CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH

ORIGINAL APPLICATION No. 170/00139/2009

DATED THIS THE 03RD DAY OF JULY, 2017

HON'BLE DR. K.B. SURESH, MEMBER (J)

HON'BLE SHRI P. K. PRADHAN, MEMBER (A)

H.R. Nagamani
W/o S.R. Dwarkanath,
Aged about 49 years,
Sub-Divisional Engineer,
Working as Customer Relation Officer (CEN),
City Telephone Exchange,
O/o The Area Manager Central,
Sampangiramnagar,
Bangalore – 560 027. .....Applicant

(By Advocate Shri M.S. Bhagwat)

Vs.

1. Chief General Manager,
Telecom
Karnataka Circle &
Disciplinary Authority,
Bharat Sanchar Nigam Ltd.,
Karnataka Circle, Halasuru,
Bangalore – 560 008.

2. Chairman-cum-Managing Director,
Bharat Sanchar Nigam Ltd.,
4th Floor, 'A' Wing,
Stateman House,
B-148, Barakhamba Road,

New Delhi – 110 001.

3. Enquiry Officer & CAO,
O/o The CGMT,
Bharat Sanchar Nigam Limited,
Corporate Accounts Unit,
3rd Floor, Telephone House,
Raj. Bhavan Road, Bangalore – 560 001. …..Respondents

(By Shri V.N. Holla Counsel for the Respondents)

ORDER

DR. K.B. SURESH, MEMBER (J):

This is a remanded matter back from Hon'ble High Court. The issue is basically the procedure adopted by the Tribunal to elicit truth. When it found from the inadequate pleadings and the vague reply filed by the respondents that something lies amiss in this morass and therefore taking the duty of an adjudicator seriously the Tribunal had discussed the matter with the learned counsels appearing and had obtained from the respondents the names and details of the concerned officials who were involved in the matter and thereafter had summoned them in accordance with law and had examined them.

2. But unfortunately the learned counsel for the respondents had erred seriously as he being a counsel of the Tribunal regularly for several years is expected to know the normal procedure and processes of the Tribunal. We regret to note that he had misguided the Hon'ble High Court into a feeling that, in all probability, taking of evidence is forbidden for the Tribunal and therefore to elicit an answer on this issue the Hon'ble High Court had sent the matter

back to the Tribunal. In this respect paragraph 5,6,7,9 and 10 is quoted herewith for easy elucidation:

> *"5. Sri V Narasimha Holla, learned counsel for the petitioners, submits that the tribunal, instead of following the procedure in dealing with such Applications, went to the extent of summoning the superior officers of the department and also the police commissioner as well as station house officer of the police station, who was seized of the investigation and the tribunal further went to the extent of questioning those officers for elicitation of points and therefore he submits that the tribunal, without considering the case properly, on its own, is in the habit of summoning witnesses of its choice and based on the answers elicited from those witnesses, the case has been decided without touching the merits of the case. Therefore, on this short question, he requests this court to set aside the order passed by the tribunal and remand the matter to the tribunal for fresh consideration in accordance with law.*
>
> *6. Sri M S Bhagwat, learned counsel for the respondent submits that before the inquiring officer, the department has failed to prove the charges levelled against the respondent. According to him, the respondent is in no way concerned with the misappropriation made by one Natarajan, since the tribunal has come to the conclusion that the said Natarajan has misused the telephone memory cards even when Vaikunta Raju was in charge of the post and the same has been continued during the period when the respondent was in charge of the post and therefore the respondent cannot be held responsible. According to him, her tenure was for a very short period of 8 ½ months and there is no dereliction of duty by her. In the circumstances, he requests this court to dismiss this writ petition.*
>
> *7. Learned counsel for the respondent further submits that after the order passed by the tribunal, the respondent has taken voluntary retirement and therefore there is no profit in reconsidering the matter afresh by the tribunal, as sought for by the learned counsel for the petitioners.*
>
> *8. Having heard the learned counsel for the parties, the only point that is to be considered by this court in this petition is whether the tribunal while considering the matter concerning imposition of penalty can summon witnesses for elicitation of answers to satisfy as to whether the procedure followed by the inquiring officer and the disciplinary authority before imposing the penalty is just and proper?*
>
> *9. Without considering the points raised by the learned counsel for the parties, we are of the view that the procedure followed by the tribunal in disposing of the case is unknown to all canons of law. When a party has approached the tribunal contending that the enquiry*

*conducted by the inquiring officer and penalty imposed by the disciplinary authority are not in accordance with the service law, what is required to be considered by the tribunal is to examine the inquiry report and the order of penalty passed by the disciplinary authority. Beyond this, the tribunal has no jurisdiction to summon any witnesses and elicit answers in order to ascertaining as to whether the respondents in the application have committed any error in law.*

*10. Therefore, only on this short question, the order passed by the tribunal is set aside and the matter is remanded to the tribunal for fresh consideration in accordance with law. This writ petition is allowed accordingly."*

**Therefore, what is the adjudicatory duty of the Tribunal being a first instance Court?**

The Tribunal being a first instance Court has responsibility as an adjudicator which may perhaps be as wide as a Civil Court and as penetrating as the High Court.

There is a historical reason for this. Prior to 1985, service jurisprudence had a chequered backdrop. In some of the states, Civil Courts under Section 9 of the CPC held sway whereas in some states the Hon'ble High Court under Article 226 of the Constitution of India dispensed justice. Therefore when it was amalgamated and fused together quite naturally the elements of both came into play. Therefore, generally the tenets of Article 226 were made applicable as the Tribunal had the power to accept affidavits and statements, like any High Court which was found necessary that, being the first instance Court, it should have certain other powers as well.

It will be proper for us to consider Section 22 of the Administrative Tribunals Act, 1985 which is quoted below. In sub clause 3 clause (a) the

Tribunal has the power to summoning and enforcing the attendance of any person and examining him on oath. But let us also examine the whole of Section 22:

> *"22. Procedure and powers of Tribunals - (1) A Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any rules made by the Central Government, the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its inquiry and deciding whether to sit in public or in private.*
>
> *(2) A Tribunal shall decide every application made to it as expeditiously as possible and ordinarily every application shall be decided on a perusal of documents and written representations and [after hearing such oral arguments as may be advanced].*
>
> *(3) A Tribunal shall have, for the purposes of [discharging its functions under this Act], the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely:-*
>
> ***(a) summoning and enforcing the attendance of any person and examining him on oath;***
> ***(b) requiring the discovery and production of documents;***
> ***(c) receiving evidence of affidavits;***
> *(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872) requisitioning and public record or document or copy of such record or document from any office;*
> ***(e) issuing commissions for the examination of witnesses or documents;***
> *(f) reviewing its decisions;*
> *(g) dismissing a representation for default or deciding it ex- parte;*
> *(h) setting aside any order of dismissal of any representation for default or any order passed by it ex-parte ; and*
> *(i) any other matter which may be prescribed by the Central Government."*

**<u>What are the elements of Section 22?</u>**

It is critically acclaimed that the Tribunal will also have all the powers of the Civil Court while trying a suit in respect of the following matters which are

elucidated earlier. It stipulates that it is the duty of the Tribunal to find out the truth for which purpose only all these powers are seen vested directly in the Tribunal otherwise the word ***"Satyameva Jayathe"*** will have no meaning.

While it may be so, in a High Court the procedure may be slightly different. The Hon'ble High Court may not usually take evidence, it will only accept evidence on affidavits or statements but then would it prohibit the Hon'ble High Court from taking evidence in a case? There are instances wherein when faced with a situation to find truth various High Courts in India have also taken evidence and which was upheld by the Hon'ble Apex Court. This is particularly so in a *Habeas Corpus* matter or in a *Quo Warranto* matter where there are disputed facts also and therefore to elicit truth the Hon'ble High Court has to find out the truth. Therefore the statement of the learned counsel for the respondents that the Tribunal do not have the power to examine witnesses seems to be very unfortunate, coming from such an experienced learned counsel. Since it is not the normal practice in the High Court to take evidence and since it is normally the procedure of the Tribunal designed as similar to the High Court, the Hon'ble High Court had assumed that probably the Tribunal may not have jurisdiction.

But the fact is that before taking evidence discussions were held with both the counsels and answers elicited as to the persons involved in it and only after that the evidence was commenced. At the point of taking evidence, no objection was raised as to the power of the Tribunal therefore it is very unfortunate that the respondents had misguided the Hon'ble High Court and

thereby had caused severe prejudice to the applicant. We are now advised that unable to bear the pressure the applicant had since taken voluntary retirement and left the scene.

***How unfortunate it is that an applicant in a case had to escape from the scenery unable to bear the pressure***

The Judiciary Academy of India is under the total control of the Hon'ble Apex Court and a series of discussions were held there for the purpose of eliciting and understanding fully the import and impact of the Code of Civil Procedure. Out of the minutes prepared for this, we had elicited points of interest so that it will be a guiding star for the Tribunal in the future also. It delineates the situation wherein the juncture of the Tribunal under the Code of Civil Procedure and in accordance with Section 22 of the Administrative Tribunals Act can be brought in so that ultimate justice can prevail. Therefore on both these grounds it is necessary to understand that the Tribunal not only has the power to take evidence but in required cases the responsibility of taking evidence is that truth will not be submerged.

