

## NOTES ON LEADING CASES

### I. STATE OF WB V. CPDR, WB & ORS. 2010 (3) SCC 571

Question of Law: Whether the High Court u/ article 226 can direct CBI, which is established under Delhi Special Police Establishment Act, 1946 ("the Act"), to investigate a cognizable crime without consent of the State Government?

Brief Facts:

Complainants & others (part workers) returned to the Complainant's house where about 50 to 60 miscreants attacked them with firearms etc. Complainant narrowly escaped and lodged an FIR. Even though 3 months had elapsed no concrete steps were taken by police hence writ petition u/article 226 was filed in public interest seeking transfer of investigation to CBI as the Ruling Party was trying to hide the incident to save its image. High Court handed over investigation to the CBI against which State filed the SLP.

Findings:

The CB through Justice D.K. Jain held that Court can direct CBI to investigate without consent of the State Govt. However cautioned that such power/order should not be passed as a matter of routine or merely because a party has leveled some allegation against the local police. CB concurred with view taken in Irrigation & Rural Engg Services UP v. Sahngoo Ram Arya (2002) 5 SCC 521 where it was held that such order should be passed only when HC after considering material on record comes to conclusion that such material does not disclose prima facie case.

- i. As per Constitutional provisions in Article 246 and Entry 2 List II it is clear that legislative power of Union to provide for regular police force of one State to exercise power & jurisdiction outside the State can only be exercised with consent of the State Government (Para 30)
- ii. S. 5(1) of the Act empowers Central Govt to extend power and jurisdiction of CBI to any area in a State but subject to consent of the State Govt. (S. 6) (para 35)
- iii. FRs cannot be extinguished by any constitutional or statutory provision as it would amount to violation of basic structure doctrine.
- iv. Article 21 broadly seeks to protect the persons of their lives & personal liberties which includes rights of the victim. State has duty to enforce human rights of citizens providing for fair & impartial investigation.
- v. Judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail power of Constitutional Courts with regard to enforcement of FRs. In a federal constitution, the distribution of legislative powers between Parliament & State Legislature involves limitation on legislative powers & therefore requires an authority other than Parliament to ascertain whether such limitations are transgressed.
- vi. If federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring the Courts act as guardians & interpreters of the Constitution & provide remedy u/32 & 226.
- vii. Restriction on Parliament by Constitution & restriction on executive by an enactment do not amount to restriction on power of judiciary u/ 32 & 226.
- viii. If the Entry 2 List II & Entry 2A & 80 List I provides investigation by another agency subject to grant of consent by the State, there is no reason why in exceptional cases Court cannot exercise the same power. This will not violate the doctrine of separation of powers.
- ix. Act itself provides that subject to consent, CBI can take up investigation in relation to crime within jurisdiction of State police, the Court can also exercise its constitutional power of judicial review. Power u/226 cannot be curtailed by S. 6 of the Act. **SIMILAR VIEW TAKEN IN SAMAJ PARIVARTAN SAMUDAYA**

**V. KARNATAKA, (2012) 7 SCC 407, AKHILESH YADAV V. VISHWANATH CHATURVEDI, (2013) 2 SCC 1, ETC.**

**II. CENTRE FOR PIL V. UOI (2012) 3 SCC 1**

Question of law: Whether the Govt can alienate, transfer or distribute natural resources/national assets otherwise than by following a fair & transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution.

Brief Facts:

PIL arose out of misallocation of licenses/radio spectrum by Ministry of Communication & IT in Jan 2008 to provide 2G spectrum. The controversy arose because spectrum was allocated on first-come-first-served basis at price prevailing in 2001 though the economic value of spectrum in 2007-08 was enormously more. There were several irregularities in allocation process.

