CRIMINAL REVISIONAL JURISDICTION

Before Kalidas Mukherjee, J.

The Central Bureau of Investigation -Versus Smti Indira Singh[1]

Criminal Procedure Code 1973; Section 239:- Framing Of Charges:- The Court is to whether or not there is prima – facie case on the basis of the materials on record for the framing of charges against the accused person.

Framing of Charges – Establishment of allegation –There is no scope requiring proof of establishment of allegation for coming to final decision as to the charge against the accused. The learned Trial judge considered the materials in such a manner as to reach finality to the question, which is not permissible within the ambit of Section 239 Cr.P,C [Para 7]

Prevention of Corruption Act: - Section 13(12) read with S.13(1)(c) documents produced by prosecution sufficient for framing charges

Fact and arguments appear from judgment:

Counsel for the parties:

Mr. Ranjan Roy for the petitioners and Mr.H.R.Banerjee

Case law referred: AIR 1977 SC 2018 (State of Bihar –Vs- Ramesh Singh: AIR 1980 SC 52 (Superintendent K. Remembrance of Legal affairs, West Bengal –Vs- Anil Kumar, Bhunja & Ors., AIR 1986 SC 2045 (R.S. Nayak –Vs- A.R. Antula & Ors., AIR 1999 SC 1744 (State of Maharastra –Vs- Som Nath Thapa); 2000 SCC (Cr) 1110 (State of Madhya Pradesh –Vs- Mohanlal Soni)., 2001 SCC (Cr) 685 Om Wati (Smt) &Anr. –Vs- State through Delhi Admn. & Ors. 2000 SCC (Cr) 1486 (State of Delhi –Vs- Gyan Devi & Ors.)

KALIDAS MUKHERJEE, J.

1. This revisional application preferred by Central Bureau of Investigation (CBI) is directed against the order dated 4.1.2007 passed by learned Judge, Special Court, Andaman and Nicobar Islands at Port Blair in Special case No. 1/2001 arising out of R.C. No. 17/A/2001 under Section 13(2) of the Prevention of Corruption Act, whereby and where under the learned Judge passed an order discharging the OP herein under Section 239 CrPC, but, directing the

[1] C.R.R. No. 1453 of 2007 heard on:September 03, 2007, Judgment:September 06, 2007.

framing of charge against the other accused under Section 13(2) of the Prevention of Corruption ACT.

2. The prosecution case, in short, is that the accused Shri R.K. Singh joined the service on 4.8.1965 as the Section Officer (Junior Engineer) in Andaman Public Works Department and gradually was promoted to the post of Superintending Engineer. The present OP Smti Indira Singh, wife of Shri R.K Singh, joined as G.T.T in the Education Department, A & N Administration with effect from 21.08.1972 and took voluntary retirement from service with effect from 28.11.1999.

3.. Investigation reveals that the accused Shri. R.K. Singh acquired huge assets in his name and the name of his Family members during the period from 1.3.1987 to 5.5.2001. The accused Shri R.K. Singh is found to have acquired assets which is disproportionate to his known source of income, to the tune of Rs. 58,09,121.53/-. It is the prosecution case that the accused Smti Indira Singh, being the wife of the Shri R.K. Singh, abetted in keeping the money in her name and, as such, she has been arrayed as an accused for possession of disproportionate assets. After completion of investigation, the prosecution submitted the chargesheet against both accused persons for the offence punishable under Section 13(2) read with section 13(2) (e) of the prevention of Corruption Act.

4. Mr. Ranjan Kumar Roy, learned counsel appearing for the petitioner herein, submits that there are sufficient materials for the framing of charge against the OP herein being the abettor, punishable under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act. Mr. Roy submits that the observation of learned Trial Judge was contrary to law, in as mush as, the learned trial Judge proceeded with a wrong approach in appreciating the materials on record for the purpose of framing of charge under section 239 CrPC. It is contended by Mr. Roy that at the time of framing of charge, proof or establishment of the allegation to the hilt is not required and the learned court is to see whether or not there is prima-facie case for framing of charge. Mr. Roy has referred me to the materials appearing in the CD, especially, the statement of witnesses examined under section 161 CRPC.

Mr. Roy has referred to and cited the decisions reported in AIR 1977 SC 2018 (State of Bihar –vs- Anil Kumar Bhunja & Others), AIR 1986 SC 2045(R.S. Nayak –Vs- A.R. Antulay and another), AIR 1999 SC 1744(State of Maharashtra etc –Vs- Som Nath Thapa), 2000 SCC(Cr) 1110 (State of MP – Vs- Mohanlal Soni), 2001 SCC(Cr.) 685 (Om Wati (Smt) and another –Vs-

State through Delhi Admn. & Others), 2000 SC(Cr.) 1486 (State of Delhi –Vs- Gyan Devi and others).

5. Mr. H.R. Banerjee appearing for the opposite party submits that the OP herein, being the wife of accused Shri R.K. Sing, is the Govt. servant who served as a Senior School Teacher in a Secondary School and took voluntary retirement. Mr. Banerjee submits that all the assets standing in her name were acquired by herself with her own fund and there is no element of instigation so as to constitute abetment. Mr. Roy submits that there is nothing on record to show that the OP herein had the positive knowledge of the alleged ill-gotten money of her husband and the essential ingredients of abetment, for which no charge can be framed against the OP herein and the learned Trial Judge was justified in discharging the OP under section 239 Cr.PC. Mr. Banerjee has referred to and cited the decisions reported in Judgments Today 2002(1); S.C. 6 Dilwar Balu Kurane –Vs- State of Maharashtra: 1986(2) SCC 716(R.S. Nayak –Vs- A.R. Antuley & another; (28) AIR 1941 Cal. 456 (Upendra Chandra Poddar and Others –Vs- Emperor) and AIR (38) 1951 Cal. 581 (Pramatha Nath –Vs- The State), 1999 Crl. Law Journal 3967 in the case of P. Nallammal –Vs- State represented by Inspector of Police. 2001.Cri., Law of Journal 1242, Seeta Hemchandra Shashittal and anr –Vs- State of Maharashtra.

6. The learned Trial Judge while discharging the OP herein observed that the independent income of the OP herein should be viewed not as abettor and indeed it has not been established that she was a conspirator in acquiring disproportionate assets. The learned Trial Judge further observed that in the chargesheet it has been depicted that female accused Smti Indira Singh had abetted to keep the money in her name and, as such, she has been arrayed as an accused for possession of disproportionate assets. It has also been observed that from the chargesheet, it has not transpired that there was a tacit/passive instigation from the side of the lady to compel or insist her husband for doing such offences. The learned Trial Judge observed that the female accused had no connivance or collusion with the prime accused in the matter of acquiring possession of properties and pecuniary resources disproportionate to his known sources of income to the extent of Rs. 58,09,121.53/- and the nothing is prominent ipso facto which could be considered that the female accused had accused had abetted and assisted the prime accused to acquire such properties/assets.

7. From the ratio of the decisions cited by the learned counsels of both the sides, it is clear that at the time of framing of charge, the court is to see

whether or not there is prima-facie case on the basis of the materials on record for the framing of charge against the accused person. In the instant case, I find that the learned trial Judge completely misdirected himself in appreciating the materials on record for the purpose of deciding whether there was prima-facie case on the basis of materials on record against the OP herein for the framing of charge within the ambit of section 239 CrPC. There is no scope requiring proof of establishment of allegation of coming to the final decision as to the charge against the accused. The learned Trial Judge considered the materials in such a manner as to reach finally to the question, which is not permissible within the ambit of section 239 Cr.PC.

8. In the instant case, the prosecution has given the description/particulars of assets acquired in the name of the OP herein, details of income, details of expenditure, list of documents for the framing of charge under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act. The list of document shows the various assets and properties acquired in the name of the present OP. It is the case of the prosecution that the accused Shri R.K. Singh acquired huge assets and had kept the same in the name of his wife i.e. the OP herein and the OP did not raise any objection in that matter and by allowing her husband to keep the assets or properties in her name, committed the offence of abetment. The prosecution has also examined al the witnesses under section 161 CrPC regarding the acquisition of the assets and properties. Mr. Roy contends that these are the sufficient materials for the framing of charge against the OP herein as an abettor punishable under section 13 (2) read with section 13(e) of the Prevention of Corruption Act. After going through the materials appearing in the Case Dairy, I find that there are sufficient materials for the framing of charge against the OP herein, as contended by Mr. Roy, the learned counsel for the prosecution. The learned Trial Judge committed illegality in discharging the OP. he ought to have framed charge against the OP also. The impugned order of the learned trial Judge so far it relates to the discharge of the OP herein is set aside. Charge be also framed against the OP. The OP is directed to appear before the learned Tribal Court within two weeks from this date failing which the learned Trial Judge will pass necessary order according to law for security her attendance. The learned Trial Judge after framing the charge, will proceed with the trial according to law. The revisional application is allowed with no order as to costs.

Urgent Xerox certified copy of the judgment be delivered to the parties, if applied for.

REVISIONAL JURISDICTION

Before Subhro Kamal Mukherjee, Kalidas Mukherjee, JJ

Union of India and others versus Mohan Rao and others [1]

Constitution of India Article 227- Order of Review – Order 47, Rule 1, CPC:- Provisions relating to power of review constitute an execution to the general rule to the effect that once a judgment is pronounced it cannot be altered afterwards. Thereafter, power of review is exercisable only where the circumstance, are strictly covered by the statutory executions. Under Order 47, rule 1 of the Code of Civil Procedure a review can be allowed on the three specified grounds, namely, (a) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by them at the time when the order was made; (b) mistake or error apparent on the face of record; or (c) for any other sufficient reason. Para 12

A & N Police manual 1963:- Rule 54 (c) Precaution to the Post of ASI of Police in Ad-hoc bases whether tenable – Held: No.

An error apparent on the face - An error apparent on the face of record must be such a patent error, which is one glance, can be detected without advancing long drawn argument on either side. Even if a decision is erroneous in law or on merits, it cannot be accepted that this is an error apparent on the face of record. Para 13

Facts of the arguments appear from judgement

Counsel for the parties

Mr.Santosh Kumar Mondal for the petitioners, Mr.Krishna Rao for the respondent Nos.1 to 5 and Mrs.Anjil Nag for the respondent No.6

SUBRO KAMAL MUKHERJEE, J.

1. This is an application seeking review of the judgment and order dated July 23, 2007 passed by a Division Bench of this Court in WPCT No. 110 of 2007.

[1] R.V.W. No. 012 of 2007, In W.P.C.T. No. 110 of 2007, Heard on: August 31, 2007, Judgment: September 06, 2007.

2. The Inspector General of Police, A & N Islands, by an order dated October 31, 2005, promoted the proforma respondent no. 6 in this application for review, namely, M.S. Murugan, to the Assistant Sub-Inspector of Police on ad-hoc basis immediate effect. The said order was partially modified by an order dated November 02, 2005, indicating that the promotion given to him would be subject to his qualifying and being confirmed as Head Constable. Since he had not undergone the lower school course to make him eligible for the promotion to the rank of Assistant Sub-Inspector of Police, be was directed to undergo lower school course to make him eligible for such promotion.

3. The administration contended that such promotion was granted to him because of his outstanding performance and achievement in the police force. The Inspector General of Police granted him sub promotion in exercise of his power conferred upon him by Rule 5.4(c) of the A & N Police Manual, 1963.

4. The respondent nos. 1 to 5 in this application for review challenged the said action of the administration in the Central Administration Tribunal; their application was registered as O.A. No. 44/AN/2006.

5. The Tribunal allowed the aforementioned application and set aside the Ad-hoc promotion given to said proforma respondent no. 6

6. Being aggrieved, the proforma respondent no. 6 moved an application under article 226 of the Constitution of India, which was registered as WPCT No. 110 of 2007.

7. A Division Bench of this Court by the judgment and order dated July 23, 2007 rejected the said application and affirmed the order of the Central Administrative Tribunal.

8. This application for review is not filed by the writ petitioner in WPCT No. 110 of 2007, but, surprisingly, by the administration.

9. The Inspector General of Police granted promotion to M.S. Murugan, Mohan Rao and four others, who were affected by such order of promotion, challenged the same before the Central Administrative Tribunal. The Tribunal set aside the said order of promotion. M.S. Murugan challenged the order of Tribunal before this Court by filing writ petition; the administration did not challenge the order of the Tribunal. This Court rejected the writ petition filed by M.S. Murugan. He is not coming with this application for review; he accepts the order. The administration, which has not challenged the order of Tribunal, is coming with this application for review.

10. Mr. Santosh Kumar Mandal, learned Government Pleader, submits that the proforma respondent is an outstanding member of the force and the Inspector General of Police was within his right in giving him ad-hoc promotion in exercise of his authority as envisaged under Rule 5.4(c) of the said Manual of 1963.

11. Mrs. Anjili Nag, learned advocate, appearing for the promorma respondent, supports the contention of Mr. Mandal and she submits that the Division Bench was wrong in observing that Rule 5.4(c) could be applied only at the time of consideration for promotion on regular basis.

12. Provisions relating to power of review constitute an exception to the general rule to the effect that once a judgment is pronounced it cannot be altered afterwards. Therefore, power of review is exercise only where the circumstances are strictly covered by the statutory exceptions. Under Order 47, rule 1 of the Code of Civil Procedure a review can be allowed on three specified grounds, namely, (a) discovery of new and important matter of evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by them at the time when the order was made; (b) mistake or error apparent on the face of record; or (c) for any other sufficient reason.

> The words *"any other sufficient reason"* have been interpreted to mean " a reason sufficient on grounds at least analogous to those specified immediately previously", that is, excusable failure to bring to the notice of the court new and important matters, or error apparent on the face of the record.

13. An error apparent on the face of record must be such a patent error, which in one glance can be detected without advancing long drawn arguments on either side. Even if a decision is erroneous in law or on merits, it cannot be accepted that this is an error apparent on the face of record.

14. Appling the tests, as aforesaid, we are of the firm option that no case for review is made out in this application.

This application for review is , therefore, rejected.

We make no order as to costs.

_____

SUPREME COURT

Before R.V. Reveenadran & Markandya Katju JJ.

Forward Seamen Union of India -Vs- Union of India & Ors.[1]

Merchant Shipping Act 1958, as amended in 2002 – the appellant Union challenged the judgment of the order of the Divisional Bench of Calcutta High Court, why the bazarmen should not be treated at par with the seamen on board the vessel as the bazarmen too hold Continuous Discharge Certificate issued by the Mercantile Marine Department?

Held : Bazarmen, as contrasted from sailors/seafarers, were not crew members of the ship nor employees of the master or owner of the vessel. It is pertinent to note that they were employees of canteen contractor who was not even engaged by A & N Administration, but by SCI. The status of Bazarmen was not equal to those regular crew members of the vessel employed by owner and engaged by the master for operating the vessel in terms of the Act. The bazarmen had not privity with the A & N Administration nor enforceable right against them. The division bench was therefore justified in dismissing the writ petition filed on behalf of the bazarmen, on the ground that they did not have any right to challenge the tender notice issued by the A & N Administration. The appeal dismissed having no merit (para 6)

Facts and argument appear from the judgment.

Counsel for the parties

Advocate: Mr. Rana Mukherjee and Mr. Abhijit Sengupta for the appellants and Mr. K.V. Vishwanathan, Mr. Sanjeev Kumar and Mr. Kumar Mihir.

For M/s Khaitan & Co. Mr. T.S. Doabia Senior Advocate, Mr. Sunita Sharma, Ms Varuna Bhan -3- -3- -Dari Gugnani, Mr. B. Krishna Prasad, Mr. D.S Mahra.

1. The appellant trade union represents "Bazarmen" employees of canteen/catering contractors operating in ships sailing between Calcutta/ Chennai and Andaman and Nicobar Islands. The said ships belonged to the

[1] The instant Civil Appeal No. 5645 of 2005; was decided on 5th March, 2009. The instant appeal was filed by the appellant Forward Seamen Union challenging the Judgment & Order dated 22.12.2003, in FMAT No. 17 of 2003 with CAN No. 98 of 2003; pronounced by the Hon'ble Division Bench of Calcutta High Court, in its circuit sitting at Port Blair.

Andaman & Nicobar Administration (Administration for short) and were managed and operated by Shipping Corporation of India Ltd. ('SCI' for short). SCI had entered into contract/s, with canteen/catering contractors to run the canteens in the said ships. There were some long pending demands by Bazarmen who were members of appellant union on the one hand, with SCI as also another Trade Union National Union of Seafarers of India (NUSI). As the ship services were sometime disrupted on account of such disputes, as public interest litigation (CO. No. 87 (W) of 1997) was filed by Andaman Chamber of Commerce. In that case, the High Court by an interim order dated 3.2.1998 appointed an Ad-hoc Committee consisting or commissioner of West Bengal, Regional General Manager Principal Officer of Mercantile Marine Department of Union of India and Director of Shipping Services of A & N Administration, to amicably resolve the disputes. The Ad-hoc Committee made various recommendations as per its proceedings dated 6.4.1998. One of the recommendations related to operation of two separate lists of Bazarmen: one of a group of 69 Bazarmen and another of a group of 79 Bazarmen, by allotting duties according to their waiting seniority in the respective groups. The Calcutta High Court approved the recommendations dated 6.4.1998 by order dated 26.6.1998. By another order dated 20.11.1998, SCI was directed to discuss all issues relating to Bazarmen only with the Trade Unions recognized and approved by the Ad-hoc Committee in respect of Port of Calcutta.

2. We are informed that from the year 2002, the role of SCI came to an end. Consequently, the Directorate of Shipping Services, A & N Administration took back the responsibility, decided to make arrangement for canteen facilities on the ships and therefore issued a Tender Notice dated 18.11.2002 inviting tenders for on board services in five vessels, that is catering canteens for cabin class and Bunk Class Passengers, two restaurants for passengers and for supply of provisions for the officers and crew for the period 26.1.2003 to 25.1.2004. The brochure provided with the tender form, it is stated, required the tendered proposed contractor to ensure (i) that Bazarmen to be employed for the canteens should be in possession of a valid continuous discharge certificate; and (ii) that through entitled to recruit canteen staff of their own choice; the contractors should give preference to local candidates.

3. The Bazarmen who were being employed by the then existing contractor from the operating lists of 69 and 79 Bazarmen) were aggrieved, as their chances of appointment would be affected it preference was to be given to locals or others who were not in the list. The appellant union, on their behalf

approached the Circuit Bench of the Calcutta High Court in W.P. No. 40/2003 uashing the said tender notice dated 18.11.2002.

4. Learned Single Judge allowed the writ petition by order dated 18.06.2003. He declared the terms and conditions tender were illegal and set aside the same. He also directed as follows:

> "The Director General of Shipping Service who is maintaining the list of Bazarmen in terms of the recommendation of the adhoc committee engaged by the Division Bench of this Court as mentioned above shall forthwith make over the said list to the local Seamen Employment Office. It shall be deemed that all those who have been listed in the said list have been listed chronologically with Seamen Employment Office. Any other person seeking to serve as a bazarmen should be entitled to get himself enrolled in such list, provided he is found fit and eligible by the Seamens' Employment Office. As and when the contractor engaged by the Administration for providing catering services to the vessels in question would require Bazarmen, they would notify the seamen employment officer accordingly and the seamens' employment office would provide placement service of bazarmen from amongst such list by enrolling such bazarmen from the list of the extent of not less than 140 percent of the vacancy."