CODE OF CIVIL PROCEDURE AND ITS JUNCTURE TO THE TRIBUNAL

As it is evident from its name, it mainly lays down the procedure to be adopted in civil courts, **and its principles may be applicable in other courts,** like writ courts, and Tribunals to the extent the enactments establishing the Tribunals provide for it, it provides for a fair procedure for redressal of disputes. The other party may know what is the dispute about, what defence it can take, and how both the parties may proceed to prove their respective

cases. Some of its provisions are substantive in nature and not procedural at all, like Sections 96,100, 114 and 115 providing for a right of appeal, review and revision. The other provisions are generally procedural in nature. The purpose of the Civil Procedure Code, 1908 (hereinafter referred to as 'Çode') is to provide a litigant a fair trial in accordance with the accepted principles of natural justice. The Code is mainly divided into two parts, namely Sections and Orders. While the main principles are contained in the Sections, the detailed procedures with regard to the matters dealt with by the Sections have been specified in the Orders. Section 122 of the Code empowers the High Court to amend the Rules, i.e. the procedure from time to time making the amendments in the said Orders.

The Code is a codification of the principles of natural justice. Natural justice means 'justice to be done naturally' which is adopted naturally by the habits of every individual. It does not mean godly justice or justice of nature. It simply means an inbuilt habit of a person to do justice. For example, if a child of 1,1/2 years breaks the saucer, the mother of the child may slap him being furious, but at the time of slapping, she would repeatedly ask him why he has broker the saucer, though she knows that the child has not started speaking. As there principles are inbuilt-habit of everyone to ask others for furnishing the explanation of anything done by them, the same are known as 'principles of natural justice'. In Garden of Eden God did not punish Adam and Eve without giving them opportunity to show cause as to why they had eaten the prohibited fruit. The first reported case of principles of natural justice in

Dr.Bentely's case, i.e. **R.V.University of Cambridge**, (1723) 1 STR 757, wherein reference of the incident of Garden of Eden was made.

(Quote from Code of Civil Procedure by Hon'ble Justice Dr.B.S.Chauhan)

The two words are repeated everyday in the courts – 'justice' and 'law. Justice is an illusion as the meaning and definition of 'justice' varies from person to person and party to party. Parties feel that they have got justice only and only if the case succeeds before the court, though it may not have a justifiable claim (Vide: **Delhi Administration V.Gurudeep Singh Uban**, AIR 2000 SC 3737)

(Quote from Code of Civil Procedure by Hon'ble Justice Dr.B.S.Chauhan)

**Section 11** contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman Jurisprudence "interest reipublicaeut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "nemodebetbisvexari pro una et eademcausa" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent ottru the subsequent suit in which such issue has been raised. "Res judicata pro veritateaccipitur" ( a thing adjudged must be taken as truth) is the full maxim which has, over the years, shrunk to mere

”res judicata”. (vide**: Kunjan Nair Sivaraman Nair v. Narayanan Nair** (2004) 3 SCC 277) which is squarely held to be applicable in writ civil courts as we;;.

The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence ‘interest republicaeut sit finis litium” (it ocncerns the State that there be an end to law suits) and partly on the maxim “nemodebetbisvexari pro uno et eademcausa” (no man should be vexed twice over for the same cause)(See:**Dr.SubramanianSwamy v. State of Tamil Nadu &Ors** 2014 (1) SCALE 79).

(Quote from Code of Civil Procedure by Hon’ble Justice Dr.B.S.Chauhan)

Conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court and if a court having no jurisdiction passes a decree over the matter, it would amount to a nullity, as the matter by-passes the correct route of jurisdiction. Such an issue can be raised even a belated stage in execution. The finding of a court or Tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of parties cannot confer jurisdiction upon a court and an erroneous interpretation equally should not be permitted to perpetuate or perpetrate, defeating the legislative intention. The Court cannot derive jurisdiction apart from the Statute. No amount of waiver or consent can confer jurisdiction on the Court if it inherently lacks it or if none exists. (Vide**: SmtNaiBahu v. Lala Ramnarayan&Ors.,** AIR 1978 SC 22;**Natraj Studios Pvt. Ltd. v. Navrang Studio & Anr..,** AIR 1981 SC 537;**SardarHasanSiddiqui v. State Transport Appellate Tribunal,** AIR 1986

All.132;**A.R.Antuley v R.S. Nayak,** AIR 1988 SC 1531; **Union of India v. Deoki Nandan Aggarwal,** AIR 1992 SC 96;**Karnal Improvement Trust v.PrakashWanti & Anr.,** (1995) 5 SCC 159;**U.P.Rajkiya Nirman Nigam Ltd. V. Indure Pvt. Ltd**.., AIR 1996 SC 1373; **State of Gujarat v. Rajesh Kumar Chimanlal Barot & Anr.,** AIR 1996 SC 2664; **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors**., AIR 1999 SC 2213; **Collector of Central Excise, Kanpur v. Flock (India) (P) Ltd., Kanpur,** AIR 2000 SC 2484 **and Vithal (P) Ltd. V. Union of India &Ors.,** AIR 2005 SC 1891).

(Quote from Code of Civil Procedure by Hon'ble Justice Dr.B.S.Chauhan)

In **Navinchandra N.Majithia v. State of Maharashtra &Ors.,** AIR 2000 SC 2966, the Supreme Court while considering the provisions of Clause (2) of Article 226 of the Constitution, observed as under:-

> "In legal parlance the expression 'cause of action' os generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more basis for suing; a factual situation that entitles one person to obtain a remedy in court from another person ….'Cause of action' is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment… the meaning attributed to the phrase 'cause of action' in common legal parlance is, existence of those facts which give a party a right to judicial interference on his behalf".

The Apex Court held that while considering the same, the court must examine as to whether institution of a complaint/plaint is a mala fide move on

the part of a party to harass and pressurise the other party for one reason or the other or to achieve an ulterior goal. For that consideration, the relief clause may be a relevant criterion for consideration but cannot be the sole consideration in the matter.

In **H.V. Jayaram v. Industrial Credit & Investment Corpn. of India Ltd.,,** AIR 2000 SC 579, the Supreme Court examined the issue of territorial jurisdiction of a court in respect of the offence under Section 113 (2) of the Indian Companies Act, 1956. Taking note of Sections 113 and 207 of the said Act, the Apex Court held that the cause of action for a default of not sending the share certificates within the stipulated period would arise only at a place where the registered office of the company was situated as from that place the share certificates could be posted and are usually posted.

In **Rajasthan High Court Advocates' Association v. Union of India &Ors.,** AIR 2001 SC 416, the Supreme Court considered the question of territorial jurisdiction of the Principal Seat of the Court at Jodhpur and the Bench at Jaipur and explained the meaning of "cause of action" observing as under:-

> "The expression 'cause of action' has acquired a judicially settled meaning. In the restricted sense, 'cause of action' means the circumstance forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the rights, but the infraction coupled with the right itself. Compendiously the expression means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact which is necessary to be proved, as distinguishing from every piece of evidence which is necessary to prove each fact, comprises in a 'cause of action'. It has to be left to be

> determined in each individual case as to where the cause of action arose".

In **Union of India & Ors. V. Adani Exports Ltd. &Anr.,** (2002) 1 SCC 567, the Supreme Court considered the scope of Section 20 of CPC and Clause (2) of Article 226 of the Constitution while examining whether in that case the Gujarat High Court had territorial jurisdiction. The Court held that the fact which may be relevant to give rise to the "cause of action", are only those which have " a nexus or relevance with the lis involved in the case and none else". In the said case, the respondent had filed an application before the Gujarat High Court claiming the benefit of pass-book Scheme under the provisions of the Import Export Policy introduced w.e.f.1-4-1995 in relation to certain credits to be given on export of srimps. However, none of the respondents in the civil application was stationed at Ahmedabad. Even the Pass-book, was to be issued by an Authority stationed at Chennai; the entries in the pass-book under the Scheme concerned were to be made by the Authority at Chennai and the export of prawns made by them and import of the inputs, benefit of which the respondents had sought in the application, were also to be made at Chennai. The Court held that the Gujarat High Court had no territorial jurisdiction, in spite of the fact that the respondents were carrying on their business of export and import from Ahmedabad, the orders of export and import were placed from and were executed at Ahmedabad, documents and payments of export and imports were sent/made at Ahmedabad, the credit of duty claimed in respect of export were handled from Ahmedabad, the respondents had executed a bank guarantee through their bankers as well as a bond at Ahmedabad, non-grant or denial of utilization of the credit in the

pass-book might affect the company's business at Ahmedabad. The court held as under:-

> "…..In order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the court to decide a dispute which has, at least in part, arisen within its jurisdiction. …..each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned. If we apply this principle then we see that none of the facts pleaded in para 16 of the petition, in our opinion, fall into the category of bundle of facts which would constitute a cause of action giving rise to a dispute which could confer territorial jurisdiction on the courts at Ahmedabad. ….the fact that the respondents are carrying on the business of export and import or that they are receiving the export and import orders at Ahmedabad or that their documents and payments for exports and imports are sent/made at Ahmedabad, has no connection whatsoever with the dispute that is involved in the applications. Similarly, the fact that the credit of duty claimed in respect of exports that were made from Chennai were handled by the respondents from Ahmedabad have also no connection whatsoever with the actions of the appellants impugned in the application. The non-granting and denial of credit in the passbook having an ultimate effect. If any, on the business of the respondents at Ahmedabad would not also, in our opinion, give rise to any such cause of action to a court at Ahmedabad to adjudicate on the actions complained against the appellants".