Findings:

- i. State is empowered to distribute natural resources however it is bound to act in consonance with principles of equality & public trust. (Para 74,75)
- ii. Common law recognizes State as having authority to protect natural resources on behalf of the public in so far as the resources are within the interest of general public. State is deemed to have proprietary interest in natural resources and must act as guardian and trustee in relation to the same. State must be guided by Doctrine of Equality in determining the actual mechanism for distribution of natural resources. (Para 76, 85)

**IIA.** This judgment was CLARIFIED AND CONFINED TO ITS OWN FACTS IN ***NATURAL RESOURCES, IN RE, (2012) 10 SCC 1 (5J)***, in which the Constitution Bench held that it was not a requirement of Article 14, nor a requirement of administrative law, that natural resources must invariably be distributed through public auction or tender, and that while revenue maximization may be a legitimate goal in some cases, there are myriad other situations where there may be priorities other than revenue maximization, where preferential allocation or allotment of scarce resources may be made without resorting to public auction or tender. See in particular paras 47, 74-82, 83, 84-92, 115-120, 121-131, 132-135, and 136-149 (Justice DK Jain's opinion speaking for 4 Judges).

THIS JUDGMENT IN TURN HAS BEEN EXPLAINED AND FOLLOWED IN ***ML SHARMA V. PRINCIPAL SEC. & OTHERS, (2014) 9 SCC 516 (3J)***, GOA FOUNDATION, ETC ETC.

**III. MAFATLAL INDUSTRIES LTD. V. UOI (1997) 5 SCC 536**

Issue: Refund of excise & custom duties collected contrary to law.

CB with majority in the ration of 8:1 held what rights & remedies are available to citizens against the State in the matter of refund of unlawfully recovered taxes & imposts.

Majority judgment was given by Justice Jeevan Reddy & dissenting opinion given by Justice S C Sen.

- i. S. 11B of Central Excise & Salt Act and S. 27 of Customs Act do not constitute law within meaning of A. 265 & hence any tax collected, retained or not

refunded in accordance with the said provisions must be collected, retained or no refunded under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery & refund of duties imposed. S. 27 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit/writ petition. All claims of refund except mentioned separately to be filed and adjudicated under provisions of the two enactments.

- ii. Where refund is claimed on ground that provisions under which the same is levied is unconstitutional, such claim being outside scope of the enactment can be made either by way of suit/writ petition.
- iii. Where as person approaches either HC/SC challenging constitutional validity of the provisions and fails, he cannot take advantage of declaration of unconstitutionality obtained by another person on another ground.
- iv. It is not open to any person to make refund claims on the basis of a decision of court/tribunal rendered in another case.
- v. A claim for refund can succeed only if the Plaintiff/Petitioner alleges and established that he has not passed on the burden of duty to another person(s).
- vi. Doctrine of unjust enrichment is just and salutary doctrine. No person can seek to collect duty from both ends.

#### **IV. SANGEET V. STATE OF HARYANA (2013) 2 SCC 452**

**(This has been overruled in UOI v. V. Sriharan, (2016) 7 SCC 1 (5-J))** to the extent that deprival of remission power of the Appropriate Govt by awarding sentences of 20-25 years or without any remission as not permissible is not in consonance with law)

Issue: Death Penalty

Findings:

- i. Judgment in Jagmohan Singh v. State of UP was decided when old CRPC, 1898 was in force. At that time S. 367(5) provided to state reasons why death penalty was not awarded in case offence is punishable. The Court laid down that discretion in the matter of sentencing is to be enshrined by the judge after balancing all the aggravating and mitigating circumstances of the crime. It was also laid down that while choosing between the 2 alternative sentences provided u/s 302 IPC, the Court is principally concerned with the aggravating/mitigating circumstances connected with the "particular crime under inquiry". (para 18-20)
- ii. Subsequently, CB in **Bachan Singh's case, (1980) 2 SCC 684 (5J)** laid down that not only the relevant circumstances of the crime should be factored in but due consideration must be given to the circumstances of the crime. Thus, concluded that death penalty should be given in 'rarest of rare case' and should be given only when the option of awarding sentence of life imprisonment is "unquestionably foreclosed".
- iii. Thus, Bachan Singh made 2 very significant departures from Jagmohan Singh's case – (i) deleting any reference to aggravating & mitigating circumstances; (ii) introducing the circumstances of the criminal (Para 25, 77)
- iv. Later, Macchi Singh (1983) 3 SCC 470 revived the balancing of aggravating & mitigating circumstances through a balance sheet theory – comparing aggravating circumstances pertaining to a crime with mitigating circumstances pertaining to a criminal. (Para 29)
- v. However, in view of inherent multitude of possibilities, the aggravating & mitigating circumstances approach has not been implemented. Therefore, not only does the aggravating & mitigating circumstances approach needs a fresh look but also the necessity of adopting that in light of conclusions in Bacchan Singh. (para 32-33)