5. The Union of India (Ministry of Shipping) and its functionaries filed an appeal against the said order of the Single Judge. It was allowed by a division bench by the impugned order dated 22.12.2003. The division bench reversed the learned Single Judge's order and dismissed the writ petition of the appellant. The Division Bench held that the 'Bazarmen' that is workers in the canteens run by the contractors were not seamen and that there was no privity of contract between the "Bazarmen' and owner of the ship (A & N Admin.). The division bench held that the directions given by the learned Single Judge were contrary to the provisions of the Merchant Shipping Act, 1958 (as amended by Amended Act of 2002) ('Act' for short). It also made the following observations while allowing the appeal and dismissing appellant's writ petition:

> "What would be that status and how the contractors would engage the bazarmen could be ascertained only when appropriate rules are framed. The seamen's employment office would no more be responsible

for their recruitment and placement. It is the employer, namely, the contractor, who would be free to recruit its men through recruitment and placement services. In these circumstances, the Central Government, while making the rules, if not already made, shall specifically consider the question as to whether the bazarmen employed through the contractors, though such bazarmen are not seamen or crew, are seafarers within the meaning of section 95 of Act."

6. The appellant have challenged the said order primarily with reference to order dated 3.2.1998 and 26.6.1998 in CO No. 87 (W) of 1997 of Calcutta High Court. It is contended that the order of the division bench violates the said orders in the earlier cases which have attained finality and should therefore be set aside. The orders dated 3.2.1998 and 26.6.1998 by the High Court in the previous public interest litigation, and the recommendations by he Ad-hoc Committee, clearly show that the dispute considered or settled were not between Bazarmen and A & N Administration. Further the orders of the High Court were not on merits, but merely provided some interim solution in a public interest litigation. No industrial dispute had raised not any writ petition filed by the Bazarmen. The dispute related to engagement of canteen workers by the canteen contractors (M/s Alankar & Co.) engaged by SCI for providing canteen service and catering business, on board of three passenger vessels belonging to A & N Admn. for specific periods. Their wages were paid by the canteen contractor. Bazarmen, as contrasted from sailors/seafarers, were not crew members of the ship nor employees of the master or owner of the vessel. It is pertinent to note that they were employees of canteen contractor who was not even engaged by A & N Administration, but by SCI. The status of Bazarmen was not equal to that of regular crew members of the vessel employed by the owner and engaged by the master for operating the vessel in terms of the Act. The Bazarmen had no privity with the A & N Administration nor any enforceable right against them. The division bench was therefore justified in dismissing the writ petition filed on behalf of the Bazarmen, on the ground that they did not have any right to challenge the tender notice issued by the A & N Administration. The appeal is therefore dismissed as having no merit.

CONSTITUTIONAL WRIT JURISDICTION

Before Subhro Kamal Mukherjee & Kalidas Mukherjee, JJ

The Lieutenant Governor and others – Vs- Prem Kumar and others[1]

Andaman and Nicobar Islands Land Revenue and Land Reforms Regulation 1966 – Chapter XII A - Whether Choudharis appointed by the Deputy Commissioner could be treated as Civil Servant – Held that Choudharis are government servants.

Whether the Choudharis are Civil Servant or not – is essentially a question of fact – the Choudharis appointed by the Administration are government servants and holding the civil posts. The Choudharis are performing the duties in connection with the affairs of the State. Choudharis are paid by the State Government out of the proceeds of tax and fees imposed by the State; such imposition of taxes or fees, in the nature of the tax, is essential a function of the State. Therefore, the Choudharis are paid out of the State fund while discharging essentially government duties. They are responsible government servant exercising delegated powers of the government. They are appointed by a authority prescribed under the said regulation of 1966 and their function are regulated by the said regulation of 1966 made by of the government. They can only be removed subject to the rules made under the said regulation. They are therefore, government servant and holder of civil posts under the State (para 19) The application dismissed.

Facts of the arguments appear from judgment

Counsel for the parties

Mr.S.K.Mandal, Mr.Hemraj Bahadur and Mr.Anil Kumar Chakraborty for the petitioners and Mr.Roshan George for the respondent.

SUBHRO KAMAL MUKHERJEE, J.

1. In this application under Article 226 of the Constitution of India against the judgment and order dated May 22, 2007 passed by the Central Administrative Tribunal in original application No. 78/AN/2005, we are invited to decide whether the Chaudharis, appointed under the Andaman & Nicobar

[1] WPCT No. 178 of 2007, decided on 5th September 2007 by the Hon'ble Division Bench of the Calcutta High Court during its Circuit sitting at Port Blair.

Islands Land Revenue & Land Reforms Regulation, 1966, are holding civil posts or not?

2. The Central Administrative Tribunal, by its impugned judgment and order, answered the aforementioned question in the affirmative and directed the administration to consider in detail the functional responsibilities of Chaudharis, work out the total number of full time Chaudharis, to frame necessary recruitment rules and consider the cases of the applicants before the said Tribunal for their regularization in the posts of Chaudharis.

3. The applicants before the Tribunal were, admittedly, appointed as part-time Chaudharis under the said Regulation of 1966 on consolidated pay.
4. The applicant no. 1 approached the said Tribunal, inter alia, for a direction for his regularization; the said application was registered as O.A. No. 50/AN/1997. By judgment and order dated July 12, 1999, the Central Administrative Tribunal disposed of the said application with the direction upon the authorities to consider the creation of regular post of Chaudhari and to frame recruitment rule for the said post within six months from the date of communication of the said order. The Tribunal, further, directed the authorities to regularize the service of the said applicant to the said post to be created on regular basis, if he was otherwise eligible as per the rules.

5. Alleging non-implementation of the said order, the applicant no. 1 filed an application for contempt. The said application for contempt was registered as CPC No. 8/AN/2000. The Deputy Commissioner, Andaman District, filed an affidavit-in-opposition to the said application for contempt, inter alia, undertaking to implement the said order dated July 12, 1999 and prayed for extension of time till February 20, 2001 for passing a reasoned and speaking order upon compliance of all formalities.

6. By order May 31, 2001 the said application for contempt was dismissed by the Tribunal by recording the undertaking of the contemnor to implement the said order of the Tribunal by passing a speaking order.

7. The said Deputy Commissioner passed his order in February 20, 2001 and turned down the claim of the applicant no. 1 for regular appointment in the post of Chaudhari. He found that the creation of regular posts of Chaudhari was not justifiable at that juncture.

8. The present applicants, in the aforementioned facts and circumstances, moved the Central Administrative Tribunal for a mandatory order directing the authorities to regularize the said applicants in the posts of Chaudharis. The said application was registered as O.A. No. 78/AN/2005. In the said application the applicants highlighted that the administration appointed the private respondents in the said application, namely, Ashad and Tahir Ali, as Chaudharis, with definite pay scale plus dearness allowance and other allowances as admissible under the rules.

9. As we have noted hereinabove, the Tribunal allowed the said application directing the administration, inter alia, to frame recruitment rules and to consider the cases of the applicants for their regularization in the post of Chaudharis.

10. Being aggrieved the administration has come up with this writ petition.

11. Mr. Santosh Kumar Mandal, learned advocate appearing for the administration, submits that in the changed circumstances there is no necessity of appointment of Chaudharis and, in any event, there is no question of framing recruitment Rules for the Chaudharis as the Chaudharis are not holding any civil posts. Mr. Mandal, however, tries to explain the orders of appointment of he private respondents by contending that those appointments were made by mistake by the officers concerned. On the strength of the said orders of appointment, it cannot be said that the posts of Chaudharis are civil posts.

12. Mr. Roshan George, learned advocate appearing for the applicants, who are respondent Nos. 1 to 5 in this writ petition, submits that the administration is following a pick and choose policy and there is no justifiable reason in not regularizing the applicants in the posts of Chaudharis when the administration did appoint the private respondents in the posts of Chaudharis treating the post as civil post. Mr. George draws our attention to the fact that the Chaudharis are to supervise the functions of he Choukidars and the administration accepts that the chaukidars are holding civil posts.

13. The Central Administrative Tribunal, in allowing the aforementioned application, relied upon the decision of the Supreme Court of India in the case of **State of Assam and others –Vs- Kanak Chandra Dutta reported in AIR 1976 Supreme Court 884**. In the said case question raised for consideration was whether Mauzadars in the Assam Valley were holders of

civil posts under the State and were entitled to protection under Article 311 of the Constitution of India. The State contended that the Mauzadars were not whole-time employees not drew salaries, but commissions and, as such, they were not holding civil posts. The Supreme Court of India made the following observations:-

> "(9) The question is whether a Mauzadar is a person holding a civil post under the State within Art. 311 of the Constitution. There is no formal definition of "Post" and "Civil Post".
>
> The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Art. 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State, see marginal note to Art. 311. In Art 311, a member of a civil service of the Union or an all-India service of a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving of employed under the State, see the marginal notes to Arts. 309, 310 and 311. The heading and the sub-heading of Part XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the State and a person said to be holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.
>
> (10) In the context of Arts. 309, 310 and 311, a post denotes an office. A person who holds a civil post under a State holds "office" during the pleasure of the Governor of the State, except as expressly provided by the Constitution, see Art. 310. A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post.

Article 310(2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post, and it emphasises the idea a post existing apart from the holder of the post. A post is an employment, but every employment is not a post. A post may be created before the appointment or simultaneously with it. A casual labour is not the holder of a post. A post under the state means a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of persons appointed to the post.

(11) Judged in this light, a Mauzadar in the Assam Valley is the holder of a civil post under the State. The State has the power and the right to select and appoint a Mauzadar and the power to suspend and dismiss him. He is a subordinate public servant working under the supervision and control of the Deputy Commissioner. He receives by way or remuneration a commission on his collections and sometimes a salary. There is a relationship of master and servant between the State and him. He holds an office on the revenue side the administration to which specific and onerous duties in connection with the affairs of the State are attached, an office which falls vacant on the death or removal of the incumbent and which is filled up by successive appointments. He is a responsible officer exercising delegated powers of Government. Mauzadars in the Assam Valley are appointed Revenue Officers and ex officio Assistant Settlement Officers. Originally, a Mauzadar may have been a revenue farmer and an independent contractor. But having regard to the existing system of his recruitment, employment and functions, he is a servant and a holder of a civil post under the State.

(12) Counsel for the State stressed the fact that normally a Mauzadar does not draw a salary. But a post outside the regularly constituted services need not necessarily carry "a definite rate of pay". The post of a Mauzadar carries with it remuneration by way of a commission on collections of Government dues. Counsel stressed the fact that a Mauzadar is not a wholetime employee. But a post outside the regularly constituted services may be a part-time employment. The conditions of service of a Mauzadar enable him to engage in other activities."

14. **In Superintendent of Post Offices and Others –Vs- P.K Rajamma reported in (1977) 3 SCC 94** the Apex Court was considering as to whether

the P & T Extra Department Agents held civil posts. The Apex Court found that an extra-department agent held a civil post and the order terminating his service in violation of Article 311 (2) of the Constitution of India was invalid. The Supreme Court of India observed that extra-department agent was not a casual worker, but he held a post under the administrative control of the State and the relationship between the postal authority and the extra-departmental agent was that of a master and servant.

15. In State of Gujarat and another –Vs- Raman Lal Keshav Lal Soni and others reported in (1983) 2 Supreme Court Cases 33, the Supreme Court of India was considering whether the members of the Gujarat Panchayat Service are government servants. In the said decision Supreme Court of India observed as under:-

> "27… We do not propose and indeed it is neither politic nor possible to lay down any definitive test to determine when a person may be said to hold a civil post under the Government. Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, the right to select for appointment, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of fact whether a person is a servant of the State or not."

16. Considering all aspect of the matter, the Supreme Court of India held that the members of the Gujarat panchayat service were government servants.

17. Kurk Amins are appointed on commission basis by District Magistrates/ Collectors in the state of U.P. for realisation of outstanding dues of the co-operative societies. The Supreme Court of India in the case of **State of U.P. and other –Vs- Chandra Prakash Pandey and others reported in (2001) 4 SCC 78** accepted the contention of the Kurk Amins that they were government servants and holders of civil posts.

18. In the background of the aforementioned discussion, let us now consider as to how the Chaudharis are appointed and what are their functions and responsibilities. Chapter XII of the said regulation of 1966 deals with the Village Officers. Chapter XII A of the said Regulation deals with the Chaudharis. The relevant provisions are Regulations 132 to 138. Factually, a Chaudhari is appointed by the Deputy Commissioner, his remuneration is fixed by the Deputy Commissioner. He is to collect and pay into the Government Treasury land revenue, cesses and other government dues ordered to be collected by him; to furnish reports regarding the state of his village; to prevent encroachments on waste land, public paths and roadways in the villages; to preserve such stations and boundary marks erected in his village by he surveyors in the service of government and to report any damage caused to such station or marks; to keep the village in good sanitary condition; to prevent unauthorized cutting of wood or unauthorized removal of any minerals or other properties belonging to the government; to control and supervise the work of the chaukidars; to perform such other duties as may be prescribed. He can be removed subject to the rules made under Regulation of 1966 by the Deputy Commissioner.

19. Considering the provision of said Regulation of 1966, the Central Administrative Tribunal held, on facts, that the Chaudharis appointed by the administration are government servants and are holding civil posts. We find that the Chaudharis are performing the duties in connection with the affairs of the State. The Chaudharis are paid by the State Government out of the proceeds of tax and fees imposed by the State; such imposition of taxes of fees, in the nature of a tax, is essentially a function of the State. Therefore, the Chaudharis are paid out of the state fund while discharging essentially governmental duties. They are responsible government servants exercising delegated powers of the government. They are appointed by an authority prescribed by the said regulation of 1966 and their functions are regulated by the said regulation of 1966 made by the government. They can only be removed subject to the rules made under the said regulation. They are, therefore, government servants and holders of civil posts under the State.

20. Whether the Chaudharis are government servant or not, is essentially a question of fact. The Central Administrative Tribunal found, upon consideration of the materials placed before it, that they are holders of civil posts. In the facts and circumstances of the case, we do not find any reason to differ

from such findings of Central Administrative Tribunal. We, also, hold therefore, that the Chaudharis are government servants and holders of civil posts.

21. In view of the scheme of the said Regulation framed by the government, we fail to appreciate the decisions of the Deputy Commissioner that creation of regular posts of Chaudharis was not justifiable at this Juncture. The Central Administrative Tribunal rightly held that there was no logic in the contention of the administration that, due to modernization, there was no work for the Chaudharis.

22. The writ application is, rejected. The order or the Central Administrative Tribunal is affirmed. We make no order as to costs.

CONSTITUTIONAL WRIT JURISDICTION
Before K.J.Sengupta and Mr. P.C.Datta, JJ.

Union of India & Others versus Shri. Tarshem Kumar[1]

Constitution of India Article 226/227 :Review DPC – Tribunal observed that DPC did not grade the officer in terms of good, very good and outstanding for selection but assessed in terms of fitness or un-fitness –O.M No. 35034/ 7/97-Estt. (D) dated 08.02.2002 criteria of selection has undergone changes – DPC should not be guided by overall grading – should makes its own assessment on the basis of entries in the CRs.

Held : That Ld. Tribunal does not appear to have committed error while directing for holding Review DPC. However, there is no reason why there shall be adherence to different guidelines the later being not applicable to the instant case. The order of the Ld. Tribunal modified that the writ petitioner shall hold DPC in respect of the performance of the respondent for the year relevant under the guideline in the matter of consideration for promotion to JAG only in terms of Office Memorandum dated 10.03.1989.

A review DPC should be constituted for consideration of CRs for a period of 05 (Five) years after having obtained general assessment for the period from November, 1999 to March, 2000.

---

[1] WPCT No.215 of 2007 decided on 15th October, 2007 by the Hon'ble Calcutta High Court, Circuit Bench at Port Blair.

Facts and arguments appear from judgment

Counsel for the parties
Mr.S.K.Mandal, Mr.A.K.Chakraborty for the petitioners and Ms.S.Ganguly, Mr.Gopala Binnu Kumar for the respondents

P.S. DUTTA, J.

1. By this writ application under Article 226/227 of the Constitution of India, the Union of India and the Andaman & Nicobar Administration have challenged the judgment and order dated 24/11/2006 passed in O.A. 12/AN/04 by the learned Central Administrative Tribunal, Calcutta Bench, Circuit at Port Blair whereby and whereunder the Tribunal directed the petitioner herein to hold a review Department Promotion Committee (in short hereinafter DPC) to consider the promotion of the respondent No. 1 herein in terms of the procedure laid down in the office memorandum No. F-22015/5186/Esstt.D dated 10th of March, 1989 issued by the Govt. of India in the Department of Personal and Training and an office memorandum dated 08/02/2002 vide O.M. No. 35034/7/97-Estt.(D) after disposing of the representation of the respondent No. 1 dated 1st of August, 1983 within the period of 45 days from the date of receipt of the order.

2. A Member of the 1985 Batch of Delhi, Andaman & Nicobar Islands, Lakshadweep, Daman & Diu and Dadra & Nagar Haveli Civil Service (in short hereinafter DANICS), the respondent No. 1 was, while functioning as Registrar of Coop. Societies, A & N Islands with additional charge of the Superintendent of District Jail promoted to Junior Administrative Grade on Ad-hoc Basis along with 28 others Grade-1 Officers of DANICS in the scale of pay of Rs. 12,000-375-16500 vide order No. 14016/59/2001-UTS-II dated 18th October, 2002. Consequently, his pay was fixed at Rs. 13,125/- in the scale of pay of Rs. 12,000-375-16500 with effect from 18.10.2002. Surprisingly, by order No. 433 dated 27/08/2003 he was communicated that his case of regularization in the regular promoted post could not be done and his pay was refixed in the substantive selection grade on 21/02/2003. He submitted a representation once on 01/08/2003 and then on 27/08/2003 requesting for sympathetic consideration of his case in view of his contemporary colleagues as also some of his junior having been regularized. According to the respondent No. 1, non consideration of his appointment to the regular post carrying Junior Administrative Grade was discriminatory.

3. Before the Central Administrative Tribunal the present writ petitioner took the stand by filing an affidavit in opposition that awarding Ad-hoc promotion to the Junior Administrative Grade of DANICS without following the conditions laid down in the Recruitment Rules for temporary period did not confer on the respondent No. 1 any right to regular appointment to the said post and it is the DPC basing on the service record did not recommend his name for the regular promotion. According to the petitioners, in Ad-hoc promotion the criteria is merely on 'seniority-cum-fitness basis', while in the case of regular appointment to the Junior Administrative Grade (JAG) of DANICS the criteria is one of 'selection', where stricter standard of assessment is adopted, with a benchmark grading of 'Very Good' for last five consecutive years for promotion. In this regard they have relied on the instruction of Department of Personnel and Training O.M. No. F.22011/5/86-Estt.D dated 10/03/1989.

4. The learned Tribunal while directing the writ petitioners to hold a review DPC for the years 1999, 2000 and 2001 observed that the DPC did not grade the Officer in terms of 'Good', 'Very Good', and 'Outstanding' for selection but assessed in terms of fitness or unfitness. It further observed that since the criteria of selection has undergone changes from 08/02/2002 vide O.M. No. 35034/7/97-Estt.(D) direction was given to follow the office memorandum No. dated 10/03/1989 for the years 1999, 2000 and 2001 and office memorandum No. dated 08/02/2002 for the year 2002.