In **Muhammad Hafiz v. Muhammad Zakariya,** AIR 1922 PC 23, the "cause of action" was explained as under:-

> "….the cause of action is the cause of action which gives occasion for an forms the foundation of the suit…."

Similarly, in **Read v. Brown,** (1889) 22 QBD 128, this was explained as under:-"Every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court".

Same meaning has been reiterated by the Privy Council in **Mohammed Khalil Khan &Ors. v. Mehbul Ali Mian&Ors.,** AIR 1949 PC 78, and by the Supreme Court in **State of Madras v. C.P. Agencies.** AIR 1960 SC 1309, **A.B.C.Laminart Pvt. Ltd. & Anr. v. A.P. Agencies, Salem** AIR 1989 SC 1239, **A.V.M. Sales Corporation v. Auuradha Chemicals Pvt. Ltd.,** (2012) 2 SCC 315.

A "cause of action" is a bundle of facts which, taken with the law applicable, gives the plaintiff a right to relief against the defendant. However, it must include some act done by the defendant, since in the absence of an act, no cause of action can possibly occurred, (Vide: **Radhakrishnamurthy v. Chandrasekhara Rao,** AIR 1966 AP 334; **Ram Awalamb v. Jata Shankar,** AIR 1969 All. 526(FB); and **Salik Ram Adya Prasad v. Ram Lakhan & Ors.,** AIR 1973 All. 107).

**Section 24** provides for power for transfer of a case from one court to another.

It provides for transfer of suit, appeal or other proceedings. **Other proceedings** included the execution proceedings. (Vide: Rajagopala Pandarathar & Ors V. Tirupathia Pillai & Anr., AIR 1926 Mad. 421; Sarjudei V. Rampati Kunwari, AIR 1962 All. 503; Prabhakara Rao H. Mawle V. Hyderabad State Bank, AIR 1964 AP 101; and Mulraj Doshi V.Gangadhar Singhania, AIR 1982 Ori. 191).

In **Nahar Industrial Enterprises Ltd. V. Hong Kong and Shanghai Banking Corporation,** (2009) 8 SCC 646, the apex court held:

> "Only civil suits are subject matter of inter State transfer from one civil court to another civil court. Sub-section (5) of section 24 of CPC provides that a suit or proceeding may be transferred from a Court which has no jurisdiction to try it. The power to transfer one case from one court to another or from one tribunal to another is to be exercised if exceptional situation arises and not otherwise. **Rules of procedures are intended to provide justice and not to defeat it".**

**Section 25** empowers the Supreme Court to transfer the case from a competent Court in one State to the Court of another State. The transfer should not be made when the proceedings in a case has reached the final stage or are likely to be concluded. (Vide: N.K.Nair & Anr. V. Kavanugalaanattu Radhika, (2005) 13 SCC 439). While considering the application under Section 25, the Court must examine all the facts involved therein and inconvenience of a party cannot be a ground for transfer. (Vide :Madhu Saxena V. Pankaj saxena, (2005) 13 SCC 158; Sarita Devi V.Manoj

Saha, (2005) 13 scc 413; Anindita Das V. Srijit Das, (2006) 9 SCC 197; and Gyanmati Yadav v. Ram Sagar Yadav, (2013) 14 SCC 621).

**Section 34**

**In TVC Skyshop Ltd. V. Reliance Communication &Ingrastructure Ltd., (2013) 11 SCC 754; State of Haryana v. Kartar Singh, (2013) 11 SCC 375).**

**Section 35** provides **Actual realistic costs – MEANING.**

Provision of costs have been incorporated in section 35, 35-A, 35-B and section 95 of CPC for the purpose of acting as a deterrence against frivolous, vexatious claims made. But the working of the provision shows that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party.

In **Salem Advocates Bar Association V. Union of India,** 2005 (6) SCC 344, the Supreme court held that the costs have to be actual and reasonable, including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules.

In **Sanjeev Kumar Jain V. Raghubir Saran Charitable Trust &Ors.,** (2012)ISCC455, the Apex Court went into the Interpretation of the words "actual realistic costs". It held that even if actual costs have to be awarded, it

should be realistic which means what a “normal” advocate in a “normal” case of such nature would charge normally in such a case”. Assuming that costs could be awarded on such basis. The actual realistic cost should have a correlation to costs which are realistic and practical. It cannot obviously refer to fanciful and whimsical expenditure by parties who have the luxury of engaging a battery of high-charging lawyers.

**Section 39** deals with transfer of decree for execution to the Court where the property is situate. The power of the executing Court has been taken away against a person or property outside the local limits of its territorial jurisdiction by the amendment. Earlier, he could execute the decree throughout the territory of the province.

**Section 96**provides for appeal, and the provision has been amended by 1999 Act that appeal would lie only, provided there is a dispute of more than of Rs.10,000/-.

In the First Appeal, it is permissible for the appellate court to re-examine and re-appreciate the evidence. The right to institute the suit is an inherent right, but the right of appeal is statutory. (Vide: Baldev Singh V. Surendra Mohan Sharma, AIR 2003 SC 225; Narvada Devi Gupta V.Birendra Kumar Jaiswal, (2003) 8 SCC 745; and Triputi Balaji Developers V. State of Bihar, AIR 2004 SC 235.

In Delhi U.P. Madhya Pradesh Transport Co. V. New India Assurance Co., (2006) 9 SCC 213, the Apex Court held that regular first appeal should not be dismissed summarily without assigning proper reason.

In **H. Siddiqui**(dead) by LRs v. **A. Ramalingam,** AIR 2011 SC 1492, the apex court held as under:

> "18. The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require tht the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on the Independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for the decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: **Thakur Kalyan Singh &Anr.,** AIR 1963 SC 146; **Girijanandini Devi &Ors. v. BijendraNarainChoudhary,** AIR 1967 SC 1124; **G.Amalorpavam&Ors. v. R.C.Diocese of Madurai &Ors.,** (2006) 3 SCC 224; **Shiv Kumar Sharma v. SantoshKumari,** AIR 2008 SC 171; and **GannmaniAnasuya&Ors. v.ParvatiniAmarendraChowdhary&Ors.,** AIR 2007 SC 2380)

In **B.V.Nagesh&Anr.v. H.V.Sreenivasa Murthy,** (2010) 10 SCC 55, While dealing with the issue, the Supreme Court held as under:

> "The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide: **SantoshHazari v**. PurushottamTiwari, AIR 2001 SC 2171]".

Thus, it is evident that the First Appellate Court must decide the appeal giving adherence to the statutory provisions of Order XLI Rule 31 CPC.

> (See also: M/s United Engineers & Contractors v, Secretary to Govt. of A.P. &Ors. AIR 2013 SC 2239; B.M.Narayana v. Shanthamma (D) by Lrs. &Anr., AIR 2012 SC Supp.264; KailashPaliwal v. Subhash Chandra Agrawal, AIR 2013 SC 2923; and **Laxmibai (Dead) thr.L.Rs. &Anr. v. Bhagwantbuva (Dead) thr.L.Rs. &Ors.,**AIR 2013 SC 1204).

Similar view has been reiterated I Tirumala Devasthanams V.K. Krishnaiah, (1998) 3 SCC 331; State of Rajasthan V. Harphool Singh, (2000) 5 SCC 652; Rajapps Hanamantha Ranoji V. Mahadev Channabasappa &Ors., AIR 2000 SC 2108; Santakumari & Ors. V. Lakshmi Amma JanakiAmma (2000) 7 SCCC 60; Satyamma V. Basamma (Dead) by LRs (2000) 8 SCC 567; Santosh Hazari V. PurushottamTiwari, AIR 2001 SC 965; Kulwant Kaur & Ors.V.Gurdial Singh Mann, AIR 2001 SC 1273; M.S.V. Raja V. Seeni Thevar,

(2001) 6 SCC 652; Hafazat Hussain V. Abdul Majeed & Ors. (2001) 7 SCC 189; V. Pechimuthu V. Gowrammal, AIR 2001 SC 2446; Neelakantan & Ors.V.Mallika Begum, AIR 2002 SC 827; Md. Mohammad Ali (Dead) by LRs. V. JagdishKalita & Ors., (2004) 1 SCC 271; Rajeshwaro V. Puran Indoria, (2005) 7 SCC 60) and Bharatha Matha & Anr. V.R. Vijaya Renganathan &Ors., AIR 2010 SC 2685).

**There may be a question, which may be a "question of fact", "question of law", or "mixed question of fact and law" and "substantial question of law". Question means anything inquired; an issue to be decided. The "question of fact" is whether a particular factual situation exists or not. A question of fact, in the Realm of Jurisprudence, has been explained** as under:-

> "A question of fact is one capable of being answered by way of demonstration. A question of opinion is one that cannot be so answered. An answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong".

(Vide: Salmond, on Jurisprudence, 12th Edn. Page 69, cited in GadakhYashwantraoKankarrao V. E.V.@ BalasahebVikhePatil&ors., AIR 1994 SC 678).

