded on the basis that a change of name of a company, duly made, required change in the sub-lease deed and that this resulted in change of the leasehold right from one company to another. Nothing was alleged in the letters aforesaid that this was done to justify any wrong, defeat any provision of law or defraud the creditors of the writ petitioner in its former name or was illegal.

17. I am tempted to name the firm of learned advocates as also the Learned counsel– which appear from the records annexed to the writ petition – who gave to the respondent no. 6 the "legal opinion" on which the decision of the respondents no.1 to 5 depended but out of courtesy, I refrain from doing so. The respondent no. 6 while acting as "State" would be well advised to choose its experts more carefully in the future.

18. The writ petition was instituted challenging the above memoranda as in Annexures "P/20" dated July 7, 2015 and "P/27" dated May 16, 2016 basically on the above grounds. Naturally, grounds have been taken of violation of the Section 23 of the Act of 1956 by the respondent authorities and of their acts

being arbitrary and not in terms of any notification which is applicable in the facts of the case.

19. No Affidavit-in-Opposition has been affirmed by any of the respondents except the respondent no. 4. The said Affidavit-in-Opposition affirmed by the respondent no. 4 solely for himself does not show authorization by any of the other respondents, including the respondent no. 1 or the respondent no. 6. Therefore, despite opportunity the other respondents including the two villains of the piece, the persons who were the respondents No.2 and 5 in 2015-2016, have not used any Affidavit-in-Opposition to deny the allegations contained in the writ petition, and have therefore admitted the contentions of the writ petitioner.

20. I could have decided the writ petition on the basis of this admission alone, had it not been my duty to decide the matter on merits, so that such people in such high positions of power with unmatched ignorance of the law, are not allowed to oppress citizens and businesses in West Bengal – which I say with much regret are few and far between in this land forsaken by industrialists and perhaps will continue to be so unless such bureaucrats are weeded out and put to pasture –and thus I now consider what the respondent no. 4 has alleged about the merits of the matter, such as they are.

21. At paragraph 32 of the Affidavit-in-Opposition affirmed by the respondent no. 4,the differences in the Articles of Association between BNK e Solutions Pvt. Ltd. and Gopi Vallabh Solutions Private Limited, - though it is the same company

before and after due change of name - which are alleged to exist, have been summarized. I will let the respondent no. 4's own words try and supply in an ex post facto affidavit, the fatal deficiencies in the memoranda impugned: -

"I also say there are many differences between Articles of Association of the two companies:

i) The sub heading and clause 2 PRELIMINARY in two companies are found to be different. Several new sub-clause in Gopi Vallabh Solution have been introduced which were not present in BNKE Solutions.

ii) The clause CAPITAL in the Articles of two companies are found to be different.

iii) In the heading CAPITAL in Gopi Vallabh Solutions the minimum paid up share capital of the company has been mentioned to be Rs. 100,1007- similar is not the situation in case of BNKE Solutions. There is also provision of raising additional funds.

iv) The clause 'DIVIDENDS' in two companies are found to be not similar.

v) The provision of BOARD OF DIRECTORS are also not similar in two companies in Articles.

vi) In Gopi Vallabh Solutions, There is provisions of insurance of equity shares.

vii) DACL, NB Group occurring in Gopi Vallabh Solutions were found in BNKE\ Solutions."

22. Even without considering the spelling mistakes in the Affidavit-in-Opposition, none of these can be found in either the Memo dated July 7, 2015 or May 16, 2016. They were never communicated even in this scanty detail, to the writ petitioner. The writ petitioner never had an opportunity of dealing with these allegations when the respondents had, even after receiving the certificate of the chartered accountant that the two memoranda and articles were the same/identical, issued the memo as in Annexure "P/27". Their representation before that, as against the memo as in Annexure "P/20" was therefore never considered and disposed of with a speaking order dealing with the points that they had raised, whether by way of Annexure "P/20" or Annexure "P/27". Thus, the Affidavit-in-Opposition has sought to supply a gross violation of the basic principles of natural justice being the absence of a speaking order, albeit by trying to supply reasons based on facts which were already on record.

23. The allegations in that sole Affidavit-in-Opposition of the respondent no. 4 has been dealt with in the Affidavit-in-Reply filed by the writ petitioners.

24. Let me now examine what these so-called details in paragraph 32 of the said Affidavit-in-Opposition actually say. They may at best be relied upon by the

respondent no. 4 to allege that there was a change in the shareholding pattern, and that the majority of the shareholders changed. In fact, that is what the respondents have argued – that by reason of the change in the Articles and Memorandum of Association of the writ petitioner, now a company having its registered office in Gurgaon controls the writ petitioner and has changed its name. However, it is not denied that the same business is being carried on by the writ petitioner under the same corporate façade. To enable the Court – even a writ court – to lift the corporate veil, certain allegations of fact are required to be made, and are required to be made not recklessly, but with sufficient materials.

25. What the law requires to be alleged in order to allow a court to lift the corporate veil, or even pierce it, is laid down in authoritative precedents cited on behalf of the respondents by Mr. Sengupta.

(i) **New Horizons Limited and Another—v—Union of India and Others**, reported in **(1995) 1 SCC 478**. This was a case involving a joint venture which the Hon'ble Supreme Court was ultimately pleased to hold that the foreign company which had a substantial holding in the company was a mere shareholder. Their Lordships were pleased at paragraph 27 of the report, to hold expressly as follows: -

"The conclusion would not be different even if the matter is approached purely from the legal standpoint. It cannot be disputed that, in law, a company is a

legal entity distinct from its members. It was so laid down by the House of Lords in 1897 in the leading case of *Salomon* v. *Salomon & Co.* [1897 AC 22 : (1895-9) All ER Rep 33] Ever since this decision has been followed by the courts in England as well as in this country. But there have been inroads in the doctrine of corporate personality propounded in the said decision by statutory provisions as well as by judicial pronouncements. By the process, commonly described as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interest of the Revenue. (See : *Gower's Principles of Modern Company Law*, 4th Edn., p. 112.) This concept, which is described as "piercing the veil" in the United States, has been thus put by Sanborn, J. in *US* v. *Milwaukee Refrigerator Transit Co.*[(1905) 142 Fed 247, 255] :

"When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

I have referred to the above judgement to show that none of the conditions for lifting of the corporate veil quoted by the Hon'ble Supreme Court with approval has been even alleged to exist in the present case whether in the sole Affidavit-in-Reply by one of the respondents affirmed for himself, or from the records produced

including the impugned memoranda. Neither public convenience is alleged to be defeated, nor wrong justified, nor crime defended here. Therefore, there can be no question of lifting the corporate veil and treating the writ petitioner as an association of persons, including the new major shareholder, which is a separate corporate entity. Therefore, the tests of where the company resides or where its domicile, are inapplicable since the first condition of lifting the façade neither exists nor is alleged to exist. This judgement, cited by Mr. Sengupta, goes against the respondents and shows how flimsy its case is, and if this was relied upon by the Learned advocates in the facts of this case, who advised the respondents including the respondent no. 1 and the respondent no. 6, I can only rue the wrong advice on which the respondents have acted.

(ii) The second case relied upon by Mr. Sengupta is the **State of Uttar Pradesh and Others—v—Renusagar Power Co. and Others** reported in **(1988) 4 SCC 59**. This was a case where the Hon'ble Supreme Court was concerned with a case where Hindalco had brought into existence the agency of the Respondent power company for the express purpose of avoiding takeover of the power station by the appellant State's Electricity Board and where the said power company was trying to avoid the liability to pay electricity duty by alleging that both the persons generating and consuming the energy were one and the same and therefore a different and lower liability to

pay duty was involved. In that case, the Hon'ble Supreme Court was pleased to hold that the generation of power by the power company ought to be held to have been done by Hindalco from its own source of generation and affirmed the findings that the corporate veil would be lifted.

So, in effect, the veil was lifted to give a benefit to the company which had established the power company – it was not lifted by the Government and in fact, the government's not lifting of the veil in such a case had been held to be an error on the part of the government at paragraph 69 of the report. It was a decision which was taken, clearly on the peculiar facts of the case, and because the Hon'ble Supreme Court made it clear that in view of the various judgements, corporate veil had become more and more transparent. It had not been pleased to hold that the veil had been perpetually stripped or removed. I would respectfully follow the judgement of the Hon'ble Supreme Court to ensure that where no cause has been made out to lift the veil, I shall let the veil of modesty and corporate identity remain.

26. Mr. Sengupta, Learned Advocate for the State, fairly submitted that he could not improve upon the records which the respondent no. 4 had relied upon and could not supply the omission on the part of the other respondents to use an Affidavit-in-Opposition despite chance having been given on May 5, 2017 to do

so, so far as the facts were concerned. He submitted fairly that all there was, on which he was arguing for lifting of the veil, was contained in paragraph 32 of the respondent no. 4's Affidavit-in-Opposition, as extracted above. As I have already held above while discussing the precedents cited by Mr. Sengupta, none of the facts alleged by the respondent no. 4 or apparent from the records disclosed, are sufficient to allow me to lift the corporate veil.

27. Though the above discussion should have amply demonstrated the reasons for my decision which shall follow, for the sake of completeness, I must also refer to the decisions cited on behalf of the writ petitioner by Mr. Sen, Learned Senior Advocate. He has relied upon: -

(i) First, a Bench decision of this Court, in the case of **Kalipada Sinha—v—Mahalaxmi Bank Ltd**, reported **AIR 1966 Calcutta 585**, where, at paragraph 4, the Hon'ble Division Bench inter alia interpreted the provisions of Section 23(3) of the Companies Act, 1956, in the following terms: - "Sub-section (3) lays down that the change of name shall not affect any rights or obligations of the company or render defective any legal proceedings by or against it, and any legal proceedings, which might have been continued or commenced by or against the company by its former name be continued by or against the company by its new name. *This makes it abundantly clear that as the alteration is only in the name and not the identity and the statute itself grants the right to*

continue an existing proceeding by the old company in its new name." (emphasis supplied).

(ii) The second was another Bench decision, in the case of **Pioneer Protective Glass Fibre P. Ltd.—v—Fibre Glass Pilkington Ltd**. reported in **(1986) 60 Company Cases 707 (Cal)**. There, the Hon'ble Division Bench, after distinguishing the judgement in *Malhati Tea Syndicate Ltd.—v—Revenue Officer, Jalpaiguri*, reported in *(1973) 43 Company Cases 337 (Cal)* on the ground that it did not consider an earlier judgment of the Hon'ble Supreme Court in *Garikapati Veerrayya—v—N. Subbiah Choudhury*, reported in *AIR 1957 SC 540*, was pleased to hold, inter alia, as follows: -

"Section 23 of the Act appears mainly to be a ministerial section and lays down the procedure for recording of the change of name. A fresh certificate of incorporation is no doubt issued, but the same is only for the purpose of recording the alteration in the name. The effect of the issue of the new certificate as provided in Sub-section (1) of Section 23 is to render the change of name complete and effective and nothing more. The section does not provide or imply that on the issue of the new certificate, the company as it existed will stand dissolved and a new company will come into existence. Sub-section (3) of Section 23 provides that change of name will not affect any right or obligation of the company and that legal proceedings in the old name will not be

rendered defective but will be continued by or against the company in its new name. The expression used in the section is 'the company' and not 'old company', or 'new company', or 'dissolved company'. *There are further indications that in spite of a change of name, the entity continues*.

For the above reasons, we hold that on a change of its name, a company does not stand dissolved nor any new company comes into existence." (emphasis supplied).

(iii) The last relied upon by Mr. Sen, perhaps clinches the issue without there being any scope of dispute by the respondents. This is the case of **Prasad Technology Park P. Ltd.—v—Sub-Registrar and Others** reported in **(2005) 128 Company Cases 996 (SC)**, and there the Hon'ble Supreme Court was faced with a similar fact situation where the changed name of a company was to be substituted in a lease deed where none of the conditions of the lease was being changed except that a restriction contained n the deed was changed. At page 1001 of the report, their Lordships of the Hon'ble Supreme Court were pleased to hold in express terms as follows:

"Only because the name of the company was changed, the same would not mean that a fresh transaction took place. Having regard to the change in the name of the company, the appellant's name was sought to

be substituted in the original agreement. The period of the lease, the quantum of the premium paid and the other terms and conditions remained unaltered, except the restriction contained in clause 2(q) of the said deed, was removed. By reason of mere change of user from carrying on one business to another, it is trite, a fresh transaction does not take place" and further "*by reason of mere change in the name of the company, 'Prasad Garments P. Ltd.' the erstwhile lessee also cannot be held to have transferred its leasehold interest in favour of the appellant herein*." (emphasis supplied).

28. In such view of the matter, I am gratified to find that what I thought at paragraph 11 of this judgement was the settled law, is in fact the settled law, in the facts of this case. This is in view of the decisions of both the Hon'ble Supreme Court and the Bench decisions of this Hon'ble court, applicable to the facts of this case, which I must follow.

29. Accordingly, both Annexures "P/20" and "P/27" which treat a due change in the name of a company incorporated under the Companies Act, 1956 to be a creation of a new entity or at the very least, a reason for lifting the corporate identity to see the manner in which the shareholders have changed, are bad in law and arbitrary and illegal and contrary to the law of the land and thus public policy and show non-application of mind to the matters of record, and they are so unreasonable that no reasonable man on the face of the same facts could have come to the same conclusion. Thus, they are also perverse within the meaning of

law. They are therefore quashed. Furthermore, any attempt to treat the writ petitioner under its old name and the changed name as two different entities would be bad in law and wholly without jurisdiction and in violation of Section 23 of the Companies Act, 1956 as interpreted authoritatively and must be struck down and quashed. As a consequence, any demand made by the respondents or any of them or those claiming there under to obtain permission fees for any fresh deed of rectification to change the name of the sub-lessee in the deed of sub-lease or rectification deed of 2005 or 2012 to the changed name of the writ petitioner or as processing fees for mutation of the said changed name, must be held to be equally without jurisdiction and impermissible on the part of the respondents or any of them. Accordingly, the respondents and each of them, including the respondents No.1, 2, 3, 4 and 5 and each of them, are commanded to record the change of name of BNKe Solutions Private Limited to the changed name of the writ petitioner, Gopi Vallabh Solutions Private Limited (the petitioner no.1) without payment of any permission fee, as demanded in Annexures "P/20" and "P/27" dated July 7, 2015 and May 16, 2016 respectively or any like decision, whether in the records of the Urban Development Department of the respondent no. 1, or in the records of the respondent no. 6, or anywhere else, including in the deeds of sub-lease and deeds of rectification, and the deed of rectification or declaration if required to be executed to give effect to the aforesaid, shall be treated as a simple deed of declaration which shall not be levied with stamp duty or registration charges as a conveyance but only as a declaration of a change of

name which had occurred on March 3, 2012 and which is being brought on record.