5. It is contended by the writ petitioners against the judgment and order of the learned Tribunal that the direction to hold review DPC in the matter of consideration of appointment of the respondent No. 1 to the post of Junior Administrative Grade was illegal in view of the fact that it was on the basis of the performances of the officer concerned as were reflected in the confidential rolls that the case of the respondent No. 1 could not be considered in his favour having regard to the instruction of the Government of India on the subject of promotion. The Bnech mark required for appointment on promotion to the Junior Administrative Grade was in terms of the office memorandum 'Very Good', which could not be achieved by the respondent No. 1 and he cannot go beyond the aforesaid O.M Dated 10/03/1989. The learned Tribunal failed to appreciate that prior to the office memorandum dated 08/02/2002, the mode of regular promotion was 'selection by merit' while for appointment in terms of the office memorandum dated 08/02/2002 the mode of selection for regular promotion by the DPC is somewhat different and in the instant case, there cannot be two modes of selection for the respondent No. 1

concerned. It has also been contended that unless the assessment of the D.P.C. is found to be perverse or arbitrary, which was not the case of respondent No. 1 the learned Tribunal was not justified in passing the order impugned.

6. We have heard Mr. S.K. Mandal, learned Advocate appearing for the petitioners and Ms. S. Ganguly and Mr. G.B. Kumar, learned Advocate appearing for the respondent No. 1.

7. Mr. Mandal, learned Counsel for the petitioners submitted that it was because of the respondent No. 1 having not achieved the Bench mark 'Very Good' for the year 1999 to 2001 that his case could not be considered by the DPC, which on the basis of the overall grading of the Officer given by the reviewing authority has to assess independently whether a concerned officer was fit or unfit for the promotion and the entire consideration has to be confined to the office memorandum of 1989, and not the subsequent memorandum of 2002, which has no manner of application to the instant case and the petitioners cannot go beyond the said O.M. of 1989 and DANICS Rules 1995.

8. Ms. Ganguly, learned Counsel for the respondent No. 1 supports the learned Tribunal's order and seeks for dismissal of the writ petition.

9. We heave carefully perused and read the O.M. dated 10.03.1989 and we find the DPC has to strictly adhere to number of norms and guidelines, which includes consideration of confidential rolls (hereinafter referred to CR in short) for the five preceding years and where one or more C.Rs have not been written for any reason during the relevant period the DPC should consider the C.Rs of the year preceding the period in question and if in any case these are not available to the DPC, it should take the C.Rs of the lower grade into account to complete the number of CRs required to be considered. The fundamental thing attention of which ought not be missed is that the DPC should not be guided by the overall grading as may be recorded in the CRs but should make its own assessment on the basis of entiries in the CRs because of the fact that overall grading in the CRs may be inconsistent with the grading under various parametres or attributes. In case of each officer, the grading shall be one among (i) Outstanding (ii) Very Good (iii) Good (iv) Average (v) Unfit. Undeniably, the bench mark required for a candidate to be eligible for consideration for promotion to the post of Junior Administrative Grade is "Very Good". The DPC in this case held deliberation in the matter of consideration of promotion of the officers on Ad-hoc basis of the Junior

Administrative Grade of the DANICS sometime in the year of 2002. It is not in dispute that Ad-hoc promotion was for a period of 6 months from the date of taking over the charge of the post or till the post is filled up on regular basis, whichever is earlier and such Ad-hoc promotion, which can be done only in compliance with the relevant rules and instruction governing such regular promotion.

10. Now, we find that the officer was graded 'Good' for the year ending March, 1999. From April, 99 to October, 99 his overall assessment as was given by the Reviewing Officer was 'Very Good'. For the period from November, 99 to March, 2000 there was no overall grading of the Officer in terms of 'Outstanding', 'Very Good', 'Good', 'Average', 'Unfit'. In terms of the Office Memorandum of Govt. of India dated 10/03/1989 the CRs should contain general assessment in terms of any of the above remarks. But with respect to the CR for the period from November, 1999 to March, 2000 there has not been any assessment as it is required under the instructions. However, for the year/period ending 2000-2001 i.e. April, 2000 to March, 2000, the officer was graded 'Very Good'. For the period from April, 2001 to March, 2001 his performance was rated 'Very Good'. The CRs for the period beyond March, 2002 was not taken into consideration presumably because of the fact that the DPC sat for deliberation in the later part of the year of 2002. Now, the guidelines of the Govt. of India commands the DPC to consider the CRs for five preceding years, while we find that the CRs for the years 1999, 2000, 2001 and part of 2002 was considered and in between the period the CR for the year November, 1999 to March, 2000 did not reflect any general assessment in terms of the guidelines. Accordingly, we feel that there should be a review by DPC to consider the CRs of the concerned Officer for a period of five years after having obtained general assessment of the said officer for the period from November, 1999 to March, 2000 in terms of the O.M dated 10/03/1989. The said office memorandum clearly directs that CRs. for five preceding years shall have to be considered and in case they are not available the CRs of the lower grade have to be taken into account to complete the numbers of CRs required to be considered. The learned Tribunal does not appear to have committed error while directing for holding review by DPC.

11. We, however, do not approve of the direction of the learned Tribunal that the writ Petitioners would hold DPC for the years required in terms of the Office Memorandum dated 10/03/1989 and the one dated 08/02/2002 as there is no reason why there shall be adherence to two different guidelines the later being not applicable to the instant case. Particularly for the reason that it was not the case of either of the parties that the respondent No. 1 or

for that matter the officers of the 1985 Batch of DANICS was/were considered for promotion as against any vacancy that accrued after the Office Memorandum dated 08/02/2002 was issued. The learned Tribunal had referred to a decision in B.L. Gupta and another -vs- M.C.D. (1998) 9 SCC, 223, does not appear to have any manner of application to the instant case. therefore, this part of the direction of the learned Tribunal has to be expunged.

12. In the circumstances as above, we maintain the order of the learned Tribunal with modification that the writ petitioners shall hold a DPC in the respect of the performance of the respondent for the years relevant under the guideline in the matter of consideration for promotion to the Junior Administrative Grade but that too only in terms to the Office Memorandum dated 10/03/1989 within three months from the date of this order.

13. This writ application is accordingly disposed of.

———

CIVIL APPELLATE JURISDICTION

Before Miss Indira Banerjee and Mr.Manik Mohan Sarkar, JJ.

Surender Singh Kanungo Versus Union of India & Ors.[1]

Arbitral Tribunal– the Arbitral Tribunal is the last authority on the question of appreciation and appraisal of the evidence adduced. It is settled position of law that while examining an award under section 34 of the said Act, the Court is clothed with the power to examine the same within four corners of the aforesaid statute, nothing more or nothing less.

Factor Determining to Award Contract-Overall price bid which would determine to whom contract would be awarded to subject to fulfillment of the requisite eligibility criteria.
Court can interfere with the Award of the Arbitrator- If analysis of evidence made by the Arbitrator was so unreasonable as to shock the judicial conscience, may be, the court would not hesitate to enter upon such an exercise, for a patently arbitrary, unreasonable and illegal award undoubtedly be contrary to public policy.
Held : The award of the Ld. Arbitrator is not manifestly contrary to any provision of the contract or any provision of law. The grounds for setting aside the award as stated in the impugned judgment and order are not

[1] FAT No.04 of 2007; decided on March, 03, 2007 by the Hon'ble High Court, Circuit Bench at Port Blair

sustainable in law. The Ld. Arbitrator had the authority to grant interest, which he did.

Facts and arguments appear from judgment

Counsel for the parties

Mr. Debal Banerjee, Mr.Kamal Bechair Panda, Mr.Krishna Rao for the appellant and Mr.Sanjay Bhasin, Mr.Arul Prasanth for the respondents.

INDIRA BANERJEE, J.

1. This appeal is against a judgment and order dated 28th September, 2007 passed by the learned District Judge, A & N Islands in other Suit No. 5 of 2006 (Union of India and another –Vs- Surendra Nath Kanungo and another) whereby the learned District Judge set aside as award dated 31st October, 2006 passed by the learned Arbitrator Shri. T.K. Mishra in an arbitration between the appellant and the respondent No. 1.

2. The facts giving rise to this appeal are briefly enumerated hereinafter:-

By a contract in writing the respondent no.1 awarded to the appellant the job of excavation in connection with extension of the runway of the Air Port at Port Blair at a total sum of Rs. 14,72,36,603/-.

3. The said contract contained inter alia the following terms-

"CLAUSE 12-A. In case of contract of substituted item or additional items, which result in exceeding the deviation limit laid down in Sub-Clause (vi) of Clause 12 above except the items relating to foundation work, which the contractor is required to do under clause 12 above the contractor shall within 7 days from the receipt of order, claim revision of the rate supported by proper analysis in respect of such items for quantities in excess of the deviation limit, not withstanding the fact that the rates for such items exist in the tender for the main work or can be derived in accordance with the provision of sub-clause (ii) of Clause 12 and the Engineer in Charge may revise their rates having regard to the prevailing market rates and the contractor shall be paid in accordance with the rates so fixed. The Engineer-in-Charge shall, however, be at liberty to cancel his order to carry out increased quantities of work by giving notice in writing to the contractor and arrange to carry it out such manner as he may consider advisable. But, under no

circumstances the contractor shall suspend the work on the plea of non-settlement of rates of items falling under this clause.

All the provisions of the preceding paragraph shall equally apply to the decrease in rates of items for quantities in excess of the deviation limit notwithstanding the fact that the rates for such items exist in the tender for the main work or can be derived in accordance with the provisions of such-Clause (ii) of the preceding Clause 12, and the Engineer in-charge may revise such rates having regard to the prevailing market rates.

CLAUSE 25. Except where otherwise provided in the contract all question and disputes relating to the meaning of the specification, designs, drawingS and instructions hereinbefore mentioned and as to the quality of workmanship of materials used on the work or as to any other questions claim, right matter or thing whatsoever in any way arising out of or relating to the contract designs, drawing specifications, estimates, instructions order or these conditions or otherwise concerning the works or the execution or failure to the execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer C.P.W.D, incharge of the work at the time of dispute or if there be no Chief Engineer the administrative head of the CPWD at the time of such appointment. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant that he has to deal with the matter to which the contract relates and that in the course of his duties as Government servant he has expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or beding unable to act for any reason, such Chief Engineer or administrative head as aforesaid at the time of such transfer vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Chief Engineer or administrative head of the C.P.W.D. as aforesaid should act as arbitrator at all. In all cases where the total amount of all the claim in dispute is Rs. 75.000/- (Rs. Seventy Five Thousand Only) and above the arbitrator shall give reasons for the award.

Subject as aforesaid the provisions of the Arbitration Act 1940, or any statutory modification or an enactment thereof and the rules made thereunder and for

the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputes.

It is also a term of the contract that the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Govt. that the final bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Govt. shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitrator(s) may from time to time will consent of the parties enlarge the time, for making and publishing the award.

The decision of the Superintending Engineer regarding the quantum of reduction as well as justification thereof in respect of rates or sub standard work which may be decided to be accepted will be final and would not be open to arbitration."

4. The contract inter alia involved excavation of 1,47,666 Cubic Metres of ordinary rock of the contract value of Rs. 73,83,300/- at the rate of Rs. 50/- per Cubic Metre and excavation of 1,47,666 Cubic Metres of hard rock of the contract value of Rs. 88,59,960/- at the rate of Rs. 60/- per Cubic Metre.

5. During the execution of the contract the work of excavation of ordinary rock exceeded the estimated quantity and till the 49th Bell, about 11,44,344 Cubic Metres of ordinary rock had been excavated.

6. The deviation being in excess of 25%, the appellant claimed Rs. 164.50 per Cubic Metres for the job of excavation of ordinary rock.

7. The respondent refused to pay the rate claimed by the appellant and the disputes that arose were referred to arbitration.

8. The learned arbitrator made and published an award fixing the market rate for excavation of rock at Rs. 113.10 per Cubic Metre. The respondents filed an application under Section 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the 1996 Act. The said application was

dismissed by the learned District Judge, A & N Islands by an order dated 29th July, 2000.

9. The respondents filed an appeal being F.A.T. No. 4220 of 2000 from the said order of the learned District Judge in this Court. By a judgment and order dated 26th February, 2002 a Division Bench of this Court comprising A Chakravorty and M.K. Basu, J.J. dismissed the appeal. The respondents did not file appeal to the Supreme Court against the said judgment and order of this Court.

10. In this meanwhile, work of excavation was in progress and further bills were raised claiming the rate of Rs. 113.10 per Cubic Metre for excavation of ordinary rock.

11.. The respondents, however, did not pay the aforesaid bills whereupon the appellant filed a writ application in this Court being W.P. No. 144 of 2001 praying inter alia for orders on the respondents to make payment of bill raised by the appellant for excavation of ordinary rock at the fixed by the Arbitrator by his award referred to above which had assumed finality.

12. The said writ application was disposed of by an order dated 17th January, 2002, whereby P.C. Ghose, J. directed the Chief Engineer, APWD to appoint an arbitrator and to refer the disputes between the parties in respect of the 17th till the 47th running bills and also the running bills that might be prepared by the Executive Engineer, APWD in respect of the contract in question till 20th February, 2002 within 31st March, 2002. The learned Arbitrator was directed to make public award after hearing the parties and after determining what could be the market rate for the work done by the appellant in respect of the excavation of ordinary rock. Therefore, the Chief Engineer, APWD appointed Jogmohan Lall, Additional director General, CPWD as arbitrator. The learned Arbitrator made and published his award.

13. The respondent made an application before the learned District Judge, A & N Islands for setting aside the said award under section 34 of the 1996 Act. By a judgment and order dated 9th March, 2004 the learned District Judge dismissed the said application being O.S. No. 4 of 2003.

14. The respondent preferred an appeal being FAT No. 001 of 2004 in this Court. By a judgment and order dated 21st June, 2004, the Division Bench

comprising Their Lordships the Hon'ble Justice Kalyan Jyoti Sengupta and the Hon'ble Justice Pranab Kumar Chattopadhyay allowed the appeal and set aside the award impugned on the sole ground that the learned Arbitrator having retired from service and another arbitrator having been appointed the arbitrator was incompetent to make and publish the award. The Division Bench, however, held as follows:-

> "The learned Arbitrator even assuming he was competent to decide the matter, has considered the evidence and appreciated the same, when upon appreciation he has come to his own finding on merit the Court cannot upset unless there is apparent perversity, it is not he case of no evidence of unacceptable evidence but question of adequacy and inadequacy of the evidence. This Court as rightly submitted by Mr. Bahadur for that matter the Court contemplated under Section 34 of the said Act, is not competent to re-apprise of re-appreciate the evidence adduced by the parties before the Arbitral Tribunal.
>
> The Arbitral Tribunal is the last authority on the question of appreciation and appraisal of the evidence adduced. It is settled position of law that while examining an award under Section 34 of the said Act, the Court is clothed with the power to examine the same within four corners of the aforesaid statute, nothing more or nothing less.
>
> Upon perusal of the said Section, we think that power of reappraisal or re-appreciation of evidence has not been conferred upon the Court. Therefore, we uphold the findings of the learned Court below to this extent that the Court cannot re-appreciate the evidence."

15. Appellants filed a Special Leave Petition in the Supreme Court being SLP (Civil) No. 21204, which was dismissed. The disputes were referred to the arbitration of Shri. T.K. Mishra, Arbitrator who held several meetings and ultimately made and published the award impugned in the Court below.

16. Mr. Debal Banerjee, learned Senior Advocate, appearing on behalf of the appellant submitted that the award impugned before the learned District Judge was a reasoned award made after giving both the parties adequate opportunity of hearing and on consideration of the materials on record.

17. Mr. Banerjee took us through the award and pointed out that the market rate for excavation of ordinary rock had been determined by the

learned Arbitrator upon consideration of the Delhi Schedule of rates of the Central Public Works Department, the analysis of rates prepared by M/s Rites, a Govt. of India undertaking as also the rate determined by the earlier award which had assumed finality.

18. Mr. Benerjee submitted that the award being reasoned and the same being on evidence the same was not liable to be set aside under Section 34 of the 1996 Act.

19. Mr. Banerjee argued that the award of the learned Arbitrator was not based on any proposition of law stated in the award, which was patently erroneous. Mr. Banerjee argued that in passing the impugned judgment and order and setting aside the award, the learned District Judge misconstrued the provision of section 34 of the 1996 Act and the various sub-sections thereof. The Conditions precedent for interference with an award, were according to Mr. Benerjee wholly absurd.

20. Mr. Banerjee argued that in passing the impugned judgment and order and setting aside the award the learned District Judge misconstrued the scope of an application under Section 34 of the 1996 Act. The learned District Judge failed to appreciate that the Court considering an application for setting aside of an award under Section 34 of the 1996 Act could not sit in appeal over the award. It was not for the Court to re-assess the evidence before the learned Arbitrator weigh the sufficiency of the evidence on record or substitute its own opinion on the evidence that should have been accepted when there is contradictory evidence. Mr. Banerjee submitted that in determining the market rate the learned Arbitrator had considered the Delhi Schedule of Rates, the analysis of rates by M/s Rites, the award of previous arbitrators as also the rates quoted by the appellant as well as another tenderer, Integral Construction Company, for work of similar nature. The arbitrator on an overall assessment of relevant facts and circumstances found in effect that the rate quoted by Integral Construction Company could not be an indicator of the prevalent market rate.

21. Mr. Sanjay Bhasin, learned Advocate, on the other hand, attacked the award contending that the learned Arbitrator had not indicated any specific reason for not accepting the rate quoted by Integral Construction Company as the market rate. Mr. Bhasin argued that the learned Arbitrator proceeded on the basis of the earlier award without independently applying his mind to the evidence on record. Mr. Bhasin pointed out that the rate determined by

the learned Arbitrator for excavation of rock was about five times higher than the rate quoted by Integral Construction Company for identically work. In fact, the tender work has been awarded to the said tenderer who has been performing the work at the rate of about Rs. 24 per Cubic Metre.

22. Mr. Bhasin argued that there can be no justification in fixing the market rate at Rs. 113 per Cubic Metre, when a Contractor was doing the same job at the rate of about Rs. 24 per Cubic Metre. The award is patently contrary to public policy and if allowed to stand would cost a huge drain on the public exchequer. Such an award was clearly against public interest.

23. Mr. Bhasin also argued that in terms of a contract it was for the Engineer-in-Charge to determine the market rate on the basis of relevant factors. Mr. Bhasin referred to Clause 24 of the Contract, being the Arbitrator Clause, which provided for arbitration of disputes other than those for which a remedy had been provided under the contract. Relying on Clause 25 Mr. Bhasin submitted that determination of the market rate for excavation of minor rock was an excepted matter and not arbitrable.

24. Mr. Bhasin submitted that even if it was assumed that the order dated 17th January, 2002 of P.C. Ghose, J. referred to above, conferred power on the learned Arbitrator to determine the market rate the learned Arbitrator was only required to determine the market rate. The Arbitrator thus committed a patent error in making the award which did not just involve the determination of the market rate but also determination of the quantum of work and the question of liability of the respondents to pay interest to the appellant for the job in question.