In Smt. Bibhabati Devi V. Ramendra Narayan Roy & Ors., AIR 1947 PC 19, the Privy Council has provided guidelines as to what cases the second appeal can be entertained in, explaining the provisions existing prior to the amendment of 1976, observing as under:-

> "…… that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to

> make that which happen not in the proper sense of the word 'judicial procedure' at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law.

'That the question of admissibility of evidence is a proposition of law but it must be such as to affect materially the finding. The question of the value of evidence is not sufficient reason for departure from the practice….".

In SuwalalChhogalal V.Commissioner of Income Tax, (1949) 17 ITR 269, the Apex Court held as under:-

> "A fact is a fact irrespective of evidence, by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient evidence".

In Oriental Investment Company Ltd. V, Commissioner of Income Tax, Bombay AIR 1957 SC 852, the Supreme Court considered a large number of its earlier judgments, including Sree Meenakshi Mills Ltd. V. Commissioner of Income Tax, AIR 1957 SC 49, and held that where the question is whether profit is made and shown in the name of certain intermediaries, were, in fact, profit actually earned by the assesse or the intermediaries, is a mixed question of fact and law. The Court further held that inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or a "mixed question of law and fact" and that a finding on fact

without evidence to support it or if based on relevant or irrelevant matters, is not unassailable.

In Sir Chunnilal V. Mehta & Sons V.Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314, the Supreme Court for the purpose of determining the issue by the Supreme Court itself, held as under:-

> "The proper test for determining whether a question of law raised in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the apex Court or by Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law".

A Constitution Bench of the Supreme Court, in the case of State of J & K v. Thakur Ganga Singh, AIR 1960 SC 356, considered as what may be the substantial question and held that authentic interpretation of Constitutional provisions amounts to substantial question of law. However, where the substantial question of law had already been decided by the Authority which is binding on the other Courts like the judgments of the Supreme Court under Article 141 of the Constitution if binding on all other Courts etc., it does not remain a substantial question of law because there remains no scope to interpret further the said provision. While deciding the said case, the Apex Court placed reliance upon its earlier judgments in Charanjit Lal Chowdhary V.

Union of India &ors., AIR 1951 SC 41; Ram Kishan Dalmia V. Justice Tendolkar, AIR 1958 SC 538; and Mohammed Haneef Quareshi V. State of Bihar, AIR 1958 SC 731. The same view has been reiterated by the Supreme Court in Bhagwan Swaroop V. State of Maharashtra, AIR 1965 SC 682.

In Reserve Bank of India V. Ramakrishna Govind Morey, AIR 1976 SC 830, the Supreme Court held that the question whether the Trial Court should not have exercised its jurisdiction differently, is not a question of law or a substantial question of law and, therefore, second appeal cannot be entertained by the High Court on this ground.

In GianDass V. Gram Panchayat, (2006) 6 SCC 271; and C.A.Sulaiman V. State Bank of Travancore, AIR 2006 SC 2848, the Apex Court held that Clause (5) to Section 100 applies only when a substantial question has already been framed and if the Court forms the opinion that some other substantial question of law also exists, the Court may frame the said issue after recording reasons for the same.

A right accrued in favour of a party by lapse of time cannot be permitted to be taken away by amendment. Amendment can also be allowed at the appellate stage. Introduction of an entirely new case, displacing admissions by a party is not permissible. (Vide: Pirgonda Hongonda Patil V. Kalgonda Shidgonda Patil & Ors., AIR 1957 SC 363; Nanduri Yogananda Laxminarasimhachari & Ors. V. Sri Agasthe Swarswamivaru, AIR 1960 SC 622; M/s Modi Spinning & Weaving Mills Co. Ltd. V. M/s Ladha Ram & Co.,

AIR 1977 SC 680; Ishwardas V. State of M.P., AIR 1979 SC 551; and Mulk Raj Batra V. District Judge, Dehradun, AIR 1982 SC 24).

A similar view has been reiterated in G. Nagamma & Anr. V.Siromanamma & Anr., and (1996) 2 SCC 25; B.K. Narayana Pillai V. Parameshwaran Pillai & Anr., AIR 2000 SC 614. However, a party cannot be permitted to move an application under Order 6 Rule 17 of the Code after the judgment has been reserved. (Vide: Arjunsingh V, Mohindra Kumar &Ors., AIR 1964 SC 993).

**A Constitution Bench of the Supreme Court in Municipal Corporation of Greater Bombay V. Lala Pancham & Ors., AIR 1965 SC 1008, observed that even the court itself can suggest amendment to the parties for the reason that main purpose of the court is to do justice, and therefore, it may invite the attention of the parties to the defects in the pleadings, so that same can be remedied and the real issue between the parties may be tried. However, it should not give rise to an entirely new case.**

In L.J. Leach& Co. Ltd. V. Messrs. Jairdine Skinner & Co. AIR 1957 SC 357; Charan Das V. Amir Khan, AIR 1921 Privy Council 50; Prigonda Hongonda Patil V. Kalgonda Shidgonda Patil AIR 1956 SC 363; Nichhalibhai Vallabhai V. Jaswantlal Zinabhai, AIR 1966 SC 997; and M/s Ganesh Trading Co. V Moji Ram, AIR 1978 SC 484, it has been held that the court can allow a party to amend pleadings at any stage.

In Jagdish Singh V. Natthu Singh, AIR 1992 SC 1604, the Supreme Court held that the Court may to a certain extent allow the conversion of the nature of the Suit, provided it does not give rise to an entire new cause of action. An amendment sought in a plaint filed for specific performance may be allowed to be done without abandoning the said relief but amendment seeking damages for breach of contract may be permitted.

If the plaintiff wants to add certain facts, which the plaintiff had not chosen to mention in the original plaint and the same were in his knowledge when the plaint was instituted it can be done. However, the plaintiff cannot be allowed to make fresh allegation of facts by way of amendment at a belated stage. (Vide: Gopal Krishnamurthi V. Shreedhara Rao, AIR 1950 Mad. 32; and Gauri Shankar V. M/s Hindustan Trust (Pvt) Ltd., AIR 1972 SC 2091).

In Union of India &Ors. V. Surjit Singh Atwal, AIR 1979 SC 1701, the Apex Court held that in case of gross delay, application for amendment must be rejected.

Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are of more help to the court in narrowing down the controversy involved and it informs the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that " as a rule, relief not founded on the pleadings should not be granted". Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between

the parties and to narrow the area of conflict and to see just where the two sides differ. (Vide: **Sri Mahant GovindRao v. Sita Ram Kesho,** (1898) 25 Ind. App. 195; **M/s Trojan & Co. v. RM.N.N. Nagappa Chettiar,** AIR 1953 SC 235; **Raruha Singh v. Achal Singh &Ors.;** AIR 1961 SC 1097; **Om Prakash Gupta v. Ranbir B. Goyal,** AIR 2002 SC 665; **IshwarDutt v. Land Acquisition Collector & Anr.** AIR 2005 SC 3165; **Kores (India) Ltd. V. Bank of Maharashtra,** (2009) 17 SCC 674 and **State of Maharashtra v. Hindustan Construction Company Ltd.,** (2010) 4 SCC 518.)

The Apex Court in **Ram Sarup Gupta** (dead) by L.Rs. **v. Bishun Narain Inter College &Ors.,** AIR 1987 SC 1242 held as under:

> "It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet…..In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question".

(See also: **ArikalaNarasa Reddy v. Venkata Ram Reddy Reddygari&Anr.** 2014 (2) SCALE 26).

The Supreme Court in**BachhajNahar v. NilimaMandal&Ors.**AIR 2009 SC 1103, held as under:

> "The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to

> ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration".

**Validity of an order is to be tested on the touch-stone of the doctrine of prejudice.**

(Vide: Jankinath Sarangi V. State of Orissa, (1969) 3 SCC 392; K.L. Tripathi V. State Bank of India &Ors., AIR 1984 SC 273; Sunil Kumar Banerjee V. State of West Bengal &Ors., AIR 1980 SC 1170; Maj. G.S. Sodhi V. Union of India, AIR 1991 SC 1617; Managing Director, ECIL, Hyderabad &Ors. V.B. Karunakar & Ors., AIR 1994 SC 1074; Krishan Lal V. State of J & K, (1994) 4 SCC 422; State Bank of Patiala & Ors. V. S. K. Sharma, AIR 1996 SC 1669; S.K. Singh V. Central Bank of India &Ors., (1996) 6 SCC 415; State of U.P. V. Harendra Arora & Anr., AIR 2001 SC 2319; Oriental Insurance Co. Ltd. V. S. Balakrishnan, AIR 2001 SC 2400; and Debotosh Pal choudhury V. Punjab National Bank &Ors., (2002) 8 SCC 68).