30. The writ petition is allowed to the above extent. There shall, however, be no order as to costs.

(PROTIK PRAKASH BANERJEE, J.)

Later:

The writ petitioners' learned Advocates are given liberty to communicate the second last paragraph of the order and the respondents are directed to act on the communication of the gist.

(PROTIK PRAKASH BANERJEE, J.)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

W.P.S.T 112 of 2019

Asim Kumar Chakrabarti
—v—
The State of West Bengal & Ors.

Present:
The Hon'ble Justice Dipankar Datta, J.
The Hon'ble Justice Protik Prakash Banerjee, J.

For the petitioner	:	Mr. D. N. Roy, Adv., Mr. Biswarup Nandy, Adv., Mr. Rajesh Kumar Shah, Adv.
For the respondents 1 to 4	:	Ms. Chaitali Bhattacharya, Adv., Mr. Kartik Chandra Kapas, Adv.
For the respondent no. 5	:	Mr. Subrata Roy, Adv.
Heard on	:	September 23, 2019.
Judgment on	:	October 31, 2019.

PROTIK PRAKASH BANERJEE, J.:

1. This petition under Article 226 of the Constitution of India challenges the Order No. 7 dated November 19, 2018 passed in O.A. No. 1238 of 2016 by the West Bengal Administrative Tribunal. By this order, the learned

Tribunal disposed of the original application after holding that there was no merit in it and thereby rejected the contention of the petitioner that he was entitled to pensionary benefits.

2. It is not in dispute that a selection process was duly held in respect whereof a panel had been appeared for the post of "patrolman" under the Office of the Commissioner of Commercial Taxes, West Bengal on November 16, 1990. It is also not in dispute that the petitioner was empanelled in it. Though the life of a panel is normally one year or at the most two years, as the relevant rules ordain, this panel was allowed to continue for almost 8 (eight) years until by a Memo dated January 8, 1999 it was cancelled by an order dated December 17, 1998 purportedly due to non-availability of vacancy. This deprived the petitioner of a chance to be considered for gainful employment for earning his livelihood without following the procedure established by law, due process and without a speaking order. The petitioner moved the learned Tribunal by way of O.A. No. 1937 of 1999 which was disposed of by an order dated June 6, 2000 directing the respondents to consider his complaint and pass a speaking order within a certain time. The record shows that pursuant thereto the respondents passed an order dated January 25, 2002, rejecting the prayer of the petitioner for being appointed for a suitable job after waiving the age bar. The petitioner carried this to the learned Tribunal by way of O.A. No. 1468 of 2002. It was allowed by the learned Tribunal by the Order No. 24 dated February 8, 2007 holding, *inter alia,* as follows:

> *"In support of their contention it was contended on behalf of the petitioner that normally one panel is to exist for a period of 15 months. But, in this case, the life of the said panel was extended for more than 8/9 years. But abruptly the concerned authority without extending the same further has cancelled the aforesaid panel for which the Petitioner has been seriously prejudiced as his name has never been forwarded to any other authority by the concerned employment exchange for being involved in the aforesaid selection process and that being the position he has suffered a lot and by now he has crossed the age limit for entry in the Govt. service and this Tribunal by its order 15.10.01 was pleased to direct that it case the applicants claim is accepted for employment, he age will not be a bar and the same should be condoned.*
>
> *Taking cue from the aforesaid order, it was contended on behalf of the Petitioner, placing their reliance unreported decisions of Hon'ble High Court passed in WP-3673 (W of 2006) that he should be given similar benefits by directing the state respondents to find ways and means to accommodate the Petitioner as per his eligibility.*
>
> *In such situation, having heard the parties before us and upon considering the totality of the circumstances as reflected in the record, we pass this direction to the State Respondent to find ways and means to accommodate the Petitioner by giving him the appointment as per eligibility provided that there is existing vacancy in the concerned department and in the matter of such appointment the age will not be treated as a bar. We further direct the respondent to take a decision in this regard within a period of six months from this order.*
>
> *Let it however be made clear that this will never create any precedent in any other matter."*

3. It will be apparent that the order dated August 02, 2007 was a mandatory order which in fact held the petitioner entitled to appointment. The petitioner's name was never forwarded to any other recruiting authority by the concerned Employment Exchange because his name had been empanelled and continued to be so empanelled before it was arbitrarily cancelled. Therefore, it is safe to hold that the entitlement of the petitioner would date back to February 08, 2007 at the latest and to the date of institution of O.A. No. 1468 of 2002 at the earliest. We hold thus since the entitlement of the petitioner had to be considered from the date of his application to the learned Tribunal once the age bar was waived.

4. Even though a period of 6 months was granted to the respondents to make such appointment, the respondents chose not to appoint the petitioner within 6 months from February 08, 2007 but moved this Court by way of W.P.S.T. No. 755 of 2008. A Coordinate Bench by the order dated April 30, 2009 was pleased to dismiss the said writ petition, *inter alia,* on the following findings:

> *"Immediately we can safely come to the conclusion to that in the absence of any Rule in terms of which the Panel was prepared and without any suggestion with regard to its life span that grinding halt put to it by the Petitioner No.2 by its diktat, is nothing but simply an executive arbitrariness which cannot pass the test of Judicial Review.*
>
> *In our humble view, as the entire decision making process is tinged with arbitrariness and is not a product of fair play; the process of the decision making and not the decision itself can attract the magnet of Judicial Review. There was no life span indicated in the constitution of the Panel. It is not simply Tweedledum and Tweedledee that it would be allowed to exist for a protracted long period of eight years. Suddenly, one fine morning the Petitioner No.2 feels there is enough of it and on the basis of surmise that here may not be vacancies available, scuttles the entire Panel.*
>
> *Neither sympathy nor sentiment has played in our mind while considering the scope of our Judicial Review over the Order passed by the learned Tribunal. We have come to the conclusion that the entire exercise undergone by the Petitioner No.2 in putting down an abrupt curtain on the life of the Panel which existed for more than eight years definitely suffers from the vice of lack of transparency. It is in colourable exercise of power the Petitioner No.2 has come to such a decision.*
>
> *In our opinion, it would be Just Justice if the Order passed by the learned Tribunal is kept in its virgin height.*
>
> *Passion for Justice and in our endeavour to keep the lamp of Justice bright and glowing we have arrived at our finding. But it was never Justice as what we have felt but what it should be according to the Constitution. The said pursuit drove us to the finding impugned that the Verdict returned by the learned Tribunal should remain unaffected.*
>
> *As we feel the learned Tribunal has acted in a correct fashion, there is no scope for interference with the Order dated 08.02.2007 passed by the learned West Bengal Administrative Tribunal in O.A. No. 1468 of 2002 and we direct that Respondent herein be given appointment within three months."*

5. It is only after this order that the petitioner was appointed on August 04, 2009 and confirmed retrospectively on June 13, 2013 w.e.f. August 06, 2012. Thus it is clear that there is no explanation for the delay in appointing the petitioner pursuant to the order dated February 08, 2007 passed by the learned Tribunal except for the period W.P.S.T. No. 755 of 2008 was pending in the file of this Court.

6. It is on the basis of the above facts that the respondents have alleged that the petitioner has not completed qualifying service in terms of Rule 36 of the Death-cum-Retirement Benefit Rules, 1971 (hereafter the 1971 Rules). In this context the respondents have relied upon Rules 36 and 67 of the 1971 Rules. They are set out hereinbelow:-

> *"36. Power of Government of condone deficiency in service- Upon any condition which it may think fit to impose, Government may condone a deficiency of six months in the qualifying service of a Government servant.*
>
> *Note- The deficiency should not be condoned with a view to make up the minimum prescribed qualifying service for the purpose of death gratuity or family pension. In other cases power should be restricted to Government servant drawing pay not exceeding Rs. 425 per month at the time of retirement on invalid or compensation pension.*
>
> *67. Amount of pension- The amount of pension is regulated as follows:*
>
> ***
>
> *(B) After service of not less than ten years a pension not exceeding the allowing amounts."*
>
> ***

The amounts have been given in four tabular forms after Clause I of Rule 67.

7. A bare perusal of the 1971 Rules to the extent relevant will show that the qualifying service is not an absolute period but where the deficiency is of up to 6 months the State Government may, subject to conditions which may be imposed by it, condone the said deficiency in qualifying service. While the qualifying service has been framed to be in substantive and/or permanent capacity by para 1 (III) of Finance Department Memo No. 2255-F dated 22.03.1973, temporary Government employees rendering continuous service for 10 (ten) years or more shall be granted pension and gratuity as admissible to permanent Government employees under normal rules. The note to Rule 36 which debars condonation of deficiency only to make up the prescribed period of qualifying service for the purpose of death gratuity or family pension is not applicable to the present case, since the case does not involve death gratuity or family pension.

8. Therefore, the only question is whether the petitioner, who is not at fault for not joining service and where the appointment has been arbitrarily held up by the respondents from 2002 onwards or at the very least from February 08, 2007 till August 08, 2009, the respondents can be allowed to take advantage of their own wrong by holding that the petitioner only had around 7 years and 27 days of service left as on the date of his retirement being August 31, 2016.

9. The learned Advocate for the respondents 1 to 4 has strenuously contended that from August 04, 2009 till the date of the retirement, the

petitioner had never raised any objection of any arbitrariness in the delay in appointing him despite the orders of the learned Tribunal; and to his entitlement to such appointment at an earlier date than as granted by the respondents. She says that the petitioner should be held to have been estopped by his inaction from August 04, 2009 till August 24, 2016 before making the first objection.

10. In order to test this objection, we will have to consider whether the argument on estoppel is on the basis of the law of evidence or equity. If this had been based on the law of evidence or promissory estoppel, the petitioner would have had to prove that he had acted on the representation of the respondents to his material prejudice relying only upon such representation. On the other hand, if it is an equitable estoppel then it is a defensive doctrine preventing one party from taking unfair advantage of another when through false language or conduct the person to be estopped has induced another person to act in a certain way which resulted in the other person being injured in some way. Therefore, while in the first case, the respondents have to show that they changed their position to their material prejudice by relying upon some conduct or representation of the petitioner, in the second case, the respondents have to show that they suffered an injury believing in the false language or false conduct of the petitioner which has brought him an unfair advantage. Whichever test we employ, it is clear that the injury, if at all, has been suffered by the petitioner for having been deprived of appointment for more than 7 years

after his entitlement was held in the eye of law to have crystallized and when he was appointed, he had no other option but to accept such appointment. In this case, it was the pygmy signing on the dotted line rather than the pygmy making a false allegation misleading the giant State.

11. Where, therefore, there is no equity in favour of the respondents to set up a defensive doctrine of estoppel, we are fortified by the judgment in the case of **State of Punjab—v—M/s. Nestle India Ltd. and Another** reported in **(2004) 6 SCC 465** where Their Lordships have been pleased to hold that since the doctrine of promissory estoppel is an equitable doctrine, it must give way when equity so requires. In this case the Government is seeking to set up an estoppel against the petitioner on the specious ground that an unemployed person litigating for employment having won a decision in his favour after 5 years of litigation w.e.f. the date of filing of the original application and after waiting for the appointment for 2 more years should have objected to the appointment while living in penury merely to keep his claim for pension alive. We do not consider this to be an equitable conduct on behalf of the Government and even if an estoppel could have been made to operate as against the petitioner or a species of waiver, if not estoppel proper, we would choose not to enforce such an inequitable defence in favour of the respondents and against the petitioner. In fact, where the claim of the petitioner was at a lower pedestal such as merely delay in issuance of appointment letter as a ground for rejection of the claim for pension for not completing qualifying service, the judgment in the

case of **Biman Behari Thakur—v—The State of West Bengal and Others** passed by a Coordinate Bench on September 2, 2019 in **W.P.S.T. No. 68 of 2019** and **Ram Nagen Chowdhury—v—The State of West Bengal and Others** passed on July 15, 2019 in **W.P.S.T. No. 24 of 2019** fortify us that where the appointment of the petitioner was delayed for no fault attributable to him and where he had been favoured with an appointment immediately after his selection for appointment he would have had the qualifying service, Rule 36 would be no bar to his getting such benefit. In those cases, the Coordinate Bench was pleased to hold in favour of the petitioner and held that the condonation of the deficient period of service could be made upon consideration and verification of the claims of delayed appointment even though there was no order of the learned tribunal directing appointment of the petitioner holding him, in effect, entitled to the appointment, that is to say, holding him entitled to appointment with a retrospective effect. This, therefore, is a better case on a higher pedestal and the respondents ought not to be rewarded for their own fault by holding that the petitioner is estopped from raising this question. Had the petitioner been appointed even on February 08, 2007, he would have certainly been entitled to the condonation of qualifying service since he would have put in a little more than 9 years and 6 months of qualifying service in his post and the deficiency would have been less than 6 months which even under the Rule 36 the Government could have condoned on conditions.