25. Mr. Bhasin argued that the Court set aside an award which was not in public interest. In support of his argument Mr. Bhasin cited the decision of the Supreme Court in the case of ONGC –Vs- Saw Pipes reported in 2003(5) SCC-705. Mr. Bhasin next cited the judgment of the Supreme Court in the case of Hindustan Zinc Ltd. –Vs- Friends Coal reported in 2006(4) SCC-445 in proposition that an award could be interfered with even on facts, if the award was arbitrary and based upon non consideration of relevant evidence.

26. Mr. Bhasin next cited the Judgment of the Supreme Court in the case of Rajasthan –Vs- Nav Bharat Construction reported in 2006(1) SCC-086 where the Supreme Court held that the arbitrator could not go beyond the terms of contract of determine claims not referred to him. Mr. Bhasin also

relied on the judgment of the Supreme Court in the case of Orissa Mining Corp. Ltd. vs. Prannath Vishwanath Rawlley reported in 1977(3) SCC-53, MD, Army Welfare vs. Sumangal Service reported in 2004(9) SCC-619, State of Orissa vs. Orient Papers and Industries Ltd. reported in 1999(3) SCC-566 and Vishwanath Sood vs. Union of India reported in 1989(1) SCC-657.

27. Mr. Banerjee giving his reply pointed out that the said Ms/ Integral Construction company had quoted Rs. 24.85 for ordinary rock but Rs. 206 per Cubic Metric Ton for hard rock i.e. over three times the rate quoted by the appellant herein.

28. Mr. Banerjee submitted that in case of composite tenders involving different kinds of jobs the terderers invariably quoted different rates for different jobs. What is important is the overall price bid which would determine who the contract would be awarded to, subject to fulfillment of the requisite eligibility criteria. Mr. Banerjee pointed out that the appellant had quoted Rs. 50 per Cubic Metre for ordinary rock and Rs.60 per cubic metre for land rock. M/s Integral Construction Company quoted Rs.206 for hard rock and Rs. 24.80 for ordinary rock. In any case the Integral Construction Company has also raised disputes which had been referred to arbitration. Mr.Bhasin, however, pointed out that the disputes referred to arbitration did not pertain to the rate of Rs. 24.80 per Cubic Metre for hard rock.

29. Mr. Banerjee argued that the very fact that the contract provided for payment on the basis of market rate, when deviation exceeded 25%, in itself showed that the respondents also acknowledged the fact that tenderers might quote profitable rates for some items but lower non-profitable rates for others, since the total cost was relevant.

30. Mr. Banerjee argued that the respondents impliedly permitted the practice of quoting low rates for some items which can be made up through some other items of work.

31. Mr. Banerjee pointed out that the question of market rate was referred to the arbitrator pursuant to an order of this Court which had assumed finality. The order was passed by consent. It was not open to the respondents to contend that the arbitrator could not decide the market rate or the market rate was an excepted matter. Mr. Banerjee finally submitted that the 1996 Act specifically provides for interest.. The rate of interest has been mentioned

in the Act. In the circumstances, the arbitrator has awarded interest in accordance with the 1996 Act. The award of interest cannot be assailed.

32. An arbitral award can be set aside only on the grounds specified in Section 34 of the 1996 Act which is extracted herein below for convenience.

> "34. Application for setting aside arbitral award.- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub section (3).
>
> (2) An arbitral award may be set aside by the Court only if-
>
> (a) the party making the application furnishes proof that-
>
> (i) a party was under some incapacity, or
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
>
> (b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or
(ii) the arbitral award is in conflict with the public policy of India.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal.

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may where it is appropriate and it is so requested by a party, adjourn the proceeding for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral tribunal proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

33. The scope of ambit of an application under Section 34 of the 1996 Act has fallen for determination in several judgments of the Supreme Court as also this Court.

34. In this case of ONGC vs. Saw Pipes (Supra) the Supreme Court inter alia held that an award which was patently illegal or contrary to the term of contract would be opposed to public policy and hence liable to interference by this Court in an application under Section 34 of the 1996 Act. There can be no doubt that in view of the law declared by the Supreme Court in the case of ONGC vs. Saw Pipes (Supra) the Court might interfere with an award which is so patently arbitrary and unreasonable that it would shock judicial conscience to allow such and award to stand.

35. That Court examining an award might also consider the question of whether the award is consistent with or contrary to the contract and for this purpose examine the terms and conditions of the contract.

36. The question in this case, however, is whether the Court can substitute its own opinion for the arbitrator when two views are possible on the same set of facts. The answer cannot but be in the negative.

37. None of the judgment referred to by Mr. Bhasin lay down the proposition of law that the Court can re-assess the evidence before the learned Arbitrator just because a huge amount of public money is involved.

38. If analysis of evidence made by the Arbitrator was so unreasonable as to shock the judicial conscience, may be, the Court would not hesitate to enter upon such an exercise, for a patently arbitrary, unreasonable and illegal award would undoubtedly be contrary to public policy.

39. The question is whether the award of the learned Arbitrator can be said to be so arbitrator and unreasonable as to shock the judicial conscience of this Court when the arbitrator has apparently placed reliance on the Delhi schedule of rates, the analysis of rates by M/s Rites, a Government of India undertaking and the rate determined by an award in an earlier arbitration, that has assumed finality, to determine the market rate.

40. The touch stone of Mr. Bhasin's argument is that the market rate determined by the learned Arbitrator is almost five times higher than the rate quoted by Integral Construction Company and the cost to the respondent, about Rs. 5.72 crores more.

41. Mr. Bhasin argued that determination of market rate at five times that rate quoted by a tenderer in respect of the same work was totally unreasonable, arbitrary, smacked of non-application of mind and hence against public policy. Such an award would break the conscience of the Court and the learned District Judge rightly set aside the award.

42. Having regard to the fact that the award involves public money amounting to over Rs.5 crores that would have to be paid out of the public exchequer, this Court has embarked upon an exercise which is not ordinarily undertaken in deciding an application under Section 34 of the 1996 Act. This Court cannot, however ignore the fact that while the contract value of the entire work allotted to the appellants was about Rs. 14 crores, the estimated cost of the unfinished work that was retendered, was about Rs. 17 crores. The appellants have been awarded about Rs. 5.72 crores.

43. The learned Arbitrator took into account the schedules of rates of the Government and/or Government undertakings on the reasonable assumption that such rates would reflect more or less the market rates or would at least not be very much higher than the market rates. It is true that the arbitrator has not specifically discussed in his award the difference between the rate quoted by Integral Construction Company and the reason why the learned Arbitrator preferred the Delhi Schedule of rates to the rate quoted by Integral Construction Company.

44. Under the 1996 Act, the Arbitrator is required to give reasons for his award unless the arbitration agreement dispenses with the requirement to give reasons.

45. The requirement to give reasons does not however mean that the award of an Arbitrator would be put to the same test as a judgment of a Court of law in an appeal before a higher Court.

46. After the commencement of the 1996 Act, the Arbitrator is required to indicate in his award, what prompted him to make the award. The award should be intelligible and should sufficiently indicate the mind of the learned Arbitrator.

47. Arbitrator are generally not legally trained persons experienced in writing judgments and conversant with the niceties of law. The language, style and expression may lack perfection. As long as the factors which weighed with the learned Arbitrator in making his award are sufficiently reflected in the award, this Court would be reluctant to interfere with an award on the ground of insufficiency of reasons.

48. The forum of arbitration is an expeditious, less expensive and less formal alternative remedy usually agreed upon by the parties and the endeavour of the Court should be to bind the parties to their agreement.

49. In the instant case the standard form contract of the respondent contains a clause for arbitration of disputes to a person appointed by the Chief Engineer of the Respondent. The Arbitrator in this case, through not a legally trained person is a person with technical qualifications who has worked in the Public Works Department and is familiar with the nature of the work which has given rise to the disputes between the parties.

50. The arbitrator in his wisdom perhaps did not deem it necessary to give reasons for the obvious i.e. greater authenticity of the rates determined by the Government and/or Government undertakings, with the help of experts taking into account all relevant factors.

51. The question of arbitrability of the disputes was never raised before the learned Arbitrator. There is also nothing in the order dated 17th January, 2002 of this Court, wherefrom it may be inferred that the arbitration was to be confined only to determination of the market rate for excavation of ordinary rock. Rather, from the language and tenor of the said order it is clear that the Arbitrator was to decide all disputes between the parties, in terms of the Arbitration Clause including the question of market rate for excavation of ordinary rock.

52. The Arbitration Clause is wide and contemplates adjudication of all disputes excepts those expressly based under the provision of the contract. The respondent agreed to the reference of inter alia the question of market rate to the arbitrator.

53. The award of the learned Arbitrator is not manifestly contrary to any provision of the contract or any provision of law. The grounds for setting aside the award, as stated in the impugned judgment and order are not sustainable in law. The learned Arbitrator had the authority to grant interest, which he did.

54. That award, in our view, not liable to interference. The learned District Judge, in our view, patently erred in setting aside the award. The appeal is thus allowed. The judgment and order of the learned District Judge is set aside.

Later

55. Learned counsel appearing on behalf of the respondents prays for stay of operation of this order for a period of four weeks. The prayer of stay is considered and granted.

55. There will be stay of operation of this order for a period of four weeks from this date.

_____

CONSTITUTIONAL WRIT JURISDICTION
Before Miss Indira Banerjee, J.

Smt. Kanti Devi versus Deputy Commissioner & Ors.[1]

Constitution of India Article 226- The premium in respect of land can be determined by the authorities Ex-parte.

Held : The authorities are directed to determine the premium for the 72 Sq. Mtrs. of land in survey No. 97 Licensed to the petitioner's husband.

Facts and arguments appear from judgment

Counsel for the parties

Mr.KMB Jayapal for the petitioner and Mr.S.K.Mandal for the respondents

INDIRA BANERJEE, J.

1. In this application under Article 226 of the Constitution of India, the petitioner being the widow of late Suresh Prasad has challenged an order No. 36A/RTIA/DO/2007/2912 dated 4th May, 2007 of the respondent No. 2 being the Additional District Magistrate, South Andaman and has sought directions on the Deputy Commissioner, South Andaman to accept the premium in respect of a plot of revenue land measuring 72 Square Metres, licensed to the petitioner's late husband, being part of Survey/plot No. 3A(2)/164/2 at Haddo village, Port Blair.

2. In 1976, the petitioner's husband Suresh Prasad, since deceased, encroached into a piece of vacant Government revenue land at Haddo village. According to the petitioner, her husband occupied 300 Square Metres of land on which he constructed a dwelling house.

3.. In 1987 the Andaman and Nicobar Administration took a decision to legalise encroachment committed by bona fide encroachers who had encroached on Government land prior to 31st December, 1978. A scheme was

[1] WPNo.300 of 2007: decided on March, 03, 2008: by the Hon'ble Calcutta High Court, Circuit Bench at Port Blair

accordingly framed, under which, land upto 200 Sq. Mtrs. Could be regularized in favour of an encroacher.

4. On or about 31st January, 1989, the petitioner's husband, since deceased, made an application in the prescribed form, to the Additional District Magistrate, for regularization of area of 300 Sq. Mtrs. encroached by him.

5. According to the petitioner, on or about 19th February, 1990 the competent authority granted licence to the petitioner's husband, since deceased, to occupy 72 square metres of the encroached land in Survey No. 3A(2)/164/2 at Haddo village. According to the petitioner, even though licence was granted to the petitioner's late husband for 72 square metres of urban land at Survey No. 3A(2)/164/2 at Haddo village, premium in respect of the same was not accepted and the record-of-rights and revenue sketch map was not finalized and handed over to the petitioner's husband till his death.

6. It is stated that the petitioner's late husband, during his lifetime, constructed a double storied residential building on a portion of the licensed land and a wooded single storied building on the remaining land, for use as the kitchen.

7. The petitioner's husband during his lifetime obtained electricity and water connection for the dwelling house for which he duly paid the requisite charges. It is alleged that the petitioner's husband also paid property tax to the concerned Municipal authorities during his lifetime.

8. On or about 8th May, 2001 a notice of eviction was issued to the petitioner's husband, since deceased, under Section 5 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. The aforesaid notice was issued on the allegation that the petitioner's husband Suresh Prasad had been in occupation of Government Quarters No. 122, allotment of which had been cancelled by the Deputy Chief Conservator of Forests by a letter dated 21st June, 1994 consequent on his acquiring his own house.

9. Eviction proceedings were initiated under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. The Estate Officer passed an order of eviction against the petitioner's husband.

10. The petitioner's husband, since deceased, challenged the said eviction order by filing an appeal before the learned District Judge, A & N Islands. By a

judgment and order dated 31st December, 2002 the learned District Judge allowed the appeal and set aside the notice of eviction by holding that the appellant was not in occupation of any quarters allowed to him by the Deputy Conservator of Forests, but had constructed his own house on land measuring 72 square metres licensed to him.

11. It appears that on or about 9th March, 2004 the petitioner applied to the Additional District Magistrate for determination of premium. Premium was, however, not determined. There was no response to the said application.

12. In response to a query under the Right to Information Act, the petitioner's son received a letter dated 4th May, 2007, informing him that his mother's application had been rejected, since the scheme for regularization had been closed on 27th November, 1998. In the said letter, it was alleged that the petitioner's husband had not turned up at the office of the Additional District Magistrate for verification of land and determination of premium notwithstanding publication of notices.

13. Thereafter, the notice dated 10th October, 2007 impugned in this writ application was issued to the petitioner, informing the petitioner that land of 245 square metres. at Survey No. 97 at Haddo Village, which belonged to the Department of Environment and Forests, Haddo would be demarcated on 12th October, 2007. According to the petitioner, the demarcation was not in conformity with the impugned notice. The entire land was demarcated and wooden pillars erected thereon covering the RCC building and the wooden single storied building. The passage of the petitioner's land was allegedly blocked.

14. Being aggrieved, the petitioner has filed this writ application. An affidavit-in-opposition has been filed on behalf of the respondents by the Tehsildar, Port Blair, wherein it is alleged that the petitioner's husband, since deceased, had joined the Mill Division under the Principal Chief Conservator of Forests on 6th August, 1979 on his ad hoc promotion-cum-transfer to the post of LCT Engineer.

15. On reporting for duty, the petitioner's husband, since deceased, requested for allotment of Government quarters. A copy of an application dated 15th December, 1980 allegedly made by the petitioner's late husband has been annexed to the affidavit-in-opposition.

16. It is stated that the petitioner's husband was permitted to occupy Government Quarter No. H/122 at Haddo village vide a Memorandum No. 4-1/ Genl/81/764 dated 30th January, 1981 and he had occupied the quarters on 30th January, 1981 and submitted an occupation report dated 31st January, 1981.

17. The Respondents allege that after the retirement of the petitioner's husband, the petitioner's husband was directed to vacate the quarters but he did not do so. After his death his legal heirs have continued to occupy the same.

18. Eviction proceedings were initiated in the Court of the Estate Officer (Additional District Magistrate), Port Blair under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 leading to the eviction order No. 20 of 2000. Admittedly the order of eviction was set aside in appeal. The order of the Estate Officer, Port Blair may have been set aside by the District Judge on the ground that the department could not produce any document/land records which could establish that the land in question was owned by the department of Environment and Forests. If the authorities chose not to produce documents, they did so at their own peril. The order of the learned District Judge has assumed finality. The alleged subsequent discovery that as per Khasra register of 1961 the particular quarters are recorded as Government quarters standing on Survey No. 97 and covering an area of 245 square metres is of no consequence.

19. The alleged review of the matter by the Principal Chief Conservator of Forests can make no difference. The direction, if any to initiate fresh eviction proceedings under the Public Premises (Eviction of Unauthorised Occupations) Act, 1971 in the Court of the Estate Officer, South Andaman, Port Blair is misconceived.

20. Mr. Mandal appearing on behalf of the Respondent authorities submitted that the Government quarters have been dismantled/destroyed by Smti. Kanti Devi and her son Shri. Munish Prasad. A police complaint has been filed. Later on 12th October, 2007 the revenue officer demarcated 245 square metres of the plot being Survey No. 97. According to the Respondents, the petitioner has constructed a house on land belonging to the Forest Department. The Respondents contend that there can be no question of allowing the petitioner to deposit premium now, at this belated stage since no endeavour was made

by the petitioner's husband or any of his legal heirs to deposit premium within the time limit of 30th April, 1999 intimated by the Deputy Commissioner by Press Notes dated 27th November, 1998 and 22nd March, 1999. In the said press notes it was specifically mentioned that no premium would be accepted after 30th April, 1999.

21. Mr. Mandal submitted that the writ petition filed after delay of 17 years ought not to be entertained. It is, however, not understood how premium could have been paid within 30th April, 1999, if the premium had not been determined till then.

22. It is not in dispute that 72 square metres. of revenue land was licensed to the petitioner's late husband way back in the year 1990. It is nobody's case that the petitioner or the members of her family had been evicted from the said land or that the said land had been resumed.

23. It is not necessary for this Court to enter into the dispute with regard to whether the petitioner's husband had been in unauthorized occupation of Forest quarters belong to the Forest Department, which has been adjudicated in the Estate Appeal referred to above.

24. The grounds on which the Estate Appeal was allowed are not material. If the respondent authorities chose not to produce the requisite materials and documents in support of their case, they did so at their own peril. The order of the District Judge has assumed finality, the said order not having been challenged in any higher forum.

25. There is substance in the contention of Mr. K.M.B. Jayapal, learned advocate appearing for the petitioner, that the issue of whether the petitioner's husband was in unauthorized occupation of any Government quarters, having been judicially adjudicated, the issue cannot be reopened at this stage, after lapse of about seven years.

26. In any case the reopening of the issue of whether the petitioner is in occupation of Government quarters, is in my view, nothing but an attempt to confuse the issues involved in this writ application.

27. There is no dispute that 72 square metres of land at Haddo village had been licensed to the petitioner's late husband. The licence could only be cancelled on the ground of non-payment of premium provided the petitioner

failed to pay the premium inspite of determination of the premium and demand for payment of the same.

28. The fact that the petitioner's husband might not have attended the office of the concerned respondent, could not be a ground for not determining the premium. No individual notice appears to have been issued calling upon the petitioner's husband or the petitioner to attend the office of the concerned respondent for the purpose of determination of rent.

29. In the absence of notice, it cannot be said that there was any default on the part of the petitioner's husband or on the part of the petitioner. Even if the petitioner had not attended the office inspite of notice, the premium may have been determined ex parte and a demand raised on the petitioner's husband.

30. It is neither a condition of the Land Revenue and Land Reforms Rules and/or Regulation nor of the licence issued to the petitioner's husband, that the petitioner's husband would have to personally attend the office of the concerned respondent for the purpose of determination of rent.

31. In any case as observed above, the 72 square metres of land licensed to the petitioner's husband has not yet been resumed. In view of the aforesaid admitted position, the allegation with regard to occupation of forest land is self contradictory.

32. The respondent authorities are bound and obliged to honour the licence in respect of 72 square metres of land at Haddo village, to determine the premium for the said 72 square metres of land and to accept the same. Any land in excess of 72 square metres licensed to the petitioner's husband may be resumed in accordance with law.

33. Mr. Jayapal has relied upon a judgment and order of a Division Bench of this Court in the case of Smti. M. Parwatti –Vs- the Lt. Governor & Ors. dated 5th October, 2007 where the Division Bench held that where was no time fixed for payment, there can be no question of on default. The licence in that case was found to have tendered the premium within reasonable time.