**The procedure is always hand-maid of justice and full opportunity should be given to the parties to bring forth their case before the Court, unless such procedure is specifically prohibited under the law and if the Court is satisfied that subsequent pleadings should not be permitted, the plaintiff cannot be denied his right to file a rejoinder.**

**In VeerasekharaVaramarayar V. Amirthavalliammal&Ors., AIR 1975 Mad.51, a Division Bench of the Madras High Court held that where the defendant brings in new facts in the written statement, the plaintiff must**

**get a chance to file a rejoinder, challenging the truth and the binding nature of the allegations/averments made in the written statement. However, the law does not compel the plaintiff to file a replication/rejoinder and the plaintiff cannot be deemed to have admitted the same simply because he had not filed the rejoinder.**

**Order XVIII, Rules 4 and 5 -** these provisions have been amended by Amendment Act, 1999 providing to record the examination-in-chief of the parties on affidavit. Different High Courts have taken a different view. However, the Supreme Court in Ameer Trading Corporation Limited V. Shapoorji Data Processing Ltd., (2004) 1 SCC 702 explained that under Rules 4 and 5 wherever the evidence of a witness is recorded, his examination-in-chief can be dispensed with taking his evidence on affidavit. However in a appropriate case examination-in-chief can also be recorded in the Court (Vide: Salem Advocate Bar Association III V. Union of India, AIR 2005 SC 3353).

**Order XVIII Rule 16 deals with the examination of witness immediately where a witness is about to leave the jurisdiction of the court, or other sufficient cause is shown to the satisfaction of the court, his evidence should be taken immediately.**

> "Apart from the principles of natural justice, having regard to the statutory provisions contained in Section 30 and O. 19 Rr. 1 and 2 C.P.C. read with O. 39 R.1, we are of the view that the Court possesses power to call the deponent for cross-examination when an affidavit has been filed in support of an application under O. 39 R.1 C.P.C."

While deciding the said case, this Court placed reliance upon large number of judgments, including Kanhaiyalal S .Dadlani, Supdt. Central Excise, Nagpur V, Meghraj Ramkaranji, AIR 1954 Nag.260m wherein the view has been taken that expression “any application” in O. 19 R.2 of the Code would include any application under the Code since the Code does not define the word “application” nor does it make any distinction between one application &Anr.. Similar view has been reiterated in Shib Sahai V. Tika, AIR 1942 Oudh 350, holding as under:-

> “ A perusal of this rule leaves no doubt that it is open to a Court on sufficient ground to allow proof of facts by means of affidavit, but if the production of the declarant of the affidavit is required in good faith for cross-examination by any party, the Court shall not use such affidavit in support of facts alleged therein without the production of the declarant. Rule 2 of Order 19 C.P.C., puts the matter further beyond doubt. This rule is to the effect that upon any application, evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent”.

In Pijush Kanti Guha V. Smt. Kinnori Mullick, AIR 1984 Cal 184, the Calcutta High Court considered the scope of application elaborately under O. XIX of the Code, while considering the application for temporary injunction, and held that there is a discretion left with the Court and no party can claim an absolute right to call the declarants of the affidavits for cross-examination, but it has to be determined on the facts of each case.

In Ranjit Ghosh V. Hindustan Steel Ltd., AIR 1971 Cal. 100, the Court held that while deciding interlocutory applications, where the affidavits from

sheet-anchor and facts are being tried to be proved by affidavits, the other party may be given an opportunity to meet the contents thereof, otherwise the order would stand vitiated being passed in “non-conformance to the procedure established by law”.

In Abdul Hameed Khan V. Mujeed-Ul-Hasan & Ors., AIR 1975 All.398, it was held that if contents of affidavits are contradicted, the Court may summon the deponents of the affidavits for cross-examination.

While examining a case under the provisions of the Industrial Disputes Act, 1947, the Supreme Court, in M/s Bareilly Electricity Supply Co. Ltd. V. The Workmen &Ors., AIR 1972 SC 330, considered the application of O. 19 Rr. 1 and 2 of the Code and observed as under:-

> “But the application of principles of natural justice does not imply that what is not evidence, can be acted upon. On the other hand, what it means is that no material can be relied upon to establish a contested fact which are not spoken to by the persons who are competent to speak about them and are subject to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal, the question that naturally arises is: is it a genuine document, what are its contents and are the statements contained therein true….. If a letter or other document is produced to establish some fact which is relevant to the inquiry, the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accordance with the principles of natural justice as also according to the procedure under O. 19 of the Code and the Evidence Act, both of which incorporate the general principles”.

In Needle Industries (India) Ltd. &Ors. V.N.I.N.I.H. Ltd. &Ors., AIR 1981 SC 1298, the Apex Court considered the case under the Indian Companies Act and observed that "it is generally dissatisfactory to record a finding involving grave consequences to a person on the basis of affidavits and documents without asking that person to submit to cross-examination". Unless the parties have agreed to proceed with the matter on the basis of affidavits only.

In Ramesh Kumar V. Kesho Ram, AIR 1992 SC 700, the Supreme Court considered the scope of application of provisions of O.19 Rr. 1 and 2 in a Rent Control matter, observing as under:-

> "The Court may also treat any affidavit filed in support of the pleadings itself as one under the said provisions and call upon the opposite side to traverse it. The Court, if it finds that having regard to the nature of the allegations, it is necessary to record oral evidence tested by oral cross-examination, may have recourse to that procedure".

In Standard Chartered Bank V. Andhra Bank Financial Services Ltd. &Ors., (2006) 6 SCC 94, the Supreme Court held that affidavit has no meaning unless the deponent submits himself to cross-examination.

The Supreme Court in Manohar Lal Chopra v. Raj Bahadur Rai Raja Seth Hira Lalm AIR 1962 SC 527 held that the civil court has a power to grant interim injunction in exercise of its inherent jurisdiction even if the case does not fall within the ambit of provisions of Order 39 CPC while delivering the

judgment the Apex Court considered the scope of application of the provisions of Section 94 CPC and observed as under:-

> "It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression 'if it is so prescribed' in Sec.94 is only this that when the rules in Order 39, Civil P.C. prescribe the circumstances in which the temporary injunction can be issue, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Sec. 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. It is in the incident of the exercise of the power of the Court to issue temporary injunction that the provisions of Sec. 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power".

The said judgment has been followed by this Court in Dileep Kumar v. Ram Saran, 1972 All LJ 379 as well as the Patna High Court in Bhagelu Mian v. Mahboob Chik, AIR 1978 Pat 318.

In exercise of the power under Order 39, Rule 1 of the Code, injunction can also be passed against the plaintiff, as the last two clauses of the Rule refer to orders of injunction against defendants, whereas the first clause (a) does not confine to application filed by the plaintiffs. The words "by any party

to the suit" in the said application are sufficient enough to indicate that the Legislature intended such orders to be passed even on applications filed by the defendants. (Vide: Vincent &Ors. v. Aisumma, AIR 1989 Ker 81; Sathyabhama Amma v. Vijaya Amma, AIR 1995 Ker 74; and Shiv Ram Singh v. Mangaral AIR 1989 All 164). The purpose for granting temporary injunction is to maintain status quo.

In Dr.Ashish Ranjan Das v. Rajendra Nath Mullick, AIR 1982 Cal 529 a similar view has been reiterated. However, it was clarified that the defendant can pray for interim relief only if the cause of action of the defendant is the same as that of the plaintiff, otherwise not.

3. It is to be noted with concern that in our country many of the litigants are poor and they may not be able to engage the best counsels which they require. They have to be satisfied with the services of whomsoever they can manage but the government and its authorities are able to engage the services of the best and thereby produce a result of total injustice.

4. Therefore what is the factual matrix in this case? A reiteration of the earlier order will be sufficient for this purpose.

**ORDER**

**[Dr. K.B. Suresh, Member (J)]**

Decisions galore are available on the power and extent of judicial review but, what about the responsibility and the extent of it which is focused on judiciary to resolve issues before them so that in the end, full justice is secured to the litigant, is the crux of this matter.

2. This matter is intrinsically connected with OA No.40 of 2009 which also we have disposed of, the applicant being one Shri.V.Natarajan, a subordinate officer of the applicant herein. The present matter relates to departmental enquiry and a punishment imposed on the applicant. Apparently, on a first gaze, it would appear that a charge had been framed, opportunity allowed to the delinquent employee, an enquiry was held, evidence adduced, disciplinary authority imposed a punishment, the essence of the punishment was upheld by the superior authorities. Therefore, a semblance of proper adjudication had clothed the claim of the applicant. Therefore, the question before us, is; wherein lies the focus addictives of judicial review? What is the quintessence of this issue? Wherein lies the legal matrix in the parameters of factual stipulation? What is the moral care of justicing policy demanded of us? An examination of facts is necessary here.

3. But, when we heard the matter, in the first instance, we had called for some documents concerning the issue and found to our shock and dismay that an extreme level of victimization and passing of responsibility had taken place even though everything was superbly covered under apparent modalities of good procedure. Therefore, we had requested for the presence of superior officers as also through the commissioner of

police, Bangalore, the Station House Officer of the Police Station which was in seisin of a connected criminal complaint. We had questioned them at length in the presence of the counsel and parties but, we have decided that the said proceedings will remain in the nature of Judges' notes and shall not be available to any party litigant as they were questioned only by the Court for elucidation of the points which had arisen.