12. On behalf of the respondents, though a judgment in the case of **State of Bihar and Others—v—Akhouri Sachindra Nath and Others** reported in **1991 Supp. (1) SCC 334** was relied upon, the question involved in that matter was whether the inter-se seniority between direct recruits and those promoted retrospectively could have been so revised as would make the retrospective promotees senior to the direct recruits in the cadre. We have failed to appreciate how this case can come to the aid of the respondents or how it is a binding precedent for the proposition for which this matter has travelled to this Court.

13. Accordingly, we are not in a position to agree with the learned Tribunal that the petitioner was estopped from making this contention on the sole basis whereof the original application, being O.A. No. 1238 of 2016 was dismissed.

14. In the above view of the matter and since it does not appear that the learned Tribunal was pleased to apply its judicial mind to the matters of record, we are afraid that the decision-making process of the learned Tribunal is vitiated by such non-application of mind. Accordingly, the order impugned dated November 18, 2018 passed in O.A. No. 1238 of 2016 is set aside. There shall be a mandatory order directing the respondents to disburse the pension and all other retirement benefits to the petitioner on notional basis w.e.f. February 08, 2007 after condonation of the deficiency

in qualifying service within a period of 1 (one) month from the date of communication of this order.

15. Writ petition is allowed. There shall be no order as to costs.

(PROTIK PRAKASH BANERJEE, J.) **(DIPANKAR DATTA, J.)**

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :
The Hon'ble Justice Dipankar Datta
and
The Hon'ble Justice Protik Prakash Banerjee

FMA No. 857 of 2012
With
FMAT No. 1415 of 2007

Sri Srikrishna Kanta Singh
Vs.
Sri Parameswar Achutanan Nair & Ors.

For the Claimant/Applicant	:	Mr. Krishanu Banik, Adv.
For the Respondent No. 3/ Insurer	:	Mr. Asimesh Goswami, Adv.
Heard on	:	30.01.2018 & 01.02.2018
Judgment on	:	May 4, 2018

PROTIK PRAKASH BANERJEE, J.

1. Once upon a time, there was a Block Development Officer for Hura Block in the District of Purulia. He took a lift on the scooter of a man who resided within his block. He wanted to go to Lalpur College for an official function from Hura. While travelling to Lalpur from Hura, on the Purulia-Bankura Road, there was a collision between a trailer and the scooter. The trailer was travelling from Purulia side towards Hura. On the Purulia-Bankura road, which runs from West to East, Lalpur precedes Hura if one is travelling from Purulia. As a result, both the

scooter driver and the Block Development Officer suffered injuries. However, the injuries suffered by the Block Development Officer were more serious and resulted in amputation of both his legs, one from below the knee and one from above the knee. As a consequence, he was permanently disabled and had to acquire prosthetics. He claimed compensation of Rs.16 lakhs under Section 166 of the Motor Vehicles Act, 1988apart from obtaining an amount of Rs.25,000/- from the Insurance Company which had insured the trailer under Section 140 of the Act of 1988.

2. This claim application was numbered as MAC Case No.89 of 2000 before the Learned Judge, Motor Accident Cases Tribunal, at Purulia. The Learned Tribunal passed an award dated July 26, 2005 for Rs.7,50,000/- in favour of the claimant, partially allowing his application. However, the Learned Tribunal by the award apportioned the liability between the company which insured the trailer and the owner-cum-driver of the scooter at Rs.4,50,000/- (less the amount of Rs.25,000/- already paid under Section 140 of the Act of 1988) and Rs.3,00,000/- respectively.

3. Being aggrieved the claimant has appealed from the said award. From the memorandum of appeal it appears that the parties to the appeal are the Owner of the Trailer, who is respondent No. 1 and was the opposite party No. 1 in the claim; the Owner-cum-driver of the scooter, who is respondent No. 2 and was the added opposite party No. 1A in the claim; and of course, the insurance company which insured the Trailer, being the respondent No. 3, who was the opposite party No. 2 in the claim.

4. Mr. Banik, Learned Advocate appearing for the Appellant, has challenged the award passed by the Learned Tribunal on the grounds which may be summarized as follows: -

(i) The Appellant was entitled to more compensation than was awarded, on the basis of the law settled for such injuries as he suffered.

(ii) The Appellant was entitled to interest on the award from the date he filed the claim application but the Learned Tribunal granted no interest at all.

(iii) The driver of the scooter did not contribute to the accident. He was not negligent. He ought not to have been made liable.

(iv) The Learned Tribunal was not entitled to apportion the award between the joint tort-feasors and direct that payment be made to the Appellant by the joint tort-feasors in the proportion directed by it.

5. Mr. Banik has impeached the following finding of the Learned Tribunal: -

"Considering the facts and circumstances and materials on record I am convinced to hold that the applicant has become crippled and permanent disabled for ever and his permanent disability is 100% and he has been leading his life with the help of his artificial limbs and it is also admitted position that he has lost control over his movement and requires an assistance of an attendant no doubt are involves a recurring expenditure and his pain and loss of two limbs cannot be described in words nor his sufferings, frustration etc. and no money can obviously compensate for all these but even the court must have to undertake the exercise in discharge of his duty if only to compensate him to the extent of payment of money and within the laid down framework it is the duty of the court to award compensation and accordingly, for artificial limbs already fixed

and also for repairing and maintenance a sum of Rs.1,20,000/- may be awarded and for permanent disablement a sum of Rs.2,00,000/- (Rupees two lakhs) may be awarded and for pain and suffers a sum of Rs.2,00,00/- (Rupees Two Lakhs) may be awarded and for personal attendant a sum of Rs.1,20,000/- may be awarded and for his treatment and other purpose Rs.1,00,000/- (Rupees one lakh) may be awarded and Rs.10,000/- may be awarded for the travelling cost of the family members of the applicant. So at best Rs.7,50,000/- (Rupees Seven lakhs and fifty thousand) may be awarded in favour of the application for the loss of his two limbs which has been amputed due to the said accident.

But, the question is who shall have to pay that amount.

In this regard, the entire facts and circumstances and materials are considered and it is found that for the fault of the driver of the scooter the accident took place but on the road generally trailer covers greater portion of the pitch road. So, it is the duty of the driver of the trailer to pass through the pitch road very slowly but, at the same time it is fact that it is not possible for the driver at the relevant time of driving the trailer to keep watch about the tail end of the trailer at the time of proceeding to pitch road and in this case practically at the tail end of the trailer the scooter came into contact and two legs of the applicant was damaged but if actually the driver of the scooter was cautious in that case there was no chance of any accident. But, whatever it may be, considering the liability to some extent of the driver of the trailer the owner of the trailer and the O.P. Insurance company of the trailer are liable to pay some compensation for such accident and the owner of the scooter is also liable to pay some amount as would be awarded as compensation in favour of the applicant.

It is to be mentioned in this regard that determination of compensation in such cases would depend on the facts and circumstances of each and notwithstanding the element of sympathy involved with the accident victim and this court is also conscious of the fact that assessment of compensation in such cases had to be on objective standards and not based on any fanciful or whimsical calculations and practically there is no difficulty to make provision for recurring expenditure of attendance for which I am constrained to hold that applicant is entitled to a sum of Rs.7,50,000/- as estimated as per heads of loss of two limbs and both the owner of the trailer and O.P. Insurance Company of the trailer are bound to pay Rs.4,50,00/- and the balance amount would be paid by the owner of the scooter because the scooter was not insured at that time."

Thereafter, the Learned Tribunal made the deductions in respect of payment of the amount under Section 140 of the Act of 1988 and thus partially allowed the claim application for compensation.

6. No decision can be understood without considering the facts of the case and the course which the litigation has taken. The claim application and the somewhat contradictory evidence adduced by the Appellant himself show that the brief summary of the facts in paragraph 1 of this judgement is correct. The Appellant was a pillion rider on the motor cycle at the time when the collision occurred on November 2, 1999. He had claimed Rs.16 lakhs according to the schedule to his claim application and had also sought 12% interest and costs of the case.

7. However, initially the Appellant did not make any claim against the present respondent no. 2. The Appellant had initially made his claim

only against the owner of the trailer and the trailer's insurer. The case as argued before the Learned Tribunal, on the basis of the initial pleadings, comprised the claim application where only the present respondent no. 1 and the present respondent no. 3 were parties as stated above, in the separate cause title just above the prescribed Form COMP A, the written statement of the insurer and the evidence adduced by those persons. On that basis, the matter came to judgement on September 29, 2004. On such date the learned Tribunal however declined to give judgement but held that necessary parties had not been arrayed and in the interests of justice, instead of dismissing the claim, by an order no. 52 granted liberty to add those persons as parties.

8. The contents of Order No.52, dated September 29, 2004, are set out hereinbelow: -

"Today is fixed for delivery of judgement. Argument was heard at length on 4.8.2004 but after that deficit Court was paid on 10.09.2004 and then today is fixed for delivery of judgment.

But after proper scrutiny of the application v/s- 166 of MV Act and the evidence of the PW 1 and 2 it is found that driver and owner of the scooter and insurance company of the scooter is not made parties and considering the entire evidence on record and also the copy of the FIR it is found that for proper adjudication of this case and to fix up liabilities of the parties regarding accident the owner and driver of the said scooter and its insurance company are necessary parties but any how they are not made parties by the applicant and not only that driver of the said scooter also did not depose in this case or is not cited by the applicant as witness and as such for proper and legal adjudication of the case and also for fixing up liability of the parties. The drivers of the both the vehicles and its owners and insurance companies, the owner, driver and

insurance company of the scooter are necessary parties but they are not made parties and as such without passing judgment for the ends of justice applicant is given liability to add then as parties as they are necessary parties of this case to give them chance to contest and to determine nature of fault and liability of the drivers of both the vehicle owners and insurance companies of the vehicles. To 11.10.2004 for taking steps."

9. The Learned Tribunal, therefore, held that the joint tort-feasors were necessary parties for determination the fault and liability of both the vehicles involved in the accident. The Appellant did not challenge the order for such addition of party contemporaneously nor as a ground in the present memorandum of appeal. He allowed it to become final as between those parties. Instead, the Appellant took out an application on November 29, 2004 stated to be under Order 1 Rule 10 as also under Order 6 Rule 17 of the Code of Civil Procedure. By this, the Appellant sought to add only Samiran Mishra, the owner-cum-driver of the scooter, one of the persons held to be a necessary party by the Learned Tribunal, as a new opposite party to his claim application. This was allowed by an Order No.56 dated January 4, 2005 passed by the Learned Tribunal. As the Learned Tribunal has recorded in the impugned award, the scooter was not even insured as on the date of accident. Yet the respondent No. 2 herein drove it on a road, carrying a pillion rider. Therefore, the Appellant cannot now be heard to contend that the respondent No. 2 herein could not have been added as the opposite party No. 1A in the claim application. Consequently, he cannot now be heard to say that the Learned Tribunal cannot give logical effect to the addition of the owner-cum-driver of the scooter a party. The Appellant is estopped by judgement, records and his own conduct from contending otherwise. Such logical consequence could also involve reaching a finding that the

respondent No. 2 was partially at fault for the accident. In fact, the Learned Tribunal so held.

10. The Learned Tribunal issued a notice to both the Respondent No.3 herein and to the added Respondent No.2 to show cause against the application claiming compensation, though as appears from the above history of the case, at different times. The respondent No. 3 sought and obtained leave under Section 170 of the Motor Vehicles Act, 1988. In its "written statement", the respondent No. 3, apart from the general denials, challenged the maintainability of the claim application as originally filed, for non-joinder of necessary parties, which was dealt with as stated above. However, in cause shown by the respondent No. 2 (the added opposite party No.1A), some very significant and material allegations were made, some of them, against the interest of the said respondent No. 2. These were verified as being true to the knowledge of the said respondent No. 2. Two of these paragraphs are extracted below: -

"1. That at the relevant point of time the petitioner was the B.D.O. of the Hura Block Development Office.

2. That, on the date of Accident i.e. 02-11-99 this Opp. Party was holding a Learner Licence in respect of a light motor vehicle and that he was on the road coming from Kashipur side towards Lalpur More, when the petitioner stop the vehicle of this opposite party and request for a lift to go to Lalpur More on the said vehicle. This Opp. Party requested the petitioner that he should not take lift with him on the vehicle, as the Opp. Party was still holding Learner Licence. But the petitioner did not listen the request of the Opp. Party and took his sit on the rear side, when under compulsion and also considering official status of the petitioner, the Opp. Party, the Opp. Party was proceeding with the

scooter towards Lalpur More, and as such as the scooter reach the Junction point, Nimtala More, Hura, the Trailer all on a sudden with great force knock the rear portion of the scooter, resulting grievous injuries on both the legs of the petitioner. The Opp. Party also sustained grievous injuries and the scooter was also damaged badly, owing to the accident which had occurred, owing to the rash and negligent driving of the trailer."

11. It is the Appellant's case before this Court that the fact that the added opposite did not have a valid licence to carry a passenger on his scooter or that he only had a learner's licence, or indeed, anything alleged by him in the cause shown as referred to above, could not in law be held to have been established. The Appellant submitted this because, on the face of the records, the said Respondent No.2 had not been called as witness by the respondent No.3 or examined by the Learned Tribunal, and according to Mr. Banik, in the eye of law, there was no "evidence" in support of the allegations contained in the cause shown. He went on to argue, that the Learned Tribunal erred in law and wholly misconstrued the law applicable to a case where there are joint tort-feasors and composite liability is contended. The Appellant submitted that it was the absolute discretion of the Appellant (qua claimant) to determine from which of the joint tort feasors it would claim compensation, and once the tort was established, and circumstances were shown to exist on the face of the accident which made it a case of composite negligence, it was no longer open to the Learned Tribunal to force the Appellant to add anyone other than the owner and insurer of the offending vehicle as a party or to apportion the compensation between the insurer of the offending vehicle and the owner cum driver of the other vehicle involved in the accident, being the scooter on which the victim was a passenger, though the

scooter was not driven by someone having a valid licence to carry a passenger, but only a learner's licence.