34. The petitioner herein stands on better ground inasmuch as the premium was in her case never determined. It is reiterated that the respondent

authorities were obliged to determine the premium, if need be, ex patre. It was also for the concerned authorities to take possession of excess land, if any. That the authorities failed to take possession of the excess land is no ground for not honouring the licence. The respondents are bound to demarcate the 72 square metres of land licensed to the petitioner's husband and settle the premium thereon.

35. The writ petition is thus allowed. The respondents are directed to determine the premium for the 72 square metres of land on Survey No. 97 licensed to the petitioner's husband. The aforesaid 72 square metres shall be demarcated. It will be open to the respondent authorities to recover possession of land occupied by the petitioner or the members of her family in excess of 72 square metres licensed to the petitioner's late husband.

———

CONSTITUTIONAL WRIT JURISDICTION
Before K.J.Sengupta and P.S.Dutta, JJ

Andaman and Nicobar Islands People Anti Corruption Forum versus The Lieutenant Governor & Ors.[1]

Constitution of India Article 226 - Locus-standi – Non-Governmental organization is espousing the cause of several illiterate and semi-literate people of Andaman and Nicobar Islands, who cannot ordinarily come to the Court of Justice because of their abject poverty and illiteracy and they are not aware of their right. Therefore, the petitioners under the firmly settled law certainly come on their behalf.

Government action in appointment must be fair devoid of any arbitrariness and highest decree of rationality.

For appointment of Mazdoor- qualification upto Vth Class the system is fruitful not only for screening purpose but this also helps extremely to achieve the constitutional goal. Article 21 A of the Constitution of India Guarantees free education upto age of 14 years of Children meaning thereby each and every boy or girl of this Country must receive elementary education upto age 14.

[1] WP No.273 of 2007 (PIL) decided on October 15, 2007 by the Hon'ble Calcutta High Court, Circuit Bench at Port Blair.

Held: If some elementary knowledge of education is made compulsory for the appointment of Mazdoor then it will help the appointee because he will be able to understand what is the benefit received him after employment. At the same time, what will his obligation in the field of work.

Facts and arguments appear from judgment

Counsel for the parties

Mr.D.Sivabalan for the petitioner and Mr.S.K.Mandal for the respondents

KALYAN JYOTI SENGUPTA, J.

1. The above public interest litigation has been filed challenging the recruitment process for the post of regular Mazdoor and also for cancellation of the written test conducted on 29th July, 2007 and not to give any appointment to any candidate pursuant to the aforesaid selection process.

2. Mr. Mandal initially raised a question of locus for the petitioner. In response to para 4, we are of the view that the petitioner has locus standi to initiate this proceeding as in paragraph 4 it has been stated that this non-government organization, the petitioner is espousing the cause of several illiterate and semi literate people of A & N Islands who cannot ordinarily come to the court of justice because of their abject poverty and illiteracy, and they are not aware of their right. Therefore, the petitioner under the firmly settled law can certainly come on their behalf. We need not cite decisions in this regard. This averment of fact has not been (Para 4) denied and disputed by respondents. We hold, therefore, that this application can be heard.

3. On 10th October, 2007 we observed initially that we are not going to disturb the appointment already been made. The interim order passed is hereby confirmed for the reasons stated hereunder.

4. On or about 5th October, 2006 the petitioner knew very well the method of recruitment process which is challenged and the petitioner further knew well that on 29th July, 2007 written test was conducted followed by interview on 4th/5th October, 2007. After completion of everything the petitioner filed this writ application on 8th October, 2007. We were informed on 10th October, 2007 that candidates have been appointed before this writ application was filed. Therefore, the third party's right has been created before this application

came to be in existence. Even from the Annexure, we find that a representation was made for cancellation of the selection process after the written test was over. We can reasonably doubt that this petition must have been filed at the instance of some unsuccessful candidates; otherwise this application could have been initiated long time back.

5. We cannot grant relief through in this matter still we feel the recruitment process affects the citizens of the country, in particular, inhabitants of these islands. At the suggestion and invitation of the parties we are examining the recruitment process already undertaken and further as per their suggestion we are evolving methodology of recruitment process which will ensure fairness, impartiality and confidentiality. So the process should be such what will ensure fair and transparent process. In this writ petition, the question raised that in the present selection process for the first time contrary to the recruitment rules essential education qualification has been introduced. According to the petitioner, for recruitment Mazdoor good physic is only criteria, written test is not required. According to the petitioner, when the introduction of the essential educational qualification followed by written test the illiterate and downtrodden people could not compete with the candidates who were having educational qualification higher than that of class V standard. This system is irrational and inherently discriminatory. The learned counsel for the petitioner submits that the recruitment process has been undertaken contrary to the recruitment rule, the text of which has been annexed at page 17 at Annexure P-2. He says that a large number of candidates who were having qualifications higher than the really eligible candidates who can be engaged for Mazdoor have completed and by this process a large section of semi-literate backward people had been eliminated. According to him, this system should be done away with.

6. Learned counsel, Mr. Mandal appearing for he respondents, contends that the unemployment problem in this country and also in these Islands as well, is so acute that a large number of candidates are coming forward to engage in any post ignoring their educational qualification. Therefore, some measures of elimination process is a must and for this purpose at present educational qualification for the appointment of regular Mazdoor has been introduced. The essential qualification for Mazdoor is class V passed in school education. Good physic and fitness for field work have also been retained. A written test has been introduced with the standard of class V so that there should be a scanning at initial stage and thereafter who will be successful in

the written test they will be called for interview followed by fitness test. He submits that this method of recruitment has been published at the time of advertisement inviting application from the eligible candidates.

7. Pursuant to our last order, the model question-cum-answer paper has been produced before us. He submits that it will appear the standard of the question is up to that of class V level of the students. He further submits that the department did not entertain any candidate having qualification higher than class V standard. He submits that this method is quite rational and has a direct nexus with the object to be achieved.

8. We have considered the respect the respective contention of the learned counsel. In the petition is has been stated that in the newspaper the minimum qualification of class V is prescribed. We have minutely read the essential qualification for eligibility of a regular Mazdoor is Vth pass in school education. Nowhere, we find this has been mentioned as minimum qualification. Therefore, it is clear from the aforesaid advertisement that candidates who will be having qualification of Vth pass school education are only entitled and those having qualification higher than Vth standard cannot apply. Therefore, the petitioner's contention in this regard is not correct factually. Next contention of the petitioner is that the written test for appointment of regular Mazdoor should not be undertaken. We are of the view that it is for the administration who is employer to lay down its own recruitment process. It is not for the stranger to suggest or fix what should be the recruitment process. Of course, we hasten to add that government action in appointment must be fair, devoid of any arbitrariness and highest degree of rationality. In this case, we do not find any irrationality or arbitrariness in introducing the written test of 100 marks of a standard of Class V. We had reasonable doubt in our mind whether the question set for test is of the class V standard or not. We have gone through minutely each and every question set for written examination and we find that the standard of the question is no doubt the standard of Class V School education. In the model question-cum-answer sheet we find that the elementary arithmetic is of the standard of class V and the subject of general relates to local information of these islands which comprise geography and current affairs. We think that the candidates who have studied up to class V and having average intelligence is capable of giving answer, if he studied properly. This system, in our view, is fruitful not only for screening purpose but this also helps extremely to achieve the constitutional goal. Article 21A of the Constitution of India guarantees free education up to the

age of 14 years of children meaning thereby each and every boy and girl of this country must receive elementary education up to age 14. If this system is allowed to continue, even for the appointment of Mazdoor, each and every family will be compelled to send their boys and girls to the schools without any option. Accordingly, we approve of this system. It is contended that this method is contrary to recruitment rules contained in Annexure P-2. Firstly, Annexure P-2 is not very reliable document and what is the document about is not very clear to us. We find a signature of some official bearing date sometime January 92 and another one 5th June, 92. We think that recruitment process cannot be a rigid one, even if we assume these documents are reliable. What was the method of recruitment 15 years ago cannot be recruitment method today. Everything has to be changed according to the circumstances and also bearing in mid of the changing society. At one point of time regular Mazdoor was essentially meant for the illiterate people but now in our country literacy level has increased, so it is also difficult to get the sufficient number of illiterate people. If this system is not introduced there would be a monopoly in the matter of appointment in regular Mazdoor. Downtrodden and poor people do not mean poverty in knowledge and in education, if may be economic poverty. In the notification it has been specifically made clear about the method of recruitment. If some elementary knowledge of education is made compulsory for the appointment of Mazdoor then it will help the appointee because he will be able to understand what is the benefit received by him after employment. At the same time what will be his obligation in the field of work.

9. In order to ensure the fair and independent conducting of written test the following method at the suggestion of Mr. Mandal may be adopted:-

(a) Setting of questions for written for written test should be entrusted to an independent body, preferable, the education department with the help of schools.

(b) There should be questions banks consisting of at least 100 question to be prepared by the committee.

(c) Out of these 100 question three separate sets of question papers should be prepared and three set sets of questions should be kept in a sealed cover by the question setters. There are to be kept in woke safe.

(d) One hour before the examination is started at the Centre there should be lottery for choosing one of three sets of question papers contained in a sealed cover and these questions should be distributed to the candidates.

If this process is adopted then no one can get any idea about which question is to be distributed to the candidates at the time of examination. Even question setters will not have any idea, and this method will prevent the leakage of the question. Obviously the invigilation at the centre has to be tightened in such a manner so that there may not be any mal-practices.

(e) In case of viva voice, if possible, audio recording may be done and the question and answer given by the candidates concerned could be recorded for future reference

10. We add the aforesaid guidelines are merely instructive not a mandate of the court. It would be open for the administration to lay out any other norms which will suit the circumstances and their purpose ensuring confidentiality and fairness.

11. Thus, this application is disposed of without any order as to costs.

CONSTITUTIONAL WRIT JURISDICTION
Before Mr.P.S.Dutta. J

Shri. Sudeep Rai Sharma versus The Lieutenant Governor & Ors.[1]

Constitution of India Article 226: Writ petition filed by the councilor of the Port Blair. Municipal Counsel-Locus Standi. The writ petitioner has locus standi to file the writ petition in view of his not being a stranger to the Administration or to the Port Blair Municipal Council, since he is a councilor of the Port Blair Municipal Council his locus to prefer the application cannot be doubted no matter whether the contentions raised in the writ petition could be substantiated or not.

Non Notified Recruitment Rule- the non notified recruitment rule approved by the Lt. Governor can be said to the partaking of the character of executive instruction unless is in contravention of Statutory Rules.

[1] WP No.123 of 2007 decided on October 15, 2007 by the Hon'ble Calcutta High Court, Circuit Bench at Port Blair.

Held : The appointment of the Respondent No. 7 to the post evidently not confirm to the rules/norms as have been fixed by the administration. At the distance date when the tenure is about to expire this will be quite inappropriate for the Court to nullity his appointment, which in a fact would be nullifying all actions and decisions taken by him by virtue of his action in the post.

Therefore direct the administration and the Port Blair Municipal Counsel to fill up the strictly in accordance with the Recruitment Rules.

Facts and arguments appear from judgment

Counsel for the parties

Mrs.Anjili Nag for the petitioner and Mr.S.K.Mandal, Mr.Krishna Rao for the respondents

P.S. DUTTA, J.

1. By this writ application under Article 226 of the Constitution of India, the petitioner, who is a Councilor of Port Blair Municipal Council challenges the appointment of the respondent No. 7 as Secretary of the Port Blair Municipal Council and prays for a writ in the nature of mandamus directing the Lt. Governor and the Port Blair Municipal Council to appoint eligible candidate to the post of the Secretary, Municipal Council after declaring that the appointment of the respondent No. 7 dated 08/09/2006 was illegal.

2. According to the petitioner in terms of the Recruitment Rules for the post of Secretary to the Municipal Council at Port Blair, the recruitment to the post has to be made by transfer on deputation from amongst the officers of Administration in the scale of pay of Rs. 3000-4500/- falling which by selection grade 'Danics' officers or Asst. Secretary/Asst. Director of the Administration with 5 years service in the grade.

3. The respondent No. 7, who was appointed to the post on 08/09/2006 by the respondent No. 1 did not fulfill the aforesaid eligibility criteria, which was strictly adhered to by the respondent No. 1 in the case of recruitment/ appointment to that post in favour of one Uday Kumar and one Basu Kumar in terms of the said Recruitment Rules. The grievance of the petitioner is that the petitioner being a member of the Port Blair Municipal Council cannot be

agreeable to the appointment of a person who is unqualified to the post and such an unqualified person is to found to have been acting beyond his jurisdiction by deciding to appoint Nurse on short term contract basis. Such a person, who is not eligible to the post has been drawing a pay scale of Rs. 12,000-16,500/-. At the material point of time when the respondent No. 7 was appointed as Secretary to the Port Blair Municipal Council he had been working as Assistant Commissioner in Andaman & Nicobar Administration at Port Blair drawing a pay scale of Rs. 8,000-10,500/-. Respondent No. 1 to 4 and 6 deliberately and with malafide intention did not advertise the post of Secretary in the News Paper and search for an eligible candidate to the post.

4. The Respondent No. 1, 2 and 3 who are the authorities in A & N Administration in their affidavit in opposition challenged the locus standi of the petitioner in preferring this writ application. It has been contended that since the creation of the post the same, which is an ex-cadre post it is being filed up on deputation basis by an officer of senior DANIICS and vide the A & N Administration order No. 3535 dated 04/09/2006, the respondent No. 7, who was at the material time at the entry grade of the DANIICS Officer and attached to the post of Assistant Commissioner (HQ) had been enjoying the scale of Pay of Rs. 8,000 to 13,500 and transferred to work to the post of Secretary Port Blair Municipal Council consequent upon transfer of Shri Uday Kumar, who was selection grade DANICS Officer. The appointment of the respondent No. 7 was in the public interest keeping in view the prevailing condition in the Port Blair Municipal Council as it was involved in a number of litigation. The respondent No. 7 was at liberty either to opt for his pay in the parent cadre or to elect the pay in the deputation post carrying deputation allowance in the scale of pay of Rs. 12,000-16,500/-. A legal notice was served by the present petitioner to the Port Blair Municipal Council raising the question of fixation of pay of the respondent No. 7 on the ground that an officer in the scale of Pay of Rs. 8,000-13,500/- was provided with the pay scale of Rs. 12,000-16,500, which in fact doubly jumped with maximum financial benefit. The Chairperson, Port Blair Municipal Council requested the Administration to rescind the Corrigendum dated 22/12/2006 in connection with the scale of pay of respondent No. 7 and requested to reconsider the pay of the respondent No. 7 in the deputation post. The Administration communicated to the Secretary as follows:-

> "The post of secretary, Port Blair Municipal Council is a Junior Administrative Grade level post in the scale of Rs. 12,000-16,500/-. The Recruitment Rule for the post is yet to be notified. Shri Mohammed presently

posted as Secretary, Port Blair Municipal Council is a Gr. II DANICS Officer in the scale of Rs. 8,000-13,500 and the deputation post is one level higher that his cadre line of promotion (i.e. his direct cadre line of promotion is to the scale of Rs. 10,000-15,200 (Selection Grade). Under the circumstances, the existing rule provision forbids Shri. Mohammed to get his pay fixed in the scale of deputation post. Accordingly, he was ordered to draw pay and allowances in his cadre scale of pay plus deputation allowances."

5. The Administration has not issued any instruction or any order for drawal of the pay of respondent No. 7 in the scale of pay of Rs. 12,000-16,500/- as alleged in the petition. If the respondent No. 7 has been allowed by the Port Blair Municipal Council, the scale of pay of Rs. 12,000-16,500/- it might have been done at the discretion of the Chairperson, Port Blair Municipal Council and not with the approval of the Administration. The Administration acted as per the provisions of the Rule. The respondent No. 7 was appointed due to shortage of the higher level officers in the scale of Rs. 10,000-15,200/-. The respondent No. 7 is a eligible officer in the post of the Secretary, Port Blair Municipal Council and writ petitioner has no cause of action.

6. The Respondent Nos. 4, 5 and 6 filed an affidavit-in-opposition giving out the Bio-Data of the respondent No. 7 and challenged the locus standi of the petitioner in challenging the appointment of the respondent No. 7 to the post. According to the respondent Nos. 4, 5 and 6, the A & N Islands (Municipal Council) Regulation, 1994, provided that every Municipality shall have a Secretary, who shall be a whole time employee of the Council and shall be appointed by the Administrator. The respondent No. 7 is a DANCIS Gr. II officer and much senior than Assistant Secretary or Assistant Director of the Administration as the post of Secretary or Assistant Director are feeder grade to the DANCIS Cadre.

7. In paragraph 30 of the Affidavit in opposition of the respondent Nos. 4, 5 and 6 it has been stated that in terms of Regulation 22 of the A & N Islands (Municipal Council) Regulation, 1994, (for short the Regulation) the Administrator is the competent authority to appoint the Secretary to the Port Blair Municipal Council and has already approved the Recruitment Rules. The tenure of the deputation post is one year on completion whereof the Administrator may extend deputation post of the Secretary of may appoint a new Secretary or completion of tenure on transfer of a serving Secretary

before completion of a deputation period. In the circumstance, the writ petition is liable to the dismissed.

8. In the affidavit in reply it has been stated by the petitioner that 'the contents of Para 28 is denied and disputed. In this connection it is stated that the Respondent No. 7 has become the Danics Officer Gr. II with effect from 01.07.2005 with the pay scale of Rs. 8,000-13,500/-. The qualification for appointment on deputation to the post of Secretary Port Blair Municipal Council can be done from the officers of the administration having the scale of 10,000-15,200 failing which the selection grade Danics officer, selection grade Assistant Secretary/ Assistant Director of Administration with 5 years service in the grade will be eligible. The respondent No. 7 was not drawing the scale of pay of Rs, 10,000-15,200 prior to his posting as Secretary, Port Blair Municipal Council. Similarly the Respondent No.7 was not a Danics Officer selection grade nor Assistant Secretary/Assistant Director of Administration with 5 years service in the grade. The respondent herein are trying to confuse this Hon'ble Court with regard to the word Danics."

9. It has further been reiterated that no rule has at all been followed in the matter of appointment of respondent No. 7 to the post, which was filled up without any advertisement.

10. I have heard the learned counsels, who are appearing for the parties.

11. The only question that calls for consideration is whether the respondent No. 7, who has been holding the post of respondent No. 5 was eligible to be appointed to the post in terms of the recruitment rules and what would be the consequences, if the court finds the appointment to be contrary to the norms and rules framed by the A & N Administration.

12. Mr. Mondal, learned counsel appearing for the respondent No. 1, 2 and 3 took the preliminary point concerning the locus standi of the petitioner, who was not definitely a candidate to the post nor should she have any legitimate grievance in the matter of appointment of a person to the post of Secretary of the Port Blair Municipal Council. It has been submitted by Mr. Mondal that a Councilor of the Port Blair Municipal Council must not come with a writ petition challenging the appointment of a person, who has been working under the Council to the satisfaction of all concerned and at the time the appointment was made, the Municipal Council was having a good number

of litigation and when an appropriate person has been appointed to the post challenge to such appointment by a Councilor is to the detriment of the interest of the Port Blair Municipal Council and when the Chairman of the Council has not raised any grievance against the petitioner's appointment and on the contrary was insisting upon fixing a pay scale of 12000-16500 the writ petitioner out of sheer malice and malafide motive has come up with this writ petition, which must be rejected.