The Court concluded:

- i. This Court has not endorsed the approach of aggravating & mitigating circumstances in Bachan Singh. However, this approach has been adopted in several decisions. This needs a fresh look.
- ii. The use of mantra of aggravating & mitigating circumstances needs a review.
- iii. In sentencing process, both crime & criminal are important. However, in capital offences it has become judge-centric sentencing rather than principles sentencing.
- iv. CB has not encouraged standardization and categorization of crimes and even otherwise it is not possible.
- v. Grant of remission is statutory. Remission can be granted u/s 432 CRPC in a case of definite term of sentencing. If the term is indefinite the power u/s 432 can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of 20 years of imprisonment.

## **V. ARUNA RAMACHANDRA SHANBHAUGH V. UOI (2011) 4 SCC 454**

Issue: Euthanasia

Facts:

A social activist filed 32 petition seeking directions from SC that Aruna, who was 60 years old was in persistent vegetative state (PVS) for the last 37 years, should be subjected to passive euthanasia by denying food and water.

Findings:

- i. CB in Gian Kaur case (1996) 2 SCC 648 held that both euthanasia & assisted suicide are not lawful. The right to life u/ article 21 does not include right to die. It was observed that euthanasia could be made lawful only by Legislature. (Para 101)
- ii. Abetment of suicide (306) and attempt to suicide (309) both are criminal offences. Constitutional validity of 309 has been upheld in Gian Kaur case. However time has come it should be deleted by the Parliament. (para 100-103)
- iii. Determination when it would be fair or right to disallow resuscitation of a person who is incapable of expressing his/her consent depends of 2 circumstances – (i) when person kept alive mechanically; (ii) when there is no plausible possibility of the person even being able to come out this stage. However, when a person is incapable of being able to give any consent, that would amount to judicial murder. (Para 117)
- iv. Thus law was laid till Parliament creates law with respect to withdrawal of life support in case of a patient in PVS. A decision has to be taken either by parents/spouse/close relatives in absence of any of them, decision can be taken even by person/body of persons acting as next friend. Even taken by doctors attending the patient. However, such decision should be taken bonafide in the interest of the patient.
- v. Even if decision is taken by near relatives/doctors/next friend to withdraw life support, decision requires approval from HC.
- vi. In case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is Court alone, as parens patriae, which ultimately must take this decision, (Para 130)
- vii. Article 226 gives abundant power to HC to pass suitable orders on application filed by near relatives etc praying for permission to withdraw life support. (para 133)
- viii. Procedure to be adopted by HC :: bench of atleast 2 judges be constituted to decide to grant or not, Before doing so, bench should seek opinion of committee of 3 reputed doctors. Notice should be issued to State & close relatives.

The Court finally dismissed the WP holding that Aruna was not dead and that right to take decision on behalf of Aruna was vested with the Hospital taking care of her and not Ms. Pinky (social activist).

**NB:** Subsequently, CB in *Common Cause v. UOI & Anr. (2018) 5 SCC 1* upheld passive euthanasia. However, held that the observation in Aruna Shaunbaugh's case that euthanasia can be made lawful only by legislature is not correct. It is not the ratio in Gian Kaur that passive euthanasia can be introduced only by Legislature.

## **VI. MALAY KUMAR GANGULY V. DR. SUKUMAR MUKHERJEE (2009) 9 SCC 221**

Issue: Medical Negligence

Facts:

Patient was a child psychologist and husband was a doctor engaged in HIV/AIDS research in USA. Both came to India in 1998. While staying in Kolkata, patient complained of skin rash for which doctor was consulted who advised rest & did not prescribe any medicine. However later when the rash appeared more aggressively, doctor prescribed injection Depomedrol. However her condition did not improve and was admitted to hospital. She was found to be suffering from Toxic Epidermal Necrolysis. After her condition did not improve, she was shifted to Mumbai by air ambulance. However, she expired after 2 days.

Case before NCDRC was filed for deficiency of service, criminal complaint was filed u/s 304A IPC and complaint was also made to WB medical Council.