12. So far as the second aspect of the submissions are concerned, I am afraid that in view of the Appellant never having challenged Order No.52 dated September 29, 2004 and having, in fact, acted upon it as evinced from his own conduct, culminating in the passing of the Order No.56 dated January 4, 2005, and in view of what has been held in paragraphs 7, 8 and 9 of this Judgement, it is no longer open to the Appellant to contend that the Learned Tribunal acted erroneously in adding the opposite party No. 1A (the respondent No. 2 herein) as a party to the proceedings and thereafter proceeding to the consequence which to the Learned Tribunal, logically followed such act. The Appellant is estopped by judgement, the records of the case and his own conduct. Once the Appellant acted upon Order No.52 dated September 29, 2004 without even taking it as a ground for appeal before this Court, he cannot be heard to say that the respondent No. 2 was not a necessary party as joint tort-feasor. If indeed he was convinced that he had the right to claim compensation from any of the joint tort-feasors and he did not want to include an admitted wrong-doer or seek compensation from such person and run the risk of having such an award passed, he ought to have challenged Order No.52 dated September 29, 2004 instead of voluntarily acting to give effect to it.

13. The respondent No. 2 never appealed from the award nor in fact, did he thereafter come forward to contest the case. He accepted his liability as apportioned by the Learned Tribunal. Now, the Appellant has challenged the award but there too, the Appellant has been guilty of a level of mendaciousness which I can only describe as an attempt to

reopen that which has achieved finality as against the respondent No. 2 in a manner unknown to law.

14. The Appellant by the rules of this Court and also the general principles of law relating to preferring a Memorandum of Appeal against an award passed in a case under Section 166 of the Act of 1988 was required to implead as parties everyone who was before the Learned Tribunal in the category of an opposite party. He so did, as described in paragraph 3 of this judgement. However, thereafter, as far back as on May 17, 2012 the Appellant abandoned his appeal as against the respondents No.1 and 2, and the appeal was dismissed as against them on May 17, 2012. By this strategy the Appellant hoped to ensure that the award could not be altered to their prejudice as against them nor sent back on remand.

15. However, all that this really ensured, is that the respondent No. 2 could not be heard to say anything against the proportion of the amount awarded against him and the fault for which he was held to be liable by the Learned Tribunal as between the parties hereto, without laying down a general principle of law.

16. If on the other hand, as prayed for by the Appellant, the award is modified, by making the respondent No. 3 solely liable for the accident then it would amount to modifying the award at the instance of a person who is not aggrieved by it – for after all, how could the victim be aggrieved with the finding the scooter and the trailer and their drivers were both at fault for the accident? Especially when, the owner-cum-driver of the scooter has accepted that he was partially at fault? After all, it is nobody's case that because of the fault of both these vehicles and their drivers, only part of the compensation awarded will be paid to the

victim – all that has been done is apportionment of the liability inter se these two tort-feasors.

17. Any other interpretation will allow a person who has not challenged the award to the extent that it affects him, to ride piggy-back on the victim and get off scot free when he in law, would not be able to do so otherwise. It may be true that the victim/Appellant piggy-backed on the respondent No. 2's scooter, but that cannot allow the reverse to happen at the appellate stage when the respondent No. 3 has not preferred any appeal.

18. So, I hold that the Appellant cannot be heard to say that he is aggrieved by the apportionment of the fault and liability as between the two joint-feasors who were before the Learned Tribunal. To the extent of the finding of the Learned Tribunal as to the liability of the respondent No. 2, the appeal fails.

19. Now we come to the first part of the submissions of the Appellant as to whether there was any valid material before the Learned Tribunal regarding the Added opposite party (respondent No. 2) not having a valid license to carry a passenger on his scooter, which could be relied upon in a proceeding under Section 166 of the Act of 1988.

20. The submissions made on this count by Mr. Banik as summarized in paragraph 11 of this judgement are perhaps irrefutable if the proceedings from which this appeal arises were adversarial in nature. Adversarial action requires that a party be made to adhere to his pleadings, and any evidence adduced which is beyond his pleadings ought not to be looked into. The pleading must be specific and not general or evasive. There must be a general denial, a specific denial and an assertion of a fact which states the version of the adversary pleading

in opposition to the claimant. It also requires that a party must adduce evidence to establish his pleadings in denial of the claimant's claim. Finally, it requires that the adversary must put so much of his case to the witness of the claimant or the claimant himself where he takes the stand, so as to give notice to the claimant or his witness to controvert it. All these are done so that the claimant, in the adversarial litigation, has sufficient chance to controvert the evidence led by his adversary and where the adversary has led evidence, to ensure that the claimant gets a chance to cross examine the witnesses of the adversary.

21. If any authority is required for the proposition that the adversary must put so much of his case to the claimant's witnesses by cross examination that he has actual notice of the positive case which is going to be led against him, and how a fact is held to be proved before a civil court in adversarial proceedings, I rely upon the cases of **A.E.G. Carapiet—v—A.Y. Derderian** reported in **AIR 1961 Calcutta 359** at **paragraph 10**and **Dr. N.G. Dastane—v—Mrs. S. Dastane** reported in **AIR 1975 SC 1534** at **paragraphs 24 and 25**.

22. However, that brings me to the overwhelming question. Is a proceeding under Section 166 of the Motor Vehicles Act, 1988 an adversarial proceeding? To answer this, I am afraid, I will have to take eternity by the hand and pause while the Court looks at the provisions of the Motor Vehicles Act, 1988, the West Bengal Motor Vehicles Rules, 1989 and some authoritative precedents.

23. The relevant provisions of the statute and the statutory rules, which are required for understanding the mode in which the learned Tribunal proceeds or is required to proceed in these cases, which are dealt with inquisitorially and not in the adversarial form, are set out hereinbelow: -

Section 166. Application for compensation. – (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made-

By the person who has sustained the injury; or

By the owner of the property; or

Where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

By any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

[(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.]

[(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act.].

Section 168. Award of the Claims Tribunal.- (1) On receipt of an application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:

Provided that where such application makes a claim for compensation under section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X.

(2) The claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty

days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct.

Section 169. Procedure and powers of Claims Tribunals.- (1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall be all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.

Section 170. Impleading insurer in certain cases.- Where in the course of any inquiry, the Claims Tribunal is satisfied that-

There is collusion between the person making the claim and the person against whom the claim is made, or

The person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that the

insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

Rule 329. Application for compensation.- (1) An application for compensation arising out of accident of the nature specified in sub-section (1) of section 165 of the Act, shall be made by a person specified in sub-section (1) of section 166 of the Act to the Claims Tribunal having jurisdiction over the area in which the accident occurred and such application shall be in Form COMP.A to these rules and shall contain the particulars specified in that Form.

(2) Every such application shall be sent to the Claims Tribunal or to the Chairman in case the Tribunal consists of more than one member, by registered post or may be presented to such member of the staff of the Tribunal as the Tribunal or, the Chairman, as the case may be, may authorize for the purpose and if so sent or presented, shall, unless the Tribunal or Chairman otherwise directs be made in duplicate and shall be signed by the applicant.

(3) There shall be appended to every such application the following documents, namely, (i) Medical certificate in Form COMP. B or Post-mortem Report, or Death Certificate; and (ii) First information Report in respect of the accident.

(4) Officer-in-charge of the police station shall, on demand by a person, who wishes to make an application for compensation and who is involved in an accident arising out of the use of a motor vehicle or the legal

successor of the deceased shall furnish to him within such period as specified by the Central government under section 160 of the Act, particulars of the vehicle involved in accident.

Rule 330. Notwithstanding anything contained in rule 329 of these rules every application for a claim under section 140 of the Act, shall be filed before the Claims Tribunal in triplicate and shall be signed by the applicant and the following documents be appended to every such application-

a report containing description of the accident;

First Information Report;

Injury Certificate or in case of death, Post-mortem Report or Death Certificate; and

A certificate regarding ownership and Insurance particulars of vehicle involved in the accident from the Regional Transport Officer in Form (COMP.C), issued free of charge.

Rule 334. Notice to the parties involved.- (1) If the application is not dismissed under rule 333 of these rules, the Claims Tribunal shall, on an application made to it by the applicant, send to the owner or the driver of the vehicle or from whom the applicant claims relief and to the insurer a copy of the application, together with the notice of the date on which it will dispose of the application and may call upon the parties to produce on that date any evidence which they wish to tender.

(2) Where the applicant makes a claim for compensation under section 140 of the Act, the Claims Tribunal shall give notice to the owner and Insurer if any, of the vehicle involved in the accident directing them to appear on the date not later than 10 (ten) days from the date of issue of such notice. The date so fixed for such appearance shall also be not later than fifteen days from the receipt of the claim application filed by the claimant. The Claims Tribunal shall state in such notice that in case they fail to appear on such appointed date, the Tribunal shall proceed ex parte on the presumption that they have no contention to make against the award of compensation.

Rule 335. Appearance and examination of parties.- (1) The opposite party may, and if so required by the Claims Tribunal, shall, at or before the first hearing or within such time as the Claims Tribunal may permit, file a written statement dealing with the claim raised in the application and any such written statement shall form part of the record.

(2) If the opposite party contests the claim, the Claims Tribunal may, and if no written statement has been filed, shall proceed to examine him upon the claim and shall reduce the result of examination into writing.

Rule 336. Summons to witness.- If an application is presented by any party to the proceeding for citation of witnesses, the Claims Tribunal shall, on payment of the expenses involved, if any, issue summons for the appearance of such witnesses, unless it considers that their appearance is not necessary for a just decision of the case.

Rule 337. (1) Fees for process.—The fees to be taken for any process issued by the Claims Tribunal shall be in the scale as may be determined

by the Tribunal from time to time, but shall not exceed those taken for a similar process by the City Civil Court in 117[Kolkata] and by the District Courts elsewhere.

(2) Appearance of legal practitioner.—The Claims Tribunal may, in its discretion, allows any party to appear before it through a legal practitioner.

(3) Local inspection.—

(a) The Claims Tribunal may, at any time during the course of an enquiry before it visit the site at which the accident occurred for the purpose of making a local inspection or examining any persons likely to be able to give information relevant to the proceeding.

(b) Any party or the representative of any party may accompany the Claims Tribunal for a local inspection.

(c) The Claims Tribunal after making a local inspection shall note briefly in a memorandum any facts observed, and such memorandum shall form part of the record of enquiry.

(d) The memorandum shall be made available to any party who desires to see the same, and shall supply any party with a copy thereof, if applied for and the fees therefore are paid.

(4) Power of summary examination.—(a) The Claims Tribunal, during a local inspection or at any other time, save at a formal hearing of a case pending before it, may examine summarily any person likely to be able to give information relating to such case, whether such person has been or it is to be called as a witness in the case or not, and whether any or all of the parties are present or not.

(b) No oath shall be administered to a person examined under clause (a).

(5) Method of recording evidence.—The Claims Tribunal shall, as examination of witnesses proceeds, make a brief memorandum of the substance of the evidence of each witness and such memorandum shall be written and signed by the members of the Claims Tribunal and shall form part of the record :

Provided that if any member or the Chairman is prevented from making such memorandum, he shall record the reason of his inability to do so and shall cause such memorandum to be made in writing from his dictation and shall sign the same and such memorandum shall form part of the record :

Provided further that the evidence of any medical witness shall be taken down, as nearly as may be, word for word.

(6) Adjournment of hearing.—Normally the hearing of an application shall continue from day to day. If the Claims Tribunal finds that an application cannot be disposed of at one hearing, it shall record the reasons which necessitate the adjournment and also inform the parties present of the date of adjournment of hearing.

(7) Expert.—(a) The Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation (other than claims under section 140 of the Act), choose not more than two persons having technical or special knowledge with respect to any matter before the Tribunal for the purpose of assisting the Tribunal in the holding of the enquiry.

(b) The expert shall perform such functions as the Tribunal may specify.

(c) The remuneration, if any, to be paid to the expert shall, in every case, be determined by the Tribunal.

(8) Framing of issues.—After considering any written statement, the evidence of the witnesses examined and the result of any local inspection, the Claims Tribunal shall proceed to frame issues upon which the right decision of the case appears to depend.

(9) Determination of issues.—After framing the issues the Claims Tribunal shall proceed to record evidence thereon which each party may desire to produce.

(10) Diary.—The Claims Tribunal shall maintain a brief diary of the proceedings.

(11) Obtaining of information and documents necessary for awarding compensation under section 140 of the Act.—The Claims Tribunal shall obtain whatever supplementary information and documents, which may be found necessary, from the police, medical and other authorities and proceed to award the claim whether the parties who were given notice, appear or not on the appointed date.

The Form, COMP. A. to the Rules referred to above, is set out hereinbelow: -

"**FORM COMP. A**

[See rule 329 of the West Bengal Motor Vehicles Rules, 1989]

An Application for Compensation

To

The Motor Accidents Claims Tribunal

.....

I.....son/daughter/wife/widow of.....residing at.....having been injured in motor vehicle accident, hereby apply for the grant of compensation for the injury sustained. Necessary particulars in respect of the injury, vehicle, etc. are given below:

I..... son/daughter/wife/widow of .....residing at .....hereby apply, as a legal representative/agent, for the grant of compensation on account of death/injury sustained by Shri/Kumari/Shrimati.....who died/was injured in a motor vehicle accident.

Necessary particulars in respect of the deceased/injury, the vehicle, etc. are given below:

Name and father's name of the person injured/dead/(Husband's name in the case of married woman and widow).....

Full address of the person injured/dead.....

Age of the person injured/dead.....

Occupation of the person injured/dead.....

Name and address of the Employer of the deceased, if any.....

Monthly income of the person injured/dead.....

Does the person in respect of which compensation is claimed, pay income tax? If so, state the amount of income-tax (to be supported by Documentary evidence).....

Place, date and time of accident.....

Name and address of Police Station in whose jurisdiction the accident took place or was registered.....

Was the person in respect of whom compensation is claimed travelling by the vehicle involved in accident? If so, give the names of places of starting of journey and destination.....