13. Smti. Anjili Nag, learned counsel for the petitioner has sought to repel the submission of Mr. Mandal as misplaced and misconceived in view of the fact that as a Councilor of the Port Blair Municipal Council the writ petitioner has every legitimate right and also the duty to ensure that a right person is appointed to the post, who can be qualified to fulfill the eligibility criteria laid down by the Administration and no malice or malafide intention can be attributed to the writ petitioner in such circumstances. A person not qualified to fulfill the eligibility criteria cannot be legally appointed and a person not legally appointed cannot be allowed to do statutory job and this being the position, the petitioner's locus standi can hardly be challenged.

14. Upon hearing the learned Counsels for the parties, I am of the opinion that the writ petitioner has locus standi to file the writ petition in view of his not being a stranger to the Administration or to the Port Blair Municipal Council and since he is a Councilor of the Port Blair Municipal Council his locus to prefer the application cannot be doubted, no matter whether the contentions raised in the writ petition could be substantiated or not.

15. Mr. Mandal submitted that under Regulation 22 of the A & N Islands (Municipal) Regulation, 1994, it is the Lt. Governor or the Administrator who is empowered to appoint a person to the post and the writ petitioner has no authority to question such appointment. His further submission was that the Recruitment Rules, which has been much capitalized by the writ petitioner has not been notified at all and in absence of the notification of the Recruitment Rules, challenge to the appointment of Respondent No. 7 on strength of the Recruitment Rules, since not notified is not maintainable.

16. This branch of the argument of Mr. Mandal has to be addressed to, for the cardinal issue is whether the eligibility criteria for selection of an officer of the A & N Administration to the post of Secretary to the Municipal Council are such as are said to be provided for in the Recruitment Rules not notified. But it appears to me that on this point s non-issue has been made an issue.

17. The respondent Nos. 4, 5 and 6, who are the authorities of Port Blair Municipal Council in their affidavit in opposition has stated that the method of appointment of the Secretary in the Municipal Council is by deputation and in case of deputation to the post of Secretary it has to be way of transfer from amongst the officer of the Administration in the scale of pay Rs. 3000-4500/-, failing which, by selection grade DANICS Officer/ Assistant Secretary/ Assistant Director of the Administration with five years service in the Grade. This is exactly the eligibility criteria in the non-notified Recruitment Rule but which has been admittedly approved by the Lt. Governor of the A & N Islands. That this is the eligibility criteria is also admitted by the Respondent Nos. 1, 2 and 3. Therefore, simply because of the fact that the approved Recruitment Rules have not been notified it does not give rise to the conclusion that the Administrator of the Administration may appoint anybody without adherence to norms. The non-notified Recruitment Rules because of the same having been approved by the Lt. Governor can be said to be partaking of the character of executive instructions and it is nobody's case that the eligibility criteria as are laid down in the Rules admit of any dispute or debate on the ground of being unreasonable. It cannot be said that the Recruitment Rules so approved of by the Lt. Governor and which is awaiting notification is in contravention of statutory Rules. It appears from the submissions of learned Counsels for the parties that this draft Rules was taken recourse to in the matter of selection of the Officers, who were the predecessor of the Respondent No. 7.

18. Reference in this connection may we had to the Comptroller & Auditor General of India and others –Vs- Mohan Lal Mehrotra and others reported in (1992) 1 Supreme Court Cases 20. In the decision in Nagpur Improvement Trust –Vs- Yadaorao Jaganath Kumbhare reported in (1999) 8 Supreme Court Cases 99, it has been held that in the absence of statutory rules governing service conditions executive instructions or decisions can be made and appointments can be made accordance with executive instructions, Now the question is whether the petitioner fulfills the eligibility criteria. According to the petitioner the post is to be filled by DANICS, who are in the selection grade of the post while the Respondent No. 7 was in entry of DANICS and was drawing the pay scale of Rs. 8000-10500/-. The scale of pay of Rs. 3000-4500/- corresponds to the revised pay scale of Rs. 10000-15200/-. In affidavit in opposition of the respondent No. 1, 2 and 3, the criteria laid down in the approved Recruitment Rules has been admitted in Para 6 of the affidavit in opposition. It is noticeable that the revised scale of pay of Rs. 10000-

15200/-, which is eligibility criteria for appointment on deputation from amongst the officers of the A & N Administration is the pay scale of the Secretary to the Municipal Council. In para 7 of the affidavit in opposition of Respondent No. 1, 2 and 3 it has been stated that the pay scale for the post of Secretary, Municipal Council has been upgraded from Rs. 10000-325-15200 to Rs. 12000-375-16500 vide Chairperson, Municipal Council's order No. 2726 dated 16/11/1998. The respondent No. 7 was appointed on 08/09/2006. In terms of the accepted norms of recruitment, it is only an officer of the administration in the scale of pay of Rs. 3000-4500/-, which corresponds to the 4th Pay Commission's scale of pay of Rs. 10000-15200/- who is eligible to the post of Secretary, Port Blair Municipal Council, which has been upgraded since 16/11/1998. In case an officer in the scale of pay of Rs. 3000-4500/- (corresponding to Rs. 10000-15200/- is not available then DANICS Officer of the selection grade or Assistant Secretary or Assistant Director of the Administration with 5 years service in the grade may be appointed. Now the respondent No. 7 according to his affidavit in opposition was upgraded to the post of DANIICS Gr.-II w.e.f. 01/07/2005 with the scale of pay Rs. 8000-13500/- and when he was serving as Assistant Commissioner (HQ) in the cadre of DANIICS he was drawing a basic pay of Rs. 9650/- and while he was at that basic scale he was appointed on deputation to the post of Secretary, Municipal Council, which carried the pay scale of Rs. 12000-16500/- Evidently, he was not drawing the scale of pay of Rs. 10000-15200/- nor did he reach the selection grade of the DANICS post. To be appointed on deputation in the post of Secretary, Port Blair Municipal Council it was not necessary of course to be an officer of the Administration in the scale of pay of Rs. 12000-16500/-. But to make oneself eligible for the post one has to be in the selection grade of the DANICS Cadre and in case of an officer of the Administration one has to be in pay scale of Rs. 10000-15200/-. The pay scale of selection grade DANICS Officer was definitely not the scale of Rs. 9650/- where at the respondent No. 7 was fixed in September, 2006 when he was appointed to the post of Secretary, Port Blair Municipal Council. The respondent No. 7 was definitely not attached to the post of Assistant Secretary or Assistant Director of the Administration with 5 years service in the grade. When the petitioner, the authorities of the A & N Administration and the authorities of the Port Blair Municipal Council accept the position that the norms fixed in the recruitment rules have been followed in the case of pre-decessor of the respondent No. 7 then it amounts to this that the recruitment rules was acted upon and the respondent No. 7 does not qualify for the post. When the language of the rules is simple and clear it cannot be stretched too

far to include some equivalent or analogues post carrying identical pay scale and it has not been shown that the petitioner was holding any post analogues to a post carrying pay scale of Rs. 10000 to 15200/-. The petitioner under the provisions of Right to Information Act applied to the A & N Administration as to whether the respondent No. 7 was eligible for the post of Secretary, Port Blair Municipal Council in consideration of the pay scale, which he was having prior to his appointment to the post. Annexure R-1, which is a reply of the concerned officer of the Administration revealed that no direct answer was provided to and it was stated that the respondent No. 7 was in the pay scale of Rs. 8000/- to 13500/- but he was given on deputation the pay scale of Rs. 12000-16500/- as it was the pay scale since upgradation of the post of Secretary to the Municipal Council under the authority of the Chairman. It is submitted that an officer, who is appointed to the post on upgradation may either opt for the upgraded pay scale of the post in case prior to his appointment he was drawing less scale of pay in the parent department or in case the appointee has crossed the pay scale of Rs. 12000-16500/- he can draw deputation allowance. Now, the issue is whether the respondent No. 7 was eligible for the appointment to the post having regard to the norms laid down by the Administration and both in the petition as also in the affidavit in apposition of the two groups of the respondents the said rule has been accepted and admitted. An officer either of the Administration or of the DANICS Cadre will not be entitled to the pay scale of Rs. 12000-16500/- in the upgraded post of the Secretary, Port Blair Municipal Council unless he is eligible to be selected to that post and for being eligible he has to be in the pay scale of Rs. 10000-15200/- or in the selection grade of the DANICS Cadre, which carries that pay scale of Rs. 10000-15200/- and in such circumstances, the petitioner does not appear to have fulfilled the eligibility criteria. By the order of the Ministry of Home Affairs dated 23/01/2006 the respondent No. 7 was placed in the scale of pay of Rs. 8000-13500/-. The scale of pay of a selection grade DANICS Officer is between Rs. 10000-15200/- which the respondent no. 7 did not yet arrive at.

19. This shows that the respondent No. 7 did not fulfill the eligibility criteria for being selected to the post. The matter of the fact is that the tenure of the present respondent No. 7/5 has either expired or is about to expired and a selection is said to be under process for filling up the post of the secretary of the Port Blair Municipal Council. The appointment of the respondent No. 7 to the post evidently does not confirm to the rules/norms as have been fixed by the Administration. But at the distant date when the

tenure is about to expire this will be quite inappropriate for the court to nullify his appointment, which in a fact would be nullifying all actions and decisions taken by him by virtue of his acting in the post.

20. In the circumstances, the appropriate order would be direct the Administration and the Port Blair Municipal Council to fill up the post strictly in accordance with the Recruitment Rules accepted by all the parties to this proceedings and any infraction thereof will vitiate the process.

21. With the observations as above writ application is disposed of. Urgent Xerox certified copy shall be provided if applied for.

———

CONSTITUTIONAL WRIT JURISDICTION
Before Miss Indira Banerjee and Mr.Manik Mohan Sarkar, JJ.

The Union of India & Ors versus Nasir Hussain & Ors.[1]
With
Nasir Hussain & Ors versus The Union of India & Ors.

Constitution of India Article 226: Preparation of Final List After Entertaining Objection- if any final list been prepared in 1997 after entertaining objection, there would be no need to invite objections again in the year 2003.

Consolidated Seniority List – there would be no necessity for inviting objections only for preparation of consolidated seniority list, had any earlier seniority list been prepared upon consideration of objection.

Held - The Ld. Tribunal rightly found that there were no materials to show that seniority had been prepared on the basis of merit position in the recruitment examination and gave the directions Impugned. Therefore the impugned directions do not call for interference.

Facts and arguments appear from judgment

[1] WPCT No.290 of 2007 with COCT No.01 of 2008 decided on October 03, 2008 by the Hon'ble Calcutta High Court, Circuit Bench at Port Blair.

Counsel for the parties

Mr.Md.Tabraiz for the petitioners/respondents and Ms.Anjili Nag for the respondents/petitioners

INDIRA BANERJEE, J.

1. Both these writ applications are directed against a judgment and order dated 22nd May, 2007 of the Calcutta Bench of the Central Administrative Tribunal on circuit at Port Blair in Original Application No. 44/AN/2005, directing the concerned authorities to verify whether the consolidated seniority list of Lower Grade Clerks had been prepared on the basis of the merit position of all the candidates listed in Order Nos. 4747 and 4748 dated 30th September, 1988 and, if not, to re-fix the seniority of the Lower Grade Clerks on the basis of their merit.

2. The applicants before the Tribunal, hereinafter referred to as the applicants, were appointed to the post of Lower Grade Clerks purely on temporary and ad hoc basis under the Amalgamated Clerical Cadre vide the administrative order Nos. 542 dated 14th February, 1987 and 861 dated 22nd February, 1988.

3. The applicants were appointed on condition that their ad-hoc appointment would be regularized by regular appointment only on their qualifying in a recruitment examination. It was also a condition of the ad hoc appointment, that the applicants would not be entitled to any increment, unless they qualified in a recruitment examination.

4. Accordingly to the authorities, the applicants were given ad hoc appointment on the express condition that such ad hoc appointment would not confer any right on the respondents, to regular appointment in the post of Lower Grade Clerks and the appointment would also not count for the purpose of seniority in the grade.

5. In 1988 a written recruitment examination was conducted for ad hoc Lower Grade Clerks as well as fresh candidates, who are hereinafter referred to as the new entrants.

6. The applicants successfully cleared the written recruitment examination along with the new entrants. The new entrants who cleared the examination were recruited vide Order No. 4747 dated 30th September, 1988. Another order being Order No. 4748 was issued on the same day, that is, 30th September, 1988 whereby the ad hoc appointment of the applicants were regularized with immediate effect.

7. The authorities claim that in 1996 a provisional seniority list was prepared of all Lower Grade Clerks appointed between 1981 and 1990. The said seniority list stated to have been circulated through the respective heads of department by administrative circular No. 66-1/95-PW dated 26th March, 1996, and objections thereto invited.

8. It is alleged that the applicants did not submit any objection to the provisional seniority list and accordingly the seniority list was finalized and circulated vide a circular No. 66-1/96 PW dated 28th January, 1997.

9. Even after the finalization of the seniority list or thereafter, till the publication of a consolidated provisional seniority list of all Lower Grade Clerks recruited between the years 1969 and 2002 in the year 2003, no objections were submitted by the respondents. In 2003 the Administration initiated action to update the entire existing seniority list of the Lower Grade Clerks by publishing a consolidated provisional seniority list of Lower Grade Clerks appointed from the year 1969 till the year 2002.

10. By an administrative circuit No. 66-1/96 PW dated 10th April, 2003, the Administration invited claims and objections within 12th May, 2003 to the consolidated provisional seniority list.

11. At this stage the respondents submitted their objections to the seniority list, inter alia contending that all the direct recruits appointed vide a circular No. 4747 had en masse been given seniority above the respondents. The objections raised by the respondents were overruled and a final seniority list was published.

12. Challenging the seniority list, the respondents filed an application before the learned Tribunal to which the authorities filed their rejoinder. The respondents also filed a supplementary affidavit before the learned Tribunal. The application was finally disposed of by the judgment and order impugned, the operative portion whereof is extracted hereinabove:-

"In view of the above the O.A. is disposed of with a direction to the respondents that they shall verify as to whether the seniority list is based on merit position of all those enlisted in orders Nos. 4747 and 4748 dated 30th September, 1988. In order to instill confidence in the minds of the applicants, their merit position in the examination and those of a few whose position is above or below the applicants should be made known to the applicants. This exercise be undertaken within a period of four months from the date of communication of this order. If the seniority list is not based on merit, the respondents shall revise the same in accordance with the merit list."

13. Challenging the aforesaid order the authorities have filed the writ application being WPCT No. 290 of 2007 in this Court, which is hereinafter referred to as the first writ application. The applicants have filed an affidavit-in-opposition, wherein the applicants have contended that the Administration had all along from 1988 till 2003, treated the applicants as senior to the new entrants. According to the applicants, the initial appointment of the applicants being earlier than the initial appointment of the new entrants, the respondents were senior to the new entrants. There had been no break in service of the respondents. After appointment of the respondents, the respondents were granted an annual increment calculated from the date of their initial ad hoc appointment.

14. On account of addition of annual and other increments the applicants were getting higher salary and allowances that the new entrants specified in order No. 4747.

15. It was further contended that to avoid stagnation of employees in their posts the Government of India had introduced a scheme known as Assured Career Progression (ACP) Scheme, which provided for financial benefits. According to the respondents, the benefit of the ACP scheme was extended to the respondents in the months of September, 2000, whereas the benefit of the said scheme was extended to the new entrants named in order No. 4747 in the month of October, 2000.

16. The applicants have filed the writ application being C.O.C.T. No. 001 of 2008, which is hereinafter referred to as the second writ application challenging the order of the learned Tribunal in so far as the same did not direct re-fixation of seniority in accordance with the dates of initial appointment and/or in other words the length of continuous officiation in the post.

17. Mr. Tabraiz, appearing on behalf of the petitioners in the first writ petition submitted that the new entrants mentioned in order No. 4747 were not impleaded as party respondents in the proceeding before the Tribunal. The learned Tribunal, according to Mr. Tabriz, committed an error in overruling the objection of the applicant authorities to the maintainability of the proceedings on the ground of non-joinder of necessary party.

18. Mr. Tabriaz submitted that in the two orders being order No. 4747 and 4748, both dated 30th September, 1998, the names of the employees had been listed in order of merit. The candidates listed in the order dated 4747 had ranked higher than the candidates listed in the order dated 4747 had ranked higher than the candidates listed in order No. 4748.

19. Mr. Tabriaz that the Administration was not in a position to submit documents before the learned Tribunal in support of their submissions of the two lists having been prepared in order of combined merit. Pursuant to the orders of this Court the records pertaining to the case have been produced. Mr. Tabraiz pointed out that the records clearly indicated that the seniority list of 1998 of Lower Grade Clerks appointed during the respective periods had been prepared on the basis of their merit position in the recruitment examination. Mr. Tabriaz submitted that in view of the records now fished out by the Administration, the order of the Tribunal was liable to be set aside.

20. Mr. Tabriaz, however, submitted that the records pertaining to selection in the year 1988/89 were not traceable. The Administration was not in position to produce the merit list.

21. Ms. Nag appearing on behalf of the applicants, being the petitioners in the second writ application, submitted that the order Nos. 4747 and 4748 were not prepared on the basis of merit position of the candidates. Order No. 4747 contained the names of new entrants, recruited for the first time and order No. 4748 contained the names of those candidates who had already been working on ad hoc basis and whose appointments were regularized.

22. Ms. Nag did not dispute the fact that seniority is computable on the basis of merit position at the time of initial appointment. Ms. Nag, however, strenuously argued that the two orders were not on the basis of combined merit position. The fresh recruits and the ad hoc employees were treated as two different classes and accordingly two different lists were prepared. The

first list of new entrants was based on their inter se merit position in the recruitment examination and order No. 4748 was prepared on the basis of the inter se seniority of the ad hoc employees whose services were regularized.

23. Ms. Nag submitted that no provisional seniority list was circulated in 1997. Even if any provisional list was circulated, the same was not given publicity and no final list had been prepared on the basis of that provisional list.

24. Ms. Nag with force contended that had any final list been prepared in 1997, after entertaining objections, there would be no need to invite objections again in the year 2003. Furthermore, the 2003 list also does not refer to any earlier seniority list, either provisional of final.

25. Ms. Nag argued that the applicants came to know that the fresh recruitment had en masse been given seniority over ad hoc employees, upon circulation of the provisional list of 2003. There could, therefore, be no question of the petitioners raising any objection at any prior point of time. Ms. Nag submitted that the petitioners raised their objection at the first opportunity. Ms. Nag also argued that it was incredible that all the fresh recruits should have ranked higher than all the ad hoc employees.

26. In course of arguments it was submitted on behalf of the Administration that the last two names in the order No. 4747 were of ad hoc employees. Ms. Nag, however, pointed out that the two candidates had not accepted appointment on ad hoc basis and had, therefore, been treated as new entrants.

27. Ms. Nag finally pointed out that the exercise in 2003 was for preparation of a consolidated seniority list. The seniority of the candidates had already been finalized. This was done on the basis of merit position in the recruitment examination. There is, however, substance in the submission of Ms. Nag that there would be no necessity for inviting objections only for preparation of consolidated seniority list, had any earlier seniority list been prepared upon consideration of objections. Moreover, the seniority list does not bear any reference to any earlier provisional or final list.