Criminal Court found some of the doctors guilty of offence u/s 304A but HC reversed this decision. NCDRC dismissed the complaint and WB Medical Council also dismissed the complaint.

Findings:

The Court held that there was medical negligence for which compensation ought to be awarded but criminal negligence could not be established individually against erring doctors.

- i. The standard of duty to care in medical services may also be inferred after factoring in position & stature of doctors concerned as also the hospital. Premium stature of services available to patient certainly raises a legitimate expectation. If representation is made by doctor that he is a specialist and ultimately it turns out that he is not, deficiency in medical services would be presumed. (Para 154-156)
- ii. Patients by and large are ignorant about disease or side/adverse effect of a medicine. Ordinarily patients are to be informed about admitted risk. (para 142-145)
- iii. Standard of proof as also culpability requirements u/s 304A IPC stand on altogether different footing. An act which may constitute negligence or even rashness under torts may not amount to the same u/s 304A. (para 133)
- iv. Negligence is breach of duty caused by omission to do something which is reasonable man guided by those considerations which ordinarily regulate conduct of human affairs would do, or doing something which a prudent & reasonable man would not do. Negligence means either subjectively a careless state of mind or objectively careless conduct. It is not an absolute term but it is a relative one. (para 135-136)
- v. Grant of compensation based on principle that a person entitled to damages should get that sum which would put him/her in the same position as he would have been if he had not sustained the wrong. For compensating a husband for

- loss of his wife, the courts would consider loss of income of family. (para 170-171)
- vi. To prove negligence in criminal law prosecution must prove (i) existence of duty (ii) breach of duty causing death (iii) breach of duty with reasonable & proper care & employing precautions. (Para 176-181)

### **D K BASU VS STATE OF WB: (1997) 1 SCC 416**

ISSUE INVOLVED: Custodial violence – Torture, Rape, Death in police Custody/Lock up infringes Article 21 as well as basic human rights & strikes a blow at rule of law. Custodial violence is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society. The petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. @Para 9

FINDINGS: 1. "Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward, flag of humanity must on each such occasion fly half-mast. In all custodial crimes that is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma a person experiences is beyond the purview of law. @Paras 10,11,12.

2. Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution required to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. @Paras 9,17,22,33.

3. Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of a an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purpose full to make the investigation effective. By torturing a person and using their

degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it. @Para 28

4. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by hardened criminals by soft peddling interrogation. It is felt that if we lay too much of emphasis on protection of their fundamental rights and human rights such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. The cure cannot, however, be worst than the disease itself. @Para 31

5. Guidelines were issued in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures. @Para 35

6. PUNITIVE MEASURES UBI JUS IBI REMEDIUM - There is no wrong without a remedy. The law will that in every case where man is wronged and undamaged he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. @Paras 40,42

7. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait jacket formula can be evolved in that behalf. @Para 54

### **VELLORE CITIZENS WELFARE FORUM VS UOI & ORS: 1996 (5) SCC 109**

ISSUE INVOLVED: Environment pollution by Tannery & other Industries in the State of TN.

FINDINGS:

1. Though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues it has no right to destroy the ecology, degrade the environment and pose as a health hazard. It cannot be permitted to expand or even to continue with the present production unless it tackles by itself the problem of pollution created by the said industry. @Para 9

2. The traditional concept that development and ecology are opposed to each other, is no longer acceptable. "Sustainable Development is the answer. Sustainable Development as defined by the Brundtland Report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". We have no hesitation in holding that "Sustainable Development' As a balancing

concept between ecology and development has been accepted as a part of the Customary International Law though its salient feature have yet to be finalised by the International Law Jurists. @Para 10

3. The "Polluter Pays" principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. @Paras 11-14

4. The Constitutional and statutory provision protect a persons right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common law right of clean environment. @Paras 16,17