Nature of injury/injuries sustained, and continuing effect, if any, of the injury/injuries.....

Name and address of the Medical Officer, if any, who attended on the injured/dead.....

Period of treatment and expenditure, if any incurred thereon (to be supported by documentary evidence).....

Nature of the injury and whether it caused permanent disablement or not.....

Registration number and the type of the vehicle involved in accident.....

Name and address of the owner of the vehicle.....

Name, Policy, Number insurance particulars and address of the Insurer of the vehicle.....

Has any claim been lodged with the owner/insurer ? If so, with what result.....

Name and address of the applicant.....

Relationship with the deceased.....

Title to the property of the deceased.....

Amount of the compensation claimed.....

Any other information that may be necessary or helpful in the disposal of the claim.....

I wish to claim compensation under section 140 of the motor Vehicles Act, 1988 only.

I wish to make a claim for compensation under the said Act and also in pursuance of the right on the principle of fault.

I.....solemnly declare that the particulars given above are true and correct to the best of my knowledge and belief and that no claim in respect of the said accident has been filed or is pending before any other Court.

Signature or thumb-Impression of the applicant.

[See section 213(3) of the Motor Vehicles Act, 1988]

Dated....."

24. Thus, we see that while the statute speaks of parties, the statutory form in which compensation is to be sought in cases under Section 166 of the Act of 1988, makes no provision for arraying anyone as a party. In fact, the statutory scheme treats the Learned Tribunal as an authority to hold an inquiry into what would be the just compensation, which would be payable, depending upon the nature of the case, by the Owner of the offending vehicle, or if there be more than one such owner and/or vehicle, the owners, the driver or drivers concerned, and the respective insurance companies. All that would be required to be stated are the particulars of those persons, as also the of the seeker of compensation, the nature of the injury (in case of injury), the treatment (including

mitigation) and the facts of the case, and thereafter, the Learned Tribunal is not limited to examining those persons named in the said Form, COMP. A, but can examine any person likely to be able to give information relating to such case, regardless of whether he has been called as a witness or whether any or all of the parties are present or not.

25. The duty to "implead" the insurer, id est, to make it a party, only arises when for reasons to be recorded in writing, the Learned Tribunal records its satisfaction about either of the two clauses in Section 170, (a) or (b), and in such case the Learned Tribunal is required to direct that such insurer be made a party to the proceeding. It is the only person which is required to be "made" a party on such a direction being issued in such a manner. It does not become a party merely because he is named in the Form COMP. A. It becomes so on a specific direction by the Learned Tribunal.

26. So far as those persons who are put on notice under Rule 334, if they are treated as "Opposite parties" they may be required by the Tribunal to file a written statement, and when they are so required, they "shall" file a written statement, which will at once form a part of the record. When such a person files a written statement and contests the claim, there is no mandate on the Learned Tribunal to examine him. It is entirely the discretion of the Learned Tribunal whether to examine such person who has filed a written statement on being required to do so, contesting the claim, pursuant to a notice, or whether not to so examine him. Either way, the written statement contesting the claim shall form a part of the record of the Learned Tribunal, and the scheme of the statute and the rules make it imperative for the Learned Tribunal to nonetheless inquire into the question of what is "just compensation" and who or who all of the persons involved, is/are required to pay it and even in what

proportion. This is the only way to read the Rules of 1989 harmonizing the rules with the provisions of the statute.

27. It is only when the opposite party does not file a written statement, that the Learned Tribunal has a duty to examine him – denoted by the word "shall" – and this makes the power and jurisdiction exercised by the Learned Tribunal something more than adversarial. I notice with great emphasis the words "may" and "Shall" used to distinguish the nature of the Learned Tribunal's duty depending upon whether written statement has been filed or not, in this connection. In any adversarial litigation, where a person contesting a claim does not file a written statement, or a counter to the claim, he cannot adduce evidence in support of any case not made out in the claim. Neither can he deny anything written in the claim. This is the basis of the argument of Mr. Banik which required this lengthy analysis of the provisions of the statute and the statutory rules to find out the legislative intention and the statutory scheme of the inquiry. However, as shall appear from what is determined hereinafter, the powers of the special tribunal under the Act of 1988 is not limited to only recording denials.

28. The fact that the tribunals established under Section 165 of the Act of 1988 are manned by the members of the subordinate judiciary does not change it into a Court rather than a statutory tribunal discharging statutory functions of holding an inquiry into just compensation and who is required to pay it. Similarly, the provisions in Rule 342 and Rule 343 making certain provisions of the Code of Civil Procedure directly applicable to the proceedings before the Learned Tribunal, and where there is no provision made for a certain thing in either the Act or the Rules, making the provisions of the Code applicable thereto, will not change the Learned Tribunal into a civil court.

29. This becomes clearer when the provisions of Section 169 of the Act of 1988 are considered. Sub-section (2) makes it amply clear that the Tribunal shall have all the powers of a civil court for specified and other purposes as may be prescribed and shall only be "deemed to be a civil court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure", but not a "court" for the purposes of the Code of Civil Procedure. That is why it was required to specify the provisions under the Code of Civil Procedure which apply to proceedings before such Tribunal even while constituting it as a special tribunal. The specified and other purposes, are clearly the determination of just compensation and who shall be liable to pay it.

30. Therefore, it is evident that a "Claims Tribunal" established under Section 165 of the Motor Vehicles Act, 1988 is not a civil court though it has many of the powers of a civil court and many of the provisions of the Code of Civil Procedure apply to it and this Court holds accordingly.

31. Once the statutory scheme read with the rules made to give effect to that scheme are considered, in the light of my above finding it is evident that the mode of proceeding before this special tribunal whose function is to inquire into and "adjudicate claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both", is actually to hold an inquiry into the claim and make an award determining the amount of compensation which appears to it to be just and specify the person or persons to whom compensation shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be.

32. Once this conclusion is reached, it is irresistible that strict rules of adversarial action, with which the Learned Members of such a Tribunal are very familiar, due to the qualifications prescribed in Section 165(3) of the Act of 1988, would not apply to such a Tribunal and it has been empowered to act inquisitorially unless expressly forbidden. Once it is accepted that the scheme of the statute and the rules, for the purposes of determining compensation, fixation of liability, and determining who is to pay what to whom, envisages an inquisitorial procedure, the requirements of adversarial proceedings take a back-seat, in the interests of the quest for truth.

33. Therefore, the Learned Tribunal examining an opposite party who has filed his written statement, is not limited under Rule 335(2) of the Rules of 1989 to recording denials by such an opposite party. On the other hand, if he has not filed a written statement, where adversarial litigation would have allowed only the recording of his statements without there being any power to rely upon them in the absence of pleadings, the duty encompasses taking into note what he has said. The phrase "proceed to examine him upon the claim" when considered with the phrase "reduce the result of the examination into writing" in the context of the Motor Vehicles Act, 1988, indicate that whatever such an opposite party says as a result of the examination becomes part of the record, and thus is required to be considered by the Learned Tribunal. Similarly, whatever the opposite party has said in the written statement, and has verified as being true to his knowledge, when it goes against his own interest, can be treated as an admission so far as he is concerned, without there being any necessity for the said opposite party to be examined, so long as the claimant is not denied compensation from the said opposite party without giving the claimant an opportunity to cross examine the said opposite party.

34. I draw confidence from the Judgement of **Mayur Arora—v—Amit @Pange and Others**, reported i**n (2011) 1 TAC 78** where the Hon'ble High Court of Delhi, while interpreting the above statutory provisions and the corresponding and substantially in pari materia provisions of the Motor Vehicles Rules of Delhi, in the light of the judgment of the Hon'ble Supreme Court in the case of **Jai Prakash—v—National Insurance Company** reported in **(2010) 2 SCC 607** has been pleased to hold as follows: -

"The aforesaid directions to the Tribunals are without prejudice to the discretion of each Tribunal to follow such summary procedure as it deems fit as provided under Section 169 of the Act. Many Tribunals instead of holding an inquiry into the claim by following suitable summary procedure, as mandated by Sections 168 and 169 of the Act, tend to conduct motor accident cases like regular civil suits. This should be avoided. The Tribunal shall take an active role in deciding and expeditious disposal of the applications for compensation and make effective use of Section 165 of the Evidence Act, 1872, to determine the just compensation."

35. However, it should be noted that the said portion of the judgement in the case of **Mayur Arora** (*supra*) was a direct quotation from the case of **Jai Prakash** (*supra*) where the Hon'ble Supreme Court was concerned with accidents in respect of which proceedings were started under Sections 158(6) and 166(4) of the Act of 1988 and the directions issued to the Learned Tribunals were in respect of proceedings thereunder, which were stated to be without prejudice to the duty of the Learned Tribunal in other cases, where too the duty to hold an inquiry instead of proceeding as if it was a regular civil suit, was mandated by the Hon'ble Supreme Court.

36. Again, one of the propositions of law laid down by the Hon'ble Supreme Court in the case of **United India Insurance Co. Ltd—v—Shila Datta**, reported in **2011 ACJ 2729 (SC)** is that

"***Though the Tribunal adjudicates a claim and determines the compensation it does not do so as in an adversarial litigation***". (emphasis supplied).

These findings are of immense importance to the case at hand, as shall appear from the records of the case brought before this Court, and the facts apparent therefrom and the submissions made.

37. In the instant case, the claimant being the Appellant has not been denied any part of the total compensation awarded to him on the ground of any admission made by the opposite party No. 1A who has not been examined by the Learned Tribunal, nor cross-examined by the Appellant. The respondent No. 2 (opposite party No. 1A) has also not disputed his liability for the accident.

38. Therefore, in the light of the provisions of the statute and the statutory rules and their analysis and the discussion considering the interpretation of these provisions to arrive at the true statutory scheme intended by the legislature, as apparent from paragraphs 22 to 37 of this judgement, it is clear that on receipt of a notice to show cause, not just the owner of the offending vehicle and its insurer, but any opposite party in the case before the Learned Tribunal, if so required by the Learned Tribunal shall file a written statement under Rule 335(1) of the said Rules of 1989 *which shall form a part of the record.* Again, under Rule 335(2) where written statement has been filed, examination of the party is not mandatory but discretionary.

39. Once I have held, as I have done in paragraphs 22 to 36 above, that the procedure before the Learned Tribunal, according to the statutory scheme, is inquisitorial and not adversarial, and when admittedly the Learned Tribunal held the added opposite party No. 1A to be a necessary party and accepting the said position, the Appellant applied for addition of the opposite party No. 1A as a party which was allowed, it is no longer open to the Appellant to contend that the filing of the written statement by the opposite party No. 1A (respondent No. 2 herein) was without jurisdiction. Once the written statement is held to have been accepted by the Learned Tribunal within its jurisdiction, it has become part of the records of the case, even without examination by the Learned Tribunal or without the opposite party No. 1A deposing or adducing evidence and without cross-examination by the Appellant.

40. Once the proceedings have been held, in such circumstances, to be inquisitorial the Learned Tribunal cannot be prohibited from looking into that which has become part of the records under statutory rules. This power to hold inquiry would allow the Learned Tribunal to hold anyone whosoever, on the basis of the materials on record before it at any time before the award is passed, as liable, provided such person is first given an opportunity of being heard. The opposite party No. 1A was given an opportunity of being heard and his verified statement was accepted as true. When exercising inquisitorial power, the Learned Tribunal can take the entirety of the factual circumstances before it into account and so long as it does not take a view which is not a reasonable one in the circumstances, this Court, even in appeal, will be reluctant to interfere.

41. There is nothing in the law relating to procedure, whether inquisitorial or adversarial, which prevents the Learned Tribunal from accepting and proceeding to hold a person who has admitted his fault in

carrying a pillion rider in such circumstances as set out above, to be liable for the accident, at least partially, and from proceeding against such an opposite party on the basis of an admission made by him against his own interest. The apportionment would not affect the joint and several liability of the joint tort-feasors towards the Appellant. It does not affect the award in favour of the Appellant. It only prejudices the opposite party No. 1A since the respondent No. 3 would be entitled to recover whatever proportion of the amount the opposite party No. 1A is held liable to pay. He had a chance to contest the proceedings by adducing evidence, after filing what I can only hold to be a written statement in the light of the above discussion including paragraphs 22 to 40 hereinabove, and he chose not to do so or explain his admission. He has not preferred any appeal from the said award. Therefore, it is an established fact on the basis of such admission that the opposite party No. 1A (respondent No. 2) was driving a scooter with only a learner's licence, while carrying a pillion rider (passenger) who did not have any valid licence to drive a scooter, to the knowledge of the opposite party No. 1A. Therefore, he was partially liable for the accident and to the extent of his liability as apportioned by the Learned Tribunal, the insurance company (respondent No. 3) would have the right to recover the amount paid by it from the respondent No. 2.

42. Thus, the first set of submissions of the Appellant as in paragraph 11, on the count of admissibility of the verified statement made by the respondent No. 2 are answered accordingly by holding them admissible and capable of being relied upon, in the circumstances aforesaid, as against the respondent No. 2, in the proceedings which have been held to be inquisitorial.

43. Once these submissions relating to holding the respondent No. 2 to be partially liable for the accident are held to be unassailable, which is the effect of the discussion and analysis so far, and as has been held at paragraph 18 of this Judgement, the questions of law and fact attempted to be raised by Mr. Banik become irrelevant and are not required to be decided, though for the sake of completeness, I shall refer to the precedents he has cited before concluding with the case and I shall refer to the questions of fact, raised very briefly by him now.

44. Mr. Banik essentially submitted that when there was evidence adduced by the Appellant through three eyewitnesses, all unshaken in cross examination, that the accident occurred due to the rash and negligent driving of the trailer, it was not open to the Learned Tribunal to hold that the accident was caused due to the fault or partly due to the fault of the respondent No. 2 herein.

45. As I will show, the evidence of the three, so-called eye-witnesses are not the same and they contradict each other. Let us take the evidence of each of these in turn.