28. It is difficult to accept that the Administration would give increments to the applicants before the new entrants if the new entrants had en masse ranked higher than the applicants and accordingly been treated as senior to

the applicants, the learned Tribunal, in our view, rightly found that there were no materials to show that seniority had been prepared on the basis of merit position in the recruitment examination and gave the directions impugned. The impugned directions do not, in our view, call for interference of this Court. Moreover, the discovery of fresh records is no ground for interference in proceeding under Article 226 of the Constitution of India. The Tribunal has merely directed the Administration to verify whether the seniority list was based on the combined merit position of all those enlisted in order No. 4747 and 4748 dated 30th September, 1988. The seniority was directed to be re-fixed only if it was found that the seniority list had not been based on merit. The direction does not call for interference of this Court. The writ applications are thus dismissed.

———

CONSTITUTIONAL WRIT JURISDICTION
Before Girish Chandra Gupta, J.

Shri Stenly James Versus The Lt. Governor & Ors.[1]

Constitution of India Article 226: Written Examination- It cannot be gainsaid that written examination is a surer method of examining the worth of a candidate. It may helps to ensure transparency in the matter of distributing the public largess by way of giving jobs. Municipal Council Chairman- Chairman, a political appointee, had no right to act as the chairman of the selection committee.

Held :Considering that the selection process was vitiated by illegality, the appointments made were bad are therefore, struck down. The posts are deemed to be vacant and it would be open to the Municipal Council to fill them up in accordance with law.

Facts and arguments appear from judgment

Counsel for the parties

[1] WPNo.209 of 2007 decided on February, 07, 2008 by the Hon'ble Calcutta High Court, Circuit Bench at Port Blair.

Mrs.Anjili Nag for the petitioner, Mr.S.K.Mandal for the administration, Mr.P.S.Biswas , Mr.Krishna Rao for the Municipal Council and Mr.Mohd. Tabraiz for the pvt.respondents.

GIRISH CHANDRA GUPTA, J.

1. On 24th August, 2006 three vacancies in the post of Junior Engineer (Civil) and four vacancies in the posts of Junior Engineer (E&M) amongst others were advertised by the Administrative Officer of the Port Blair Municipal Council. In order to be eligible for the posts the candidates were required to qualify in a written examination to be conducted by the Administration. It is not dispute that the vacancies advertised on 24.08.2006 have been filled up without resorting to any written examination.

2. The writ petitioner has alleged that in order to bestow favours upon the chosen ones, the written examination was dispensed with and the chosen candidate/candidates were appointed merely on the basis of viva-voce. Therefore, the propriety of the appointments made by the Municipal Council is in issue in this writ petition.

3. Mr. Tabraiz, learned Advocate appearing for the private respondents submitted that this course was adopted by the Municipal Council because an order dated 27.06.2007 passed in W.P. No. 34 of 2007 by this court directed that the vacancies advertised in the year 2002 should be filled up in accordance with the Recruitment Rules which were in force at that point of time. He submitted that considering the fact that all these vacancies had arisen prior to the amendment of the Recruitment Rules, all these vacancies were filled up in accordance with the Recruitment Rules of 1998 which do not mandate any written examination.

4. He also relied on a judgment in the case of **Sardara Singh and others –Vs- State of Punjab and others reported in (1991) 4 SCC 555.** He relied on Paragraph 7 which reads as follows:

> "7. It is then contended that the written test, conducted by the previous Service Selection Board, was abandoned and only oral interviews were conducted. The selection, therefore, is illegal. Normally it may be desirable to conduct written test and in particular of handwriting which is vital for a Patwari whose primary duty is to record clearly entries in revenue records followed by oral interview.

The Rules do not mandate to have both. Options were given either to conduct written test or viva voce or both. In this case the Committee adopted (*Sic* opted) for viva voce as method to select the candidates which cannot be said to be illegal."

5. He added that the mere fact that the Municipal Council had resorted to filling up of the vacancies on the basis of oral interview, it cannot be said that the appointments were bad.

6. Mr. P.S. Biswas, learned Advocate appearing for the Municipal Council supported the submission made by Mr. Tabriaz and further submitted that there is no provision made in the Recruitment Rules of 1998 for Mechanical Engineer or for an Electrical Engineer. They contemplate Engineer simpliciter. The disciplines of engineering are not separately provided.

7. Mr. S. K. Mandal, learning Government Pleader appearing for the A & N Administration submitted that the Municipal Council should not have deviated from the advertised course which was to choose the candidates on the basis of their performance in the written examination. He added that the Municipal Council had adopted a wrong procedure. He further submitted that what has added fuel to fire is the fact that the Chairperson of the Municipal Council had acted as the Chairman of the Selection Committee which is contrary to the Recruitment Rules which provided that Secretary of the Municipal Council shall be the Chairmen of the Selection Committee.

8. In this case it is not in dispute that the Chairperson of the Municipal Council acted as Chairman of the selection committee. He therefore submitted that on both the grounds the appointments were had.

9. Now the questions which arise for a decision are:-

(a) Whether the order dated 27.06.2007 can be said to have exempted the requirement of holding written examination?
(b) Was the procedure adopted by the Municipal Council for the purpose of filling up vacancies legal?
(c) Did the vacancies, notified on 24.08.2006, arise prior to the amendment of the Recruitment Rules on October, 24, 2005?
(d) Can the selection be said to have been vitiated by reason of the fact that Chairperson of the Municipal Council acted as Chairman of the selection committee?

10. We shall answer the issue in the order they have framed:-

(e) The order dated 27.06.2007 was passed in WP No. 34 of 2007. In that writ petition what was in controversy was whether the three vacancies of Junior Engineer (Civil) which arose prior to 2002 and were advertised in the year 2002 could be allowed to be filled up in accordance with the rules subsequently framed in the year 2005. This question was answered as follows:

"In the case before us, in the year 2002 when advertisement was given and the writ petitioner applied for three vacant posts, the rules of 2005 did not see the light of the day. Therefore, those three vacancies for the post of Junior Civil Engineer should be filled up in accordance with the Rules annexed as Annexure –B to the present writ application and not according to 2005 Rules enacted by the Municipal authority".

It is, therefore, clear that the order dated 27.06.2007 specifically permitted three vacancies of Junior Engineer (Civil) to be filed up in accordance with the Rules prevalent in the year 2002 when those posts were advertised. At this stage, a comparison between the posts advertised in 2002 and in 2006 becomes necessary. A chart below is given to indicate the position.

<table>
<tr><td colspan="5">16.06.2002</td><td colspan="3">24.08.2006</td></tr>
<tr><td>Sl. No.</td><td>Category</td><td>Scale of Pay</td><td>No. of Vacancy</td><td>Sl. No</td><td>Name of the post an No. of vacancy</td><td colspan="2">No. of posts</td></tr>
<tr><td>1.</td><td>Junior Engineer (Civil)</td><td>Rs.5000-150-8000</td><td>3</td><td rowspan="2">1.</td><td rowspan="2">Junior Engineer (Civil)
Number of regular vacancy -03
Temporary likely to continue -03</td><td rowspan="2">General -02
General 02</td><td rowspan="2">OBC-01
OBC-01</td></tr>
<tr><td>2.</td><td>Junior Engineer (Mech)</td><td>Rs.5000-150-8000</td><td>1</td></tr>
<tr><td>3.</td><td>Junior Engineer (Elect)</td><td>Rs.5000-150-8000</td><td>1</td><td rowspan="2">2.</td><td rowspan="2">Junior Engineer (Mechanical and Electrical) Number of permanent – vacancy -04</td><td rowspan="2">General -03</td><td rowspan="2">OBC-01</td></tr>
<tr><td>4.</td><td>Draughtsman Gr. III (Civil)</td><td>Rs.4000-100-6000</td><td>07</td></tr>
</table>

It would appear that in the year 2002 one vacancy of Junior Engineer (Mechanical) and one vacancy of Junior Engineer (Electrical) was advertised, Whereas in the year 2006 four vacancies of Junior Engineer (Electrical and Mechanical) were advertised. In the year 2002 Mechanical and Electrical engineers were separately dealt with but in

the year 2006 these two disciplines namely Electrical and Mechanical have been clubbed together and this clubbing is permitted only under the Rules of 2005. Therefore, it cannot be said that the vacancies as regards Junior Engineers (Electrical and Mechanical) arose in 2002. At that stage this type of clubbing between the two disciplines namely Electrical and Mechnical was not even contemplated by the Rules. This was contemplated only by the Rules prepared on 24.10.2005. Therefore, it cannot be said that taking a clue form the order of this Court passed, in WP No. 34 of 2007, on 22.06.2007 that the written examination was dispensed with by the selection committee. Moreover, even in the year 2002 the Municipal Council had issued the following press note:

"The written examination proposed to be conducted on 15th September, 2002 at Tagore Govt. College of Education as notified Vide Press Note dated 2.9.2002 and 3.9.2002 for the following post under the Municipal Council among the applicants who have applied for the post in response to press Note dated 22.2.2002 and 29.5.2002 published in the Employment Exchange and who have been intimated individually vide letter/telegram are hereby informed that the said written examination is postponed till further notice due to unavoidable Administrative reasons.

1. Junior Engineer (Civil)
2. Junior Engineer (Electrical)
3. Junior Engineer (Mechanical)
4. Draughtsman Gr. III
5. Surveyor.

The fresh date written examination will be intimated to all concerned well in advance."

It would, therefore, appear that even in the year 2002, the Municipal Council proposed to recruit engineers only on the basis of the performance of the candidates in the written examination. It is one thing to say that the Recruitment Rules did not contemplate written examination and is another to say that the Recruitment Rules bar a written examination. The Recruitment Rules are merely silent on this

subject. The authority thought it proper that the engineers to be recruited should be tested by written examination.

For the reasons indicated above, I answer the first issue in the negative except for the recruitment of three Junior Engineer (Civil).

(a) It cannot be gainsaid that written examination is a surer method of examining the worth of a candidate. It also helps to ensure transparency in the matter of distributing the public largess by way of giving jobs.

In the case **Praveen Singh –Vs- State of Punjab and others reported in 2000 (8) SCC 633** the Apex Court opined as follows:

"…Be it noted that there is always a room for suspicion for the common appointments if the oral interview is taken up as the only criteria, Of-Course, there are posts and posts where interviews can be a safe method of appointment but to the post of a Block Development Officer or a Panchayat Officer wherein about 4500 people applied for 40 posts, interview cannot be said to be a satisfactory method of selection through, however, it may be a part thereof-…"

The Judgment in the case of **Sardara Singh** (Supra) cited by Mr. Tabraiz does not really apply to the facts and circumstances of this case. In the case of Sardara Singh, the Rules gave option to the selection committee to resort to written test or to viva voce. Therefore, their Lordships did not find any fault when the candidates were appointed merely on the basis of viva voce. In the present case 1998 Rules were silent on this aspect. In spite thereof the municipal Council in its wisdom through it proper to choose the candidates only on the basis of written examination and issued a press note which I already have indicated above. When a conscious decision was taken even in the absence of mandatory rules to go in far written examination what compelled the authority to be satisfied with viva voce has not been explained. The Recruitment Rules of 2005 specifically require a written examination. Therefore, the appointments could not have been made merely on the basis of viva voce.

I, therefore, answer this issue in the negative.

(b) Mr. Biswas, learned Advocate appearing for the Council submitted that on 3.5.2005 that is to say prior to 24.10.2005 when the amended rules came into force five posts of Junior Engineers were created. It is on this basis that he tired to contend that these vacancies arose prior to 24.8.2006. I am unable to accept this submission. These posts were created on 3.5.2005. Creation of a post and a post becoming vacant are not synonymous. Selection process was started by the notice dated 24.8.2006 when the amended rules had already come into force. Therefore, there is no escape from the conclusion that the notice published on 24.8.2006 is governed by the Recruitment Rules of 2005. What clinches the issue is the fact that the posts of Junior Engineer (E&M) were simply not there prior to the amendment of the Recruitment Rules of 1998 in the year 2005.

Therefore, it is vain to suggest that these are the vacancies which arose prior to the amended Recruitment Rules had come into force.

I therefore, answer this issue in the negative.

(d) No one has disputed that the Chairperson of the Municipal Council acted as Chairman of the selection committee. However, this was sought to be justified on the basis of the Rules of 1998. I already have held that the Rules of 2005, except to the extent exempted by the order dated 27.6.2007, are applicable which provide that the Secretary of the Port Blair Municipal Council shall be the Chairman of the selection Committee. Therefore, the chairperson, a political appointee, had no right to act as the Chairman of the selection committee and therefore, this issue is answered in the affirmative.

All the points raised have thus, been answered.

11. Now the question is as to the relief which may be granted. During the pendency of the writ petition, the appointments have already been made which is naturally subject to the doctrine of lis pendens. The persons who have been appointed have all been added as respondents to this writ petition and they were represented by Mr. Tabraiz.

12. Considering that the selection process was vitiated by illegality, the appointment made were also bad and are therefore, struck down. The posts

are deemed to be vacant and it would be open to the Municipal Council to fill them up in accordance with law.

13. There shall be no order as to costs.

14. Mr. Biswas, learned Advocate appearing for the Municipal Council prayed for stay of operation of this order. Considering that the matter is grave one, the order shall remain stayed for a period of four weeks from date.

CONSTITUTIONAL WRIT JURISDICTION

Before Girish Chandra Gupta and Tapan Mukherjee, JJ.

The Lt. Governor & Ors –vs Smti Alvira D'Souza & Ors.
With
Shri. Pankaj Samaddar & Ors versus The Lt. Governor & Ors.[1]

Constitution of India Article 226- Purity in the Administration of Justice and purity in all stages of Administration including all the activities of the State is need of the hour, which cannot be sacrificed so lightly.

Held : Mrs. Alvira D'Souza and Mrs. S. Manju are working under Dr. Singh in presentae unlike the case cited wherein the expert had at one point of time been the teacher of the candidates. This fact coupled with the fact that Dr. Singh was responsible for framing the questions and evaluating the answer scripts and the fact that these two examinees scored highest marks in the subject are all pointers which cannot be lightly brushed aside. Therefore, the order under challenge cannot be sustained, writ application succeed, order under challenge is set aside.

GIRISH CHANDRA GUPTA, J

1. These two writ petition are directed against a common judgment and order dated 14.09.2007 passed by the learned Central Administrative Tribunal in OA No. 17/A&n/2007 (Mrs. Alvira D'Souza and others –Vs- The Lt. Governor and others).

---

[1] WPCT No.306 of 2007 and WPCT No.311 of 2007 decided on February 05, 2008 by the Hon'ble Calcutta High Court, Circuit Bench at Port Blair.

2. The facts and circumstances of the case briefly stated are as follows:

On 15.09.2006, the A & N Administration issued a notification inviting applications for filling up 9 posts of Agriculture Assistant duly maintaining the quota for the reserved category.

3. Mrs. Alvira D'Souza, Mrs. Manju and Mrs. Shakeela Nawaz amongst others appeared in the written test and were declared successful by a press notification dated 02.03.2007. On 13.03.2007 an interview was held. On 23.03.2007 the Administration issued a notification notifying that the selection process had been cancelled and the written examination would be held afresh. The process was cancelled on the basis that there had been large scale adoption of unfair practice at the written examination.

4. The Tribunal after the parties, has set aside the order by which the selection process was cancelled. It is against this order that the present writ petitions has been filed.

5. The Tribunal it appears, has taken into consideration a report filed by the Deputy Director Mr. A.S. Yadav. From the report of Mr. Yadav, the following facts transpired which have factually not been disputed by anyone.

(a) Mrs. Alvira D'Souza and Mrs. S. Manju were working under Dr. D.R. Singh, Senior Scientist, Horticulture Division, Central Agriculture Research Institute.

(b) Both Mrs. Alvira D'Souza and Mrs. S. Manju scored highest marks in the written examination in the subject paper.

(c) Dr. D.R. Singh is one of the persons who had prepared the questions for the written test.

(d) Dr. D.R. Singh was present when the question paper was finally settled.

(e) The answer sheets were made over to Dr. D.R. Singh for evaluation.

These facts are not in dispute.

6. The learned Tribunal concluded in favour of the applicants before the Tribunal on the ground that subsequent to cancellation of the process, examination was held for the second time in which both Mrs. Alvira D'Souza and Mrs. S. Manju had qualified. The Tribunal. Therefore, has held that the allegation of any bias is factually incorrect, and it is on this basis that the Administration was directed to give effect to the first selection process.

7. Mr. Tabraiz, learned Advocate appearing for the private respondents, who were applicants before the Tribunal very fairly submitted that only Mrs. Alvira D'Souza and Mrs. S. Manju are interested in this litigation. Smti. Shakeela Nawaz is no longer interested because she has already been absorbed in a better employment.

8. Mr. Tabraiz, submitted that mere fact that Mrs. Alvira D'Souza and Mrs. S. Manju were working under Dr. D. R. Singh would not or cannot adversely affect the selection process. In support of his submission he relied on a judgement in the case of Dalpat Abasaheeb Solunke and others –Vs- Dr. B.S. Mahajan and others reported in 1990(1) SCC 305. He relied on paragraph 13 of the said judgement wherein the following view was expressed by the Apex Court.

> "13.. The fourth and the last ground given by the High Court to set aside the appointment of the appellant in CA No. 3507 of 1989 is that respondents 4 and 5 to the writ petition were guides of the appellant when he was doing his M. Sc. by Research. We are unable to understand as to how the fact that they were his guides when the appellant was doing his M. Sc. would influence their decision in selecting him, or vitiate the selection made. They must have been guides to many who had appeared for the interview. As senior teachers in the faculty in question, it is one of their duties to guide the students. In fact, very often the experts on the Selection Committees have to be drawn from the teaching faculty and most of them have to interview candidates who were at one or the other time their students. That cannot disqualify them from being the members of the selection committees. In fact, as stated by respondent 4 in his affidavit before the High Court, even respondent 2, the aggrieved candidate was also his student. Curiously through the High Court has discarded the said fact by observing that in point of time, the appellant was closer to respondent 4 as a student since the appellant was his student

at a later date, it is not necessary to comment further on this reasoning."

8. Mr. Mandal, learned Government Pleader appearing for State/ Writ petitioner and Mrs. Nag, learned Advocate appearing for the writ petitioner in the other matter submitted that, this judgment has no manner of application to the facts and circumstances of this case. They submitted that possibility of bias in evaluation of scripts cannot be ruled out in the facts and circumstances of the case. Although two of the applicants, namely, Mrs. Alvira D'Souza and Mrs. S. Manju scored highest marks on the subject paper they faired poorly in General Knowledge and English. The Tribunal fell into a grievous error according to them, in judging the validity of the second selection process. They submitted that the second selection process was resorted to because the first one was invalid. The validity of the first selection process on the basis on the result of the first process could not be judged on the basis of the result of the second process if the first selection process were valid, the second process would not have been resorted to.

9. We have considered the rival submission advanced by the learned Advocates. We are of the view that the submissions advanced by the petitioners on the question of bias has to be accepted. In the case of Dalpat Abasaheeb Solunke and others –Vs- Dr. B.S. Mahajan and Others relied upon by Mr. Tabraiz, the successful candidates at one point of time were students of the Expert whose services were pressed into service to finalise the selection process. Their Lordships held that more fact that the applicants in that case were ex-students of the Expert would not vitiate the process.