4. The factual matrix is thus –

BSNL decided to introduce a system of IT cards whereby a customer is enabled to purchase the said cards and utilize it for making telephone calls without payment of any specific amount from specific call centres or telephones in order to facilitate cashless transaction. It would appear from the records that the sale of VCC cards had commenced from 12.7.1999 after an intelligent network was installed following which on 6.7.1999, a meeting was held for the launch of Virtual Card Calling service and certain decisions were taken as apparently no other mandate was available for an intelligent monitoring of the system and the meeting was attended by S/ShriS.R.Chandran, A.M. (East), S.M. Sivashankaraiah, D.E.(MS), H.S. Vishwanatha Rao, DE. (Int-I) ULS, Haroon Rasheed, A.O. (Receipts), K. Narayanan Kutty, SDE (IN) and B.G. Somaashekhaa Shastry, SDE (ULS C-DOT). It was decided at the meeting at clause 1, that SDE (IN) will print the VCC cards only on demand from sale points i.e. CSCs/TCs so as to minimize cutting into the validity time of the cards. **SDE (IN) shall maintain the log book for printing of VCC cards with clear entries of PSN numbers cancelled for the reasons of bad printing etc. He shall also**

**open individual file for each CSC/TC for VCC cards, he shall also maintain VCC Cards Stock Register and Cards Issue Register to keep proper accounting of cards which shall be produced before A.M. (E)/G.M.(E) for perusal and auditing on their visit to IN, he will send a weekly statement on the cards issued to various centres to AO (Receipts) with copies to SDEs, CSCs/TCs and PC ULS (INTL).** Thus he communicates weekly at horizontal level with his colleagues namely SDEs, incharge of distribution (sales) and the AOs, incharge of accounting. At vertical level, he reports monthly to A.M.(E)/G.M.(E).

5. We found that at the relevant point of time, one Shri Honne Gowda was the SDE (IN) and it has come out that the concerned officer had failed in all the five aspects reported above for which apparently disciplinary action was taken against him and **censure alone was imposed upon him in spite of the fact that although there are figures available as to the number of cards printed, there are no figures available as to the invalid cards or cards returned as unsold. There was no weekly reporting with copies to SDEs incharge of sale and there was no reconciliation of account with Accounts Officer (Receipts) i.e. Mr. Haroon Rasheed, who had also admitted that no reconciliation was ever made.** The D.E. ULS (Intl-I) has to periodically check the cards in stock at IN, scrutinize all registers and also inspect files for all CSC/TC. He will have to send a monthly statement of VCC cards to Chief Accounts Officer with a copy to AM (East). The S.D.E. In charge of the SCS should maintain a daily sale register and send a weekly statement to A.O (Receipts) and monthly statement to CAO with a definite proforma. The

applicant herein was the SDE of the concerned CSC and, therefore, apparently, if there is any shortage, she has the primary responsibility. The D.E. (O/D)/C.S. will at least once in a month make physical verification and reconcile the account. The A.O. (Receipts) will receive daily collection and weekly statements and tally them with the reconciled statement issued by SDE (IN) and SDE (CSC)/TC and he will bring into notice of AM. (E)/C.A.O. (NS), the discrepancies. He is also obliged to send monthly statement to C.A.O. (NS)/A.M.(E). The C.A.O.(NS) will be responsible for overall monitoring of collections and assessments. The AM (East) will inspect the S.D.E.(IN) once in a month. Therefore, a proper procedure is seen made out and on paper, everything appears to be correct and proper but, after we called for the VCC cards indents and inspected the same, we came to realize the shoddy system that was in operation and to cover up a discrepancy and lacuna of the system, an officer is being made a scapegoat and victimized. Thereupon, we summoned the concerned officers and enquired of the situation prevailing but, since we have not given an opportunity to any of the parties to participate in the inquisition, the proceedings of the inquisition shall only be used as a clarificatory strategy.

6. It would appear that on 18.8.1999 the earlier incumbent made over the charge of SDE to the applicant. We have already seen that VCC cards have come into operation from 12.7.1999 and on 26.7.1999 the procedure for issuance of cards were finalized vide No. AME/CSC/99-2000 dated 26.7.1999. But, we have seen from the indent produced dated 23.7.1999 that Shri Vaikunta Raju, the predecessor of the applicant, was then holding

the responsibility of City Exchange CSC, Lalbagh Road, Bangalore and seems to have issued indent Card No. 2 on that date. Apparently, he had authorized V. Natarajan, the applicant in O.A. No.40 of 2009 to see the actual counter clerk dealing with the cards in office of SDE (IN) and collect them by signing. But, thereafter, continuously the said V. Natarajan had signed as SDE In Charge of CSC, he seems to have made a seal of 'Officer In Charge, CSC City' and signed it himself. We had asked the DGM as to who proposed the seals and he replied that the senior officer will have to approve it and then the concerned officer will make it available. In this case, Natarajan himself seems to have made a seal as the Officer In Charge (nobody knows who appointed him as Officer in Charge) and the SDE (IN) seems to have accepted all his subsequent requisition indents without any question even though it is contrary to laid down procedure. The SDE (IN) at that time, was Shri.Honne Gowda, who was also printing the cards with no details available as to how many cards he had printed and how many are distributed to each SDE (CSC) for sale. It is also surprising to note that the closing balance of one indent does not tally with the opening balance of subsequent indent and every figure is given wrongly. It is noted in this connection that each CSC has to have its own file and register and, therefore, comparison at least with the previous indent is definitely possible at a glance, but, Shri Honne Gowda had sanctioned the indents without any demur.

7. It would appear that on 11.4.2000, the charge of the office was handed over to Shri G. Madhavamurthy and even under Shri G. Madhavamurthy, Shri Natarajan continued as Officer In Charge. The respondents have a

case that even though the applicant was transferred out from the post, she was orally by her superior i.e. the D.E., asked to continue looking after the CSC also. No document is available for such additional responsibility being handed over to the applicant. The applicant denying this additional responsibility to her, it can be presumed that it is created only as a link between the genesis of the events and its culmination. We had examined all the indents but could not find the applicant's signatures in any. Even some of the indents do not carry the seal, it was all handwritten by Shri Natarajan who posed as the Officer In Charge and Shri Honne Gowda accepted it. To compound it also, Shri Haroon Rasheed, the A.O. (Receipts) who was also in the meeting for formulation of matrix to be followed, would submit in the inquisition that there was no daily statement, no weekly statement and no monthly statement either to him from SDE (CSC) or from him to the CAO (NS) and AM (E) and for more than 3 years no one bothered to look into the situation of the CSC. No physical verification was done by the concerned officers senior namely the DE and the DGM, even though they were enjoined to do so. From the factual responses made available to us from the concerned officers and the answers given by both applicants i.e. in O.A. No. 40 of 2009 and the present case, we had reason to suspect that one organized group may be working and the superior officers were unable to check and controvert them. Therefore, we can only conclude that unfortunate events have taken place in BSNL.

8. This is more pertinent in the light of three other SDE (CSC) who were reporting in accordance with the laid down procedure. Therefore,

there is a clear-cut failure on the part of the superior officers, the DE and DGM when viewed in the light of one CSC (Customer Service Centre) being negligent in the nth degree and not offer any reconciliation, for three years together when others in the same city had scrupulously followed the correct procedure. Seniors failed to notice that no weekly or monthly statement was coming forth from one of the CSCs where they wear supervisory offices. They never enquired why. If the senior officers had acted within their powers and in compliance with their jurisdiction, such a theft would not have occurred and Shri Natarajan would not have the opportunity to style himself as Officer In Charge and issue indents and Shri Honne Gowda would not have a chance to honour such obviously frivolous indents. In this context, a question may be rightly asked on the actual number of cards issued and printed. Going by the same methodology and the psychology of the persons involved to the facts of the case, it is easy for them to print ten times more number of cards indented for and sell every one of them but show only the indented cards as actual sale. This strong possibility cannot be easily discounted, but this is only a possibility. But the fact remains that with such frivolous indents and forged sale, a person was able to style himself as Officer In Charge and there is now a shortage of more than Rs.17 lakhs. He has claimed that these shortages were the result of invalidation of cards. If the cards were invalidated, it ought to have been received back by Shri Honne Gowda but there is no evidence of that, there is no such allegation in the pleadings of Shri V. Natarajan earlier. We had also gone through the papers. Therefore, there was total lack of probit on the part of Bangalore Telephone Officers and the conclusion is that the

applicant who was In Charge of the service centre, was brought in as a face saving device, made a scapegoat and victimized. The circular dated. 13.10.1999 issued by BSNL contained the procedure to be followed scrupulously for selling the IT cards, but the procedure was not complied with and the department failed to notice the same till 2002 when the audit wing of the department found out the discrepancy. A person with normal diligence should have been able to see one indent slip and realiZe that the opening balance is not shown properly but the supplying officer had not been able to detect it for more than 3 years. We also came to know that the indenting officer was allowed to print cards at his will and supply it to various CSCs as per their indent and apparently the department had no system to check how many cards are being printed on a daily/monthly/yearly basis by the supplying officer. The circular clearly states that a day to day detailed report in the prescribed format for the sale of IT cards shall be prepared and submitted while depositing the cash with AO (Receipts). This was apparently not done for three years. There is also no system of tallying what the supplying officer prints and issues and what is sold out by the entire division and the money received by AO (Receipts). In this particular case, we found from the records that the applicant who is SDE and is also the Head Of Office, seems to have been kept in complete darkness by the STOA-P, even the supplying office and the office of AO (Receipt)s have never questioned the authority of STOA-P to sign the slips. Further, the pilferage or mistake could have been detected by just one look at the slips but it has not been detected by them. With all the above omissions, it becomes quite clear that a greater omission is on the part of

Divisional Engineer, the Deputy General Manager and the General Manager, who seem to have totally forgotten their responsibility as a supervisory officer, no officer was ever questioned for such omission. The STOA-P was himself engaging in the entire correspondence without approval and the applicant's knowledge. There is a difference in the amount of vigour which is expected from the supervising officers for continuing the new scheme. Since the system of cards was new, the supervising officers were expected to watch for the proper implementation with more diligence that is required for the on-going scheme. No supervisory officer seems to have shown such vigour. The department would also have prescribed a system for the tally of unsold and expired cards in order to understand the effectiveness of their customer service. If such a system had been in place, it would have helped in detecting pilferage and misappropriation that was happening every fortnight. This was compounded by total lack of supervision only in this office. This is more highlighted when viewed in the background of three offices in the city which were fully compliant with procedure. Therefore, this difference is there for all to see as in day light.