46. On the point of how the accident occurred, the Appellant, being the victim, examined himself as PW 1. He had this to say: -

In the deposition, the Victim had alleged that “On that date about 11.30 am I was going to Lalpur to attend an official duty at Lalpur College riding on the pillion seat of scooter. We were proceeding towards Purulia and a trailer bearing No. WB-15-1605 and dashed as a result I sustained crashed injury of my both legs. My elbow bones also fractured, my finger ligaments who are also damaged. I also sustained injuries on my other parts on my body. After sustaining injury I was removed BPHC, Hura from there I was removed at Purulia Sadar Hospital, and thereafter I was

shifted to Tata Main Hospital, Tata Nagar, Jamshedpur. My both legs were amputed (sic) there, one above knee, left leg and the right leg was amputed (sic) under the knee."

In the cross examination, the Victim as PW1 alleged, on the other hand, 'I was going in a scooter of one Mishra while the accident took place. Mr. Mishra was driving the scooter. In case of any on-rushing vehicle the pillion rider can see the same though he safe at the back of the driver. The place where the accident took place was the junction of three roads. **The scooter was running on the left side of the road. The trailer in question was also running on the left side of the road. The road proceeds from Purulia to Hura side from west to east.** Many persons of the locality saw the incident." (Emphasis supplied)

So, it is the specific case of the PW 1 (victim himself) that the scooter and the trailer were both running on the left side of the road (from his point of view) which ran from West to East from Purulia to Hura

47. On the point of how the accident occurred, the PW 2 had this to say: -

This man claimed to be a sweetmeat shop owner at Hura Block More, which is also known as "Nimtala Ghat More" again within the jurisdiction of the victim who was the Block Development Officer, Hura. His case in the deposition is that "I know the petitioner of this case. He met with an accident on 2.11.99 at about 11.30 am on Purulia—Bankura Road at Nimtala More. I saw the incident on my own eyes. While the petitioner was travelling in a scooter and was proceeding from Hura to Lalpur side on the way he met with an accident. A trailer was proceeding from

Lalpur to Hura dashed the scooter being the number WB15/1605. The trailer was running at a high speed. **The trailer dashed the scooter on the right hand side of the road**. Owing to such accident the driver of the scooter fell on the earth and pillion rider Krishnakanta sustained serious injuries due to such accident.". (emphasis supplied).

In the cross examination, the said PW2 stated "I have come to court without receiving any summons from court. The petitioner himself asked me to depose in this case. Samiran Mishra was driving the scooter at that time. Nimtala More is the junction of four roads. My shop is situated on Hura-Kashipur Road, in a corner place. At the time of accident many customers were present in my shop. **The scooter was proceeding from east to west. The Trailer was proceeding from western side to the eastern side.** While I came out from my shop the petitioner was lying on the road in injured condition." (emphasis supplied)

48. The PW 3, one Ashok Kumar Kundu, had this to say about how the accident occurred, in his cross examination: -

"At the time of accident the petitioner was B.D.O. at Hura Block Office, and I got acquaintance with him since his joining as B.D.O. On the relevant date of accident I was at Neemtala More. I cannot name the person who was driving the scooter but he is a resident of Lalpur which is about 2 K.M.S away from Hura. At Neemtala More three roads meet. One road stretches to Kashipur and another road leading from Bankura to Hura. **The scooter was approaching from Bankura to Purulia. I found the scooter when it just crossed the Neemtala More. The trailer was proceeding from Purulia to Bankura. Purulia – Bankura road stretches West-East direction. The scooter was on the left side of the road i.e. on the southern side of the road. The trailer was a**

big vehicle. The breadth of the Hura-Road is about 18' in width at the accident site. I found the trailer was approaching at a high speed and dashed against the scooter. The driver of the trailer moved the vehicle to the right side and finally dashed against the scooter i.e. on the southern side of the road the trailer dashed the scooter. Then the driver as well as the person who was on the pillion fell on the road. The trailer stopped about 15 feet away from the accident site, both of them removed to Hura P.H.C. I did not find any mark on the road for applying of brake by the driver of the trailer. I was about 40/50 cubits away from the accident site and about 50 cubit away from Neemtala More".

49. On the above basis, Mr. Banik contended that by the principles of res ipsa loquitur, it was clear that the accident on the basis of proven facts, was wholly the fault of the trailer and its driver.

50. However, Mr. Asimesh Goswami, appearing for the respondent No. 3, Relying inter alia upon the evidence adduced by the Appellant, through himself and his witnesses, and the cross examination, pointed out (as extracted in paragraphs 46, 47 and 48 above) that on the face of the said evidence there was a contradiction since while it was an admitted position that the road from Purulia to Hura runs from west to east, and the victim himself as PW1 admitted that both the scooter and the trailer were on the left side of the said road, and the trailer dashed the scooter while travelling thus, yet strangely the PW 2 and the PW 3 maintained that the driver of the trailer moved the trailer to the right and dashed the scooter, that is, on the southern side of the road. The road was from west to east. The left side could not therefore be the southern side. The trailer and the scooter were stated by the victim to be travelling on the same side of the road, whereas another alleged eyewitness made

out a case that they were travelling towards each other from the opposite direction and thereafter the trailer moved to the right to cause an accident after it had crossed the scooter. All three allege that they are eyewitnesses. The versions of the said three witnesses differ materially from each other and more importantly, the evidence of the injured Appellant differs from that of the other two alleged eyewitnesses in respect of the material particulars and circumstances of how the "thing" happened. Mr. Goswami contends that when the Appellant has made out a case that "the thing speaks for itself", if the witnesses cannot agree how the thing happened, it cannot be said that the circumstances of the happening of the thing have been established. On this basis he submits that either the witnesses are to be held to be unworthy of credit, or it ought to be held by this Court that the manner in which the accident happened has not been established. Since the question of the liability of the owner of the trailer and thus, the indemnity through insurance given by the respondent No. 3, depend on the establishment of the manner of the accident, in a case where res ipsa loquitur has been urged by the Appellant, this ought to be case where the Court must hold that the thing, by itself, does not speak.

51. Even though this point cannot be reopened because of what I have held in respect of the submissions made by the Appellant in paragraph 11 at inter alia paragraphs 18 and 43 of this Judgement, so that the Appellant does not feel that his case on facts was not noticed by the Court, I proceed to note that since the geography of the place is very material, particularly due to the apparent contradiction between the testimony of so-called eye-witnesses, the Court sought a sketch map drawn to scale. Mr. Banik produced in Court such a sketch map which was not objected to by Mr. Goswami, showing the geographical location of the spot where the accident occurred and the relative positions of the

roads and the directions marked on it, with the terminal points indicated in it. This sketch map was kept with the record. It clearly shows that on the road from Purulia to Bankura, from the Purulia side, Lalpur is before Hura. So, if the scooter was travelling from Hura to Lalpur and the trailer was travelling from Lalpur to Hura, they were travelling towards each other from opposite directions. On facts, thus, it is possible to harmonize all three versions of the eye-witnesses if it could be held that the scooter and the trailer were coming from opposite directions, and the scooter was on the left side of the road, and the trailer moved to the left side of the road, and passed the scooter and then the accident occurred, when the trailer – which is quite long – had partially or almost wholly passed the trailer, and if indeed the trailer had moved to the right from the perspective of the scooter. Yet in that case, the theory of head on collision while the trailer *was approaching the scooter, as alleged by the PW 3,* cannot be maintained. To that extent the evidence adduced on behalf of the Appellant has to be disbelieved in the interest of harmonizing the evidence of all three witnesses.

52. Continuing therefore, with the rather pointless analysis of the evidence (in view of the questions of law decided in paragraphs 18 and 43 and that the proceedings were inquisitorial in nature and that the finding of partial fault on the part of the respondent No. 2 is unassailable) I must also logically also record that once it is held that a huge and lumbering trailer is passing a scooter, on a pitch road, which finding about the nature of the road is undisputed, it is clear that the driver of the scooter had ample scope and in fact the best opportunity to see the trailer swerving, if indeed it had, and take precautions, since he had a smaller vehicle and could see the entire body of the trailer which was yet to pass him, or the trailer's tail end, in case the rest of the trailer had passed and which was in front and to his side, whereas the driver of

the trailer in his driver's cab could not see behind except through the rear view mirror and particularly considering the nature of movement of a trailer. However, since the accident nonetheless occurred, the fault of the scooter on which the victim was alleged to be pillion-riding illegally, cannot be ruled out on the preponderance of the balance of probabilities. It is not the case of any party that the trailer was articulated at several points and each articulated section would move independently. Therefore, if the thing here at all speaks for itself, it would say, loud and clear that here is a case where both the driver of the trailer and the driver of the scooter are at fault. If such is the case, then both sets of owners and drivers and both sets of insurance companies would be tort-feasors. This rather self-referring analysis was necessitated by Mr. Banik's insistence on the point of res ipsa loquitur being considered and dealt with, though, on my deciding the questions of law relating to the impermissibility of the Appellant assailing the award on the ground that the Learned Tribunal found the respondent No. 2 to be partially liable for the accident, such point became academic and otiose.

53. Now we come to the question of whether the Learned Tribunal, while apportioning the fault and holding the respondent No. 2 to be partially liable for the accident – which finding, as I have held above, is unassailable as between these parties –could also have directed that a certain specified proportion be paid by the respondent No. 2 to the Appellant and another specified portion be paid by the respondent No. 3 to the Appellant.

54. Here, I find Mr. Banik on slightly surer ground. The locus classicus relating to this aspect of the matter can be found in the law laid down by the Apex Court itself, not very long ago. This is the Judgement in the case of **Khenyei—v—New India Assurance Co. Ltd. reported in**

(2015) 9 SCC 273. The last part of the penultimate paragraph of the report is the locus classicus on the subject of composite negligence and the liability of joint tort-feasors: -

"(i) In the case of composite negligence, Plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis-à-vis the Plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the Plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case,

impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

55. In the light of the above precedent it is clear that while the Learned Tribunal was perfectly justified in the facts of the case to determine the extent of the composite negligence of the drivers, and even put a monetary value to it, it was not open to it after finding that the respondent No. 3 was also partly at fault, to direct that each of the joint tort-feasors pay a particular sum to the Claimant. The correct course ought to have been to make the award after determining the extent of composite negligence of the driver of the trailer and the driver of the scooter for their inter se liability, and then allow the tort-feasor who has satisfied his own liability and the liability of the other to recover the proportion of the liability of the other which he has satisfied, from such other in execution of the award in the main proceeding.

56. However, since the respondent No. 2 has not appealed against the award nor is the present appeal continued against him by reason of the Order dated May 17, 2012 (about five years after the claimant preferring the appeal), any increase in the award as prayed for by Mr. Banik would operate only against the respondent No. 3, which flies against the face of the law laid down by the Apex Court. Specious arguments made after trying to steal a march on the Court, the judicial process and one of the parties, by crafty strategies, cannot be allowed to defeat the purpose behind the law laid down by the Hon'ble Supreme Court or dilute an award determining the composite negligence of joint tort-feasors when such finding of negligence or the composite negligence itself cannot be reopened as held above. Perhaps the respondent No. 2 was not a party

to the strategy of the Appellant and its Learned Advocate – still he cannot be allowed to benefit from such sharp practice.

57. Let me then see whether the Appellant is entitled to any increase in the quantum of the award. The amputation of both his legs – one from below the knee and one from above the knee – has not been disputed. However, he has, as appears from his cross examination, not suffered any loss of income thereby. He has admitted therein that his basic salary is still the same, but he is getting more than Rs.912/- with increase in dearness allowance. He has admitted that is not getting any increment not because of the accident because he could not pass the departmental examination.

58. I have to see whether under Section 166 of the Act of 1988, the conduct of the victim can at all be considered otherwise than by holding him guilty of contributory negligence. Had the Appellant not been riding pillion on the scooter, even if there had been an accident, he would not have lost his legs. This is the least I can say. The scooter's driver-cum-owner was also injured, but he did not lose his legs. Why was the Appellant present at the spot of the accident? Was he a bona fide passenger, going for urgent official work? No such case has been made out. Instead, on the basis of materials which I have held are admissible in the inquisitorial proceedings, it is clear that the Appellant knowing fully well that the scooter owner-cum-driver had only a learner's licence and was not lawfully competent to carry a passenger without a licence to drive a scooter nonetheless forced the scooter driver-cum-owner to give him a lift, abusing his authority as the Block Development Officer of the block within which the said scooter driver resided. Now here is a man who abused his authority and forced the commission of an illegal act.

There was, unfortunately, an accident. He lost both his legs and was permanently partially disabled. Justice works in strange ways.

59. After that, he claimed compensation, completely suppressing his own illegal acts and forcing another to commit an illegal act. He claimed compensation only from the owner of the trailer and its insurer. His suppression of truth was found out and the driver-cum-owner of the scooter was arrayed and admitted his illegal conduct which he was forced by the Appellant to do and was found to be also partially liable for the accident. Compensation was awarded to the Appellant, which is not unreasonable considering the facts and circumstances of the case. Even then, he preferred an appeal on questions of law, and quietly and surreptitiously, wanting more money from the Insurance Company instead of contenting himself with seeking an increase in compensation which would be payable in the same proportion of composite negligence as found by the Learned Tribunal, had the appeal dismissed against the owners of both the vehicles. Why he did so is easy to understand – perhaps he knew that the amounts he wanted were beyond the reach of humble persons such as those whom he had in abuse of his authority, bent to his will. Therefore, the insurance company, the favourite sacrificial animal in such cases, was to pay for his bonanza. He could not even prove details of all the heads under which he had claimed compensation.