5. It is thus obvious that the Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities under section 3(3) of the Act with adequate powers to control pollution and protect the environment. It is a pity that till date no authority has been constituted by the Central Government. The work which is required to be done by an authority in terms of section 3(3) read with other provision of the Act is being done by this Court and the other Courts in the country. It is high time that the Central Government realises its responsibility and statutory duty to protect the degrading environment in the country. If the conditions in the five districts of Tamil Nadu, where tanneries are operating, are permitted to continue then in the near future all rivers/canals shall be polluted, underground waters contaminated, agricultural lands turned barren and the residents of the area exposed to serious diseases. It is, therefore, necessary for this Court to direct the Central Government to take immediate action under the provisions of the Environment Act. @Para 20

6. There are more than 900 tanneries operating in the five districts of Tamil Nadu. Some of them may, by now, have installed the necessary pollution control measures, they have been polluting the environment for over a decade and in some cases even for a longer period. This Court has in various orders indicated that these tanneries are liable to pay pollution fine. The polluters must compensate the affected persons and also pay the cost of restoring the damaged ecology. @Para 21

7. The Board has Power under the Environment Act and the Rules to lay down standards for emissions or discharge of environmental Pollutants. Rule 3(2) of the Rules even permit the Board to specify more stringent standards from those provided under the Rules. @Para 24



## **KHARAK SINGH VS THE STATE OF U. P. & ORS: 1964 SCR (1) 332**

ISSUE INVOLVED: Challenge to constitutional validity of Chapter 22 of U.P. Police Regulations (Surveillance) on the ground of infringement of Rights under Articles 19(1)(d) & 21 of the Constitution of India.

FACTS: Kharak Singh was challaned in a case of dacoity in 1941 but was released under Section 169, Criminal Procedure Code as there was no evidence against him. On the basis of the accusation made against him he states that the police have opened a "history sheet" in regard to him. Regulation 228 which occurs in Chapter 22 of the Police Regulations defines "history-sheets" as "the personal records of criminals under surveillance". That regulation further directs that a "history-sheet" should be opened only for persons who are or are likely to become habitual criminals or the aiders or abettors of such criminals. These history-sheets are of two classes : Class A for dacoits, burglars, cattle-thieves, and railway-goodswagon thieves, and class B for those who are confirmed and professional criminals who commit crimes other than dacoity, burglary, etc. like professional cheats. @Para 3

State's Contentions: (1) that the impugned regulations do not constitute an infringement of any of the freedoms guaranteed by Part III of the Constitution which are invoked by the petitioner, and (2) that even if they were, they have been framed "in the interests of the general public and public order" and to enable the police to discharge its duties in a more efficient manner and were therefore "reasonable restrictions" on that freedom.

FINDINGS:

1. We shall now proceed with the examination of the width, scope and content of the expression "personal liberty" in Art 21. Having regard to the terms of Art 19 (1)(d) we must take it that expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those deal with in the several clauses of Art 19(1). In other words, while Art 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Art 21 takes in and comprises the residue. @Para 13

2. In our view cl. (b) of Regulation 236 is plainly violative of Art 21 and as there is no "law" on which the same could be justified it must be struck down as unconstitutional. @Para 16

3. This petition raises a question of far-reaching importance namely, a right of a citizen of India to lead a free life subject to social control imposed by valid law. The fact that the

question has been raised at the instance of an alleged disreputable character shall not be allowed to deflect our perspective. If the police could do what they did to the petitioner, they could also do the same to an honest and law-abiding citizen. @Para 20

4. No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Art 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Art 19. If a Person's fundamental right under Art 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art 19(2) so far as the attributes covered by Art 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount -to a reasonable restriction. within the meaning of Art 19(2) of the Constitution. But in this case no such defence is available, as admittedly there is no such law. So the petitioner can legitimately plead that his fundamental rights both under Art 19(1)(d) and Art 21 are infringed by the State. @Para 30

### **DANIAL LATIFI & ANR VS UNION OF INDIA: 2001 (7) SCC 740**

ISSUE INVOLVED: Constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

FINDINGS: 1. In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question. @Para 20

2. Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair maintenance which is to be made and paid to her within the iddat period. Under sec 3(2) the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order

directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced woman's right to provision and maintenance under Section (3)(1)(a) of the Act has been subjected to the condition of husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat. @Para 27

3. A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word provision indicates that something is provided in advance for meeting some needs. @Para 28

4. The important section in the Act is section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. @Para 29

5. Even under the Act, the parties agreed that the provisions of Sec 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Sec 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional. @Para 31