9. Shri Gopal Das, the Director of HRD, BSNL, Delhi, passed and order in December, 2008. The pertinent points which he found are as follows:

i) Smt H.R. Nagamani, the applicant, was the SDE in Charge from 18.8.1999 till April 2002. She failed to notice the misappropriation of Rs. 17,09,855/- sale of IT cards by Shri V. Natarajan, STOA (P). During this period, Shri V. Natarajan placed indents for IT cards for Rs. 76,71,090/-. Shri V. Natarajan credited an amount of Rs. 58,60,890/- to AO (Receipts). Thus, there is shortage.

ii) Shri M.R. Nagaraj, CAO, was appointed as enquiring authority (He is one of the apparent recipients of weekly reconciliation statement).

iii) He found that PWR L.L.R. Swamy, D.E. (vig.) had apparently not uttered a word against the applicant. He also said that some other officers were also In Charge of CSC but on the date of inspection of the Audit, she was In Charge of CSC.

iv) PW2 Shri N. Prabhakar, SDE (Vig.) apparently, does not know about the allegations against her.

v) Shri T.S. Ravi, STOA (G) had apparently said that it was Shri Natarajan who used to sign as Officer In Charge right from July 1995 (the applicant had assumed charge only in 1999) and she had to follow the established practice set by her predecessors. Apparently, the said V. Natarajan acted beyond the control and knowledge of the applicant

vi) PW4 Shri A.M. Nataraju, SDE (Vig.) said that if the guidelines were precisely followed, the misappropriation by Shri V. Natarajan would not have taken place. He also said that the guidelines were not received by City CSC at any point of time. Apparently, he said that only during the enquiry, the applicant came to know that guidelines were issued without really circulating it to the office.

vii) PW5 Shri C.P. Vijay Kumar, STOA (G) had said that only Shri V. Natarajan was handling IT cards and he alone was managing the entire affairs with no access to anybody else.

viii) PW6 Shri Honne Gowda, SDE (IN) (the printer) would say that he accepted V. Natarajan's indents without ascertaining the designation. The IT cards were never reconciled. He had never informed his superiors in this regard and Director HRD found that evidence of Honne Gowda supports the understanding from SDE (IN) and V. Natarajan.

ix) He also found that PW7 Shri K. Narayanakutty, SDE IN practically exonerates the applicant. He also found that on 10.04.2000 itself, Shri V. Madhavamurthy assumed the office of CSC.

But surprisingly, Shri Gopal Das found that the applicant should have effectively supervised the functions of CSC without expecting officers of other sections to point out the lapses in the functioning of CSC to her. This, we consider, is of causing injury after insult. All the witnesses deposed that she had no role in all the situations, there is a high degree of negligence of

superior officers, even before she came on the scene, Shri V. Natarajan was operating the sale of it cards by himself, yet senior officers of BSNL in spite of all the evidence collected in her favour in the enquiry itself had opportunity to say that yet the applicant is to be punished.

10. The allegation of the applicant is that she is being victimized as there is a system failure in the BSNL and proper lack of control emanated from very high officials of BSNL for which they may have to answer and to prevent such a situation, some scape-goat was found and in spite of the fact that she was in actual charge of the CSC only for a very short time, she was brought in as a scapegoat. Therefore, we have to hold that there is a great degree of violation of Administrative Probity by higher echelons of BSNL. **The omissions and commissions of these officers may have to be properly assessed and analysed and their opportunity to hold sensitive position have to be considered afresh as integrity and probity in service are essential. It would appear to us that there is a collective failure in this regard. We have ascertained that no steps have been formulated till this date to recover the lost money though all the officers of BSNL are of the definite view that the misappropriation was done by V. Natarajan.** We had an opportunity to go through the complaint in the criminal justice system and also the methodology that was followed. It appears to us that this program failed by deliberate intent or withholding of data from the police. It seems to us that an acquittal is being engineered. Shri V. Natarajan's defence is that the shortage is due to invalidation of cards. We had an opportunity to discuss in this regard. We are not satisfied with his reply. We found out that the

Station House Officer who represented the prosecution system in the country was not allowed to see the indents of Shri V. Natarajan. Since we do not want to prejudice the defence of the applicant in O.A. No. 40 of 2009 any further, we do not want to pass any further comment, but a copy of this order be forwarded to the Commissioner of Police Bangalore, to consider whether any investigation is necessary in the concerned case.

11. We felt it necessary to examine whether the applicant has failed and whether the failure belongs only to her or some officers as well and if so, the punishment given to the other officer officers. Hence, we were required to ask the learnt counsel for the respondent to furnish some details, especially, on the issue of guidelines of the department to prevent such occasion of misappropriation and the regular practice prevailing in the particular office of CSC, City and also the diligence shown by the department for the implementation of the checks and balances. We found the following lacunae in the system:

12. The department of BSNL had for the first time come out with the concept of 11 Cards introduced in the month of June,1999, under which Cards were being printed with various denominations "for being used as Pre-paid Cards" which had to be sold to the customers. For the proper implementation of this scheme, the department had issued a circular dated 13.10.1999 which apparently contained the procedure to be scrupulously followed while selling the IT Cards. As per the guidelines extracted from Art. of Charge No. 2 of the Charge memo (page 30), we felt it necessary to inquire from the officers of the department as to how these guidelines were actually put in practice and we notice the following lapses:

(1) **From the circular, it appears that the Cards are printed, sold and accounted for in a triangular system. The Customer Service Centre decides how many card they want during the fortnight and indented the same to the supplying office (a different office) where the incharge officer is (and the name of the officer at that time was Shri Honne Gowda). When the cards are sold and cash is obtained from the customers, the cash is collected on daily basis by a third officer, who is the Accounts Officer (AO) (Receipts). From the circular, it is clear that such a triangular system was intended to be operative, but, in actual implementation, it was not operative and the department has failed to notice the same till in 2002, when the Audit Wing of the department found out how the discrepancy leading to misappropriation of nearly Rs. 17 Lakhs. We find that (Honne Gowda's office) was not properly reading the indent slips issued by the STOA-P. We have perused as many as 49 indent slips and found that in each slip the concerned STOA-P was showing the figures of unsold cards and indented cards. But, in the next consecutive slip, the opening balance was always shown equal to the cards indented whereas the actual opening balance should have been shown as unsold cards (+) indented. This is such an aspect where a person of normal diligence should have been able to see one indent sleep and realize that the opening balance is not shown properly. But the supplying office was not able to detect it for more than three years.**

(2) **We also came to know that the indenting officer was allowed to print cards at his will and supply it to various CSCs as per their indent and apparently, the department had no system to check how many cards are being printed by the supplying office on a daily or monthly or yearly basis.**

(3) **The circular clearly states that a day-to-day detailed report in the prescribed format for the sale of IT cards shall be prepared and submitted while depositing the cash with the AO (Receipts). This was apparently not done for three years.**

(4) **There is also no system of tallying what the supply officer prints and issues and what is sold out by the entire division and money received by the AO (Receipts).**

(5) **In this particular case, we find from the records that while the Applicant SDE, who is also the Head of Office, seems to be kept in complete darkness by the STOA-P Shri P. Natarajan,**

**who never presented any indent slip or any daily tally sheet for her perusal and signature, even the supplying office and the office of AO (Receipts) have never questioned the authority of STOA-P to sign the slips. Further, what pilferage or mistake they could have detected by just one look at the slips, they have not detected. In fact, the AO has apparently never received any tally slips from any of the SDEs from whom he was collecting the cash on a daily basis.**

**With all the above omissions, it becomes quite clear that a greater omission is on the part of the Divisional Engineer (DE), DGM and the GM, who seem to have totally omitted their responsibility as a supervisory officer. The guidelines clearly instruct the SDEs to submit a monthly tally report to the office of the DE and we were told that some other SDEs working under some other DEs were following the practice of submitting such tallies. This information was in fact produced before us by the learned counsel for the respondents to bring home the gravity of emissions by the applicant. However, we tend to view it otherwise. When are circular prescribes a monthly report, it is the duty of the supervisory officer to see that his juniors are sending the said report. In addition, the DE is also supposed to carry out an annual inspection of all the SDEs which apparently has not been done during the three years or later and no officer superior to the DE has ever questioned for such omission. Had the DE had asked for the monthly report even once, then the SDE would have come to know that her STOA-P was himself engaging in the entire correspondence without her knowledge or approval.**

(6) **We also find that the department did not have the system of monthly or quarterly meeting of the DE with all his SDEs. Such a system of monthly meeting is extremely useful for proper coordination, human resource augmentation and preventing of possible misappropriation arising-out of inadequate supervision either by SDE or by the DE or by the DGM.**

(7) **There is a difference in the amount of rigor which is expected from the supervising officers for continuous scheme and a new scheme. Since the system of cards was new, the supervising officers were expected to watch for the proper implementation with more diligence than is required for the ongoing schemes. No supervisory officer seems to have shown such rigour.**

(8) **The scheme of the cards was such that at the end of every fortnight, there was a possibility of some cards getting expired due to non activation since only the sold cards would be activated. The department would also have prescribed a system for the tally of unsold and expired cards in order to understand the effectiveness of their customer service. If such a system had been in place, even that would have helped in detecting the pilferage and misappropriation that was happening every fortnight.**

13. We, therefore, feel obliged to ask the department to set up a proper system for the implementation of the Circular dated 13.10.1999 and ensure that proper monitoring is done. We reiterate that they should not stop at simply issuing the instructions and circulars but also collect and review the report that are to be submitted on a periodical basis.