60. All that Mr. Banik could do was to show judgements where in cases of amputation higher amounts had been paid, and where negligence was not held to be contributory where a scooter was being driven by a father with his minor children riding pillion and where the Hon'ble Supreme Court expressly enjoined a sympathetic view because of that fact and since there was a presumption that a father would take

sufficient care while driving his own children, and where the facts of the accident, uncontroverted and on the unshaken testimony of eye-witnesses showed that the accident occurred due to the fault of one rather than both the vehicles and their drivers. These facts were not found to be correct by the Learned Tribunal in the inquisitorial proceedings. The inquisitorial nature of the proceedings and such mode of proceeding by the Learned Tribunal were not challenged by the Appellant. It is as if he felt that merely throwing judgements at the Appellate Court, without considering whether they were applicable to the facts of the case, could take the place of facts established or deemed to be established at the stage of the proceedings before the first forum.

61. In the facts and circumstances of the case, therefore, I do not feel that a case has been made out for enhanced compensation by the Appellant, and the prayer for modification of the award by enhancing the compensation is therefore rejected.

62. We come now to the question of interest. Section 171 of the Act of 1988 provides as follows: -

"**Award of interest where any claim is allowed**–Where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf."

63. After considering the reported and authoritative precedents, including the case of **Puttamma and Others—v—K.L. Narayana Reddy and Another**, reported in **(2013) 15 SCC 45** and the various judgements referred to in it appears to me that the Hon'ble Supreme Court has not laid down any law making it mandatory for the Learned Tribunal to

award interest. The language of the statute indicates that the Learned Tribunal has a discretion to award interest. The reported judgements, however, show that the Hon'ble Supreme Court has laid down the criteria for deciding the proper rate of interest and from when it would be payable.

64. The Appellant has relied upon the case of **National Insurance Company Limited—v—Keshav Bahadur and Others** reported in **2004 ACJ 648 (SC)**. This case relates to the jurisdiction of the Learned Tribunal to award interest at a higher rate on default. The Hon'ble Supreme Court held that such a course of action was prohibited and once the discretion to impose interest was exercised, then that would be the rate at which interest would be payable from the date of the claim application and not a higher rate if there was default in payment within the time stipulated by the Learned Tribunal. This case does not help me, since here the Learned Tribunal chose not to exercise its discretion to award interest.

65. The Learned Tribunal, in its wisdom, has not granted any interest to the Appellant though it has allowed the claim, but partially. Therefore, it has exercised its statutory discretion. As already held above, the power to award interest is a discretion, and therefore, the Learned Tribunal is within its jurisdiction to award or not to award interest. Not awarding interest is also an exercise of jurisdiction, by exercising the discretion not to award interest. It is not a case where it has failed to exercise its jurisdiction. It is a rare case when the Appellate Court interferes with an exercise of discretion. At any rate, if there is a discretion to be exercised by the first forum, then the Appellate Forum, in a proper case, where there are sufficient materials on record, can exercise such discretion itself, though I reiterate that it is a rare case

that it will differ from the first forum by reversing the exercise of discretion. Very strong grounds need to be made out for it. For the sake of completeness, I will proceed to analyze whether such strong grounds have been made out.

66. Even though it is clear that the case was filed within reasonable time from the accident (in November, 1991) the case was prolonged only due to the fault of the Appellant in not impleading all parties considered necessary by the Learned Tribunal for deciding this case of composite negligence. It was wholly the Appellant's fault that the proceeded to the stage of judgement without a necessary party as held by the Learned Tribunal. The Appellant insisted on bringing the case to judgement on September 29, 2004 without a necessary party as held by the Learned Tribunal and thereby the proper course ought to have been, on such finding, to dismiss the claim application, on that ground alone. Since there is no question of limitation, and this would be dismissal for a technical ground, the Appellant could have made the claim again, curing the fatal defect. Instead, the Learned Tribunal, strained the quality of mercy and was compassionate enough not to dismiss the claim petition the ground of failure to implead a necessary party but gave a chance to the Appellant to cure the fatal defect by adding the necessary parties. The Appellant applied for the same on November 2004 – five years after the accident – and the order was passed for addition of party on January 4, 2005, and the proceedings thereafter were completed on July 26, 2005. Therefore, this is not a case where the proceedings were prolonged due to the act of the respondent No. 3, who is the sole respondent now. Further, the award was not satisfied because the Appellant challenged it on grounds which have ultimately not prevailed with this Court. Had he not challenged it he would have got the award money immediately or by execution without any question of stay, since the respondent No. 3

and/or the other respondents did not challenge the award and the award as passed became final as against them. Had he challenged it but had continued it against all the respondents, it would have shown his good faith. Neither the delay in satisfaction of the award nor the delay in deciding the appeal can be attributed to the respondent No. 3. I do not feel that the respondent No. 3 ought to be made to suffer for the fault of the Learned Tribunal or the Appellant. Therefore, I hold against Mr. Banik's client also on the question of interest, as contended by him and summarized by me in paragraph 4(ii) of this judgement.

67. Now it only remains to deal with the authorities relied upon by the Appellant, before proceeding to the order which logically must follow the process of reasoning outlined above, in paragraphs 1 to 66 of this judgement.

67.1. **2014 (4) TAC 684 (SC) Kumari Kiran through her father Hari Narayan—v—Sajjan Singh and Others:** The Appellant relied upon this judgement for the proposition that that driver of the heavy vehicle was more responsible for the accident than the driver of the light vehicle.

With respect to the Appellant the facts of the case which was cited before me and the facts of the present case are not the same. I cannot agree that the Hon'ble Supreme Court was pleased to lay down a general proposition that whenever there is an accident involving a heavy vehicle and a light vehicle or a two-wheeler, the fault must lie with the heavy vehicle and its driver, regardless of the facts established in each case. This was the case where a father was driving his minor children riding pillion on a motor cycle and the Hon'ble Supreme Court was pleased to categorically hold that at least this much could be assumed from such circumstance that he was taking sufficient care (since his own minor children were with him). This case would not apply in the present

circumstances where a reasonable explanation has been given by the Learned Tribunal for holding the scooter and its driver to be partially liable. Besides the question of reopening the determination of inter se liability in view of what I have held in respect of the submissions at paragraph 11 of this judgement in paragraphs 18 and 43 hereof, would not arise.

67.2. **2014 ACJ 2161 (SC) Yerramma and Others—v—G. Krishnamurthy and Another:2014 ACJ 2161 Yerramma and other Vs. G. Krishnamurthy and Another:** Here a corporation bus turned to enter its depot without giving indication such that a motorcyclist following close behind, crashed into it causing the accident. The situation is wholly different here, on facts. The case does not apply. Besides the question of reopening the determination of inter se liability in view of what I have held in respect of the submissions at paragraph 11 of this judgement in paragraphs 18 and 43 hereof, would not arise.

67.3. **2013 ACJ 2712 Dulcina Fernandes and others Vs. Joaquim Xavier Cruz and Another**

67.4**. (2014) 2 WBLR (SC) 19: 2013 ACJ 2544 (SC), Minu Routh and Another—v—Satya Pradyumna Mohapatra.**

On facts these cases are not applicable to the present case**.** Besides the question of reopening the determination of inter se liability in view of what I have held in respect of the submissions at paragraph 11 of this judgement in paragraphs 18 and 43 hereof, would not arise.

67.5. **2009 ACJ 1314 (SC) : 2009 (2) TAC III (SC): Usha Rajkhowa—v—Paramount Industries and Others**. This has been relied upon to contend that the principle of res ipsa loquitur applies. However, as I have already held,the question of reopening the determination of inter se

liability in view of what I have held in respect of the submissions at paragraph 11 of this judgement in paragraphs 18 and 43 hereof, would not arise. Besides, if the thing does speak for itself, as I have held in paragraphs 51 and 52 of this judgement, it speaks loud and clear that the driver of the scooter was at least partially at fault for the accident, and the owner-cum-driver of the scooter has not appealed against such finding of the Learned Tribunal.

67.6. **2013 (3) TAC 181 (SC) = 2013 ACJ 1767 New India Assurance Company Ltd.—v—Saheli Sarkar and Others** was cited for the proposition that no evidence beyond pleadings can be considered by the Learned Court or tribunal. However, as I have held in paragraphs 22 to 43, the proceedings before the Learned Tribunal under the Motor Vehicles Act, 1988 not being adversarial but inquisitorial, this proposition is not attracted in the present case.

67.7. **2010 ACJ 2212 National Insurance Co. Ltd—v—Mita Samanta**: The Appellant cited this case once again in a futile attempt to ignore the observations of the Court that the finding of partial liability and fault against the respondent No. 2 had achieved finality. This case was on the basis of a contention by the insurer that in an accident when an unidentified truck struck a motor-cycle from behind and sped away, and where truck was found by police investigation and the insurance company pleaded that an investigator appointed by him stated that after inquiring from various witnesses he had concluded that the truck was not involved in the accident, but neither the owner nor the driver of the truck was examined, the tribunal held that the accident was caused by the rash and negligent driving of the truck. The finding was upheld in appeal. I quite fail to appreciate how on facts this case can at all apply to the present case, where the tribunal in an inquisitorial proceeding has

recorded a finding that the driver of the scooter was partially at fault and liable and the scooter driver-cum-owner has not challenged the finding.

67.8. **(2018) ACC 150 (SC) Dinesh Kumar J. @ Dinesh J.—v—National Insurance Co. Ltd. and Others** was cited by the Appellant again to impeach the finding of contributory negligence on the part of the motor-cyclist claimant where the claimant motor-cyclist had preferred an appeal against the finding of the Learned Tribunal affirmed by the Hon'ble High Court. Here, the Appellant is not the person against whom there is any finding of contributory negligence by the Learned Tribunal. The respondent No. 2 against whom there was such a finding has neither preferred any appeal nor is the appeal being continued against him. The case clearly does not apply.

67.9. On the question of composite negligence, the Appellant has relied upon two judgements for the proposition that the Claimant may claim the entire compensation from any one of the joint tort-feasors.

(i) A full Bench decision of the Hon'ble High Court of Madhya Pradesh being **2005 ACJ 831 Sushila Bhadoriya and Others—v—Madhya Pradesh State Road Corporation and Another.**

(ii). The case of **Khenyei—v—New India Assurance Co. Ltd. reported in (2015) 9 SCC 273** referred to in paragraphs 54 and 55 of this Judgement.

However, as has been demonstrated above, the facts of the present case are clearly different in the instant case. Here the Appellant impleaded the joint tort-feasors to avoid having the claim dismissed for non-joinder of a necessary party which finding became final as against the parties, did not challenge it, obtained an award for compensation on a finding of fault against both the joint tort-feasors whereby the Learned Tribunal

also determined their inter se liability for the composite negligence, and none of the joint tort-feasors challenged this award.

Therefore, while I respectfully will follow the precedent laid down by the Hon'ble Supreme Court, as I must, I have to give effect to the ratio of the judgement to its fullest, as applicable to the facts of this case.

67.10. The Appellant has relied upon the following judgements to contend that the application of the principle of res ipsa loquitur requires this Court to reverse the finding of composite negligence on the ground that allegedly the accident speaks for itself and that the trailer was being driven in a rash and negligent manner: -

(i) **1991 (1) TAC 715 Basthi Kasim Saheb (Dead) by Legal Reps—v—Mysore State Road Transport Corporation and Others,**where the Hon'ble Supreme Court held that where the evidence on the case indicates that there was no unexpected development, it was for the driver to have explained how this happened and there is no such explanation forthcoming. In such a case, where the claimant could not prove the actual cause of the accident and on the face of it, it was so improbable that the accident could have happened without the negligence of the driver, the Court should presume such negligence without further evidence and the burden is on the defendant to show that the driver was not so negligent and the accident might more probably have happened in a manner which did not connote negligence on his part.

In the case at hand, the finding of fact which has achieved finality as against the respondent No. 2 is not merely that of contributory negligence, but also of composite negligence where he has been held to be partially at fault. He has not challenged it. The reasoning of the

Learned Tribunal is not fanciful or based on no material on record. Therefore, there is on the face of it, nothing which makes it improbable that the accident could not have happened without the sole negligence of the driver of the trailer.

(ii) **AIR 1979 SC 1862 Bishan Devi—v—Sirbak Singh** the rejection of the claim petition on the ground that the Claimant had failed to prove the identity of the driver of the offending vehicle, on the basis of a pleading of the insurance company which was held to be palpably false, where the insurance company had alleged that the offending vehicle had been stolen by someone, but the owner of the offending vehicle who filed his written statement a month later, did not support the case of theft of his vehicle. Here, the owner of the scooter who was also driving the vehicle himself filed a cause admitting an illegal act against his interest and furthermore, on being found partially liable for the accident, neither challenged the proportion of composite negligence determined on his account, nor the award. The Appellant not being aggrieved by the finding of composite negligence on the part of the scooter-driver from whom too he was awarded compensation this decision, which is not applicable to the facts of the case, does not aid him.

(iii) **1976 ACJ 184 Krishna Bus Service Ltd.—v—Smt. Mangli and Others**: This case too was decided on the basis of presumption of negligence and res ipsa loquitur. One of the findings of the Hon'ble Supreme Court was that the driver of the offending vehicle had a duty to take care where the accident was such that in the ordinary course of events it would not have happened if proper care was taken by that driver. The facts of the case, as I have been at some pains to demonstrate, are not those where in law I can draw such a presumption, first, for the respondent No.2, against whom there is a finding of partial

liability has accepted it, second, because the Appellant is not aggrieved by it and third because the Learned Tribunal has recorded reasons which appear to be very probable on the preponderance of probabilities on the face of the materials on record in the inquisitorial proceeding, that there was composite negligence including the partial fault of the driver of the scooter on which the Appellant was riding pillion. Therefore, this decision will not be applicable in the facts of this case.