6. Shah Bano's case clearly enunciated what the present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that the maintenance is payable only upto the stage of iddat and this provision is applicable in case of a normal circumstances, while in case of a divorced Muslim woman who is unable to maintain herself, she is entitled to get Mahr. That is the basis on which the Bench of Five Judges of this Court interpreted the various texts and held so. If that is the legal position, we do not think, we can state that any other position is possible nor are we to start on a clean slate after having forgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in Shah Banos case in relation to a divorced Muslim woman getting something by way of maintenance in the nature of Mahr is indeed the statutorily recognised by making provision

under the Act for the purpose of the maintenance but also for provision. When these two expressions have been used by the enactment, which obviously means that the Legislature did not intend to obliterate the meaning attributed to these two expressions by this Court in Shah Banos case. @Paras 32,34

**SODAN SINGH VS NDMC & ORS: 1989 (4) SCC 155**

ISSUE INVOLVED: Right to engage in trading business on the pavements of roads of the city of Delhi.

FINDINGS:

1. The right to carry on trade or business mentioned in Article 19(1)(g) of the Constitution, on street pavements, if properly regulated, cannot be denied on the ground that the streets are meant exclusively for passing or re-passing and for no other use. Proper regulation is, however, a necessary condition as otherwise the very object of laying out roads--to facilitate traffic--may be defeated. Allowing the right to trade without appropriate control is likely to lead to unhealthy competition and quarrel between traders and traveling public and sometimes amongst the traders themselves resulting in chaos. The right is subject to reasonable restrictions under clause (6) of Article 19. @Para 17

2. The provisions of the Delhi Municipal Corporation Act, 1957, are clear and nobody disputes before us that the Municipal Corporation of Delhi has full authority to permit hawkers and squatters on the side walks where they consider it practical and convenient. In case of ambiguity, they should receive a beneficial interpretation, which may enable the municipalities to liberally exercise their authority both, in granting permission to individuals for making other uses of the pavements, and, for removal of any encroachment which may, in their opinion, be constituting undesirable obstruction to the travelling public. @Para 18

3. The petitioners do have the fundamental right to carry on a trade or business of their choice, but not to do so on a particular place, as circumstances are likely to change from time to time. But that does not mean that the licence has to be granted on a daily basis; that arrangement cannot be convenient to anybody, except in special circumstances. @Para 24

4. Article 21 is not attracted in the case of trade or business-either big or small. The right to carry on any trade or business and the concept of life and personal liberty within Article 21 are too remote to be connected together. @Paras 19, 21

5. The guarantee under Article 19(1)(g) extends to practice any profession, or to carry on any occupation, trade or business. 'Profession' means an occupation carried on by a person by virtue of his personal and specialised qualifications, training or skill. The

word 'occupation' has a wide meaning such as any regular work, profession, job, principal activity, employment, business or a calling in which an individual is engaged. 'Trade' in its wider sense includes any bargain or sale, any occupation or business carried on for subsistence or profit, it is an act of buying and selling of goods and services. It may include any business carried on with a view to profit whether manual or mercantile. 'Business' is a very wide term and would include anything which occupies the time, attention and labour of a man for the purpose of profit. It may include in its form trade, profession, industrial and commercial operations, purchase and sale of goods, and would include any- thing which is an occupation as distinguished from pleasure. The object of using four analogous and overlapping words in Article 19(1)(g) is to make the guaranteed right as comprehensive as possible to include all the avenues and modes through which a man may earn his livelihood. In a nutshell the guarantee takes into fold any activity carried on by a citizen of India to earn his living. The activity must of course be legitimate and not anti-social like gambling, trafficking in women and the like. @Para 28

6. Street Trading being a fundamental right has to be made available to the citizens subject to Article 19(6) of the Constitution. It is within the domain of the State to make any law imposing reasonable restrictions in the interest of general public. Since a citizen has no right to choose a particular place in any street for trading, it is for the State to designate the streets and earmark the places from where street trading can be done. Inaction on the part of the State would result in negating the fundamental right of the citizens. It is expected that the State will do the needful in this respect within a reasonable time failing which it would be left to the courts to protect the rights of the citizens. @Paras 29,30