14. Having heard and gone through the pleadings, we have to conclude that the inquiry which was held against the applicant was a farce and evidence against her and the punishment imposed on her is not the cogent result of an inquiry. Therefore, we now have to assess the effect of that inquiry on the applicant and by a large stretch; on the society and general public as well. To err in the administrative function is quite normal. The bona fides of the error may even save the real doer. But, deliberate commitment of an error in order to save the guilty and victimize a person to ensure a face saving device is repugnant to the Court. But, what are the factors which must influence us following the finding that a witch hunting have taken place.

15. An adequate understanding of the nature and purpose of Administrative Law requires us to probe further into the way in which our society is ordered. At the most basic level it requires us to articulate more

specifically the type of democratic society in which we live and to have some vision of the political theory which that society espouses. The role of more particular legal topics that constitute administrative law, such as natural justice and judicial review, can only be adequately assessed within such a framework. Concepts such as accountability, participation and rights do not possess only one meaning, which can be analysed by a purely "factual" inquiry. Nor can the place of such ideas be understood by pointing to their general connections with a democratic society. The very meaning and importance of such concepts will differ depending upon the type of democratic regime within which they subsist. Or to put the same point in a different way, every democratic society will have some ideas of rights, participation and accountability, but these will differ depending upon the nature of that society. Administrative law is easier to understand when such background ideas are revealed, precisely because the rationale for the topics that make up the subject and the manner in which they interrelate, become clearer. Any attempt to discuss particular topics without considering these background ideas evidences a series of implicit assumptions about such ideas that are concealed and untested. Therefore after having set-up modality of control and vigilance, and having failed in effecting control as was required of them, it would appear that evidence to the contrary, superior officers vied with each other to punish the helpless applicant even when evidence in the enquiry was in her favour and also they had the advantage of the enquiries held against Shri Natarajan and Shri Honne Gowda as well. This discriminative yard-stick used in Shri Gowda's case is baffling and shocking.

16. The model outlined above helped to shape the very form of judicial intervention in the following way. There is a distinction between appeal and review. The former is concerned with the merits of the case, in the sense that the appellate court can substitute its own opinion for that of the initial decision-maker. Appeals cannot lie on fact and law, or simply upon law. Such rights of appeal are statutory, and the courts possess no inherent appellate jurisdiction. Review is, at least in theory, different from this. It is concerned not with the merits of the decision, but with its “validity” or with the “scope” of the agency’s power. The courts’ power of review is not based upon statute, but upon an inherent jurisdiction within the superior courts. The respondents had urged that, the judicial review must encompass only weather the modalities were kept aloft and particularly in this case, even though evidence was in favour of the applicant, all concerned authorities had held against her. But the applicant would point-out that the intent and purpose of judicial review is not to condone ethical lapses but, to uphold value of morality and truth. In ***Amarchand Vs. Union of India*** reported in AIR 1964 SC 1658, the Hon'ble Apex Court held that privilege cannot be claimed for lack of application of mind. Here also, lack of application of mind is crystal clear.

17. An interesting and important question is why the courts possess this inherent power. It is by no means novel. Indeed the texts of early administrative cases are replete with the language of review and jurisdiction. The original rationale for this inherent jurisdiction was obviously linked to the reasons for the development of judicial review: a desire by the courts to control inferior agencies and to protect the individual from

illegalities committed by them. Nonetheless, the development of the traditional model in the nineteenth century served both to strengthen the rationale for this inherent jurisdiction, and to reinforce the division between review and appeal.

18. The defects of the traditional model of public law have been presented above. Criticism of traditional orthodoxy is all very well, but we must put something in its place. An approach that has become more prevalent is to argue for a rights based conception of public law. This is based upon the imposition of certain standards of legality and is designed to prevent the abuse of power by public bodies stricto sensu, and by a range of other quasi-public or private bodies which possess a certain degree of power. On this view judicial intervention is no longer premised on the idea that the courts are simply applying the legislative will. Their role is to articulate principles, which should guide the exercise of administrative action and to interpret legislation in the light of these principles. Therefore, examining the legality of finding from the disciplinary authority, upward we have to hold that, it is vitiated by non-application of mind and extreme bias. **In S.P. Gupta Vs. Union of India, reported in 1981 (Suppl) SCC 87** the Hon'ble Apex Court held that the duty to give cogent reasons afforded a constitutional sanctity to a citizens rights. The logical consequence of the duty to give reasons is the amenability of reasons, so accorded, to be in harmony with the record.

19. A rights-based view of law and adjudication is commonly associated with Dworkin’s important work. This is not the place for any detail examination of this theory of law, but the relevance of this work for our

present purposes can be sketched quite briefly. Dworkin's theory of adjudication is based on law as integrity. According to this theory, "propositions of law or true if they figure in follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice. It is integral to the Dworkinian approach that, subject to questions of fit, the court should choose between "eligible interpretations" by asking which shows the community's structure of Institutions as a whole in a better light from the standpoint of political morality". On this view and individual will have a right to the legal answer which is forthcoming from the application of the above test. Thus, the respondents have surely failed in their exercise of jurisdiction.

20. Any view of public law must be based upon some view, explicitly or implicitly, of law and the adjudicative process, and the view propounded by Dworkin has many attractions. It can and has been used as a means of justifying the existence of certain individual rights; as a way of giving a more particular interpretation to those rights; and as an interpretative device through which to decide which types of protection should be available, even in cases where no fundamental rights are at stake at all. It is in this sense that a rights-based view of public law could be said to be one which draws upon the work of Dworkin."

21. The adjudication process, therefore, must completely envelope and address the issues involved. It must be remembered that every resolution of a dispute must not only resolve that dispute but, must be a pointer in the right direction. We have already concluded that serious malice existed in

the Senior Officers in a cover up operation and which has resulted in grave prejudice to the applicant and even graver prejudice to the Society at large and the people of India. If we allow this to go un-noticed, then we may not be fully responsible to the burden of jurisdiction placed on us. Therefore, the following orders are passed:

22. Therefore, the following orders are issued:

(I) We direct the 2nd Respondent to appoint a Committee of 3 Senior Officers of experience and doubtless integrity of above G.M. level, to look into the failure of the supervisory machinery in the matter and affix responsibility of each officer and take such effective steps to resolve public confidence and prevent loss to the public exchequer and to recover the money lost if any.

(II) We hereby quash Annexure-A/8, A/10 and other consequential orders and declare that no fault can be attributed to the applicant in this regard and declare her to be fully exonerated of all charges.

(III) In view of the cumulative failure of the supervisory system and the great loss caused to the Country for the employment and re-employment of investigative forces, criminal justice machinery and other requisites, we impose costs of Rs. 1 lakh on Respondent No. 1 of which Rs. 50,000/- shall be paid over to the National Legal Service Authority at New Delhi and 50,000/- to be paid to the Karnataka State Legal Service Authority at Bangalore, to be utilized to provide assistance to poor litigants. Respondent No. 1 shall also pay a cost of Rs. 5,000/- to the applicant.

(IV) All financial and other appropriate benefits which flow from quashing of the orders, as stated above, shall be made available to the applicant within three months from today.

(V) We, therefore, direct the CMD, BSNL and CGM, Telecom, Karnataka Circle to set up a proper system for monitoring the printing, sale, cash collection, writing off unutilized cards etc. and monitor them for six months and report back to us how the monitoring system have been set in proper functioning. The report should reach us on or before 31.12.2010.

(VI) A copy of this order will be forwarded to the Comptroller and Auditor General of India and the Commissioner of Police, Bangalore City, to take further action as they deem fit.

23. The O.A. is thus allowed with total costs of Rs. 1,05,000/- (Rupees one lakh and five thousand only)."

Sd/- Sd/-

(LEENA MEHENDALE)
MEMBER (A)

(DR. K.B. SURESH)
MEMBER (J)

5. Since we have already settled the question of jurisdiction, it need only to see what more is to be needed. Regarding clause V, we will give the respondents time till 31.12.2017 to furnish the appropriate report to Minister for Telecommunications. Therefore the OA is allowed without cost.

(P. K. PRADHAN)
MEMBER (A)

(DR. K.B. SURESH)
MEMBER (J)

/ksk/pm