10. In the present case the factual background is wholly different. Admittedly, in the present case Mrs. Alvira D'Souza and Mrs. S. Manju, at the time when the selection process started and the examination was held, were working under Dr. Singh as Research Associates. Dr. Singh contributed questions to the question bank. He was present when the questions were finally settled for the written examination. He is also the person who has evaluation the answers scripts of both Mrs. Alvira D'Souza and Mrs. S. Manju amongst others. Both of them scored highest marks in their subject in the written examination whereas they faired very poorly in the General Knowledge and English papers. Therefore, suspicion of bias cannot be ruled out which is enough to vitiate the entire thing. Reference in this regard may be made to the judgement of the Apex Court in the case of Ranjit Thakur –Vs- Union of India and others, reported in AIR 1987 SC 2386 wherein Their Lordships quoted with approval the view expressed by Queens Bench in the case of

Allinson –Vs- General Council of Medical Education and Registration, wherein it was held.

> "… In the administration of justice, whether by a recognized legal court or by persons who although not a legal public court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration any person who is to take part in it should not be in such a position that he might be suspected of being biased."

11. Mrs. Alvira D'Souza and Mrs. S. Manju are working under Dr. Singh in present unlike the case cited by Mr. Tabraiz wherein the Expert had at one point of time been the teacher of the candidates. This fact coupled with the fact that Dr. Singh was responsible for framing the questions and evaluating the answers scripts and the fact that these two examinees scored highest marks in the subject are all pointers which cannot be lightly brushed aside.

12. Purity in the administration of justice and purity in all stages of administration including all the activities of the State is need of the hour which cannot be sacrificed so lightly.

13. We also do not appreciate why Mrs. Alvira D'Souza and Mrs. S. Manju are fighting the litigation tooth and nail when they appear to have qualified at the second written examination. Their conduct is suggestive as also betrays their anxiety.

14. For the reasons indicated hereinabove, we are of the view the order under challenge cannot be sustained.

15. These writ petitions, therefore, succeed and are allowed. The order under challenge is set aside.

16. The second selection process may be proceeded with.

17. Mr. Tabriaz appearing for the private respondents submitted that his instructions are to prefer a Special Leave petition and prayed for stay of operation of this order for a period of three weeks. Considering the gravity of the matter, operation of the order is directed to remain stayed for a period of three weeks from date.

_____

THE MARITIME ZONES OF INDIA (REGULATION OF FISHING BY FOREIGN VESSELS) ACT, 1981

(28th September, 1981)

An Act to provide for the regulation of fishing by foreign vessels in certain maritime zones of Indian and for matters connected therewith.

Be it enacted by Parliament in the Thirty second Year of the Republic of India as follows:-

CHAPTER I
PRELIMINARY

1. **Short title and commencement. -** (1) This Act may be called THE MARITIME ZONES OF INDIA (REGULATION OF FISHING BY FOREIGN VESSELS) ACT, 1981.
(2) It shall come into force on such date[1] as the Central Government may, by notification in the Official Gazette, appoint.

Provided that different dates may appointed for different provisions of this Act and the reference in any such provisions to the commencement of this Act shall be construed as a reference to the commit into force of that provisions.

2. **Definitions.** – In this Act unless the context otherwise requires.-

(a) "exclusive economic zone of India" means the exclusive economics Zone of India in accordance with the provisions of Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976.
(b) 'fish' means any aquatic animal, whether piscine or not, and includes shell fish, crustacean, molluses, turtle (chelenia), aquatic mamall (the young, fry, eggs and spawn thereof), holothurians, coelenterates, sea weed, coral (prifera) and any other aquatic life;
(c) 'fishing' means catching, taking, killing, attracting or pursuing fish by any method and includes the processing, preserving, transferring, receiving and transporting of fish;
(d) 'foreign vessel' means any vessel other than an Indian vessel:
(e) 'Indian vessel' means-
  (I) a vessel owned by Government or by a corporation establishment by a Central Act or a Provincial or State Act, or
  (II) a vessel-
  (i) which is owned wholly by persons to each of whom any of the following description applies:-
  (1) a citizen of India
  (2) a company in which not less than sixty per cent of the share capital is held by citizens of India.

[1] w.e.f 02.11.1981.

(3) A registered on operative society every member whereof is a citizen of India or where any other co-operative society is a member thereof, every individual who is a member of such other co-operative society is a citizen of India; and
(ii) Which is registered under the Merchant Shipping Act, 1958, or under any other Central Act or any Provincial or State Act.

Explanation **–** For the purpose of this clause, 'registered co-operative society' means a society registered or deemed to be registered under the Co-operative Society Act, 1912, or any other law relating to co-operative societies for the time being inforce in any State:

(f) 'licence' means a licence granted under Section 4;
(g) 'maritime zones of India' means the territorial waters of India or the exclusive economic zone of India;
(h) 'master', in relation to a vessel, means the person for the time being having command or charge of the vessel;
(i) 'owner', in relation to a vessel, includes any association of persons, whether incorporation or not, by whom the vessel is owned or chartered;
(j) 'permit' means a permit granted or deemed to have been granted under Section 5;
(k) 'prescribed' means prescribed by rules made under this Act;
(l) 'processing', in relation to fishing, including cleaning, beheading, filleting, shelling, peeling, icing, freezing, canning, salting, smoking, cooking, pickling, drying and otherwise preparing or preserving fish by any other method;
(m) 'specified ports' means such ports as the Central Government may, by notification in the Official Gazette, specify for the purposes of this Act;
(n) 'territorial waters of India' means the territorial waters of India in accordance with the provision of Section 3 of the Territorial Water Continental Shelf, Exclusive Economics Zone and other Maritime Zones Act, 1976;
(o) 'vessel' includes any ship, boat sailing vessel or other description of vessel.

CHAPTER II
REGULATION OF FISHING BY FOREIGN VESSELS

3. **Prohibition of fishing in maritime zones of India by foreign vessel**.- Subject to the provisions of this Act, no foreign vessel shall except under and in accordance with.-

(a) a licence granted under Section 4; or
(b) a permit granted under Section 5,

by the Central Government, be used for fishing within any maritime zone of India.

4. **Grant of licences.-** (1) The owner of a foreign vessel or any other person (not being in either case any person to whom any of the description specified in sub-items (1) to (3) of item (I) of sub-clause (II) of clause (e) of Section 2 applies) who intends to use such vessel for fishing within any maritime zone of India, may make an application to the Central Government for the grant of a licence.

(2) Every application under sub-section (1) shall be in such form and shall be accompanied by such fees as may be prescribed.

(3) No licence shall be granted unless the Central Government, having regard to such matters as may be prescribed in the public interest in this behalf and after making such inquiry in respect of such other matters as may be relevant, is satisfied that the licence may be granted.

(4) Every order granted or rejecting an application for the issue of a licence shall be in writing.

(5) A licence granted under this section –
(a) shall be in such form as may be prescribed;
(b) shall be valid for such areas, for such period, for such method of fishing and for such purposes as may be specified therein;
(c) may be renewed from time to time; and
(d) shall be subject to such conditions and restrictions as may be prescribed and to such additional conditions and restrictions as may be specified therein.

(6) A person holding a licence under this Section shall ensure that every person employed by him complies in the course of such employment; with the provisions of this Act, or any rule or order made thereunder and the conditions of such licence.

5. Prohibition of fishing by Indian citizens, etc., using foreign vessels.- (1) Every Indian citizen and every person to whom any of the descriptions specified in sub item (2) or (3) of item (I) of sub-clause (II) of clause (e) of Section 2 applies, who intends to use any foreign vessel for fishing within any maritime zone of India, may make an application to the Central Government for a permit to use such vessel for such purpose.

(2) Every application under sub-clause (I) shall be made is such form and shall be accompanied by such fees as may be prescribed.

(3) No permit shall be granted unless the Central Government, having regard to such matters as may be prescribed in the public interest in this behalf and after making such inquiry in respect of such other

matters as may be relevant, is satisfied that the permit may be granted.

(4) Every order granted or rejecting an application for the grant of such permit shall be in writing.

(5) A permit granted under this section –
(a) shall be in such form as may be prescribed;
(b) shall be valid for such areas, for such period, for such method of fishing and for such purposes as may be specified therein;
(c) may be renewed from time to time; and
(d) shall be subject to such conditions and restrictions as may be prescribed and to such additional conditions and restrictions as may be specified therein.

(6) A person holding a permit under this Section shall ensure that every person employed by him complies in the course of such employment; with the provisions of this Act, or any rule or order made thereunder and the conditions of such permit

(7) Notwithstanding anything contained in the foregoing provisions of this section or in Section 3, any permission granted to an Indian citizen to use or employ foreign fishing vessels in any maritime zone of India and in force immediately before the commencement of this Act shall, if the terms and conditions of such permission are not inconsistent with the provisions of this Act, be deemed to be a permit granted under th is section and such permission shall continue to be in force after such commencement on the same terms and conditions, including the conditions as to the area of operation and the period of its validity, and the provisions of this Act, shall, so far as may be apply to such permission.

6. Cancellation of suspension of licence or permit.- (1) The Central Government may, if there is any reasonable cause to believe that the holder of any licence or permit has made any statement in, or in relation to, any application for the grant or renewal of such licence or permit which in correct or false in material particulars or has contravened any of the provisions of this Act or any rule or order made thereunder or of the provisions of any licence or permit or any conditions or restrictions specified therein, suspend such licence or permit, as the case may be, pending the completion of any inquiry against such holder for making such incorrect or false statement or for such contravention as the case may be.

(2) Where the Central Government is satisfied, after making such inquiry as is necessary, that the holder of any licence or permit he made such incorrect or false statement as is referred to in sub-section (1) or has contravened the provisions of this Act, rule or order made thereunder or of the provisions or any licence or permit or any conditions or restriction specified therein, it may without prejudice to any other penalty to which such holder may be liable under the

provisions of this Act, cancel such licence or permit, as the case may be.

(3) Every person whose licence or permit has been suspended under sub-section (I) shall, immediately after such suspension, stop using the foreign fishing vessel in respect of which such licence or permit is given and shall not resume such fishing until the order or suspension has been revoked.

(4) Every holder of a licence or permit which is suspended or cancelled shall, immediately after such suspension of cancellation, surrender such licence or permit, as the case may be, to the Central Government.

7. Foreign vessel entering maritime zones of India without licence of permit to stow gear.- Where any foreign vessel enters any maritime zone of India without a valid licence or permit granted under this Act, the fishing gear, if any, of such vessel shall, at all times while it is in such zone, be kept stowed in the prescribed manner.

8. **Fishing for scientific research, investigation, etc.**- Notwithstanding anything contained in Section 3, the Central Government may, in writing, permit a foreign vessel to be used for fishing within any maritime zone of India for the purpose of carrying out any scientific research or investigation or for any experimental fishing in accordance with such terms and conditions as may be prescribed.

CHAPTER III
POWERS OF SEARCH AND SEIZURE

9. Authorised officers and their powers.- (1) Any officer of the Coast Guard constituted under the Coast Guard Act, 1978, or such other officer of Government as may be authorized by the Central Government may, for the purpose of ascertaining whether or not the requirements of this Act have been complied with, either with or without a warrant.-

(a) stop or board a foreign vessel in any maritime zone of India and search such vessel for fish and for equipment used for capable being used for fishing.
(b) require the master of such vessel of produce-
    (i) any licence, permit, log book or other document relating to the vessel and examine to take copies of such licence, permit, log book or document;
    (ii) any catch, net fishing gear or other equipment on board such vessel or belonging to the vessel and examine such fish, net, gear equipment;
(c) make such inquiries as may be necessary to ascertain whether any offence under this Act has be committed.

(2) Where the officer referred to in sub-section (1) (hereinafter referred to as authorized officer) has reasons to believe that any foreign Vessel has been, is being, or is about to be, used for committing an offence under this Act, he may, with or without a warrant,-

(a) seize and detain such vessel, including any fishing gear, fish equipment, stores or cargo found on board such vessel or belonging to the vessel, and seize and detain any fishing gear abandoned by the vessel;
(b) require the master of the vessel so seized or detained to bring such vessel to any specified port;
(c) arrest any person who, such officer has reason to believe, has committed such an offence;

(3) In taking any action under sub-section (2), the authorized officer may use such force as may be reasonably necessary.

(4) Where any vessel or other things are seized or any person has been arrested, under sub section (2) .-

(a) the vessel or other things so seized shall, as soon as possible, be produced before a Magistrate competent to try an offence under this Act who shall make such order as he may deem fit for the retention or custody of such vessel or things with Government or with any other authority pending the completion of any proceedings for the prosecution of any offence under this Act or for its use by such authority during such retention or custody on such terms and conditions as the Magistrate may think fit to impose:

Provided that the Magistrate may, on an application made by the owner or master of such vessel in the prescribed form, order the release of the vessel or other things so seized on the owner or master furnishing security in the form of cash or a bank guarantee for an amount not less than fifty per cent. of the value of the vessel or things so seized:

Provided further that where any fish so seized is subject to deterioration, the Magistrate may authorize the sale of such fish and the depositing of the proceeds of sale in Court;

(b) the arrested person shall, as soon as possible, be informed of the grounds for such arrest and he shall, without unnecessary delay, be produced before such Magistrate; and
(c) the Central Government shall be informed of such seizure or arrest and the details thereof.

(5) Where, in pursuance of the composition of any offence under this Act, any foreign vessel is pursued the limits of the exclusive economic zone of India, the powers conferred on an authorised officer by this

Section may be exercised beyond such limits in the circumstances and to the extent recognized by international law and State practice.

CHAPTER IV
OFFENCES AND PENALTIES

10. Penalty for contravention of Section 3.- Where any foreign vessel is used in contravention of the provisions of Section 3, the owner or master of such vessel shall.-

(a) in a case where such contravention takes place in any area within the territorial waters of India, by punishable with imprisonment for a term no exceeding three years or with fine not exceeding rupees fifteen lakhs or with both; and

(b) in a case where such contravention takes place in any areas within the exclusive economics zone of India, be punishable with fine not exceeding rupees ten lakhs.

11. Penalty for contravention of licence.- Whoever contravenes the provisions of any licence shall be punishable with fine not exceeding rupees ten lakhs.

12. Penalty for contravention of permit.- Whoever contravences the provisions of any permit shall be punishable.-

(a) where such contravention relates to the area of operation of method of fishing specified in such permit, with fine not exceeding rupees five lakhs; and

(b) in any other case, with fine not exceeding rupees fifty thousand.

13. Confiscation of vessels etc.- (1) where any person is convicted of an offence under Section 10 of Section 11 of Section 12, the foreign vessel used to or in connection with the commission of the said offence, together with its fishing gear, equipment, stores and cargo and any fish on board such ship or the proceeds of the sale of any fish ordered to be sold under the second proviso to clause (a) of sub-section (4) of section 9 shall also be liable to confiscation.

(2) The foreign vessel or other things confiscated under sub-section (1) shall vest in the Central Government.

14. Penalty for contravention of section 7.- Where any foreign vessel is found in any maritime zone of India in contravention of the provisions of Section 7, the owner or master of such vessel shall be punishable with fine not exceeding rupees five lakhs.

15. Penalty for obstruction of authorised officers.- if any person-

(a) intentionally obstructs any authorised officer in the exercise of any powers conferred under this Act; or

(b) fails to afford reasonable facilities to the authorised officer or his assistants to board to vessel or to provide for adequate security to such officer and assistant at the time of entry into the vessel or when they are on board such vessel, or

(c) fails to stop the vessel or produce the licence, permit, log book or other documents or any fish, net fishing gear or other equipment on board such vessel, when required to do so by the authorised officer, he shall be punishable with imprisonment for a term which may extent to one year or with fine not exceeding rupees fifty thousand with both.

16. Court to pass certain orders.- Where any person is convicted of any offence under this Act, the Court may, in addition to awarding any punishment, order that any costs incurred in connection with the retention or custody of the vessel during the pendency of any proceedings for the prosecution of an offence under this Act, as reduced by the amount, if any, realised out of the use of the vessel by the authority with whom such vessel was retained or kept in custody, shall be payable by the person convicted.

17. Offence by companies.- (1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company, for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any such punishment provided in this Act if he proveds that the offence was committed with his knowledge or that he has exercised all due diligence to prevent the commission of such offence

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. – For the purpose of this section.-

(a) 'company' means a body corporate and includes a firm or other association of individuals; and

(b) 'director' in relation to a firm, means a partner in the firm.

CHAPTER V
MISCELLANEOUS

18. **Offences to be cognizable.-** Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under this Act shall be cognizable.

19. **Cognizance and trial of offences.-** (1) No court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by an authorised officer.

    (2) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under this Act.

20. **Magistrate's power to impose financed penalties.-** Now withstanding anything contained in Section 29 of the Code of Criminal Procedure, 1973, it shall be lawful for any Metropolitan Magistrate or any Judicial Procedure of the First Class specially empowered by the State Government in this behalf to pass any sentence authorised by this Act.

21. **Place of trial.-** Any person committing of offence under this Act or any rules made the under may be tried for the offence in such place as the Central Government, may be tried for the offence in such place as the Central Government, may be general or special order, published in the Official Gazette, direct in this behalf.

22. **Presumptions.**- (1) Where any offence is alleged to have been committed under the provisions of this Act, the place of commission of such offence shall be presumed on the basis of the certified copy of the relevant entry in the log book or other official record of the vessel or aircraft which was used in connection with the detection of the offence.

    (2) Where any foreign vessel is found within any maritime zone of India and the fishing gear of such vessel is not stowed in the prescribed manner of fishing is found on board such vessel, it shall be presumed, unless the contrary is proved, that the said vessel was used for fishing within that zone.

23. **Protection of action taken in good faith.-** (1) No suit, prosecution 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 the provisions of this Act.

    (2) No suit or other legal proceedings shall lie against the Government for any damage caused or likely to be caused for anything which is in good faith done or intended to be done to pursuance of the provisions of this Act.

24. **Act to supplement other laws.-** The provisions of this Act shall be to addition to and not in derogation of the provisions of any other law for the time being in force.

25. **Power to make rules.-** (1) The Central Government may, try notification in the Official Gazette, make rules[2] for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generally of the foregoing power, such rules may provide for all or any of the following mattes, namely.-

(a) the form in which an application for a licence or permit may be made and the fees that shall accompany such application;
(b) the matters which may be taken into account in the granting of licences and permits;
(c) the form of licenced and permits and the conditions and restrictions subject to which licences and permits may be granted;
(d) the manner in which the fishing gear of a foreign vessel shall be kept stowed under Section 7;
(e) the terms and conditions under which a foreign vessel may be permitted to be used for fishing within any maritime zone of India for the purpose of carrying out and scientific research for investigation or for any experimental fishing under Section 8;
(f) the form in which an application may be made for releasing the vessel or other things seized under the first proviso to clause (a) of sub-section (4) of Section 9;
(g) any other matter which is required to be, or may, be prescribed.

(3) In making any rule under this section, the Central Government may provide that the contravention thereof shall be punishable with fine which may extend to fifty thousand rupees.

(4) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the sessions immediately following the session or the successive sessions aforesaid, both House agree in making, any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be or no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

26. **Removal of difficulties.-** (1) if any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not in

[2]. See Maritime Zones of India (Regulation of Fishing By Foreign Vessel) Rules, 1982

consistent with the provisions of this Act as may appear to it to be necessary for removing the difficulty;

Provide that no order shall be made under this section after the expiry of three years from the commencement of this act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

----------<><><><><>----------

The Maritime Zones of India

(Regulation of Fishing by Foreign Vessels Act 1981)