67.11. The Appellant has relied upon two decisions being **IV (2006) ACC 845 (SC) National Insurance Company Ltd—v—Bhagwani and Others** and also **IV (2017) ACC 577 (P & H) National Insurance Company Ltd—v—Kailash Chand & Another** both in turn relying upon **National Insurance Co. Ltd.—v—Sawran Singh and Others** reported in **(2004) ACC 1 (SC)**, to contend that "Learner's Licence" is also a valid licence. However, the decisions do not stop at that. They are based on the case of **Swaran Singh** (*supra*) which clearly holds that it cannot be said that if a learner is driving a vehicle subject to the conditions mentioned in the (learner's) licence, he would not be a person who is not duly licensed. It has not been disputed from the Bar or on record in the instant case that the conditions of the learner's licence held by the respondent No. 2 at the material time did not allow him to carry any pillion rider/passenger who did not hold a valid licence to drive a light motor vehicle or scooter. Therefore, on the face of the records the respondent No. 2 was in violation of the terms and conditions of his learner's licence. These judgements therefore do not come to the aid of the Appellant especially when the respondent No. 2 has not challenged the award.

67.12. I notice two other decisions only to hold that they are not applicable to the facts of the present case and since the Appellant is

estopped by judgement, his own conduct and the records of the case, as held by me in paragraph 12 of this judgement from contending that the driver of the scooter is not a necessary party. These are **2008 ACJ 1964 : 2008 (2) TAC 799 (SC) Machindranath Karmathi Kasar—v--D.S. Mylarappa and Others** and **2006 (2) TAC 254 (Cal) Malati Alias Mala Alias Mita Goon—v—Union of India.** These judgements hurt the Appellant more than they help him. For one thing, the judgement in the case decided by the Hon'ble Supreme Court was on the basis of the motor vehicles rules in Karnataka where the driver of an offending vehicle is usually not impleaded as recorded by the Hon'ble Supreme Court; for another, there the Hon'ble Supreme Court held that if in respect of a single accident, there is more than one claim and a finding is reached against a non-party of being liable for the accident, then that person, in another claim, even if filed by him, cannot have that finding varied unless he has challenged the finding against him in the first claim. Therefore, on facts this goes against the Appellant herein, who is actually trying to challenge the finding of composite negligence against the respondent No. 2 which the respondent No. 2 has not done. The Appellant is not so entitled. The Calcutta case envisaged a situation where the driver of the vehicle voluntarily offered a lift to the victim and as long as the employer of the driver was a party, necessity of the impleadment of the driver was not felt. Here, the respondent No. 2 is the owner-cum-driver of the scooter, and that is an admitted fact. He said in a verified statement that the victim/Appellant forced him to allow the Appellant to ride pillion on the scooter, knowing that the respondent No. 2 had only a learner's licence which did not allow him to do so. Therefore, it was not voluntary. On these different facts alone, the Calcutta case would not be applicable to the present case.

I must reiterate here the salutary and legal principle hallowed by time and its application, that a judgement is an authority only for what it decides and not what can be logically deduced from it. A little difference in facts can and does make a lot of difference in the precedential value of the judgement. In the instant case, none of the judgements cited by the Appellant actually apply to the present case on facts.

67.13. The Appellant has cited 6 judgements for the proposition that the Motor Vehicles Act, 1988 is a beneficial legislation (for the victim and the claimant) and that it is not necessary in proceedings under the Act of 1988 to go by any rules of pleadings or evidence since it is the duty of the Learned Tribunal to arrive at a just compensation and that the Learned Tribunal is not bound by strict or technical rules of evidence. Not only did most of these cases cited arise out of an accident resulting in death, these judgements only lay down the settled law with which there can be no quarrel, but which at the same time, either do not apply on facts, or, as demonstrated by the discussions so far, harm the Appellant more than they help him, since he has been relying on strict rules of pleading and evidence to try and ensure that the Court does not look at the case which led the Learned Tribunal to find partial fault in a composite negligence against the respondent No. 2 and award compensation as against the joint tort-feasors in favour of the Appellant. Nonetheless so that the Appellant does not feel that the cases cited by him were not considered, these are set out hereinbelow: -

(i) **IV(2009) ACC 910 (SC) Raj Rani & Others—v—Oriental Insurance Company Ltd. and Others.**

(ii) **IV (2009) ACC 981 (SC) Oriental Insurance Company Ltd.—v--Md. Nasir & Another**

(iii) **2011 (2) TAC 41 SC =1(2011) ACC 62 (SC) National Insurance Company Ltd. and Others—v—Anita Saha and Others**

(iv) **1981 A.C.J. 507 Motor Owner's insurance Co. Ltd—v—Jadavjit Keshavjit and Others.**

(v) 1987 ACJ 411 Skandia Insurance Co. Ltd.—v—Kokilaben Chandravadan and Others.

(vi) II(2004) ACC 37 (SC) New India Assurance Company ltd.—v—Kiran Singh & Others.

67.14. So far as the enhancing the amount of compensation is concerned, the Appellant has by his own acts has made it impossible for this Court to reopen the determination of partial liability of the respondent No. 2 in the case of composite negligence while at the same time precluding the Court from enhancing the compensation as against the respondent No. 2 whose partial liability can neither be reopened in his absence nor prejudicially affected further by enhancement, as held in paragraphs 12 to 61 above. Therefore, none of the authorities cited by the Appellant, in the peculiar facts of this case, apply – in fact, the facts of those cases do not show such egregious wrong doing by the victim and such sharp practice by his lawyer to try and undo those things which have achieved finality, between the parties, as discussed above. These cases, being 2017 ACJ 2834 (SC) New India Assurance Co. Ltd—v—Gajendra Yadav and Others; 2017 ACJ 979 (SC), 2011 ACJ 1 (SC), 2015 ACJ 729 (SC) equivalent to 2015 ACC 392 SC, New India Assurance Co. Ltd.—v—Dr. Sukanta Kumar Behera;2015 ACJ 484 Raman—v—Uttam Haryana Bijli Vitaran Nigam Ltd., 2014; ACJ 1441 (SC) Mekala—v—Malathi and Others; 2014 ACJ 1375 (SC), M.K. Gopinathan—v—J. Krishna and Others; 2014 ACJ 1412 (SC), Dinesh Singh—v—Bajaj

Allianz General Insurance Co. Ltd; 2012 ACJ 28 (SC) Govinda Yadav—v—New India Assurance Co. Ltd.I have dealt with the cases cited by Mr. Banik as being factually inapposite in paragraph 60 and made my decision on this point clear in paragraph 61 for the reasons stated in the foregoing paragraphs of this judgement.

67.15. I have already made my decision on the question of interest clear in paragraphs 62 to 66 of this judgement.

68. In fact, at one stage of the hearing, considering my conclusions about the nature of the inquiry that the Learned Tribunal is required to hold, and in view of my findings about the accident, a proposal was made that the matter be sent back on open remand, with a direction on the respondent No. 3 to make payment of the entire amount awarded by the Learned Tribunal when a concession was made by Mr. Goswami that the respondent No. 3 would have no objection to such course of action provided that the respondent No. 3 was allowed to recover any amount found to be due after such enquiry by the Learned Tribunal on remand, from the respondent No. 2. However, this proposal was made since Mr. Banik had given the impression that the respondents No.1 and 2 were not contesting the appeal and had not preferred any cross-appeal against the award, without disclosing to this Court that in fact, Mr. Banik had already, as far back as on May 17, 2012 abandoned his appeal as against the respondents No.1 and 2, and the appeal was dismissed as against them on May 17, 2012 and therefore the award could not be altered to their prejudice as against them. This court has recorded the above less than fair conduct on the part of Mr. Banik, in its order dated February 1, 2018.

69. I would therefore, apply the rule laid down in the case of **Khenyei** (*supra*) and hold that the respondent No. 3 would be liable to pay the entire compensation awarded by the Learned Tribunal by the award impugned and instead of the respondent No. 2 paying to the Appellant the amount adjudicated to be his share, after satisfaction by the respondent No. 3 of the said amount held by the Learned Tribunal to be payable by the respondent No. 2 to the Appellant, the respondent No. 3 would be entitled to recover the said amount from the respondent No. 2 by way of execution of the award as modified by this Appellate Judgement and Order.The appeal, therefore, fails on all grounds, as discussed above, except to the extent that the award has been modified, as mentioned above.

70. The appeal therefore succeeds, partly, to the extent indicated above. Though I am unhappy with the sharp practice exhibited by the appellant apart from my disapproval, I say nothing about it. The parties will bear their own costs.

(PROTIK PRAKASH BANERJEE, J.)

Dipankar Datta, J.:

71. By presenting this appeal under section 173 of the Motor Vehicles Act, 1988 (hereafter the Act), the appellant essentially seeks (1) enhancement of the compensation awarded to him by the relevant

tribunal while disposing of his application under section 166 of the Act; and (2) fastening the liability to pay such compensation entirely on the insurer of the offending **trailer**, meaning thereby that the owner/driver of the scooter on which the appellant was riding pillion is not made liable to bear any part of the compensation to which the appellant is found to be entitled.

72. My learned brother in the draft of the proposed judgment has given adequate reasons why the appellant is not entitled to either of such relief. While I share the views of my learned brother, I wish to express my opinion (upon adverting to the version of the appellant himself once again) to decline him relief as claimed in the appeal.

73. The appellant alleged that a **trailer** being driven in a rash and negligent manner dashed the scooter, on which he was riding pillion, and as a direct consequence thereof he suffered the unfortunate amputation of his lower limbs.

74. I have tried in vain to find out from such version of the appellant as to what exactly led to the accident, or to be more precise, how the **trailer** dashed the scooter.

75. A trailer, according to section 2(46) of the Act, "means any vehicle other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle". Section 2(39) of the Act defines a semi-trailer as "a vehicle not mechanically propelled (other than a trailer), which is intended to be connected to a motor vehicle and which is so constructed that a portion of it is super-imposed on, and a part of whose weight is borne by, that motor vehicle". It is common knowledge that a trailer drawn by a motor vehicle is commonly used for transport of goods and materials.

76. A trailer by its very definition in the Act, therefore, is an unpowered vehicle which has to be drawn or towed by a powered vehicle.

77. For the purpose of proper understanding of the basic issue that has arisen for decision, id est, whether the **trailer** was being driven in a rash and negligent manner leading to the unfortunate accident, I shall hereafter refer to the **trailer** spoken of by the appellant and his witnesses as the offending vehicle and also classify and describe it as the powered vehicle and the unpowered vehicle, whenever/wherever necessary.

78. Having understood what a trailer means, as defined in the Act, it would indeed be absurd to suggest that the unpowered vehicle and not the powered vehicle was being driven rashly and negligently and in the process the unpowered vehicle dashed the scooter. Sight cannot, however, be lost that a powered vehicle drawing or towing an unpowered vehicle in common parlance compositely is often described as a trailer. I shall assume, giving the appellant the benefit of incorrect description of the offending vehicle, that the appellant in fact intended to say that the powered vehicle, drawing or towing the unpowered vehicle, was being driven without proper care and diligence amounting to rash and negligent driving and not the unpowered vehicle, and that the accident in question was a fallout thereof. So far, so good.

79. Although the length of the offending vehicle has not been referred to by any of the witnesses supporting the claim, judicial notice can also

be taken of the highways in our country on which long vehicles, id est, a powered vehicle drawing or towing an unpowered vehicle, ply and taken together the length of the powered and unpowered vehicles normally varies between 20 and 30 meters. If the offending vehicle were a long vehicle, or even if the same were not a long vehicle, either way, it was necessary for the appellant, who could adduce the best evidence, to depose which part of the offending vehicle dashed the scooter, ~ whether there was a head-on collision with the powered vehicle or the scooter was dashed by the unpowered vehicle, or otherwise. The appellant, who was riding pillion, must have been in a proper and clear position to visualize what was happening in front, unless of course he had dozed off. He did not say so. Apart from deposing that the offending vehicle dashed the scooter, no further/other version is forthcoming from the appellant's side of exactly how the scooter was dashed which could enable the tribunal to satisfactorily arrive at a finding that the accident in question was the obvious outcome of rash and negligent driving of the offending vehicle. What emerges from the version of the appellant is that the scooter was proceeding on the left side of the road and the offending vehicle was also travelling on the left side of the road, from the appellant's point of view. This version, if believed, would give rise to a likely situation of a head-on collision. The appellant by virtue of his intellect is supposed to comprehend the difference between a head-on collision and dashing. It is not his case that there was any head-on collision. That being the position, it would stand to reason that the scooter was dashed by the unpowered vehicle. The scooter having passed the powered vehicle which was drawing or towing the unpowered vehicle, the scooter could be dashed by the unpowered vehicle only if the powered vehicle had changed its trajectory leading to the unpowered vehicle swerving and in the process dashing the scooter. This version, unfortunately, is not there.

The possibility of the unpowered vehicle dashing the scooter in case the scooter rammed into it, cannot be totally ruled out having regard to the cause shown by the owner thereof, who was on the front seat and driving it, on affidavit, that he had no driving license but only a learner's license. An individual having a learner's licence is not expected to have the same expertise as an individual having a regular driving license. That the owner/driver of the scooter may have contributed to the accident is a plausible conclusion on facts and in the circumstances, based on preponderance of probabilities. Had it not been a case of the insurer accepting the award by not impugning it either by an independent appeal or by filing a cross-objection, this is a case where it could fairly and reasonably be held that rash and negligent driving of the offending vehicle had not been proved at all. The appellant ought to thank his fortune that this finding is not required to be given here. Bearing in mind the elaborate discussion of the evidence that were adduced before the tribunal by my learned brother, the conclusion is inescapable that the tribunal did neither commit any error in holding that there was negligence on the side of both drivers and also that the compensation payable to the appellant requires to be apportioned in the shares as directed in the impugned award.

80. I also record my concurrence in regard to the direction for payment of the entire compensation to the appellant by the insurer, as awarded by the tribunal, and reserving liberty to the insurer to effect recovery of a part thereof from the owner of the scooter in the manner as proposed by my learned brother.

81. To avoid any inconvenience to the appellant, the insurance company is directed to transfer whatever is payable on account of compensation to the appellant by National Electronic Fund Transfer. Mr. Banik shall furnish the particulars of the bank account of the appellant to the learned advocate-on-record of the insurance company in course of a week from date; whereafter the insurance company shall act in compliance with this order within a further period of a month.

(DIPANKAR DATTA, J.)